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Wednesday, October 19, 2016

BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Part 1006

[Docket No. CFPB–2014–0033]

RIN 3170–AA49

Safe Harbors From Liability Under the Fair Debt Collection Practices Act for Certain Actions Taken in Compliance With Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z)

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Official Bureau interpretations.

SUMMARY: The Bureau of Consumer Financial Protection (Bureau) is issuing this interpretive rule under the Fair Debt Collection Practices Act (FDCPA) to clarify the interaction of the FDCPA and specified mortgage servicing rules in Regulations X and Z. This interpretive rule constitutes an advisory opinion for purposes of the FDCPA and provides safe harbors from liability for servicers acting in compliance with specified mortgage servicing rules in three situations: Servicers do not violate FDCPA section 805(b) when communicating about the mortgage loan with confirmed successors in interest in compliance with specified mortgage servicing rules in Regulation X or Z; servicers do not violate FDCPA section 805(c) with respect to the mortgage loan when providing the written early intervention notice required by Regulation X to a borrower who has invoked the cease communication right under FDCPA section 805(c); and servicers do not violate FDCPA section 805(c) when responding to borrower-initiated communications concerning loss mitigation after the borrower has invoked the cease communication right under FDCPA section 805(c).

DATES: This rule is effective on October 19, 2017, except that the interpretation contained in Part II.A is effective on April 19, 2018.

FOR FURTHER INFORMATION CONTACT: Dania L. Ayoubi, Counsel, or Laura A. Johnson or Amanda E. Quester, Senior Counsels; Office of Regulations, at (202) 435–7700.

SUPPLEMENTARY INFORMATION:

I. Background

In January 2013, the Bureau issued several final rules concerning mortgage markets in the United States (2013 Title XIV Final Rules), pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), Public Law 111–203, 124 Stat. 1376 (2010). Two of these rules were (1) the Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X) (2013 RESPA Servicing Final Rule); [1] and (2) the Mortgage Servicing Rules Under the Truth in Lending Act (Regulation Z) (2013 TILA Servicing Final Rule).[2]

The Bureau clarified and revised those rules through notice and comment rulemaking during the summer and fall of 2013 in the (1) Amendments to the 2013 Mortgage Rules under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z) (July 2013 Mortgage Final Rule) [3] and (2) Amendments to the 2013 Mortgage Rules under the Equal Credit Opportunity Act (Regulation B), Real Estate Settlement Procedures Act (Regulation X), and the Truth in Lending Act (Regulation Z) (September 2013 Mortgage Final Rule).[4] In October 2013, the Bureau clarified compliance requirements in relation to successors in interest, early intervention requirements, bankruptcy law, and the Fair Debt Collection Practices Act (FDCPA) [5] through an Interim Final Rule (IFR) [6] and a contemporaneous compliance bulletin (October 2013 Servicing Bulletin).[7] Among other things, the IFR provisionally exempted servicers from the early intervention requirements when a borrower has properly invoked the FDCPA's cease communication protections and indicated that the Bureau expected to explore the potential utility and application of such requirements in comparison to the FDCPA protections in a broader debt collection rulemaking.[8] In October 2014, the Bureau added an alternative definition of small servicer in the Amendments to the 2013 Mortgage Rules under the Truth in Lending Act (Regulation Z).[9] The purpose of each of these updates was to address important questions raised by industry, consumer advocacy groups, and other stakeholders.

A. Proposed Rule

On December 15, 2014, the Bureau published for notice and comment a proposed rule to amend Regulations X and Z.[10] Among other things, the Bureau proposed three sets of rules relating to successors in interest. First, the Bureau proposed rules to define successors in interest for purposes of Regulation X's subpart C and Regulation Z as those persons who acquired an ownership interest in the property securing a mortgage loan in a transfer protected from due-on-sale enforcement by the Garn-St Germain Depository Institutions Act of 1982. Second, the Bureau proposed rules relating to how a mortgage servicer confirms a successor in interest's identity and ownership interest in the property. Third, the Bureau proposed to apply specified mortgage servicing rules in Regulations X and Z to successors in interest whose identity and ownership interest in the property have been confirmed by the servicer. The Bureau proposed these changes to address the significant problems that successors in interest continue to encounter with respect to the servicing of mortgage loans secured by their property—such as lack of access to information about the mortgage loan—which can lead to unnecessary foreclosures.

The Bureau also proposed to maintain the IFR's exemption from the live contact requirements of § 1024.39(a)

[1] 78 FR 10695 (Feb. 14, 2013).

[2] 78 FR 10901 (Feb. 14, 2013).

[3] 78 FR 44685 (July 24, 2013).

[4] 78 FR 60381 (Oct. 1, 2013).

[5] 15 U.S.C. 1692 *et seq.*

[6] 78 FR 62993 (Oct. 23, 2013).

[7] Bureau of Consumer Fin. Prot., CFPB Bulletin 2013–12, *Implementation Guidance for Certain Mortgage Servicing Rules* (Oct. 15, 2013), *available at http://files.consumerfinance.gov/f/201310_cfpb_mortgage-servicing_bulletin.pdf.*

[8] 78 FR 62993, 62994 (Oct. 23, 2013). The Bureau received comments in response to the IFR that it took into account in developing the proposed rule and sample forms for consumers in bankruptcy.

[9] 79 FR 65300, 65304 (Nov. 3, 2014).

[10] 79 FR 74176 (Dec. 15, 2014).

with regard to a mortgage loan for which a borrower has invoked the cease communication protections of FDCPA section 805(c), for a servicer subject to the FDCPA with respect to that loan, while partially eliminating the exemption from the written early intervention notice requirements of § 1024.39(b) to require that a servicer provide a modified written notice to the borrower, if loss mitigation options are available. In addition to the information set forth in § 1024.39(b)(2), the proposal would have required that the modified written early intervention notice include a statement that the servicer may or intends to invoke its specified remedy of foreclosure.

B. Final Rule

Concurrent with issuing this interpretive rule, the Bureau is finalizing the proposed changes described above, with certain adjustments in the Amendments to the 2013 Mortgage Rules under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z) (2016 Servicing Final Rule).[11] Among other things, the 2016 Servicing Final Rule includes the proposed three sets of rule changes relating to successors in interest, with modifications to address concerns raised in comments the Bureau received. First, the 2016 Servicing Final Rule adds definitions of successor in interest to Regulations X and Z that are modeled on the categories of transferees that are protected from due-on-sale enforcement by the Garn-St Germain Depository Institutions Act of 1982.[12] Consistent with the proposal, successors in interest, as defined in the 2016 Servicing Final Rule, will not necessarily have assumed the mortgage loan obligation (*i.e.,* legal liability for the mortgage debt) under State law or otherwise be legally obligated on the mortgage loan.

Second, the 2016 Servicing Final Rule includes new rules relating to how a mortgage servicer confirms a successor in interest's identity and ownership interest. It also defines confirmed successor in interest under subpart C of Regulation X and under Regulation Z as a successor in interest once a servicer has confirmed the successor in interest's identity and ownership interest in the relevant property.

Third, the 2016 Servicing Final Rule provides that a confirmed successor in interest is considered a borrower for purposes of Regulation X subpart C and § 1024.17 and a consumer for purposes of Regulation Z §§ 1026.20(c) through (e), 1026.36(c), 1026.39, and 1026.41 (collectively referred to herein as the Mortgage Servicing Rules). Under the 2016 Servicing Final Rule, confirmed successors in interest can obtain information about the mortgage loan through requests for information and notice of error procedures.[13] Confirmed successors in interest are also generally entitled to receive notices required under the Mortgage Servicing Rules to the extent applicable, if the servicer is not providing the same specific notices to another borrower on the account.[14] Applying these protections to confirmed successors in interest will further the purposes of RESPA and TILA by helping to prevent unnecessary foreclosures and other consumer harm by keeping confirmed successors in interest informed of the status of the mortgage loans on their property.

The 2016 Servicing Final Rule also finalizes the proposed partial exemption from the early intervention requirements with regard to a mortgage loan for which any borrower has invoked the cease communication right pursuant to FDCPA section 805(c), for a servicer subject to the FDCPA with respect to that loan, with modifications to address concerns raised in comments the Bureau received. Under the 2016 Servicing Final Rule, if a borrower has invoked the cease communication right pursuant to FDCPA section 805(c), a servicer subject to the FDCPA with respect to that loan is exempt from the live contact requirements with respect to that mortgage loan. If no loss mitigation option is available or while any borrower on the mortgage loan is a debtor in bankruptcy under title 11 of the United States Code, a servicer is also exempt from the written notice requirements with respect to that mortgage loan. If these conditions are not met, the servicer is required to provide a modified written early intervention notice pursuant to § 1024.39(d)(3), as described in more detail below.

II. Application of Interpretive Rule

While many mortgage servicers are not subject to the FDCPA, mortgage servicers that acquired a mortgage loan at the time that it was in default are subject to the FDCPA with respect to that mortgage loan. The Bureau is issuing this interpretive rule to clarify the interaction between certain provisions of the FDCPA and the Mortgage Servicing Rules. This interpretive rule constitutes an advisory opinion under FDCPA section 813(e) and provides a safe harbor from liability for actions done or omitted in good faith in conformity with the opinion, even if the opinion is rescinded or amended in whole or in part after the act or omission occurs, or is determined invalid by a judicial authority.[15] The interpretations contained in this rule are included in relevant commentary to Regulations X and Z.[16]

A. Confirmed Successors in Interest

In the 2016 Servicing Final Rule, the Bureau is extending certain protections of Regulations X and Z to cover confirmed successors in interest whether or not a successor has assumed the mortgage loan obligation.[17] For

[11] *See* Bureau of Consumer Fin. Prot., Final Rule: Amendments to the 2013 Mortgage Rules under the Real Estate Settlement Procedures Act (Regulation X) and the Truth In Lending Act (Regulation Z) (Aug. 4, 2016), *available at http://www.consumerfinance.gov/policy-compliance/rulemaking/final-rules/amendments-2013-mortgage-rules-under-real-estate-settlement-procedures-act-regulation-x-and-truth-lending-act-regulation-z.*

[12] Regulation X § 1024.31; Regulation Z § 1026.2(a)(27)(i).

[13] The 2016 Servicing Final Rule provides that, in responding to a request for information under § 1024.36 or a request for documentation under § 1024.35(e)(4), a servicer may omit location and contact information and personal financial information (other than information about the terms, status, and payment history of the mortgage loan) if: (i) The information pertains to a potential or confirmed successor in interest who is not the requester; or (ii) the requester is a confirmed successor in interest and the information pertains to any borrower who is not the requester.

[14] The same exemptions and scope limitations apply to confirmed successors in interest as to other borrowers under the Mortgage Servicing Rules. Additionally, if a servicer provides an initial written notice and acknowledgment form to a confirmed successor in interest upon confirmation in compliance with the requirements of Regulation X § 1024.32(c)(1) through (3), the 2016 Servicing Final Rule allows the servicer not to provide notices under the Mortgage Servicing Rules to the confirmed successor in interest until the confirmed successor in interest requests such notices through the acknowledgment.

[15] FDCPA section 813(e).

[16] Regulation X comments 30(d)–1 and 39(d)–2; Regulation Z comment 2(a)(11)–4.ii.

[17] For purposes of Regulation X subpart C, successor in interest is defined as:

A person to whom an ownership interest in a property securing a mortgage loan subject to this subpart is transferred from a borrower, provided that the transfer is:

- A transfer by devise, descent, or other operation of law on the death of a joint tenant or tenant by the entirety;
- A transfer to a relative resulting from the death of a borrower;
- A transfer where the spouse or children of the borrower become an owner of the property;
- A transfer resulting from a decree of a dissolution of marriage, legal separation agreement, or from an incidental property settlement agreement, by which the spouse of the borrower becomes an owner of the property; or
- A transfer into an *inter vivos* trust in which the borrower is and remains a beneficiary and which does not relate to a transfer of rights of occupancy in the property.

example, servicers generally will have to comply with Regulation X's requirements for loss mitigation and Regulation Z's requirements for periodic statements with respect to confirmed successors in interest.[18] This interpretive rule clarifies the interaction between the requirements in the 2016 Servicing Final Rule applicable to confirmed successors in interest and FDCPA section 805(b)'s general prohibition on communicating with third parties in connection with collection of a debt.

FDCPA section 805(b) generally prohibits debt collectors from communicating with third parties in connection with the collection of a debt in the absence of a court order or prior consumer consent given directly to the debt collector. FDCPA section 805(b) permits debt collectors to communicate with a person who is a consumer for purposes of section 805. FDCPA section 805(d), in turn, states that the term consumer for purposes of section 805 includes the consumer's spouse, parent (if the consumer is a minor), guardian, executor, or administrator.[19] The use of the word ''includes'' indicates that section 805(d) is an exemplary rather than exhaustive list of the categories of individuals that are ''consumers'' for purposes of FDCPA section 805.

FDCPA section 805 thus recognizes the importance of permitting debt collectors to communicate with a narrow category of other persons who, by virtue of their relationship to the obligor or the debt in question, may need to communicate with the debt collector in connection with the collection of the debt.

In light of its expertise as the agency that Congress has charged with interpreting and implementing the FDCPA, RESPA, and TILA, the Bureau interprets the term consumer for purposes of FDCPA section 805 to include a confirmed successor in interest as that term is defined in Regulation X § 1024.31 and Regulation Z § 1026.2(a)(27)(ii). Given their relationship to the obligor, the mortgage loan, and the property securing the mortgage loan, and given the Bureau's extension of certain protections of Regulations X and Z to them, the Bureau concludes that confirmed successors in interest are—like the narrow categories of persons enumerated in FDCPA section 805(d)—the type of individuals with whom a servicer needs to communicate about the mortgage loan. As the Bureau notes in the 2016 Servicing Final Rule, a servicer's failure to provide information to a successor in interest about the status of a mortgage loan or to evaluate the successor in interest for available loss mitigation options could result in unnecessary foreclosure and loss of the successor in interest's ownership interest. Under this interpretive rule, servicers subject to the FDCPA with respect to a mortgage loan do not violate FDCPA section 805(b)'s prohibition on communicating with third parties by communicating with a confirmed successor in interest about a mortgage loan secured by property in which the confirmed successor in interest has an ownership interest, in compliance with the Mortgage Servicing Rules.[20]

Because this interpretive rule applies only to the use of the term consumer in section 805, it does not affect the definition of consumer under the remaining FDCPA provisions. Moreover, this interpretive rule applies only to confirmed successors in interest as defined in Regulation X § 1024.31 and Regulation Z § 1026.2(a)(27)(ii) to facilitate their access to information about the mortgage loan encumbering their property. It does not expand the definition of consumer for purposes of FDCPA section 805 beyond confirmed successors in interest as defined in Regulations X and Z. Furthermore, this interpretation does not relieve servicers that are debt collectors of their obligations under the FDCPA, including their obligations under FDCPA sections 806 through 808.[21]

B. Required Early Intervention Notice

As explained in the 2016 Servicing Final Rule, the Bureau is, in part, eliminating the exemption from the written early intervention requirements with regard to a mortgage loan for which any borrower has invoked the cease communication right under FDCPA section 805(c), for a servicer subject to the FDCPA with respect to that loan. A servicer that is a debt collector with respect to that loan is exempt from the written notice requirements with regard to that loan if no loss mitigation option is available[22] or while any borrower on the mortgage loan is a debtor in bankruptcy under title 11 of the United States Code. If these conditions are not met, the servicer is required to provide a modified written early intervention notice that, among other things, includes statements encouraging the borrower to contact the servicer, provides a brief description of examples of loss mitigation options that may be available from the servicer, and states that the servicer may or intends to invoke its specified remedy of foreclosure.[23] The servicer is legally required to provide a delinquent borrower with the written notice not later than the 45th day of the borrower's delinquency. As a general matter, this written notice must be provided well before the servicer may initiate foreclosure: In most cases, the servicer is legally required to wait until a borrower's mortgage loan obligation is more than 120 days delinquent, after the written notice has been sent, to make the first notice or filing required by applicable law for any judicial or non-

Regulation X § 1024.31. The 2016 Servicing Final Rule's definition of successor in interest for Regulation Z is identical, except that the Regulation Z definition substitutes ''a dwelling securing a closed-end consumer credit transaction is transferred from a consumer'' for ''a property securing a mortgage loan is transferred from a borrower.'' Regulation Z § 1026.2(27)(i). The categories included in these definitions track the categories of transfers protected by section 341(d) of the Garn-St Germain Depository Institutions Act of 1982. The 2016 Servicing Final Rule also defines confirmed successor in interest as a successor in interest once a servicer has confirmed the successor in interest's identity and ownership interest in the relevant property. Regulation X § 1024.31, Regulation Z § 1026.2(a)(27)(ii).

[18] Regulation X §§ 1024.30(d) and 1024.41; Regulation Z §§ 1026.2(a)(11) and 1026.41.

[19] 15 U.S.C. 1692c(d). In general, the FDCPA defines consumer as ''any natural person obligated or allegedly obligated to pay any debt.'' FDCPA section 803(3), 15 U.S.C. 1692b(3).

[20] As a consequence of this interpretation, the protections in FDCPA sections 805(a) and (c), which apply to consumers for purposes of section 805, apply to confirmed successors in interest. Under FDCPA section 805(a), a debt collector may not—without the prior consent of the consumer or the express permission of a court—communicate with the consumer in connection with the collection of any debt in certain circumstances, including at any unusual or inconvenient time or place. And, as explained in greater detail below, FDCPA section 805(c) provides that, if a consumer refuses in writing to pay a debt or requests that a debt collector cease communicating with the consumer about the debt, the debt collector must generally cease communicating with the consumer.

[21] For example, servicers that are debt collectors must not: Engage in conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt; use any false, deceptive, or misleading representation or means in connection with the collection of a debt; or use unfair or unconscionable means to collect or attempt to collect any debt.

[22] *See* Regulation X comment 39(d)–1 (explaining availability of loss mitigation options).

[23] Regulation X § 1024.39(d)(3). The 2016 Servicing Final Rule provides the following model language that servicers that are debt collectors may use:

This is a legally required notice. We are sending this notice to you because you are behind on your mortgage payment. We want to notify you of possible ways to avoid losing your home. We have a right to invoke foreclosure based on the terms of your mortgage contract. Please read this letter carefully.

Appendix MS–4(D). Use of this model clause or another statement in compliance with § 1024.39(d)(3)(i), on a written notice as required by and in compliance with the other requirements of § 1024.39(d)(3), provides a safe harbor from FDCPA liability under section 805(c) for providing the required statement.

judicial foreclosure process. This written notice may not contain a request for or suggestion of payment, other than for purposes of loss mitigation, and the servicer is not required to provide it to the borrower more than once during any 180-day period.[24]

Section 805(c) of the FDCPA provides that, if a consumer refuses in writing to pay a debt or requests that a debt collector cease communicating with the consumer about the debt, the debt collector must discontinue communicating with the consumer, subject to enumerated exceptions. As relevant here, the prohibition does not apply where a debt collector communicates with a consumer who has invoked the cease communication right to notify the consumer that the debt collector or creditor may invoke specified remedies which are ordinarily invoked by such debt collector or creditor[25] or, where applicable, to notify the consumer that the debt collector or creditor intends to invoke a specified remedy.[26]

Because failure to provide the written early intervention notice required by § 1024.39(d)(3) is closely linked to a servicer's ability to invoke its specified remedy of foreclosure, the Bureau concludes that the notice falls within the exceptions in FDCPA sections 805(c)(2) and (3).

This interpretation is limited to the specific situation where a servicer that is a debt collector with respect to a mortgage loan is required by § 1024.39(d)(3) to provide a modified written early intervention notice to a borrower who has invoked the cease communication right under FDCPA section 805(c) with regard to that loan. It is a narrow safe harbor, based only upon the interplay between these two specific federal consumer protections—the early intervention requirements of § 1024.39 of Regulation X and the cease communication provision and statutory exceptions of section 805(c) of the FDCPA. All other provisions of the FDCPA, including the prohibitions contained in FDCPA sections 805 through 808, are unaffected by this interpretation, and a servicer that is a debt collector with respect to the particular mortgage loan remains liable to the extent that anything in the notice violates any other provision of the FDCPA.[27]

The Bureau concludes that, in the limited circumstances where a servicer is subject to the FDCPA with respect to a borrower's mortgage loan and the borrower has invoked the cease communication right pursuant to FDCPA section 805(c) with regard to that mortgage loan, and where the servicer complies with the requirements of the modified written early intervention notice under § 1024.39(d)(3) of Regulation X, the modified written early intervention notice required under § 1024.39(d)(3) is within the statutory exceptions of FDCPA section 805(c)(2) and (3) and thus does not violate section 805(c) with respect to the mortgage loan.

C. Borrower-Initiated Communications Concerning Loss Mitigation After Invocation of Cease Communication Rights

Even after a borrower has invoked the cease communication right under section 805(c) of the FDCPA, the borrower may contact the servicer to discuss or apply for loss mitigation. For instance, as noted above, § 1024.39(d)(3) requires servicers subject to the FDCPA with respect to a borrower's mortgage loan to provide a written early intervention notice to borrowers who have invoked the FDCPA's cease communication right with regard to that loan if any loss mitigation option is available and no borrower on the mortgage loan is a debtor in bankruptcy under title 11 of the United States Code. The written notice must include a statement encouraging the borrower to contact the servicer.[28] The Bureau believes that, when borrowers respond to such a notice by contacting the servicer to discuss available loss mitigation options or otherwise initiate communication with the servicer concerning loss mitigation, such a borrower-initiated communication should not be understood as within the category of communication that borrowers generally preclude by invoking the cease communication right under FDCPA section 805(c). The Bureau therefore concludes that a borrower's invocation of the FDCPA's cease communication right with regard to a mortgage loan does not prevent a servicer that is a debt collector with respect to that mortgage loan from responding to borrower-initiated communications concerning loss mitigation.

As noted above, FDCPA section 805(c) empowers borrowers to direct debt collectors to cease contacting them with respect to a debt and frees borrowers from the burden of being subjected to unwanted communications regarding collection of a debt. Borrower-initiated conversations about loss mitigation options do not give rise to the burden of unwanted communications that FDCPA section 805(c) protects against. Rather, they are sought out by borrowers for this narrow purpose. The Bureau therefore concludes that a borrower's cease communication notification pursuant to FDCPA section 805(c) should ordinarily be understood to exclude borrower-initiated communications with a servicer concerning loss mitigation because the borrower has specifically requested the communication at issue to discuss available loss mitigation options. Accordingly, when a servicer that is a debt collector with respect to a mortgage loan responds to a borrower-initiated communication concerning loss mitigation after the borrower's invocation of FDCPA section 805(c)'s cease communication protection with regard to that loan, the servicer does not violate FDCPA section 805(c) with respect to such communications as long as the servicer's response is limited to a discussion of any potentially available loss mitigation option. For example, a servicer may discuss with a borrower any available loss mitigation option that the owner or assignee of the borrower's mortgage loan offers, instructions on how the borrower can apply for loss mitigation, what documents and information the borrower would need to provide to complete a loss mitigation application, and the potential terms or details of a loan modification program, including the monthly payment and duration of the program. These borrower-initiated communications, although variable, are unlikely to be perceived as within the scope of the cease communication request given the borrower's initiation of communications concerning loss mitigation information.

This is the case even if the borrower provides a cease communication notification during the loss mitigation application and evaluation process under § 1024.41. The borrower usually should be understood to have excluded the loss mitigation application and evaluation process under § 1024.41 from the general request to cease communication, and therefore a servicer should continue to comply with the procedures under § 1024.41. Only if the borrower provides a communication to the servicer specifically withdrawing

[24] Regulation X § 1024.39(d)(3).

[25] FDCPA section 805(c)(2).

[26] FDCPA section 805(c)(3).

[27] For example, servicers that are debt collectors must not: Engage in conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt; use any false, deceptive, or misleading representation or means in connection with the collection of a debt; or use unfair or unconscionable means to collect or attempt to collect any debt.

[28] *See* Regulation X § 1024.39(b)(2)(i).

the request for loss mitigation does the cease communication prohibition apply to communicating about the specific loss mitigation action.[29]

The Bureau notes that this interpretation provides a safe harbor from FDCPA section 805(c) for servicers that are debt collectors with respect to a particular mortgage loan communicating with the borrower in connection with a borrower's initiation of communications concerning loss mitigation. Preceding a borrower's loss mitigation application and during the evaluation process, a servicer may respond to borrower inquiries about potentially available loss mitigation options and provide information regarding any available option. Similarly, if that borrower submits a loss mitigation application, the servicer's reasonable diligence obligations under § 1024.41(b)(1) require the servicer to request additional information from the borrower, including by contacting the borrower, and these communications by the servicer to complete a loss mitigation application do not fall within the cease communication prohibition. The servicer may also seek information that will be necessary to evaluate the borrower for loss mitigation, though the servicer may not seek a payment unrelated to the purpose of loss mitigation. Once the borrower's loss mitigation application is complete, a servicer's communications with a borrower in accordance with the procedures in § 1024.41 are not subject to liability under FDCPA section 805(c) because they arise from the borrower's application for loss mitigation.

The Bureau recognizes that, in order for a borrower to engage in meaningful loss mitigation discussions with a servicer, the servicer may discuss repayment options, the borrower's ability to make a payment, and how much the borrower can afford to pay as a part of a loss mitigation option for which the servicer is considering the borrower. Furthermore, the Bureau understands that any offer for a loan modification or repayment plan is likely to include a specific payment amount the borrower must pay under the terms of the loss mitigation agreement. Such communications, as long as for the purpose of loss mitigation, are permissible because they should not be understood as within the scope of the cease communication request.

[29] *See* Bureau of Consumer Fin. Prot., Implementation Guidance for Certain Mortgage Servicing Rules, CFPB Bulletin 2013–12 (Oct. 15, 2013), *available at http://files.consumerfinance.gov/f/201310_cfpb_mortgage-servicing_bulletin.pdf.*

The Bureau emphasizes, however, that the cease communication prohibition continues to apply to a servicer's communications with a borrower about payment of the mortgage loan that are outside the scope of loss mitigation conversations. The Bureau's interpretation does not protect a servicer that is a debt collector with respect to a mortgage loan and is using borrower-initiated communications concerning loss mitigation as a pretext for debt collection in circumvention of a borrower's invoked cease communication right under FDCPA section 805(c) with regard to that loan. Seeking to collect a debt under the guise of a loss mitigation conversation is not exempt from liability under FDCPA section 805(c) under this interpretation. Thus, in subsequently communicating with a borrower concerning loss mitigation, the servicer is strictly prohibited from making a request for payment that is not immediately related to any specific loss mitigation option. Some examples of impermissible communications include initiating conversations with the borrower related to repayment of the debt that are not for the purposes of loss mitigation, demanding that the borrower make a payment, requesting that the borrower bring the account current or make a partial payment on the account, or attempting to collect the outstanding balance or arrearage, unless such communications are immediately related to a specific loss mitigation option.[30] Additionally, all other provisions of the FDCPA, including the prohibitions contained in FDCPA sections 805 through 808, continue to apply.[31]

III. Regulatory Requirements

This rule articulates the Bureau's interpretation of the FDCPA. It is exempt from notice and comment rulemaking requirements under the Administrative Procedure Act pursuant to 5 U.S.C. 553(b). Because no notice of proposed rulemaking is required, the Regulatory Flexibility Act does not require an initial or final regulatory flexibility analysis.[32] The Bureau has determined that this rule does not impose any new or revise any existing recordkeeping, reporting, or disclosure requirements on covered entities or members of the public that would be collections of information requiring OMB approval under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*

[30] *See* 53 FR 50097, 50103 (Dec. 13, 1988) (Section 805(c)–2 of the Federal Trade Commission's (FTC) Official Staff Commentary on FDCPA section 805(c)) (''A debt collector's response to a 'cease communication' notice from a consumer may not include a demand for payment, but is limited to the three statutory exceptions [under FDCPA section 805(c)(1) through (3)].'').

[31] For example, servicers that are debt collectors must not: Engage in conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt; use any false, deceptive, or misleading representation or means in connection with the collection of a debt; or use unfair or unconscionable means to collect or attempt to collect any debt.

Dated: August 2, 2016.

Richard Cordray,

Director, Bureau of Consumer Financial Protection.

[FR Doc. 2016–18902 Filed 10–18–16; 8:45 am]

BILLING CODE 4810–AM–P

[32] 5 U.S.C. 603(a) and 604(a).

SMALL BUSINESS ADMINISTRATION

13 CFR Parts 121, 124, and 126

RIN 3245–AG24

Small Business Mentor Protégé Programs; Correction

AGENCY: U.S. Small Business Administration.

ACTION: Correcting amendments.

SUMMARY: The U.S. Small Business Administration (SBA) published a final rule in the **Federal Register** on July 25, 2016 (81 FR 48557), amending its regulations to establish a new Government-wide mentor-protégé program for all small business concerns, consistent with SBA's mentor-protégé program for Participants in SBA's 8(a) Business Development (BD) program. The rule also made several additional changes to current size, 8(a), Office of Hearings and Appeals, and HUBZone regulations, concerning among other things, ownership and control, changes in primary industry, economic disadvantage of a Native Hawaiian Organization (NHO), standards of review, and interested party status for some appeals. This document makes several technical corrections to that final rule, including correcting citations, eliminating a paragraph that conflicts with a new provision added by that final rule, and making conforming amendments.

DATES: Effective October 19, 2016.

FOR FURTHER INFORMATION CONTACT: Michael McLaughlin, Office of Policy, Planning & Liaison, U.S. Small Business Administration, 409 Third Street SW., Washington, DC 20416; 202–205–5353; *michael.mclaughlin@sba.gov.*

SUPPLEMENTARY INFORMATION: The final rule published on July 25, 2016, at 81 FR 48557, contained several errors, including inadvertent oversights and omissions that must be corrected in order to ensure consistency within the regulations and to avoid public uncertainty or confusion. First, a correction is needed because the amendment in instruction 5 on page 48579, column one, should have also applied to § 121.702(b)(1)(i), not just paragraph (a)(1). Specifically, the instruction should have read: ''Amend §§ 121.702(a)(1)(i) and (b)(1)(i) by adding the words 'an Indian tribe, ANC or NHO (or a wholly owned entity of such tribe, ANC or NHO),' before the words 'or any combination of these.' '' The final rule amended the requirements for the Small Business Innovation Research (SBIR) Program to specifically recognize that a small business concern owned and controlled by an Indian tribe, Alaska Native Corporation (ANC) or a Native Hawaiian Organization (NHO) may be eligible to participate in the SBIR Program. Historically, the eligibility requirements for the SBIR Program have been consistent with those for SBA's Small Business Technology Transfer (STTR) Program. While the final rule amended the eligibility requirements for the SBIR Program in § 124.702(a)(1)(i), it inadvertently did not make the same corresponding change to the STTR Program. As such, this correction is necessary to add that same clarifying language to the STTR eligibility requirements as that added to the SBIR requirements.

Second, a correction is needed to delete § 124.110(g)(2). After this correction, a corresponding correction to the numbering also needs to occur that would eliminate paragraph (g)(1) as a separate paragraph and move the substance of paragraph (g)(1) to the end of the introductory text of paragraph (g). In response to public comment, SBA changed the way in which SBA requires an applicant concern to demonstrate the economic disadvantage status of a NHO. *See* § 124.110(c) (81 FR 48580–48581). Section 124.110(g)(2) had meaning only with respect to the way SBA previously required an applicant concern to demonstrate the economic disadvantage status of an NHO. SBA mistakenly did not remove § 124.110(g)(2) when it made the change to § 124.110(c). This correction is needed to remove the paragraph because it is now inconsistent with the July 25, 2016 final rule.

Third, a correction is needed to make a conforming change to § 124.112. The final rule eliminated the requirement from § 124.203 that an applicant must submit IRS Form 4506T in every case, and clarified that SBA may request additional documentation during the 8(a) application process when necessary. However, the final rule did not make the conforming change that the IRS Form 4506T is not needed in every case for an annual review as well, but, rather, may be requested on a case-by-case basis during an annual review by SBA.

Fourth, due to the change made to § 121.103(h), which eliminated the ability of a joint venture to be populated with individuals intended to perform contracts awarded to the joint venture, a conforming correction is needed to § 124.513(c), which references populated joint ventures. Specifically, § 124.513(c)(4) provided that in the case of a populated separate legal entity joint venture, 8(a) Participant(s) must receive profits from the joint venture commensurate with their ownership interests in the joint venture. Because SBA eliminated populated joint ventures, that provision is now superfluous and needs to be deleted.

Fifth, a correction is needed to amend an incorrect cross reference. The final rule revised § 126.615. That revised language referenced an exception contained in § 126.618(d). There is no paragraph (d). Therefore, the cross reference contained in § 126.615 is revised to read § 126.618.

Sixth, a correction is needed to correct a mistaken instruction. Instruction 2 on page 48578 purported to revise the last two sentences of the introductory text of 13 CFR 121.103(h). However, on May 31, 2016, SBA amended paragraph (h) by adding a new final sentence to the introductory text of paragraph (h). 81 FR 34243, 34258, instruction 2.c. Consequently, a sentence that SBA intended to remove remains in paragraph (h), while a sentence that SBA added on May 31, 2016 was revised. Thus, SBA is revising the introductory text of paragraph (h) to read as intended under both rules.

List of Subjects

13 CFR Part 121

Administrative practice and procedure, Government procurement, Government property, Individuals with disabilities, Loan programs—business, Reporting and recordkeeping requirements, Small businesses.

13 CFR Part 124

Administrative practice and procedures, Government procurement, Hawaiian natives, Indians—business and finance, Minority businesses, Reporting and recordkeeping requirements, Tribally-owned concerns, Technical assistance.

13 CFR Part 126

Administrative practice and procedure, Government procurement, Penalties, Reporting and recordkeeping requirements, Small businesses.

Accordingly, 13 CFR parts 121,124, and 126 are corrected by making the following correcting amendments:

PART 121—SMALL BUSINESS SIZE REGULATIONS

■ 1. The authority citation for part 121 continues to read as follows:

Authority: 15 U.S.C. 632, 634(b)(6), 662, and 694a(9).

■ 2. Amend § 121.103 by revising the introductory text of paragraph (h) to read as follows:

§ 121.103 How does SBA determine affiliation?

* * * * *

(h) *Affiliation based on joint ventures.* A joint venture is an association of individuals and/or concerns with interests in any degree or proportion consorting to engage in and carry out no more than three specific or limited-purpose business ventures for joint profit over a two year period, for which purpose they combine their efforts, property, money, skill, or knowledge, but not on a continuing or permanent basis for conducting business generally. This means that a specific joint venture entity generally may not be awarded more than three contracts over a two year period, starting from the date of the award of the first contract, without the partners to the joint venture being deemed affiliated for all purposes. Once a joint venture receives one contract, SBA will determine compliance with the three awards in two years rule for future awards as of the date of initial offer including price. As such, an individual joint venture may be awarded more than three contracts without SBA finding general affiliation between the joint venture partners where the joint venture had received two or fewer contracts as of the date it submitted one or more additional offers which thereafter result in one or more additional contract awards. The same two (or more) entities may create additional joint ventures, and each new joint venture entity may be awarded up to three contracts in accordance with this section. At some point, however, such a longstanding inter-relationship or contractual dependence between the same joint venture partners will lead to a finding of general affiliation between and among them. For purposes of this provision and in order to facilitate tracking of the number of contract awards made to a joint venture, a joint venture: Must be in writing and must do business under its own name; must be identified as a joint venture in the System for Award Management (SAM); may be in the form of a formal or informal partnership or exist as a separate limited liability company or other separate legal entity; and, if it exists as a formal separate legal entity, may not be populated with individuals intended to perform contracts awarded to the joint venture (*i.e.,* the joint venture may have its own separate employees to perform administrative functions, but may not have its own separate employees to perform contracts awarded to the joint venture). SBA may also determine that the relationship between a prime contractor and its subcontractor is a joint venture, and that affiliation between the two exists, pursuant to paragraph (h)(5) of this section. For purposes of this paragraph (h), contract refers to prime contracts, and any subcontract in which the joint venture is treated as a similarly situated entity as the term is defined in part 125 of this chapter.

* * * * *

§ 121.702 [Amended]

■ 3. Amend § 121.702(b)(1)(i) by adding the words ''an Indian tribe, ANC or NHO (or a wholly owned business entity of such tribe, ANC or NHO),'' before the words ''or any combination of these''.

PART 124—8(A) BUSINESS DEVELOPMENT/SMALL DISADVANTAGED BUSINESS STATUS DETERMINATIONS

■ 3. The authority citation for part 124 continues to read as follows:

Authority: 15 U.S.C. 634(b)(6), 636(j), 637(a), 637(d), 644 and Pub. L. 99–661, Pub. L. 100–656, sec. 1207, Pub. L. 101–37, Pub. L. 101–574, section 8021, Pub. L. 108–87, and 42 U.S.C. 9815.

■ 4. Amend § 124.110 by revising paragraph (g) to read as follows:

§ 124.110 Do Native Hawaiian Organizations have any special rules for applying to the 8(a) BD program?

* * * * *

(g) An NHO-owned firm's eligibility for 8(a) BD participation is separate and distinct from the individual eligibility of the NHO's members, directors, or managers. The eligibility of an NHO-owned concern is not affected by the former 8(a) BD participation of one or more of the NHO's individual members.

* * * * *

§ 124.112 [Amended]

■ 5. Amend § 124.112 by adding the word ''and'' at the end of paragraph (b)(8), removing paragraph (b)(9), and redesignating paragraph (b)(10) as paragraph (b)(9).

■ 6. Amend § 124.513 by revising paragraph (c)(4) to read as follows:

§ 124.513 Under what circumstances can a joint venture be awarded an 8(a) contract?

* * * * *

(c) * * *

(4) Stating that the 8(a) Participant(s) must receive profits from the joint venture commensurate with the work performed by the 8(a) Participant(s);

* * * * *

PART 126—HUBZONE PROGRAM

■ 7. The authority citation for part 126 continues to read as follows:

Authority: 15 U.S.C. 632(a), 632(j), 632(p), 644; and 657a; Pub. L. 111–240, 24 Stat. 2504.

§ 126.615 [Amended]

■ 8. Amend § 126.615 by removing ''§ 126.618(d)'' and adding in its place ''§ 126.618''.

A. John Shoraka,

Associate Administrator for Government Contracting and Business Development.

[FR Doc. 2016–25080 Filed 10–18–16; 8:45 am]

BILLING CODE 8205–01–P

SMALL BUSINESS ADMINISTRATION

13 CFR Part 125

RIN 3245–AG24

Small Business Mentor Protégé Programs; Correction

AGENCY: U.S. Small Business Administration.

ACTION: Final rule; correction.

SUMMARY: The U.S. Small Business Administration (SBA) published a final rule in the **Federal Register** on July 25, 2016, (81 FR 48557) to, among other things, implement provisions of the National Defense Authorization Act of 2013, which pertain to performance requirements applicable to small business and socioeconomic program set-aside contracts and small business subcontracting. That rule contained an instruction to amend portions of § 125.6 that do not exist. This document removes the amendatory instruction.

DATES: Effective October 19, 2016.

FOR FURTHER INFORMATION CONTACT: Michael McLaughlin, Office of Policy, Planning & Liaison, U.S. Small Business Administration, 409 Third Street SW., Washington, DC 20416; 202–205–5353; *michael.mclaughlin@sba.gov.*

SUPPLEMENTARY INFORMATION: SBA published a final rule in the **Federal Register** on May 31, 2016 (81 FR 34243). That rule amended § 125.6. On July 25, 2016, SBA published a separate final rule in the **Federal Register** (81 FR 48557) that purported to amend § 125.6 by removing ''§ 125.15'' from the introductory text of paragraph (b) and adding in its place ''§ 125.18'' and by removing ''§ 125.15(b)(3)'' from paragraph (b)(5) and adding in its place ''§ 125.18(b)(3)''. These amendments could not be implemented as instructed because paragraph 125.6 (b) does not contain the text to be removed. These changes inadvertently failed to take into account the amendments made to § 125.6 by the final rule published on May 31, 2016. This correction removes the instruction to amend § 125.6 published on July 25, 2016, in 81 FR 48558.

In the FR Rule Doc. No. 2016–16399 in the issue of July 25, 2016, beginning on page 48557, make the following correction:

■ On page 48585, in the third column, remove amendatory instruction 34 in its entirety and the amendment to § 125.6.

A. John Shoraka,

Associate Administrator for Government Contracting and Business Development.

[FR Doc. 2016–24832 Filed 10–18–16; 8:45 am]

BILLING CODE 8025–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Chapter I

[Docket No. FAA–2016–9288]

Hazardous Materials: Emergency Restriction/Prohibition Order

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Emergency restriction/ prohibition order.

SUMMARY: This document provides Emergency Restriction/Prohibition Order No. FAA–2016–9288, issued October 14, 2016 and effective at 12 p.m. (noon) Eastern Daylight Time (EDT), October 15, 2016 to Samsung Galaxy Note 7 Users and air carriers. The Emergency Order prohibits persons from offering for air transportation or transporting via air any Samsung Galaxy Note 7 device on their person, in carry-on baggage, in checked baggage, or as cargo; requires individuals who

inadvertently bring a Samsung Galaxy Note 7 device onto an aircraft immediately power off the device, not use or charge the device while aboard the aircraft, protect the device from accidental activation, including disabling any features that may turn on the device, such as alarm clocks, and keep the device on their person and not in the overhead compartment, seat back pocket, nor in any carry-on baggage, for the duration of the flight; requires air carriers to alert passengers to the prohibition against air transport of Samsung Galaxy Note 7 devices, in particular, immediately prior to boarding, and to deny boarding to a passenger in possession of a Samsung Galaxy Note 7 device unless and until the passenger divests themselves and their baggage of the Samsung Galaxy Note 7 device; and requires that if an air carrier flight crew member identifies that a passenger is in possession of a Samsung Galaxy Note 7 device while the aircraft is in flight, the crew member must instruct the passenger to power off the device and not to use or charge the device onboard the aircraft and protect the device from accidental activation, including disabling any features that may turn on the device, such as alarm clocks, and keep the device on their person and not in the overhead compartment, seat back pocket, nor in any carry-on baggage, for the duration of the flight.

DATES: The Emergency Restriction/ Prohibition Order provided in this document is effective at 12 p.m. (noon) Eastern Daylight Time (EDT) on October 15, 2016.

FOR FURTHER INFORMATION CONTACT: Ryan Landers, Office of the Chief Counsel, Federal Aviation Administration, 1701 Columbia Ave., College Park, GA 30337; telephone: (404)-305–5200; email: *ryan.landers@faa.gov.*

SUPPLEMENTARY INFORMATION: The full text of Emergency Restriction/ Prohibition Order No. FAA–2016–9288 issued October 14, 2016 is as follows:

This Emergency Restriction/ Prohibition Order (Order) is issued by the United States Department of Transportation (DOT) pursuant to 49 U.S.C. 5121(d) and will be effective at 12:00 p.m. (noon) Eastern Daylight Time (EDT), October 15, 2016. This Order is issued to all persons who transport or offer a Samsung Galaxy Note 7 device for air transportation in commerce within the United States. Individuals who own or possess a Samsung Galaxy Note 7 device may not transport the device on their person, in carry-on baggage, in checked baggage, nor offer the device for air cargo shipment. This prohibition includes all Samsung Galaxy Note 7 devices. Samsung Galaxy Note 7 devices are properly classified as lithium ion batteries contained in equipment, UN3481, Class 9 (49 CFR 172.101).

By this Order, DOT is:

* Prohibiting persons from transporting or offering for air transportation a Samsung Galaxy Note 7 device, by either carrying it on their person or in carry-on baggage when boarding an aircraft, placing the Samsung Galaxy Note 7 device in checked baggage, or shipping it via air as cargo;
* requiring air carriers to alert passengers to the prohibition against air transport of a Samsung Galaxy Note 7 device, in particular, immediately prior to boarding and to deny boarding to a passenger in possession of a Samsung Galaxy Note 7 device unless and until the passenger divests themselves and their baggage, including carry-on and checked, of the Samsung Galaxy Note 7 device;
* requiring that persons who inadvertently bring a Samsung Galaxy Note 7 device onto an aircraft immediately power off the device, do not use or charge the device while aboard the aircraft, protect the device from accidental activation, including disabling any features that may turn on the device, such as alarm clocks, and keep the device on their person and not in the overhead compartment, seat back pocket, nor in any carry-on baggage, for the duration of the flight; and
* requiring that if an air carrier flight crew member identifies that a passenger is in possession of a Samsung Galaxy Note 7 device while the aircraft is in flight, the crew member must instruct the passenger to power off the device, do not use or charge the device while aboard the aircraft, protect the device from accidental activation, including disabling any features that may turn on the device, such as alarm clocks, and keep the device on their person and not in the overhead compartment, seat back pocket, nor in any carry-on baggage, for the duration of the flight.

Upon information derived from the Samsung Galaxy Note 7 device recall issued September 15, 2016, recent incidents of a dangerous evolution of heat with Samsung Galaxy Note 7 replacement devices, Samsung's October 11, 2016 decision to stop manufacturing and selling Samsung Galaxy Note 7 devices due to the inability to identify the root cause of the incidents, and the U.S. Consumer Product Safety Commission (CPSC) recall of all Samsung Galaxy Note 7 device issued October 13, 2016, the Secretary of Transportation (Secretary) has found an unsafe condition and that an unsafe practice exists and constitutes an imminent hazard to the safety of air transportation. For more detailed information see ''Background/Basis for Order'' below.

Effective at 12 p.m. (Noon) Eastern Daylight Time, October 15, 2016, Any Person Identified by This Order

(1) Shall not transport, nor offer for transportation, via air a Samsung Galaxy Note 7 device. By virtue of this Order and the CPSC recalls, the Samsung Galaxy Note 7 devices are now forbidden for transportation by air. For purposes of this Order, transporting or offering for transportation includes bringing a Samsung Galaxy Note 7 device aboard an aircraft on your person (*e.g.,* in your pocket), bringing a Samsung Galaxy Note 7 device aboard an aircraft in carry-on baggage, offering a Samsung Galaxy Note 7 device in checked baggage, and offering a Samsung Galaxy Note 7 device for air cargo shipment (*e.g.*, Federal Express or United Parcel Service).

(2) Shall ensure that a prohibited Samsung Galaxy Note 7 device inadvertently brought aboard an aircraft is immediately powered off, not used or charged while aboard the aircraft, protected from accidental activation, including disabling any features that may turn on the device, such as alarm clocks, and kept on their person and not in the overhead compartment, seat back pocket, nor in any carry-on baggage, for the duration of the flight.

Air Carrier Requirements

By virtue of this Order and the CPSC recalls, the Samsung Galaxy Note 7 device is a forbidden hazardous material. In accordance with 49 CFR part 175, air carriers must not accept these devices for air transportation by knowingly permitting a passenger to board an aircraft with a Samsung Galaxy Note 7 device. Damaged or recalled lithium ion batteries, including those contained in equipment, are not permitted to be transported by air, and a Samsung Galaxy Note 7 device is categorized as ''forbidden.'' 49 CFR 173.21(c). Air carriers are required to make passengers aware of the prohibition against transport of Samsung Galaxy Note 7 devices aboard aircraft on their person, in carry-on or checked baggage, and as air cargo. Air carriers must also alert passengers to this prohibition immediately prior to boarding. If an air carrier representative identifies that a passenger is in possession of a Samsung Galaxy Note 7 device prior to boarding the aircraft, the air carrier must deny boarding to the passenger unless and until the passenger divests themselves, including on their person and in checked and carry-on baggage, of the Samsung Galaxy Note 7 device. If an air carrier flight crew member identifies that a passenger is in possession of a Samsung Galaxy Note 7 device while the aircraft is in flight, the crew member must instruct the passenger to power off the device, not use or charge the device while aboard the aircraft, protect the device from accidental activation, including disabling any features that may turn on the device, such as alarm clocks, and keep the device on their person and not in the overhead compartment, seat back pocket, nor in any carry-on baggage, for the duration of the flight.

This Order applies to all persons who transport Samsung Galaxy Note 7 devices, or offer them for transportation, by air in commerce (as defined by 49 U.S.C. 5102(1)) to, from, and within the United States, and their officers, directors, employees, subcontractors, and agents. This Order is effective at 12 p.m. (noon) Eastern Daylight Time (EDT), October 15, 2016, and remains in effect unless rescinded in writing by the Secretary, or until it otherwise expires by operation of regulation and/or law.

Jurisdiction

The Secretary has the authority to regulate the transportation of lithium ion batteries contained in equipment in commerce. 49 U.S.C. 5103(b). The Secretary has designated lithium ion batteries contained in equipment, UN 3481, as a hazardous material subject to the requirements of the HMR. 49 U.S.C. 5103(a); 49 CFR 172.101. Persons who offer for transportation, or transport, lithium ion batteries contained in equipment by air in commerce to, from, and within the United States are a ''person,'' as defined by 49 U.S.C. 5102(9), in addition to being a ''person'' under 1 U.S.C. 1 and a ''person who offers'' as defined by 49 CFR 171.8. ''Commerce'' is as defined by 49 U.S.C. 5102(1) and 49 CFR 171.8, and ''transportation'' or ''transport'' are as defined by 49 U.S.C. 5102(13) and 49 CFR 171.8. Accordingly, persons who transport or offer for transportation lithium ion batteries contained in equipment in commerce, including by air, are subject to the authority and jurisdiction of the Secretary including the authority to impose emergency restrictions, prohibitions, recalls, or out-of-service orders, without notice or an opportunity for hearing, to the extent necessary to abate the imminent hazard. 49 U.S.C. 5121(d).

Background/Basis for Order

An imminent hazard, as defined by 49 U.S.C. 5102(5), constitutes the existence of a condition relating to hazardous materials that presents a substantial likelihood that death, serious illness, severe personal injury, or a substantial endangerment to health, property, or the environment may occur before the reasonably foreseeable completion date of a formal proceeding begun to lessen the risk that death, illness, injury or endangerment may occur.

A Samsung Galaxy Note 7 device may cause an ignition or a dangerous evolution of heat or become a fuel source for fire. Samsung and CPSC acknowledged this fact with the September 15, 2016 recall, Samsung's October 11, 2016 announcement that it was suspending the manufacture and sale of the Samsung Galaxy Note 7 device, and the October 13, 2016 Samsung and CPSC expanded recall covering all Samsung Galaxy Note 7 devices. Furthermore, persons have experienced incidents of dangerous evolution of heat with the recalled Samsung Galaxy Note 7 devices. Just one fire incident poses a high risk of death, serious illness, severe personal injury, and danger to property and the environment. This risk is magnified when the fire or evolution of heat occurs aboard an aircraft during flight. Therefore, each offering and transportation of a Samsung Galaxy Note 7 device constitutes an imminent hazard.

A. Samsung Galaxy Note 7 Recall and Incidents

On September 15, 2016, Samsung and the CPSC recalled certain Samsung Galaxy Note 7 devices sold prior to September 15, 2016. The recall was based on a finding that the lithium ion battery in a Samsung Galaxy Note 7 device ''can overheat and catch fire.'' Samsung offered either a refund or replacement Samsung Galaxy Note 7 device. Subsequently, there were reported incidents of the replacement Samsung Galaxy Note 7 devices overheating and/or catching fire. In a decision announced on October 11, 2016, Samsung stopped production and sale of Samsung Galaxy Note 7 devices. On October 13, 2016, Samsung and the CPSC expanded the recall to include all Samsung Galaxy Note 7 devices because they ''can overheat and catch fire.''

B. DOT Actions To Mitigate the Safety Risk of Samsung Galaxy Note 7 Devices in Air Transportation

In the wake of Samsung Galaxy Note 7 device incidents, the Federal Aviation Administration (FAA) and Pipeline and Hazardous Materials Safety Administration (PHMSA) have taken a number of steps to mitigate the safety risk of Samsung Galaxy Note 7 devices in air transportation. On September 8, 2016, the FAA issued a statement strongly advising passengers not to turn on or charge a Samsung Galaxy Note 7 device aboard an aircraft, nor stow a Samsung Galaxy Note 7 device in any checked baggage. On September 15, 2016, PHMSA issued a Safety Advisory Notice to inform the public about the risks associated with transporting damaged, defective, or recalled lithium batteries or portable electronic devices, including the Samsung Galaxy Note 7 device recalled by the CPSC. The Safety Advisory Notice required that persons who wish to carry the recalled Samsung Galaxy Note 7 device aboard an aircraft must (1) turn off the device; (2) disconnect the device from charging equipment; (3) disable all applications that could inadvertently activate the phone; protect the power switch to prevent its unintentional activation; and (4) keep the device in carry-on baggage or on your person.

On September 16, 2016, the FAA issued general guidance to airlines about the rules for carrying recalled or defective lithium batteries and lithium battery-powered devices aboard an aircraft. Specifically, the FAA noted that (1) U.S. hazardous materials regulations prohibit air cargo shipments of recalled or defective lithium batteries and lithium battery-powered devices; (2) passengers may not turn on or charge the devices when they carry them aboard the aircraft; (3) passengers must protect the devices from accidental activation; and (4) passengers must not pack them in checked baggage. On September 16, 2016, the FAA issued a Safety Alert for Operators (SAFO), recommending the following action by air operators: (1) Ensure that operator personnel responsible for cargo processing know and understand that damaged or recalled lithium batteries—including those installed in equipment and devices—are forbidden on aircraft as air cargo; and (2) ensure that operator personnel responsible for passenger processing and cabin safety know and understand that damaged or recalled lithium batteries—including those installed in devices—may be restricted from carriage or use on the aircraft. On October 10, 2016, the FAA issued updated guidance on the Samsung Galaxy Note 7 device, urging passengers aboard an aircraft to power down and not use, charge, or stow in checked baggage, any Samsung Galaxy Note 7 device.

Notwithstanding the above DOT actions, and in light of continued risks identified by Samsung and CPSC associated with Samsung Galaxy Note 7 devices, the further action described in this Order is necessary to eliminate unsafe conditions that create an imminent hazard to public health and safety and the environment.

Remedial Action

To eliminate or abate the imminent hazard:

(1) Persons covered by this Order shall not transport, nor offer for transportation, via air any Samsung Galaxy Note 7 device.

(2) Air carriers are required to alert passengers to the prohibition against air transport of Samsung Galaxy Note 7 devices, in particular, immediately prior to boarding and to deny boarding to a passenger in possession of a Samsung Galaxy Note 7 device unless and until the passenger divests themselves and carry-on or checked baggage of the Samsung Galaxy Note 7 device.

(3) Persons covered by this Order who inadvertently bring a prohibited Samsung Galaxy Note 7 device aboard an aircraft must immediately power off the device, leave it powered off until no longer aboard the aircraft, not use or charge the device while aboard the aircraft, protect the device from accidental activation, including disabling any features that may turn on the device, such as alarm clocks, and keep the device on their person and not in the overhead compartment, seat back pocket, nor in any carry-on baggage, for the duration of the flight.

(4) When a flight crew member identifies that a passenger is in possession of a Samsung Galaxy Note 7 device while the aircraft is in flight, the crew member must instruct the passenger to power off the device, not use or charge the device while aboard the aircraft, protect the device from accidental activation, including disabling any features that may turn on the device, such as alarm clocks, and keep the device on their person and not in the overhead compartment, seat back pocket, nor in any carry-on baggage, for the duration of the flight.

Rescission of This Order

This Order remains in effect until the Secretary determines that an imminent hazard no longer exists or a change in applicable statute or federal regulation occurs that supersedes the requirements of this Order, in which case the Secretary will issue a Rescission Order.

Failure To Comply

Any person failing to comply with this Order is subject to civil penalties of up to $179,933 for each violation for each day they are found to be in violation (49 U.S.C. 5123). A person violating this Order may also be subject to criminal prosecution, which may result in fines under title 18, imprisonment of up to ten years, or both (49 U.S.C. 5124).

Right To Review

Pursuant to 49 U.S.C. 5121(d)(3) and in accordance with section 554 of the Administrative Procedure Act (APA), 5 U.S.C. 500 *et seq,* a review of this action may be filed. Any petition seeking relief must be filed within 20 calendar days of the date of this order (49 U.S.C. 5121(d)(3)), and addressed to U.S. DOT Dockets, U.S. Department of Transportation, 1200 New Jersey Avenue SE., Room W12–140, Washington, DC 20590 (*http://Regulations.gov*). Furthermore, a petition for review must state the material facts at issue which the petitioner believes dispute the existence of an imminent hazard and must include all evidence and exhibits to be considered. The petition must also state the relief sought. Within 30 days from the date the petition for review is filed, the Secretary must approve or deny the relief in writing; or find that the imminent hazard continues to exist, and extend the original Emergency Order. In response to a petition for review, the Secretary may grant the requested relief in whole or in part; or may order other relief as justice may require (including the immediate assignment the case to the Office of Hearings for a formal hearing on the record).

Emergency Contact Official

If you have any questions concerning this Emergency Restriction/Prohibition Order, you should call PHMSA Hazardous Materials Information Center at 1–800–467–4922 or email at *phmsa.hm-infocenter@dot.gov.*

Issued in Washington, DC, on October 14, 2016.

Patricia A. McNall,

Deputy Chief Counsel, Federal Aviation Administration.

[FR Doc. 2016–25322 Filed 10–14–16; 4:15 pm]

BILLING CODE 4910–13–P

DEPARTMENT OF THE TREASURY

Financial Crimes Enforcement Network

31 CFR Part 1010

Conditional Exception to Bank Secrecy Act Regulations Relating to the Burma Section 311 Final Rule

AGENCY: Financial Crimes Enforcement Network (''FinCEN''), Treasury.

ACTION: Grant of conditional exception.

SUMMARY: This document contains a conditional exception, pursuant to authority under the Bank Secrecy Act, which would permit certain U.S. financial institutions to maintain correspondent accounts for Burmese banks under certain conditions.

DATES: *Applicability Date:* This conditional exception is applicable beginning October 7, 2016.

FOR FURTHER INFORMATION CONTACT: All questions about the exceptive relief must be addressed to the FinCEN Resource Center at (800) 767–2825 (Monday through Friday, 8:00 a.m.–6:00 p.m. ET).

SUPPLEMENTARY INFORMATION:

I. Statutory and Regulatory Background

The Bank Secrecy Act (''BSA''), Titles I and II of Public Law 91–508, as amended, codified at 12 U.S.C. 1829b, 12 U.S.C. 1951–1959, and 31 U.S.C. 5311–5314 and 5316–5332, authorizes the Secretary of the Treasury (''Secretary''), among other things, to issue regulations requiring persons to keep records and file reports that are determined to have a high degree of usefulness in criminal, tax, regulatory, and counter-terrorism matters. The regulations implementing the BSA appear at 31 CFR Chapter X. The Secretary's authority to administer the BSA has been delegated to the Director of FinCEN.[1]

FinCEN has the authority, under 31 U.S.C. 5318(a)(7) and 31 CFR 1010.970, to make exceptions to the requirements of 31 CFR Chapter X. Such exceptions may be conditional or unconditional, may apply to particular persons or to classes of persons, and may apply to particular transactions or classes of transactions. Moreover, an exception is issuable or revocable in the sole discretion of FinCEN, based on the circumstances to which the exception applies.

II. FinCEN Issuance 2016–1

This document, FinCEN Issuance 2016–1, provides exceptive relief under

[1] Treasury Order 180–01 (Sept. 26, 2002).

31 U.S.C. 5318(a)(7) and 31 CFR 1010.970 to U.S. financial institutions covered by 31 CFR 1010.651 (FinCEN's rule imposing special measures against Burma under Section 311 of the USA PATRIOT Act). The exceptive relief permits such financial institutions to maintain correspondent accounts for Burmese banks under certain conditions. Specifically, FinCEN is providing the following exceptive relief:

The provisions of paragraphs (b)(1) and (2) of 31 CFR 1010.651 shall not apply to a correspondent account that is established, maintained, administered, or managed in the United States by a covered financial institution (as defined in 31 CFR 1010.651(a)(3)) for, or on behalf of, a Burmese banking institution, provided that such covered financial institution subjects the account to the due diligence obligations set forth under Section 312 of the USA PATRIOT Act and its implementing regulation 31 CFR 1010.610.

FinCEN is providing this exceptive relief given (i) FinCEN's assessment of Burma's progress to date in addressing issues identified in FinCEN's 2003 finding that Burma was a jurisdiction of primary money laundering concern; (ii) a high-level commitment by Burma to continue making progress in addressing those issues; and (iii) FinCEN's consideration of the ongoing effect on U.S. national security and foreign policy of U.S. financial institutions' compliance with 31 CFR 1010.651.

Section 311 Action Against Burma

On November 18, 2003, FinCEN found Burma to be a jurisdiction of primary money laundering concern pursuant to 31 U.S.C. 5318A, as added by Section 311 of the USA PATRIOT Act of 2001 (Section 311).[2] FinCEN based its finding on a number of factors, including (i) Burma's lack of an effective anti-money laundering/countering the financing of terrorism (AML/CFT) regime; (ii) high levels of public corruption in Burma; (iii) a recognition that Burma is a haven for international drug trafficking; and (iv) a lack of cooperation by Burma with U.S. law enforcement agencies in criminal matters. In connection with this finding, on April 12, 2004, FinCEN issued a final rule at 31 CFR 1010.651 prohibiting U.S. financial institutions from maintaining U.S. correspondent accounts for Burmese banking institutions.[3]

Burma's Progress in Addressing the Concerns Described in the Section 311 Finding

Since FinCEN promulgated the final rule in 2004, Burma has taken steps to improve its AML/CFT regime and to address the issues of corruption, drug trafficking, and law enforcement cooperation.

Improvements to Burma's AML/CFT Regime

FinCEN's finding noted that ''the Burmese anti-money laundering law is ineffective and unenforceable'' and could not be regarded as effectively remedying a number of AML/CFT deficiencies, including that: (i) The Burmese Central Bank had no anti-money laundering regulations for financial institutions; (ii) banks licensed by Burma were not legally required to obtain or maintain identification information about their customers; (iii) such banks were also not required to maintain transaction records of customer accounts; and (iv) Burmese financial institutions were not required to report suspicious transactions.[4]

Since 2012, Burma has made significant progress in addressing the strategic AML/CFT deficiencies identified by the Financial Action Task Force (FATF),[5] which resulted in its removal in June 2016 from the FATF's public list of countries with strategic AML/CFT deficiencies. In 2013, the Burmese Central Bank, which previously had been part of the Ministry of Finance, became independent. Through its 2014 Money Laundering Law and the Burmese Central Bank's 2015 customer due diligence directive, Burma now requires financial institutions to conduct due diligence and know the true identity of their customers including beneficial owners. Burma has criminalized money laundering and terrorist financing, and it has established a legal framework to implement targeted financial sanctions under United Nations Security Council Resolutions (UNSCR) 1267, 1373, and related resolutions. Further, Burma has established a financial intelligence unit and made progress in ensuring that it has operational and budgetary independence.

Actions Addressing Public Corruption in Burma

FinCEN's finding noted that, as of 2003, Transparency International—the leading international non-governmental organization devoted to curbing corruption—ranked Burma as ''the fourth most corrupt jurisdiction out of 133 jurisdictions assessed worldwide.''[6] Burma has taken some significant steps to address public corruption. In 2012, Burma ratified the UN Convention against Corruption.[7] Burma passed an Anti-Corruption Law in 2013 (and amended it in 2016), improving its ability to receive and investigate allegations of official corruption.

Attention to International Drug Trafficking

FinCEN's 2003 finding identified Burma as ''a haven for international drug trafficking'' and noted that Burma had failed to take any regulatory or enforcement action against financial institutions with well-known criminal links.[8] Burma is in the process of restructuring and expanding its counternarcotic task forces and Burma has worked regionally on counternarcotics initiatives, including those coordinated through the United Nations Office on Drugs and Crime.

Cooperation With U.S. Law Enforcement Agencies in Criminal Matters

FinCEN noted in its 2003 finding that U.S. law enforcement indicated that they rarely gained access to bank-related information pursuant to investigations, and that they received no cooperation regarding counterfeiting investigations involving Burma.[9]

U.S. law enforcement indicates that cooperation with Burmese authorities has since improved. For example, in September 2014, the U.S. and Burmese governments signed a Letter of Agreement to enhance cooperation in the fight against illicit drugs and transnational crime, and to support the development of Burma's law enforcement capacity and promote the rule of law.

FinCEN's Remaining Concerns

FinCEN is encouraged by Burma's progress thus far, but believes that Burma has not yet fully addressed the concerns articulated in the 2003 finding.

Although Burma has made a number of technical improvements to its AML/

[2] 68 FR 66299 (Nov. 25, 2003).

[3] 69 FR 19093 (Apr. 12, 2004) (codified at 31 CFR 1010.651).

[4] 68 FR at 66300.

[5] The FATF is an inter-governmental body that sets standards and promotes effective implementation of legal, regulatory, and operational measures for combating money laundering, terrorist financing, and other related threats to the integrity of the international financial system.

[6] 68 FR at 66302.

[7] United Nations Office of Drugs and Crime, *Myanmar becomes the 165th State Party to UN Convention on Corruption,* January 10, 2013.

[8] 68 FR at 66300–301.

[9] *Id.* at 66301.

CFT regime, FinCEN remains concerned that Burma has not yet implemented its new reforms and has not displayed adequate effectiveness in mitigating the risks and threats of money laundering and terrorist financing. FinCEN also notes that a significant portion of financial activity in Burma relies upon informal money transfer systems, which remain largely unregulated and unsupervised.

FinCEN is also concerned that Burma has not sufficiently addressed the corruption issues identified in the 2003 finding. Burma's ranking on Transparency International's International Corruption Perceptions Index remains high. The U.S. State Department's 2016 International Narcotics Control Strategy Report on Burma notes that ''corruption is endemic in both business and government. . . The rule of law remains weak, and Burma continues to face a significant risk of narcotics proceeds being laundered through commercial ventures.'' [10]

The United States also continues to recognize Burma as a haven for international drug trafficking. In September 2016, under the Foreign Relations Authorization Act, the President determined Burma to be a major illicit drug producing country or major drug-transit country.[11] Further, Burma's cooperation with U.S. law enforcement, while improved since 2003, nonetheless remains nascent and largely untested.

Considerations for Exceptive Relief

As noted in the final rule, the Section 311 action was designed to encourage Burma to make necessary changes to its AML/CFT regime in order to address FinCEN's concerns. Burma has begun to address those concerns, but significant work remains. FinCEN welcomes Burma's recent commitment to work with FinCEN and other components of the U.S. Department of the Treasury, as well as with the U.S. government more broadly, in advancing its AML/CFT efforts. FinCEN has considered Burma's progress, its remaining deficiencies, and its commitment to address those deficiencies in deciding to issue this exceptive relief.

This exceptive relief also takes into account the effect of FinCEN's action on U.S. national security and foreign policy, as did the final rule.[12] FinCEN's final rule contained an exemption at 31 CFR 1010.651(b)(3) that allowed U.S. financial institutions to maintain correspondent accounts for Burmese banks if such activity was licensed under authorities administered by the U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC). Since 2012, OFAC has, via general licenses, authorized a broad range of financial activity with respect to Burma that would otherwise have been prohibited under the Section 311 rule. On October 7, 2016, the President terminated the national emergency with respect to Burma and revoked all Burma sanctions Executive orders, lifting the economic and financial sanctions on Burma administered by OFAC. As a result of the termination of the Burma sanctions program, the OFAC general licenses referenced above are no longer in effect. Therefore, the exemption incorporated into FinCEN's final rule at 31 CFR 1010.651(b)(3), which effectively permitted U.S. correspondent account activity with Burmese banks, no longer has any operational effect. FinCEN has taken this into consideration in deciding to issue this exceptive relief.

Dated: October 13, 2016.

Jamal El Hindi,

Acting Director, Financial Crimes Enforcement Network.

[FR Doc. 2016–25249 Filed 10–18–16; 8:45 am]

BILLING CODE 4810–02–P

[10] U.S. State Department, *2016 International Narcotics Control Strategy Report,* available at *http://www.state.gov/j/inl/rls/nrcrpt/2016/vol2/253387.htm.*

[11] *See* Section 706(1) of the Foreign Relations Authorization Act, Fiscal Year 2003 (Pub. L. 107–228); *2016 Presidential Determination for Major Drug Producing and Transit Countries,* available at *https://www.whitehouse.gov/the-press-office/2016/09/12/presidential-determination-major-drug-transit-or-major-illicit-drug.*

[12] 69 FR at 19094.

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R08–OAR–2016–0311; FRL–9954–14–Region 8]

Approval and Promulgation of Air Quality Implementation Plans; State of Utah; Revisions to the Utah Division of Administrative Rules, R307–300 Series; Area Source Rules for Attainment of Fine Particulate Matter Standards

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is finalizing approval and finalizing the conditional approval of portions of the fine particulate matter ($PM_{2.5}$) State Implementation Plan (SIP) and other general rule revisions submitted by the State of Utah. The revisions affect the Utah Division of Administrative Rules (DAR), R307–300 Series; Requirements for Specific Locations. The revisions had submission dates of May 9, 2013, May 20, 2014, September 8, 2015, and March 8, 2016. The March 8, 2016 submittal contains rule revisions to address our February 25, 2016 conditional approval of several Utah DAR R307–300 Series rules submitted on February 2, 2012, May 9, 2013, and May 20, 2014. These area source rules control emissions of direct $PM_{2.5}$ and $PM_{2.5}$ precursors, which are sulfur dioxides (SO_2), nitrogen oxides (NO_X) and volatile organic compounds (VOC). Additionally, the EPA is finalizing to approve the State's reasonably available control measure (RACM) determinations for the rule revisions that pertain to the $PM_{2.5}$ SIP. This action is being taken under section 110 of the Clean Air Act (CAA or Act).

DATES: This final rule is effective on November 18, 2016.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA–R08–OAR–2016–0311. All documents in the docket are listed on the *http://www.regulations.gov* Web site. Although listed in the index, some information is not publicly available, *e.g.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available through *http://www.regulations.gov,* or please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section for additional availability information.

FOR FURTHER INFORMATION CONTACT: Crystal Ostigaard, Air Program, EPA, Region 8, Mailcode 8P–AR, 1595 Wynkoop Street, Denver, Colorado 80202–1129, (303) 312–6602, *ostigaard.crystal@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

On October 17, 2006 (71 FR 61144), the EPA strengthened the level of the 24-hour $PM_{2.5}$ National Ambient Air Quality Standards (NAAQS), lowering the primary and secondary standards from 65 micrograms per cubic meter (μg/m^3), the 1997 standard, to 35 μg/m^3. On November 13, 2009 (74 FR 58688), the EPA designated three nonattainment areas in Utah for the 24-hour $PM_{2.5}$ NAAQS of 35 μg/m^3. These are the Salt Lake City, Utah; Provo, Utah; and

Logan, Utah-Idaho nonattainment areas. The State of Utah has made a number of SIP submittals intended to address the requirements under part D of title I of the CAA for these $PM_{2.5}$ nonattainment areas. Among those requirements are those in sections 172(c)(1) and 189(a)(1)(C) regarding RACM and reasonably available control technology (RACT).

On August 18, 2016 (81 FR 55156), the EPA proposed to approve and conditionally approve a number of RACM components in the $PM_{2.5}$ Moderate area SIP submitted by the State. Our proposed notice provides details on the EPA's interpretation of the RACM requirements under part D and our evaluation of the State's submittals. The submittals dated May 9, 2013, May 20, 2014, September 8, 2015, and March 8, 2016, contained various revisions to the Utah DAR, Title R307—Environmental Quality, set of rules, most of which are applicable to the Utah SIP for $PM_{2.5}$ nonattainment areas. The rules we are addressing in this final rule were provided by Utah in the four different submissions listed above, and these rules are R307–101–2, General Requirements: Definitions; R307–302, Solid Fuel Burning Devices in Box Elder, Cache, Davis, Salt Lake, Tooele, Utah, and Weber Counties; R307–312, Aggregate Processing Operations for $PM_{2.5}$ Nonattainment Areas; and R307–328, Gasoline Transfer and Storage.

II. Response to Comments

The EPA did not receive any comments on the proposed action.

III. Final Action

For the reasons stated in our proposed notice, the EPA is finalizing approval of revisions to Administrative Rule R307–101–2, along with revisions in R307–300 Series; Requirements for Specific Locations (Within Nonattainment and Maintenance Areas), R307–312 and R307–328 for incorporation into the Utah SIP as submitted by the State of Utah on March 8, 2016. This final rule completes the February 25, 2016 (81 FR 9343) conditional approval for R307–101–2, R307–312, and R307–328 that had submission dates of February 2, 2012, May 9, 2013, and May 20, 2014. Additionally, we are finalizing approval of Utah's determination that R307–312 constitutes RACM for the Utah $PM_{2.5}$ SIP that was conditionally approved on February 25, 2016 (81 FR 9343); however, we are not acting at this time to determine that Utah's $PM_{2.5}$ attainment plan has met all requirements regarding RACM under subparts 1 and 4 of part D, title I of the Act. We intend to act separately on the remainder of Utah's $PM_{2.5}$ attainment plan.

The EPA is finalizing the conditional approval of revisions for R307–302 found in the May 9, 2013, May 20, 2014, and September 8, 2015 submittals. Additionally, the EPA is finalizing the conditional approval of Utah's determination that R307–302 constitutes RACM for the Utah $PM_{2.5}$ SIP for solid fuel burning devices. As stated earlier, we are not determining that Utah's $PM_{2.5}$ attainment plan has met all requirements regarding RACM under subparts 1 and 4 of part D, title I of the Act. Under section 110(k)(4) of the Act, the EPA may approve a SIP revision based on a commitment by the state to adopt specific enforceable measures by a date certain, but not later than one year after the date of approval of the plan revision. On May 19, 2016, Utah submitted a commitment letter to adopt and submit specific revisions within one year of our final action on these submittals; specifically to add continuous controls that extend to startup, shutdown, and malfunction, by establishing a prohibition on fuel types that can't be burned in a solid fuel burning device at any time. Since we are finalizing our conditional approval, Utah must adopt and submit the specific revisions it has committed to within one year of our finalization. If Utah does not submit these revisions within one year, or if we find Utah's revisions to be incomplete, or we disapprove Utah's revisions, this conditional approval will convert to a disapproval. If any of these convert to a disapproval, that will constitute a disapproval of a required plan element under part D of title I of the Act, which starts an 18-month clock for sanctions, see CAA section 179(a)(2), and the two-year clock for a federal implementation plan (FIP) to address the disapproved plan element, see CAA section 110(c)(1)(B).

IV. Incorporation by Reference

In this rule, the EPA is finalizing regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, the EPA is finalizing the incorporation by reference of Utah Division of Administrative Rules described in the amendments set forth to 40 CFR part 52 below. Therefore, these materials have been approved by the EPA for inclusion in the state implementation plan, have been incorporated by reference by the EPA into that plan, are fully federally enforceable under sections 110 and 113 of the CAA as of the effective date of the final rulemaking of the EPA's approval, and will be incorporated by reference by the Director of the **Federal Register** in the next update to the SIP compilation.[1] The EPA has made, and will continue to make, these materials generally available through *www.regulations.gov* and/or at the EPA Region 8 Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information).

V. Statutory and Executive Order Reviews

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

- Is not a significant regulatory action subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and

[1] 62 FR 27968 (May 22, 1997).

• does not provide the EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, the SIP is not approved to apply on any Indian reservation land or in any other area where the EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications and will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. The EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

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 December 19, 2016. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action 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, Intergovernmental relations, Incorporation by reference, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organization compounds.

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

Dated: September 26, 2016.

Debra H. Thomas,

Regional Administrator, Region 8.

40 CFR part 52 is amended as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

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

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

Subpart TT—Utah

■ 2. Section 52.2320, the table in paragraph (c) is amended as follows:
■ a. Under ''R307–101. General Requirements'' by revising the entry for ''R307–101–2'';
■ b. Under ''R307–302. Davis, Salt Lake, and Utah Counties: Residential Fireplaces and Stoves'' by revising the entries ''R307–302–1'', ''R307–302–2'', ''R307–302–3'', ''R307–302–4'';
■ c. Under ''R307–302. Davis, Salt Lake, and Utah Counties: Residential Fireplaces and Stoves'' by adding the entries ''R307–302–05'', ''R307–302–06'';
■ d. Under ''R307–312. Aggregate Processing Operations for $PM_{2.5}$; Nonattainment Areas'' by revising the entry for ''R307–312'';
■ e. Under ''R307–312. Aggregate Processing Operations for $PM_{2.5}$; Nonattainment Areas'' by removing the entry for ''R307–312–5(2)(a)'';
■ f. Under ''R307–328. Ozone Nonattainment and Maintenance Areas and Utah and Weber Counties: Gasoline Transfer and Storage'' by revising the entry for ''R307–328''; and
■ g. Under ''R307–328. Ozone Nonattainment and Maintenance Areas and Utah and Weber Counties: Gasoline Transfer and Storage'' by removing the entry for ''307–328–4(6)''.

The revisions and additions read as follows:

§ 52.2320 Identification of plan.

* * * * *

(c) * * *

Rule No.	Rule title	State effective date	Final rule citation, date	Comments
*	*	*	*	*
		R307–101. General Requirements		
*	*	*	*	*
R307–101–2	Definitions	3/3/2016	[Insert **Federal Register** citation], 10/19/2016.	
*	*	*	*	*
		R307–302. Davis, Salt Lake, and Utah Counties: Residential Fireplaces and Stoves		
R307–302–01	Definitions	2/4/2015	[Insert **Federal Register** citation], 10/19/2016.	Conditionally approved through 10/19/2017.
R307–302–02	No-Burn Periods for PM_{10}	2/4/2015	[Insert **Federal Register** citation], 10/19/2016.	Conditionally approved through 10/19/2017.
R307–302–03	No-Burn Periods for Carbon Monoxide.	3/6/2014	[Insert **Federal Register** citation], 10/19/2016.	Conditionally approved through 10/19/2017.
R307–302–04	Violations	3/6/2014	[Insert **Federal Register** citation], 10/19/2016.	Conditionally approved through 10/19/2017.
R307–302–05	Opacity and other Controls for Heating Appliances.	3/6/2014	[Insert **Federal Register** citation], 10/19/2016.	Conditionally approved through 10/19/2017.

Rule No.	Rule title	State effective date	Final rule citation, date	Comments
R307–302–06	Prohibition	1/1/2013	[Insert **Federal Register** citation], 10/19/2016.	Conditionally approved through 10/19/2017.
* * * * * * *				
R307–312. Aggregate Processing Operations for $PM_{2.5}$; Nonattainment Areas				
R307–312	Aggregate Processing Operations for $PM_{2.5}$ Nonattainment Areas.	2/4/2016	[Insert **Federal Register** citation], 10/19/2016.	
* * * * * * *				
R307–328. Ozone Nonattainment and Maintenance Areas and Utah and Weber Counties: Gasoline Transfer and Storage				
R307–328	Ozone Nonattainment and Maintenance Areas and Utah and Weber Counties: Gasoline Transfer and Storage.	2/4/2016	[Insert **Federal Register** citation], 10/19/2016.	
* * * * * * *				

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[FR Doc. 2016–25148 Filed 10–18–16; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R08–OAR–2016–0107; FRL–9954–13–Region 8]

Approval and Disapproval and Promulgation of Air Quality Implementation Plans; Interstate Transport for Utah

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is taking final action on portions of six submissions from the State of Utah that are intended to demonstrate that the State Implementation Plan (SIP) meets certain interstate transport requirements of the Clean Air Act (Act or CAA). These submissions address the 2006 and 2012 fine particulate matter ($PM_{2.5}$) National Ambient Air Quality Standards (NAAQS), 2008 ozone NAAQS, 2008 lead (Pb) NAAQS, 2010 sulfur dioxide (SO_2) NAAQS and 2010 nitrogen dioxide (NO_2) NAAQS. The interstate transport requirements under the CAA consist of four elements: Significant contribution to nonattainment (prong 1) and interference with maintenance (prong 2) of the NAAQS in other states; and interference with measures required to be included in the plan for other states to prevent significant deterioration of air quality (prong 3) or to protect visibility (prong 4). Specifically, the EPA is approving interstate transport prongs 1, 2 and 4 for the 2008 Pb NAAQS, approving prong 4 for the 2010 SO_2 NAAQS, disapproving prong 4 for the 2006 $PM_{2.5}$, 2008 ozone, 2010 NO_2 and 2012 $PM_{2.5}$ NAAQS, and disapproving prong 2 for the 2008 ozone NAAQS.

DATES: This final rule is effective on November 18, 2016.

ADDRESSES: EPA has established a docket for this action under Docket Identification Number EPA–R08–OAR–2016–0107. All documents in the docket are listed on the *http://www.regulations.gov* index. Although listed in the index, some information may not be publicly available, *e.g.,* Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically through *http://www.regulations.gov* or in hard copy at the Air Program, Environmental Protection Agency (EPA), Region 8, 1595 Wynkoop Street, Denver, Colorado 80202–1129. The EPA requests that you contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section to view the hard copy of the docket. You may view the hard copy of the docket Monday through Friday, 8:00 a.m. to 4:00 p.m., excluding federal holidays.

FOR FURTHER INFORMATION CONTACT: Adam Clark, Air Program, U.S. Environmental Protection Agency, Region 8, Mailcode 8P–AR, 1595 Wynkoop, Denver, Colorado 80202–1129, (303) 312–7104, *clark.adam@epa.gov.*

I. Background

On May 10, 2016, the EPA proposed action on two submittals from Utah for the interstate transport requirements of CAA section 110(a)(2)(D)(i)(I) for the 2008 Pb and 2008 ozone NAAQS. 81 FR 28807. An explanation of the CAA requirements, a detailed analysis of the state's submittals, and the EPA's rationale for approval of a portion of the 2008 Pb submittal and disapproval of a portion of the 2008 ozone submittal were all provided in the notice of proposed rulemaking, and will not be restated here. The public comment period for this proposed rule ended on June 9, 2016. The EPA received four comments on the proposal, which will be addressed in the ''Response to Comments'' section, below.

In the May 10, 2016 proposed action, the EPA proposed to disapprove the Utah SIP for prongs 1 and 2 of CAA section 110(a)(2)(D)(i)(I) for the 2008 ozone NAAQS. In that document, the EPA cited to air quality modeling conducted to support the promulgation of an update to the Cross-State Air Pollution Rule to address interstate transport with respect to the 2008 ozone NAAQS (CSAPR Update). The air quality modeling (1) identified locations in the U.S. where the EPA anticipates nonattainment or maintenance issues in 2017 for the 2008 ozone NAAQS (these are identified as nonattainment and maintenance receptors), and (2) quantified the projected contributions from emissions from upwind states to downwind ozone concentrations at the nonattainment and maintenance receptors in 2017. The document also proposed to apply an air quality threshold of one percent of the NAAQS, equivalent to 0.75 ppb with respect to the 2008 ozone NAAQS, to determine whether a state was ''linked'' to an identified downwind air quality problem in another state such that the upwind state may significantly contribute to nonattainment or interfere with maintenance of the NAAQS in the downwind state. The proposal modeling data showed that emissions from Utah contribute above the one percent threshold to two identified maintenance receptors and one nonattainment receptor in the Denver, Colorado area. Accordingly, as the Utah Department of Environmental Quality (UDEQ) did not provide technical analysis to support the State's conclusion that emissions originating in Utah do not significantly contribute to nonattainment or interfere with maintenance of the 2008 ozone NAAQS in any other state, the EPA proposed to disapprove the Utah SIP as to prongs 1 and 2 of CAA section 110(a)(2)(D)(i)(I).

On September 7, 2016, the EPA promulgated a final CSAPR Update, which included updated modeling data that reflected responses to comments received in the context of the CSAPR Update rulemaking.[1] The updated modeling projects three maintenance receptors in the Denver, Colorado area, but it does not project any nonattainment receptors in that area. Table 1 summarizes the air quality modeling results from the updated modeling conducted to support the final CSAPR Update relative to Utah. The modeling continues to indicate that Utah contributes emissions above the one percent threshold of 0.75 ppb with respect to 3 maintenance receptors in the Denver, Colorado area, confirming the data cited at proposal.

TABLE 1—MAINTENANCE RECEPTORS WITH UTAH CONTRIBUTION MODELED ABOVE 1%

Monitor I.D.	State	County	Utah modeled contribution (ppb)
80590006	Colorado	Jefferson	1.03
80590011	Colorado	Jefferson	1.17
80350004	Colorado	Douglas	1.63

Since the updated modeling continues to indicate that the contributions from Utah are above the one percent threshold of 0.75 ppb with respect to maintenance receptors in the Denver, Colorado area, and because the State has not otherwise provided a technical analysis which demonstrates that its SIP contains adequate provisions prohibiting emissions that will interfere with maintenance of the 2008 ozone NAAQS in any other state, the EPA is finalizing a disapproval of the Utah SIP with respect to the prong 2 requirements of CAA section 110(a)(2)(D)(i)(I) as to the 2008 ozone NAAQS.

Based on this new technical information showing that there are no longer any projected 2017 nonattainment receptors in the Denver, Colorado area or any other state to which Utah contributes at or above the one percent threshold, the EPA is not finalizing the proposed disapproval with respect to prong 1 of CAA section 110(a)(2)(D)(i)(I) as to the 2008 ozone NAAQS, as the proposed disapproval was based on in part on the EPA's August 4, 2015 Notice of Data Availability (NODA) modeling of a projected nonattainment receptor in Denver, Colorado. 80 FR 46271. The EPA will address the prong 1 requirements in a separate, subsequent rulemaking.

On August 1, 2016, the EPA proposed action on six submittals from Utah for the visibility-related interstate transport requirements of CAA section 110(a)(2)(D)(i)(II) prong 4. 81 FR 50430. An explanation of the CAA requirements, a detailed analysis of the state's submittals, and the EPA's rationale for approval of portions of the 2008 Pb and 2010 SO_2 submittals and disapproval of portions of the 2006 and 2012 $PM_{2.5}$, 2008 ozone and 2010 NO_2 submittals were all provided in the notice of proposed rulemaking, and will not be restated here. The public comment period for this proposed rule ended on August 31, 2016. The EPA did not receive any comments on this proposed action.

II. Response to Comments

Comment: Commenters UDEQ and the Wyoming Department of Environmental Quality (WDEQ) asserted that the CSAPR Update rulemaking was developed and promulgated for eastern states, and should not apply to western states. UDEQ stated that the EPA acknowledged in the CSAPR Update proposal that it will address contribution levels of western states like Utah on a case-by-case basis. 80 FR 75706, 75708 through 75709, December 3, 2015. The commenters contend that the EPA should consider other factors beyond those considered in developing the CSAPR Update.

UDEQ asserted that there are higher naturally occurring levels of background ozone in the west,[2] specifically citing the EPA's draft Regulatory Impact Analysis for the proposed 2015 ozone NAAQS rulemaking, contending that ''background ozone is a relatively large percentage (*e.g.* 70–80%) of the total seasonal mean ozone in locations in the intermountain western United States.'' [3] The commenter contends that background ozone levels in Utah and Colorado must be taken into consideration when evaluating nonattainment areas within the state borders and the impact that they have on intermountain downwind states.

Commenter WDEQ stated that the CSAPR modeling does not adequately account for important regional differences between the east and the west, including the unique topography, altitude, weather and wildfire prevalence (including intensity and duration) in the western U.S. The commenter asserted that the EPA did not provide a technical explanation for how the model accounts for the differences between the eastern and western U.S. with regard to these factors, and that such an analysis should be conducted before the CSAPR modeling is applied to evaluate

[1] A pre-publication version of the final CSAPR Update rulemaking can be found in the docket for this action, and is available at *https://www3.epa.gov/airmarkets/CSAPRU/Cross-State%20Air%20Pollution%20Rule%20Update%20for%20the%202008%20Ozone%20NAAQS%202060%20AS05%20FRM.pdf* (**Federal Register** publication pending).

[2] *See* National Ambient Air Quality Standards for Ozone, 79 FR 75234, 75382 (December 17, 2014) (proposed rule).

[3] EPA's draft Regulatory Impact Analysis of the Proposed Revisions to the National Ambient Air Quality Standards for Ozone p. 2–16.

interstate transport with respect to western states. The commenter recommended that the EPA work with western states to ''make regional adjustments and remove erroneous data from the CSAPR model.''

Response: The commenter does not provide any evidence or technical basis for their claim about the inadequacies of the CSAPR Update modeling for the western U.S. As described in the CSAPR Update Air Quality Modeling Technical Support Document (AQM TSD), the CSAPR modeling was performed for a nationwide domain that accounted for the differences in emissions (including actual wild fires), meteorology, and topography in various regions across the U.S. The AQM TSD includes an evaluation of 2011 base year model performance for 8-hour daily maximum concentrations on a regional and statewide basis as well as for individual monitoring sites. For example, the performance evaluation results for the region that includes Utah and Colorado indicate a mean bias of less than 10 percent for 8-hour daily maximum predicted ozone concentrations compared to the corresponding measured data. As described more fully in the AQM TSD, the EPA's use of the CAMx source apportionment modeling for the CSAPR Update is appropriate and the Agency finds its use sufficient for the purposes of assessing and identifying downwind air quality problems and contributions from upwind states in both the eastern and the western U.S.[4] The emissions modeling TSD for the CSAPR Update final rule ''Preparation of Emission Inventories for the version 6.3, 2011 Emissions Modeling Platform'' describes how fire emissions were developed and modeled using a consistent approach for the contiguous U.S. As described earlier, the most updated modeling continues to indicate that emissions from Utah will interfere with maintenance of the 2008 ozone NAAQS at three receptors in the Denver, Colorado area.

The EPA does not find the information provided by the commenters to indicate flaws in the modeling conducted by the EPA. Rather, the commenters point to factors which the CSAPR Update modeling specifically took into account. For these reasons, the EPA disagrees with these comments and finds the use of the CSAPR Update modeling to evaluate Utah's contributions to interstate transport is reasonable and supported.

The EPA did acknowledge in the proposed CSAPR Update that ''there may be additional criteria to evaluate regarding collective contribution of transported air pollution in the West,'' and that ''timeframe constrains the opportunity to conduct evaluations of additional criteria'' in the context of that rulemaking. 80 FR 75709, December 3, 2015. The commenters do not explain how the EPA's modeling has allegedly failed to consider the other factors that they contend should be taken into account. With respect to background concentrations, UDEQ has not explained how it believes the EPA must consider background ozone levels in evaluating interstate transport in the west, nor has UDEQ cited any specific provision of the statute that specifically requires such consideration. While the EPA does not view the obligation under the good neighbor provision as a requirement for upwind states to bear all of the burden for resolving downwind air quality problems, both upwind and downwind states can take reasonable steps to control emissions impacting downwind air quality even in areas affected by high levels of background concentrations of ozone. Were the EPA to absolve upwind states of the responsibility to make such reasonable reductions, the area's citizens would suffer the health and environmental consequences of such inaction.

Notably, in its comment letter, UDEQ agreed that a further technical analysis was necessary to demonstrate that the state had satisfied prongs 1 and 2 of CAA section 110(a)(2)(D)(i)(I), and the State is in the process of developing such an analysis. The EPA will review that additional analysis when it is submitted to the EPA in a subsequent SIP submission.

Comment: Commenter Utility Air Regulatory Group (UARG) cites to EPA's action to approve Arizona's SIP in spite of the CSAPR Update modeling indicating that the state significantly contributed to nonattainment at two California receptors. The commenter contends that the EPA's differing actions on the Utah and Arizona SIPs amount to developing policy about what transport criteria apply in western states. The commenter asserted that the EPA's actions on these two SIPs establish regulatory policy in a piecemeal fashion through separate, case-by-case rulemakings, and that this practice leads to confusion and uncertainty among state officials, the public, and the regulated community. The commenter stated that the EPA should describe the western transport criteria in a comprehensive rulemaking which includes a rationale for selecting these criteria. The commenter asserted that the EPA's failure to do so would deprived interested parties of an opportunity to provide meaningful and comprehensive comments on this issue.

Response: As described in the proposal for this action and in the CSAPR Update, the EPA is assessing each of the western states transport obligations on a case-by-case basis using the information available, which includes information from the CSAPR Update modeling. The rulemaking addressing the Arizona SIP explains, as the commenter notes, why additional factors are relevant to evaluating Arizona's contribution to other states, factors that are not similarly applicable to Utah's contribution to the Denver receptors. Nothing in section 110(a)(2)(D)(i)(I) requires the EPA to establish criteria for evaluating individual SIPs through a national rulemaking. *See EPA* v. *EME Homer City Generation, L.P.,* 134 S.Ct. 1584, 1601 (2014) (''nothing in the statute places EPA under an obligation to provide specific metrics to States before they undertake to fulfill their good neighbor obligation''). As required by the CAA and Administrative Procedures Act, the EPA clearly described its bases for disapproving the Utah SIP in its proposal. Similarly, the EPA also described its bases for approving the Arizona SIP in its proposal for that action. The public, including the commenter, had an opportunity to provide meaningful and comprehensive comments both on the Utah and Arizona actions, and therefore the EPA disagrees that interested parties are deprived of an opportunity to comment on issues relating to the EPA's analysis of western transport.

Comment: Commenter WDEQ stated that the EPA did not provide an explanation as to what technical analysis from the State of Utah would have been sufficient. Another commenter (UARG), quoting language from the CSAPR Update proposal (80 FR 75715, December 3, 2015), stated that EPA should identify and explain the additional criteria that may be relevant to the western states and whether it is necessary and appropriate to also evaluate the same criteria with respect to eastern states. The commenter

[4] ''The EPA used CAMx photochemical source apportionment modeling to quantify the impact of emissions in specific upwind states on downwind nonattainment and maintenance receptors for 8-hour ozone. CAMx employs enhanced source apportionment techniques that track the formation and transport of ozone from specific emissions sources and calculates the contribution of sources and precursors to ozone for individual receptor locations. The strength of the photochemical model source apportionment technique is that all modeled ozone at a given receptor location in the modeling domain is tracked back to specific sources of emissions and boundary conditions to fully characterize culpable sources.'' 80 FR 75726, December 3, 2015.

asserted that the EPA's failure to address this issue denied the public a meaningful opportunity to comment on it.

Response: The Supreme Court has made clear that ''nothing in the statute places EPA under an obligation to provide specific metrics to States before they undertake to fulfill their good neighbor obligation.'' *EPA* v. *EME Homer City Generation,* 134 S.Ct. at 1601. Thus, the EPA does not agree that it is required to identify all relevant criteria for evaluating SIPs before taking formal action on the submissions. The Court explained that ''[t]he statute speaks without reservation: Once a NAAQS has issued, a state 'shall' propose a SIP within three years, [40 U.S.C.] 7410(a)(1), and that SIP 'shall' include, among other components, provisions adequate to satisfy the Good Neighbor Provision, [40 U.S.C.] 7410(a)(2).'' *Id.* It is therefore the responsibility of the state to demonstrate that its SIP contains provisions sufficient to meet the requirements of CAA section 110(a)(2)(D)(i)(I). A state can and should submit all of the technical information it considers relevant to evaluate its contribution to downwind air quality, including anticipated changes in the emissions from sources within the state and any additional factors specific to the state that influence its emissions and air pollution which may transport to other states. As we noted at proposal and in this final action, Utah has not submitted technical information or analysis which leads the EPA to conclude that the state is not interfering with maintenance of the NAAQS in other states, particularly in light of air quality modeling demonstrating that emissions from Utah impact air quality in Denver, Colorado. The basis for this conclusion was clearly explained at proposal, and the EPA therefore does not agree that the public did not have a meaningful opportunity to comment on the factors relevant to the proposed disapproval of the Utah SIP submission.

Comments regarding the factors relevant to evaluation of interstate transport with respect to eastern states are out of the scope of this rulemaking and do not require a response.

Comment: Commenter UDEQ stated that Utah's contributions to Denver are modest and other factors weigh against the conclusion of significant contribution or interference with maintenance. UDEQ argued that the one percent threshold should be a screening threshold that can be overcome by empirical evidence. The commenter cited a proposed EPA action on Idaho's SIP in which EPA Region 10 did not rely solely on Idaho's contribution being below one percent in its action on that SIP, but also considered Idaho's modeling data and analysis that reinforced the EPA modeling results. 80 FR 66862, October 30, 2015. UDEQ argued that the EPA should follow this and ''consider additional factors when evaluating Utah's ozone infrastructure SIP.'' Commenter WDEQ claimed that it is appropriate for western states to use a ''weight of evidence'' approach, as was used in EPA Region 9's proposed action on Arizona's 2008 ozone transport SIP. 81 FR 15200, March 22, 2016.

Response: The EPA encourages states to submit any relevant information, such as that submitted by Idaho, to assist us in evaluating a state's impact on downwind state's air quality and the control requirements in order to determine whether a state's SIP is approvable. The EPA agrees that it is appropriate to analyze all information for western states and make a conclusion based on a weight of the evidence, but the EPA has not received any such evidence from UDEQ that is sufficient to alter our determination that Utah interferes with maintenance at Denver area receptors.

The EPA notes that the one percent threshold as used in the CSAPR rulemakings is in fact a screening threshold. States are not determined to significantly contribute to nonattainment or interfere with maintenance downwind merely because emissions from the state exceed the one percent threshold. Rather, the threshold is used to identify those states that are subject to further analysis to determine whether cost-effective reductions are achievable from sources within the states. The levels of such reductions quantify the amounts of emissions that significantly contribute to nonattainment and interfere with maintenance in other states. CSAPR Update, Final Rule, pre-publication draft at 77–80. If UDEQ believes that the EPA should consider additional factors with respect to its linkage to the Denver receptors, it should identify those factors in its SIP submission. But as noted, UDEQ did not provide any technical analysis in its SIP submission, and to the extent additional factors have been identified in UDEQ's comments, it did not explain how those factors should affect the EPA's conclusion in this action. Without explaining how such factors should impact EPA's analysis, the EPA does not agree that Utah's impacts on the Denver receptors are modest, particularly considering emissions from the State contribute as much as twice the one percent air quality threshold, nor has the State offered any analysis to support this conclusory statement.

The EPA also analyzed the State's submission and in the proposal described deficiencies such as a lack of quantification of the included emission reduction measures or evaluation of how such measures are sufficient to address the State's contribution to nonattainment and maintenance receptors in Denver, Colorado. The commenters here again provide no information as to why the EPA's case-specific analysis of Utah's SIP is incorrect.

Comment: Commenter UDEQ asserted that the one percent screening threshold is arbitrary, stating that EPA only explains why it rejected five percent and anything below one percent, but does not justify one percent as opposed to two percent, which Utah meets. UDEQ argued that this threshold has not been subject to sufficient scrutiny and comment when applied to western states, and that the EPA has only determined that the one percent threshold is appropriate for eastern states. 80 FR 66862–66863, October 30, 2015.

Response: As stated in the May 10, 2016 proposal for this final action, the EPA believes contribution from an individual state equal to or above one percent of the NAAQS could be considered significant where the collective contribution of emissions from one or more upwind states is responsible for a considerable portion of the downwind air quality problem. The EPA's analysis has shown that the one percent threshold captures a high percentage of the total pollution transport affecting downwind states. 81 FR 28810, May 10, 2016. This threshold has been used by the EPA in past transport actions including the original CSAPR (76 FR 48208, August 8, 2011), and the EPA determined this threshold was appropriate following the public comment process in those previous rulemakings.

In the final CSAPR Update rulemaking, the EPA compiled the contribution modeling results from the air quality modeling in order to analyze the impact of different possible thresholds, and concluded that the one percent threshold continues to be a reasonable means of accounting for the combined impact of relatively small contributions from many upwind states. *See* CSAPR Update, Final Rule, pre-publication draft at 81–82; AQM TSD. For each of the ozone receptors identified in the final CSAPR Update rule analysis, the EPA identified: (1) The total upwind state contributions, and (2) the amount of the total upwind state contribution that is captured at one percent, five percent, and half (0.5) percent of the NAAQS. The EPA continues to find that the total collective contribution from upwind states' sources represent a significant portion of the ozone concentrations at downwind nonattainment and maintenance receptor locations. This analysis shows that the one percent threshold generally captures a substantial percentage of the total pollution transport affecting downwind states without also implicating states that contribute insignificant amounts. Analysis of the data for the Denver receptors at issue in this rulemaking results in the same conclusion. Use of a higher threshold would result in a relatively large reduction in the overall percentage of ozone pollution transport captured relative to the amounts captured at the one percent level at the receptors. For example, none of the transport from upwind states would be captured with a five percent threshold.

Although UDEQ proposes that the EPA should instead use a two percent threshold with respect to the Denver receptors, it has not submitted additional information or analysis to assist the EPA in determining whether there is an appropriate alternative contribution threshold for Utah or western states generally. Rather, UDEQ's proposal to use a two percent threshold appears to only be justified by the conclusion that Utah would not have been linked to Denver receptors at this level (the updated modeling indicates contribution to a maintenance receptor above two percent: See Table 1 of this preamble). Given the lack of relevant information or analysis submitted by the State, and based on an analysis of EPA's own CAMx air quality modeling data, the EPA continues to find that the one percent threshold is appropriate to apply to identify upwind states linked to the Denver receptors.

Comment: Commenter UDEQ asserted that the IPM model used to project emissions for electric generating units is not precise. The commenter supported this assertion by citing a comment from Louisiana Chemical Association (LCA) on the NODA which stated the IPM model ''is simply not accurate enough and is dependent upon too many uncertain assumptions and imprecise inputs to make binding decisions of 'significant contribution' or 'interference with maintenance' when dealing with projections of ozone at part per billion level.'' UDEQ argued that this model is imprecise and should therefore be subject to ''opportunity for rebuttal based on empirical evidence.''

Response: The EPA has addressed LCA's comment in the response to comments document on the CSAPR Update proposal. In that document, we noted that the D.C. Circuit Court has recognized the usefulness of models despite the inherent uncertainty. In upholding the EPA's approach to evaluating interstate transport in CSAPR, the D.C. Circuit held that they would not ''invalidate EPA's predictions solely because there might be discrepancies between those predictions and the real world. That possibility is inherent in the enterprise of prediction.'' *EME Homer City Generation, L.P.* v. *EPA,* 795 F.3d 118, 135 (2015). The court continued to note that ''the fact that a 'model does not fit every application perfectly is no criticism; a model is meant to simplify reality in order to make it tractable.' '' *Id.* at 135–36 (quoting *Chemical Manufacturers Association* v. *EPA*, 28 F.3d 1259, 1264 (D.C. Cir. 1994).

The EPA has also provided thorough explanation as to how the modeling conducted for the CSAPR Update was appropriate. As stated in the final CSAPR Update, ''the EPA projected future 2017 baseline EGU emissions using version 5.15 of the Integrated Planning Model (IPM) (*www.epa.gov/airmarkets/power-sector-modeling*). IPM, developed by ICF Consulting, is a state-of-the-art, peer-reviewed, multiregional, dynamic, deterministic linear programming model of the contiguous U.S. electric power sector. . . . The model is designed to reflect electricity markets as accurately as possible. The EPA uses the best available information from utilities, industry experts, gas and coal market experts, financial institutions, and government statistics as the basis for the detailed power sector modeling in IPM.'' [5] CSAPR Update, Final Rule, pre-publication draft at 131.

We have not received empirical evidence from the State to rebut our conclusions as stated in the proposal for this final rulemaking.

Comment: Commenter UDEQ argued that the EPA's reliance on IPM modeling is incorrect in Utah's case because this modeling used a 2011 emissions inventory that excluded certain enforceable reductions and included Carbon plant emissions, though the facility is no longer in operation.

Response: The EPA disagrees that the IPM modeling excluded certain enforceable reductions and included Carbon plant emissions. The shutdown of the Carbon power plant was accounted for in the CSAPR Update modeling, and no emissions were modeled from the facility in the 2017 scenario. (*See* documents and EPA–HQ–OAR–2015–0500–0205 and EPA–HQ–OAR–2015–0500–0014 in the docket for the CSAPR Update, or in the docket for this rulemaking. These documents, respectively, are the NEEDS database which defines the starting fleet in IPM and a unit level comparison of emissions from point sources between the 2011 and 2017 inventories). As for the other enforceable reductions referenced by the commenter, we cannot respond because the commenter has not provided specific detail as to the reductions that were unaccounted for. The EPA has encouraged and given the opportunity for states to submit information with regard to any inconsistencies between ''on the books'' upcoming reductions and the emissions modeled for the CSAPR Update in both that proposed rulemaking and in the August 4, 2015 NODA. 80 FR 46271, August 4, 2015.

Comment: Commenter UDEQ asserted that western states do not have confidence in the way in which they can submit data for consideration under the Exceptional Events Rule, which has not yet been finalized. UDEQ stated that ''it will be difficult for the EPA to get an accurate assessment of the responsibility that Utah and other western states have to downwind states with regard to the 2008 ozone NAAQS as used in CSAPR until the EPA releases a final rule on these revisions.'' Commenter insisted that finalization of this rulemaking will allow the EPA to address data influenced by wildfires, stratospheric intrusions, and abnormally high background ozone.

Response: The EPA agrees that the final Exceptional Events Rule will assist states and the EPA in preparing and processing exceptional events demonstrations for events, including wildfires, which contribute to monitored ozone NAAQS exceedances or violations, if those events meet the applicable criteria in the Exceptional Events Rule, including (1) the event affected air quality; (2) the event was not reasonably controllable or preventable; and (3) the event was caused by human activity that is unlikely to recur at a particular location or was a natural event. Exceptional Events Final Rule, pre-publication draft.[6] Although the rule is intended to

[5] Detailed information and documentation of the EPA's Base Case, including all the underlying assumptions, data sources, and architecture parameters can be found on the EPA's Web site at: *www.epa.gov/airmarkets/power-sector-modeling.*

[6] See ''Treatment of Data Influenced by Exceptional Events,'' final rule, pre-publication

Continued

streamline the exceptional events demonstration process, there is an exceptional events rule and process currently in place. *See* 40 CFR 50.14. We have not received and failed to act on exceptional events demonstrations from states that would impact the determination that Utah interferes with maintenance at receptors in the Denver area.

The EPA disagrees with the comment's note that abnormally high background ozone itself may qualify as an exceptional event. An exceptional event must be defined by the source of its emissions. If the underlying source is a natural event (*e.g.,* wildfire) and the emissions influence a regulatory monitor, then it can be considered for exclusion under the Exceptional Events Rule. If the underlying source is anthropogenic then the explicit text of CAA section 319 requires that it can only be considered under the Exceptional Events Rule if the activity causing emissions is unlikely to recur at a particular location. The meteorological processes that result in pollutant transport and the formation of background ozone are ongoing and thus not an event, even though their influence on ambient concentrations at a particular time and location may be observed only occasionally and thus seem ''event-like.'' Regardless of where the activity or event that caused emissions occurred, and regardless of whether the emissions travel internationally or interstate, all exceptional event criteria applicable to that activity or event must be met in order for the emissions to be excluded.

Comment: Commenter WDEQ stated that the EPA's application of CSAPR to the western U.S. will place an undue burden on all western states. WDEQ noted that its department lacks staff experienced in running Comprehensive Air Quality Model with Extensions (CAMx version 6.11) modeling, and asserted that the EPA has acknowledged that this modeling is quite costly and resource intensive.

Response: States are not required to conduct modeling to address their interstate transport requirements under CAA section 110(a)(2)(D)(i)(I). However, where the EPA has conducted modeling that indicates emissions from a state may impact air quality in another state, both the EPA and the state must address how that modeling impacts any conclusion regarding the upwind state's compliance with the statutory interstate transport requirements. The EPA understands that air quality modeling can be both complex and resource intensive, and remains committed to assisting the states in conducting or reviewing air quality modeling and other relevant technical information for the purposes of determining compliance with CAA section 110(a)(2)(D)(i)(I).

draft as signed by EPA Administrator Gina McCarthy on September 16, 2016.

III. Final Action

In this action, the EPA is approving the Utah SIP with regard to certain interstate transport requirements of CAA section 110(a)(2)(D)(i) for the 2008 Pb and 2010 SO_2 NAAQS from the State's certifications as shown in Table 2 of this preamble. The EPA is disapproving the Utah SIP with regard to certain interstate transport requirements of CAA section 110(a)(2)(D)(i) for the 2006 $PM_{2.5}$, 2008 ozone, 2010 NO_2 and 2012 $PM_{2.5}$ NAAQS as shown in Table 3 of this preamble. As noted in our August 1, 2016 proposed action, the EPA is not required to take further action with regard to the prong 4 disapprovals, because a FIP is already in place for Utah that corrects all regional haze, and thus visibility transport, SIP deficiencies. 81 FR 43894. This action is being taken under section 110 of the CAA.

TABLE 2—LIST OF UTAH INTERSTATE TRANSPORT PRONGS THAT EPA IS APPROVING

Final approval
January 19, 2012 submittal—2008 Pb NAAQS:
(D)(i)(I) prongs 1 and 2, (D)(i)(II) prong 4.
June 2, 2013 submittal—2010 SO_2 NAAQS:
(D)(i)(II) prong 4.

TABLE 3—LIST OF UTAH INTERSTATE TRANSPORT PRONGS THAT EPA IS DISAPPROVING

Final disapproval
February 21, 2010 submittal—2006 $PM_{2.5}$ NAAQS:
(D)(i)(II) prong 4.
January 31, 2013 submittal—2008 Ozone NAAQS:
(D)(i)(I) prong 2, (D)(i)(II) prong 4.
January 31, 2013 submittal—2010 NO_2 NAAQS:
(D)(i)(II) prong 4.
December 22, 2015 submittal—2012 $PM_{2.5}$ NAAQS:
(D)(i)(II) prong 4.

IV. Statutory and Executive Order Reviews

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

- Is not a significant regulatory action subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and
- Does not provide the EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994). In addition, the SIP does not apply on any Indian reservation land or in any other area where the EPA or an Indian tribe has demonstrated that a tribe has

jurisdiction. In those areas of Indian country, the rule does not have tribal implications and will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register.** This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by *December 19, 2016.* Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See CAA section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

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

Dated: September 29, 2016.

Shaun L. McGrath,

Regional Administrator, Region 8.

40 CFR part 52 is amended to read as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

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

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

■ 2. Section 52.2354 is amended by redesignating the introductory text as paragraph (a) and adding paragraph (b). The addition reads as follows:

Subpart TT—Utah

§ 52.2354 Interstate transport.

* * * * *

(b) Addition to the Utah State Implementation Plan regarding the 2008 Pb Standard for CAA section 110(a)(2)(D)(i) prongs 1, 2 and 4, submitted to EPA on January 19, 2012, and addition to the Utah SIP regarding the 2010 SO_2 Standard for CAA section 110(a)(2)(D)(i) prong 4, submitted to EPA on June 2, 2013.

[FR Doc. 2016–25145 Filed 10–18–16; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2016–0499; FRL–9954–20–Region 9]

Approval and Promulgation of Implementation Plan; California; Calaveras County, Chico (Butte County), San Francisco Bay Area and San Luis Obispo County (Eastern San Luis Obispo) Base Year Emission Inventories for the 2008 Ozone Standards

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: The Environmental Protection Agency (EPA) is taking direct final action to approve revisions to the California State Implementation Plan (SIP) concerning the base year emission inventories (EIs) for four areas designated as nonattainment areas (NAAs) for the 2008 ozone National Ambient Air Quality Standards (2008 ozone NAAQS). The subject areas include Calaveras County, Chico (Butte County), San Francisco Bay Area and San Luis Obispo (Eastern San Luis Obispo). We are approving these revisions under the Clean Air Act (CAA or ''the Act'').

DATES: This rule is effective on December 19, 2016 without further notice, unless the EPA receives adverse comments by November 18, 2016. If we receive such comments, we will publish a timely withdrawal in the **Federal Register** to notify the public that this direct final rule will not take effect.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R09–OAR–2016–0499 at *http://www.regulations.gov,* or via email to Nancy Levin, Air Planning Office at *levin.nancy@epa.gov.* For comments submitted at *Regulations.gov*, follow the online instructions for submitting comments. Once submitted, comments cannot be removed or edited from *Regulations.gov*. For either manner of submission, the EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.* on the web, cloud or other file sharing system). For additional submission methods, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section. For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *http://www2.epa.gov/dockets/commenting-epa-dockets.*

FOR FURTHER INFORMATION CONTACT: Nancy Levin, EPA Region IX, (415) 972–3848, *levin.nancy@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document, ''we,'' ''us'' and ''our'' refer to the EPA.

Table of Contents

I. Background

On March 12, 2008, the EPA strengthened the primary and secondary eight-hour ozone NAAQS to 0.075 parts per million (ppm) (73 FR 16436).[1] In

[1] Since the 2008 primary and secondary NAAQS for ozone are identical, for convenience, we refer to

Continued

accordance with section 107(d) of the CAA, the EPA must designate an area ''nonattainment'' if it is violating the NAAQS or if it is contributing to a violation of the NAAQS in a nearby area.

The EPA designated 18 areas in California as nonattainment for the 2008 ozone NAAQS on May 21, 2012, effective July 20, 2012 (77 FR 30088, codified at 40 CFR 81.305). The Calaveras County, Chico (Butte County), Imperial County, Kern County (Eastern Kern), Mariposa County, Nevada County (Western part), San Diego County, San Francisco Bay Area, San Luis Obispo (Eastern San Luis Obispo) and Tuscan Buttes NAAs were classified (by operation of law) as ''Marginal'' nonattainment. The EPA classified the Ventura County NAA as ''Serious'' nonattainment. The EPA classified the Los Angeles-San Bernardino Counties (West Mojave Desert), Riverside County (Coachella Valley) and Sacramento Metro NAAs as ''Severe-15'' nonattainment. The EPA classified the Los Angeles-South Coast Air Basin and San Joaquin Valley NAAs as ''Extreme'' nonattainment. The EPA designated the lands of the Pechanga Band of Luiseño Mission Indians of the Pechanga Reservation and the Morongo Band of Mission Indians in Southern California as separate NAAs and classified them as ''Moderate'' and Serious nonattainment, respectively.

The EPA proposed the 2008 ozone NAAQS SIP Requirements Rule (SRR) on June 6, 2013 (78 FR 34178) and finalized the SRR on March 6, 2015 (80 FR 12264, codified at 40 CFR part 51, subpart AA), effective April 6, 2015. The SRR established implementation requirements for the 2008 ozone NAAQS, including requirements for ''base year'' emission inventories under CAA section 182(a)(1).

On July 17, 2014, the California Air Resources Board (CARB) submitted a staff report, titled ''8-Hour Ozone State Implementation Plan Emission Inventory Submittal, release date: May 23, 2014'' (''submittal'') to the EPA. This submittal addresses base year inventory requirements for 15 of the 18 NAAs in California.[2] On September 2, 2016, CARB submitted additional technical information titled ''8-Hour Ozone State Implementation Plan Emission Inventory Supplemental Documentation (September 2016)'' (herein referred to as ''EI Supplemental Documentation'') to support the NAA emission inventories submitted on July 17, 2014.

On May 4, 2016 (81 FR 26697), the EPA issued one of three types of determinations for each NAA that was originally classified as Marginal for the 2008 ozone NAAQS. The EPA determined that four Marginal NAAs in California—Calaveras County, Chico (Butte County), San Francisco Bay Area and Tuscan Buttes—had attained the 2008 ozone NAAQS by the applicable attainment date of July 20, 2015, based on complete, quality-assured and certified ozone monitoring data for 2012–2014. The EPA determined that one NAA in California—San Luis Obispo (Eastern San Luis Obispo) (''Eastern SLO'')—qualified for a 1-year attainment date extension for the 2008 ozone NAAQS even though it did not attain the NAAQS by the applicable deadline. Finally, the EPA reclassified five NAAs in California as Moderate because they did not attain the 2008 ozone NAAQS by the attainment date and did not qualify for a 1-year extension. The EPA ''bumped up'' the following Marginal NAAs to Moderate: Imperial County, Kern County (Eastern Kern), Mariposa County, Nevada County (Western part) and San Diego County. In addition to the Marginal area requirements, which include submittal of a base year emission inventory (see CAA section 182(a)(1)), these NAAs became subject to additional requirements.[3] However, these additional requirements are not the subject of this action.

In this action, we are acting on a portion of CARB's submittal, namely, the base year EIs for the Calaveras County, Chico (Butte County), Eastern SLO and San Francisco Bay Area NAAs. We are deferring action on the base year EIs for NAAs that are required to submit updated base year EIs to support their attainment demonstrations and to meet reasonable further progress requirements because we anticipate that these later submittals will supersede the EIs in the CARB 8-hour EI submittal for these areas.

II. Summary and Analysis of the State's Submittal

A. Statutory and Regulatory Requirements

1. Procedural Requirements for Adoption and Submittal of SIP Revisions

CAA section 110(a)(1) and 110(l) and 40 CFR 51.102 require states to provide reasonable notice and an opportunity for a public hearing prior to adoption of SIP revisions. Section 110(k)(1)(B) requires the EPA to determine whether a SIP submittal is complete within 60 days of receipt. Any plan that we have not affirmatively determined to be complete or incomplete will become complete six months after the day of submittal by operation of law. A finding of completeness does not approve the submittal as part of the SIP nor does it indicate that the submittal is approvable. It does start a 12-month clock for the EPA to act on the SIP submittal (see CAA section 110(k)(2)).

2. Requirements for Base Year Inventories

CAA section 182(a)(1) and 40 CFR 51.1115(a) require states to submit a ''base year inventory'' for each 2008 ozone nonattainment area within two years of the effective date of designation. This inventory must be ''a comprehensive, accurate, current inventory of actual emissions from sources of VOC and NO_X emitted within the boundaries of the nonattainment area as required by CAA section 182(a)(1)'' (40 CFR 51.1100(bb), see also CAA section 172(c)(3)). In addition, 40 CFR 51.1115(a) requires that the inventory year be selected consistent with the baseline year for the reasonable further progress (RFP) plan, which is usually the most recent calendar year for which a complete triennial inventory is required to be submitted to the EPA under the Air Emissions Reporting Requirements (40 CFR part 51, subpart A) (see 40 CFR 51.1110(b)).

B. Summary of the State's Submittal

The State submitted base year EIs for areas designated as nonattainment for the 2008 8-hour ozone NAAQS on July 17, 2014.[4] CARB's submittal documents the public review process followed prior to its submittal to the EPA as a revision to the SIP. The submittal includes a copy of a CARB notice of public meeting on June 26, 2014 to consider the approval of the submittal, a transcript from the June 26, 2014 meeting,[5] and a

both as ''the 2008 ozone NAAQS'' or ''the 2008 ozone standard.''

[2] The submittal did not include EIs for the Tuscan Buttes NAA, which is a small, high elevation area containing no anthropogenic sources, see submittal, p. 3, or for the Pechanga and Morongo NAAs.

[3] These requirements include: An attainment demonstration; provisions for reasonably available control technology and reasonably available control measures; reasonable further progress (RFP) reductions in volatile organic compounds (VOC) and/or nitrogen oxide (NO_X) emissions; contingency measures; a vehicle inspection and maintenance program; and NO_X and VOC emission offsets at a ratio of 1.15 to 1 for major source permits (see 40 CFR part 51, subpart AA and CAA sections 182(b) and 172(c)). A SIP revision addressing these requirements is due to the EPA by January 1, 2017 (81 FR 26697, May 4, 2016).

[4] Submittal pp. 7–35.

[5] Meeting, State of California, Air Resources Board, CAL/EPA Headquarters, Byron Sher

signed resolution stating that the CARB made the EIs available for public review at least 30 days prior to the board hearing and that the EIs were adopted after notice and public hearing.[6] As noted above, on September 2, 2016, CARB provided additional technical information referred to herein as EI Supplemental Documentation to support the NAA EIs submitted on July 17, 2014.

CARB selected 2012 as the base year because it was the most recent year for which comprehensive emissions estimates were available,[7] and because CARB wanted a consistent inventory across the state.[8] The submitted base year EIs are expressed as 2012 average summer day emissions in tons per day (tpd) and categorized as stationary point sources, area-wide sources, on-road mobile sources and other mobile sources. CARB's EI Supplemental Documentation describes methods used to estimate emissions for each category and subcategory.[9] The submittal describes the updates to the 2012 EIs since the last comprehensive EI update, and it also describes how emissions were calculated for ''split regions'' not defined by CARB's county, air basin, and district boundaries.[10]

Table 1 summarizes the 2012 EIs for the Calaveras County, Chico (Butte County), Eastern SLO and San Francisco Bay Area NAAs for nitrogen oxides (NO_X) and volatile organic compound (VOC) emissions.[11]

TABLE 1—2012 AVERAGE SUMMER DAY EMISSION INVENTORIES (TPD)

Category	NO_X	% of total	VOC	% of total
Calaveras County				
Stationary Sources	0.12	5	0.23	4
Area-wide Sources	0.09	3	1.82	33
On-road Mobile	1.70	64	1.03	19
Other Mobile	0.75	28	2.49	45
Total *	2.66	100	5.56	100
Chico (Butte County)				
Stationary Sources	2.03	12	2.08	15
Area-wide Sources	0.67	4	4.81	34
On-road Mobile	7.06	40	3.32	23
Other Mobile	7.79	44	4.00	28
Total *	17.54	100	14.21	100
San Francisco Bay Area				
Stationary Sources	41.33	14	62.13	23
Area-wide Sources	7.99	3	68.37	26
On-road Mobile	151.65	52	74.02	28
Other Mobile	88.55	31	59.98	23
Total *	289.51	100	264.50	100
Eastern SLO				
Stationary Sources	0.17	25	0.10	21
Area-wide Sources	0.00	0	0.16	33
On-road Mobile	0.37	54	0.17	35
Other Mobile	0.14	21	0.05	10
Total *	0.68	100	0.48	100

* Differences due to rounding. Excludes biogenic emissions.

1. Stationary Source Emissions

CARB estimates stationary point source emissions based on annual reports submitted by the local air districts. The local air districts are responsible for working with facility operators to compile estimates, using source testing, direct measurement or engineering calculations. CARB estimates emissions from smaller point sources, such as gasoline dispensing facilities and residential water heaters, as a group and reports them in a single source category. CARB groups stationary point source emissions into the following categories: Fuel combustion, waste disposal, cleaning and surface coatings, petroleum production and marketing, and industrial processes.[12]

Auditorium, Second Floor, 1001 I Street, Sacramento, California 95814, Thursday, June 26, 2014, 9:04 a.m., Tiffany C. Kraft, CSR, Certified Shorthand Reporter, License Number 12277, pp. 7–8.

[6] CARB, ''The 8-Hour Ozone State Implementation Plan Emission Inventory Submittal,'' Resolution 14–14, June 26, 2014, Agenda Item No.: 14–5–1, signed by Tracy Jensen, Clerk of the Board.

[7] Submittal, p. 5.

[8] In particular, CARB wanted to assure consistency with the South Coast Air Quality Management District, which planned to use 2012 data for its base year inventory. *See* Supplemental Documentation.

[9] *Ibid.*

[10] Submittal, pp. 5–6.

[11] *Ibid.*, pp. 7–35.

[12] Submittal, pp. 7–35. Fuel combustion subcategories: Electric utilities, cogeneration, oil and gas production (combustion), manufacturing and industrial, food and agricultural processing, service and commercial, other (fuel combustion). Waste disposal subcategories: Sewage treatment, incinerators, other (waste disposal). Cleaning and surface coatings subcategories: Laundering, degreasing, coatings and related process solvents, printing, adhesives and sealants. Petroleum

Continued

CARB describes the methodologies it uses for smaller point sources in the EI Supplemental Documentation. For example, while CARB reports most of the food and agricultural processing emission sources as individual point sources, CARB estimates the exhaust emissions from agricultural irrigation pumps from a model developed by CARB staff. The EI Supplemental Documentation provides a link to the methodology used.[13] The model uses United States Department of Agriculture (USDA) engine population estimates, emission factors, average annual use in hours, average brake horsepower of engine and average engine load factors.[14]

2. Area-Wide Source Emissions

CARB's area-wide source inventories include categories where emissions take place over a wide geographic area, such as consumer products, residential fuel combustion and farming operations. CARB groups area-wide source emissions as either solvent evaporation or miscellaneous processes.[15]

CARB describes the methodologies for each area-wide source emission category in the EI Supplemental Documentation, pages 21–29. CARB uses various methodologies for estimating emissions from area-wide source categories. For example, the California Department of Pesticide Regulation (DPR) calculates pesticide emission estimates for CARB. The DPR applies Emission Potential (EP) values from the DPR database to the amount of grower-reported pesticide application in DPR's Pesticide Use Report database.[16] For the consumer products emissions estimates, CARB conducted surveys to collect updated product and ingredient information for approximately 360 consumer product categories, and determined the total sales and total VOC emissions for each category based on the survey data. CARB adjusted emissions to the 2012 base year by using population data from the California Department of Finance (2013).[17] CARB bases emissions from farming operations on data from the USDA's 2012 Census of Agriculture and emission factors for each livestock category.[18] CARB uses survey data and emission factors to estimate emissions from residential wood combustion, a subcategory of residential fuel combustion. In 2011, CARB updated its methodology for residential wood combustion to include more recent survey data on residential wood burning devices and consumption rates, updates to the EPA National Emission Inventory emission factors and improved calculation approaches.[19]

3. Off-Road Mobile Source Emissions

CARB has developed category-specific models for numerous off-road (also known as ''non-road'') sources, including locomotives, ships, industrial and construction equipment, and recreational vehicles. CARB used the OFFROAD2007 model for categories without source-specific models. CARB provided supplementary documentation describing the methodologies used for the following off-road sources: Aircraft, ocean going vessels, commercial harbor craft, recreational boats, off-road recreational vehicles, fuel storage and handling equipment, farm equipment and off-road equipment (*i.e.,* transport refrigeration units, drill rigs, cargo handling equipment, and trains).[20] The submittal provided emission estimates for off-road sources that reflected updates to data models for ocean going vessels, recreational boats, recreational vehicles, off-road equipment and farm equipment.[21] In addition to describing each category, CARB provides Web site links to additional information on each methodology. These descriptions include the type of source represented, the types and source of data used, and the models used. For example, CARB describes ocean-going vessels (OGVs) as commercial vessels greater than or equal to 400 feet in length or 10,000 gross tons or propelled by a marine compression ignition engine with a displacement of greater than or equal to 30 liters per cylinder. CARB's emission inventory includes all OGV emissions occurring within 100 nautical miles of the California coastline.

4. On-Road Mobile Source Emissions

CARB estimated on-road mobile emissions from cars, light and heavy-duty trucks, motorcycles, buses and motor homes using its Emission Factors (EMFAC) model version 2011, which was the latest EPA-approved version available at the time the EIs were prepared.[22] CARB estimated vehicle populations using registration data from the Department of Motor Vehicles (DMV), updated in 2012.[23] The model estimates vehicle miles traveled (VMT) from data and mileage accrual rates from the Bureau of Automotive Smog Check Program. CARB states that the EIs in this submittal reflect updates to the EMFAC2011 activity parameters, including vehicle population and activity using 2012 DMV data, vehicle sales and survival rate estimates, fuel sales from the Board of Equalization, and updates to mileage accrual rates using Smog Check data. CARB adjusted the default VMT regional allocations using the 2012 National Transportation Atlas Database. The model also reflects the emissions benefits of CARB's 2010 Truck and Bus Regulation, the ''Pavley'' Clean Car Standards and the Low Carbon Fuel Standard. CARB provides additional information on EMFAC at *http://www.arb.ca.gov/mseimsei.htm.*

C. The EPA's Evaluation of the State's Submittal

1. Evaluation of Procedural Requirements

Based on the documentation included in CARB's submittal, we find that the submittal satisfies the procedural requirements of sections 110(a)(1) and 110(l) of the Act requiring states to provide reasonable notice and an opportunity for public hearing prior to adoption of SIP revisions. CARB's submittal became complete by operation of law on January 17, 2015 pursuant to section 110(k)(1)(B).

productions and marketing subcategories: Oil and gas production, petroleum marketing, other (petroleum production and marketing). Industrial processes subcategories: Food agriculture, mineral processes, metal processes, wood and paper, other (industrial processes).

[13] Attachment 2, Appendix D, Emission Inventory Methodology, Agricultural irrigation Pumps—Diesel (Updated August 2006), available at *http://www.arb.ca.gov/regact/agen06/attach2.pdf*

[14] EI Supplemental Documentation, pp. 11–12.

[15] Submittal, pp. 7–35. Solvent evaporation subcategories: Consumer products, architectural coatings and related process solvents, pesticides/fertilizers, asphalt paving/roofing. Miscellaneous processes subcategories: Residential fuel combustion, farming operations, fires, manage burning and disposal, cooking.

[16] The EP value is the fraction of the product that is assumed to potentially contribute to atmospheric VOC. California's pesticide use reporting program requires that all agricultural pesticide use must be reported monthly by growers to county agricultural commissions, who in turn, report the data to DPR. See *http://www.cdpr.ca.gov/docs/pur/purmain.htm.*

[17] CARB, Section 6.1 Consumer Products (revised April 2000), available at *http://www.arb.ca.gov/ei/areasrc/fullpdf/full6-1.pdf.*

[18] CARB, Section 7.6 Livestock Husbandry (Revised May 2004), available at *http://www.arb.ca.gov/ei/areasrc/fullpdf/full7-6.pdf.*

[19] CARB, Section 7.1 Residential Wood Combustion (Revised October 2015), available at *http://www.arb.ca.gov/ei/areasrc/fullpdf/full7-1_2011.pdf.*

[20] EI Supplemental Documentation, pp. 4–10.

[21] See submittal p. 6.

[22] On March 16, 2013, the EPA approved and announced the availability of EMFAC2011 as the latest update to the EMFAC model for use in SIP development and transportation conformity by California state and local governments to meet CAA requirements (78 FR 14533). On December 14, 2015, the EPA announced the next revision to EMFAC—EMFAC 2014 (80 FR 77337). CARB submitted the 2008 8-hour ozone EI submittal after the EPA's approval of EMFAC2011 and prior to the EPA's approval of EMFAC2014.

[23] EI Supplemental Documentation, p. 3.

2. Evaluation of Base Year Inventory Requirements

The EPA has reviewed the 2012 average summer day base year EIs for the Calaveras County, Chico (Butte County), Eastern SLO and San Francisco Bay Area NAAs. Our review included the emission estimates for stationary sources, area-wide sources and mobile sources. We find that CARB's selection of 2012 as the base year was appropriate for these areas because 2012 was the most recent calendar year for which a consistent and comprehensive statewide inventory was available.[24] The submittal and EI Supplemental Documentation provide sufficient information and explanation to allow the EPA to make a determination on the acceptability of the EIs. Accordingly, we conclude that the EIs constitute a comprehensive, accurate, current inventory of actual emissions from sources of VOC and NO_X emitted within the boundaries of the relevant NAAs, as required under the CAA and SRR (40 CFR 51.1100(bb), see also CAA section 172(c)(3)).

D. Public Comment and Final Action

As authorized in section 110(k)(3) of the Act, the EPA is fully approving the submitted EIs for the Calaveras County, Chico (Butte County), San Luis Obispo County (Eastern SLO) and San Francisco Bay Area NAAs because we believe they fulfill all relevant requirements. We do not think anyone will object to this approval, so we are finalizing it without proposing it in advance. However, in the Proposed Rules section of this **Federal Register**, we are simultaneously proposing approval of the same submitted EIs. If we receive adverse comments by November 18, 2016, we will publish a timely withdrawal in the **Federal Register** to notify the public that the direct final approval will not take effect and we will address the comments in a subsequent final action based on the proposal. If we do not receive timely adverse comments, the direct final approval will be effective without further notice on December 19, 2016.

III. Statutory and Executive Order Reviews

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

- Is not a significant regulatory action subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and
- Does not provide the EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, the SIP is not approved to apply on any Indian reservation land or in any other area where the EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications and will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. The EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

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 December 19, 2016. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. Parties with objections to this direct final rule are encouraged to file a comment in response to the parallel notice of proposed rulemaking for this action published in the Proposed Rules section of today's **Federal Register**, rather than file an immediate petition for judicial review of this direct final rule, so that the EPA can withdraw this direct final rule and address the comment in the proposed rulemaking. This action may not be challenged later in proceedings to enforce its requirements (see section 307(b)(2)).

List of Subjects in 40 CFR Part 52

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

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

Dated: September 28, 2016.

Deborah Jordan,

Acting Regional Administrator, Region IX.

Chapter I, title 40 of the Code of Federal Regulations is amended as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

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

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

[24] We also note that, because the State is not required to submit an RFP plan for Marginal areas, the requirement for the inventory year selected to be consistent with the baseline year for the RFP plan is not relevant to these areas.

Subpart F—California

■ 2. Section 52.220 is amended by adding paragraph (c)(481) to read as follows:

§ 52.220 Identification of plan—in part.

* * * * *

(c) * * *

(481) The following revision was submitted on July 17, 2014 by the Governor's designee.

(i) [Reserved]

(ii) Additional materials.

(A) California Air Resources Board.

(*1*) California Air Resources Board, Staff Report, ''8-Hour Ozone State Implementation Plan Emission Inventory Submittal,'' release date: May 23, 2014, excluding the tables of 2012 average summer daily emissions (tons per day) other than the tables for Chico (Butte County), San Luis Obispo County (Eastern San Luis Obispo), Calaveras County, and San Francisco Bay Area.

* * * * *

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BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2015–0559; FRL–9952–22]

Penflufen; Pesticide Tolerances

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes tolerances for residues of penflufen in or on vegetable, bulb, group 3–07; beet, sugar, roots; and beet, sugar, tops. Interregional Research Project Number 4 (IR–4) requested the tolerance associated with pesticide petition number (PP#) 5E8382, and Bayer CropScience requested the tolerances associated with PP# 5F8379, under the Federal Food, Drug, and Cosmetic Act (FFDCA).

DATES: This regulation is effective October 19, 2016. Objections and requests for hearings must be received on or before December 19, 2016, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: The docket for this action, identified by docket identification (ID) number EPA–HQ–OPP–2015–0559, is available at *http://www.regulations.gov* or at the Office of Pesticide Programs Regulatory Public Docket (OPP Docket) in the Environmental Protection Agency Docket Center (EPA/DC), West William Jefferson Clinton Bldg., Rm. 3334, 1301 Constitution Ave. NW., Washington, DC 20460–0001. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OPP Docket is (703) 305–5805. Please review the visitor instructions and additional information about the docket available at *http://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: Michael Goodis, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001; main telephone number: (703) 305–7090; email address: *RDFRNotices@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. The following list of North American Industrial Classification System (NAICS) codes is not intended to be exhaustive, but rather provides a guide to help readers determine whether this document applies to them. Potentially affected entities may include:

- Crop production (NAICS code 111).
- Animal production (NAICS code 112).
- Food manufacturing (NAICS code 311).
- Pesticide manufacturing (NAICS code 32532).

B. How can I get electronic access to other related information?

You may access a frequently updated electronic version of EPA's tolerance regulations at 40 CFR part 180 through the Government Printing Office's e-CFR site at *http://www.ecfr.gov/cgi-bin/text-idx?&c=ecfr&tpl=/ecfrbrowse/Title40/40tab_02.tpl.*

C. How can I file an objection or hearing request?

Under FFDCA section 408(g), 21 U.S.C. 346a, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2015–0559 in the subject line on the first page of your submission. All objections and requests for a hearing must be in writing, and must be received by the Hearing Clerk on or before December 19, 2016. Addresses for mail and hand delivery of objections and hearing requests are provided in 40 CFR 178.25(b).

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing (excluding any Confidential Business Information (CBI)) for inclusion in the public docket. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit the non-CBI copy of your objection or hearing request, identified by docket ID number EPA–HQ–OPP–2015–0559, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be CBI or other information whose disclosure is restricted by statute.
- *Mail:* OPP Docket, Environmental Protection Agency Docket Center (EPA/DC), (28221T), 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001.
- *Hand Delivery:* To make special arrangements for hand delivery or delivery of boxed information, please follow the instructions at *http://www.epa.gov/dockets/contacts.html.*

Additional instructions on commenting or visiting the docket, along with more information about dockets generally, is available at *http://www.epa.gov/dockets.*

II. Summary of Petitioned-for Tolerance

In the **Federal Register** of October 21, 2015 (80 FR 63731) (FRL–9935–29), EPA issued a document pursuant to FFDCA section 408(d)(3), 21 U.S.C. 346a(d)(3), announcing the filing of a pesticide petition (PP# 5E8382) by Interregional Research Project Number 4 (IR–4), 500 College Road East, Princeton, NJ 08540. The petition requested that 40 CFR 180.664 be amended by establishing tolerances for residues of the fungicide penflufen, (1*H*-Pyrazole-4-carboxamide, *N*-[2-(1,3-dimethylbutyl)phenyl]-5-fluoro-1,3-dimethyl-), in or on onion, bulb, 3–07A at 0.01 parts per million (ppm); and onion, green, 3–07B at 0.015 ppm. That document referenced a summary of the petition prepared by Bayer CropScience, the registrant, which is available in the docket EPA–HQ–OPP–2015–0559–0002 at *http://www.regulations.gov.*

In the **Federal Register** of July 20, 2016 (81 FR 47150) (FRL–9948–45), EPA issued a document pursuant to

FFDCA section 408(d)(3), 21 U.S.C. 346a(d)(3), announcing the filing of a pesticide petition (PP# 5F8379) by Bayer CropScience, 2 T.W. Alexander Drive, Research Triangle Park, NC 27709. The petition requested that 40 CFR 180.664 be amended by establishing tolerances for residues of the fungicide penflufen, (1*H*-Pyrazole-4-carboxamide, *N*-[2-(1,3-dimethylbutyl)phenyl]-5-fluoro-1,3-dimethyl-), in or on beet, sugar, roots at 0.01 ppm and beet, sugar, tops at 0.01 ppm. That document referenced a summary of the petition prepared by Bayer CropScience, the registrant, which is available in the docket EPA–HQ–OPP–2015–0559–0006 at *http://www.regulations.gov.*

Five comments were received in response to the notices of filing. EPA's responses to these comments are discussed in Unit IV.C.

Based upon review of the data supporting the petition, EPA has revised the petitioned-for tolerances for subgroups 3–07A and 3–07B since the Agency has determined that a crop group tolerance for vegetable, bulb, group 3–07 is more appropriate. The reason for these changes are explained in Unit IV.D.

III. Aggregate Risk Assessment and Determination of Safety

Section 408(b)(2)(A)(i) of FFDCA allows EPA to establish a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the tolerance is ''safe.'' Section 408(b)(2)(A)(ii) of FFDCA defines ''safe'' to mean that ''there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information.'' This includes exposure through drinking water and in residential settings, but does not include occupational exposure. Section 408(b)(2)(C) of FFDCA requires EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing a tolerance and to ''ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue. . . .''

Consistent with FFDCA section 408(b)(2)(D), and the factors specified in FFDCA section 408(b)(2)(D), EPA has reviewed the available scientific data and other relevant information in support of this action. EPA has sufficient data to assess the hazards of and to make a determination on aggregate exposure for penflufen including exposure resulting from the tolerances established by this action. EPA's assessment of exposures and risks associated with penflufen follows.

A. Toxicological Profile

EPA has evaluated the available toxicity data and considered its validity, completeness, and reliability as well as the relationship of the results of the studies to human risk. EPA has also considered available information concerning the variability of the sensitivities of major identifiable subgroups of consumers, including infants and children.

The liver and thyroid are target organs for penflufen. No evidence of quantitative or qualitative susceptibility was seen in developmental toxicity studies (rats and rabbits). Developmental toxicity was not observed in the rat or rabbit studies, although the studies did not test up to the limit dose. However, new studies are not expected to identify developmental endpoints with points of departure (PODs) lower than those determined in the current studies. In the reproductive study, decreased pup weight, delayed vaginal patency, and decreased brain, spleen, and thymus weights were seen in the presence of limited maternal effects (body weight changes), suggesting qualitative sensitivity. However, concern for the sensitivity is low since the effects are well characterized, and there is a clear NOAEL for the effects seen. Decreased motor and locomotor activity were observed in both sexes of rats following acute oral exposure and in female rats following subchronic oral exposure; neuropathological lesions were not observed in either study.

Penflufen is classified as having ''suggestive evidence of carcinogenicity.'' A statistically significant increase in histiocytic sarcomas with a positive trend in male rats only (but in the absence of a dose response and lack of pre-neoplastic lesions) was seen. A marginal increase in brain astrocytomas was also observed in males at the high dose; however, this effect was not dose-related, did not reach statistical significance, and there was no overall trend. In addition, there were no pre-neoplastic lesions, such as glial proliferations, which are a good indicator of chemical tumor induction (*i.e.,* there will be changes in the cells prior to transformation to a neoplasm). The ovarian adenomas observed at the high dose also showed no dose response, no pair-wise significance, no decrease in latency, and there were no pre-neoplastic lesions such as hyperplasia of the epithelial cells of the endometrium. Additionally, there was no evidence of carcinogenicity in male or female mice (at doses that were judged to be adequate to assess the carcinogenic potential), no concern for mutagenicity (*in vivo* or *in vitro)* for the parent molecule or the two metabolites, and there were no other lines of evidence of carcinogenicity (such as structure-activity relationship). Although these three tumors were considered treatment-related, they provided weak evidence of carcinogenicity due to the marginal nature of the tumor responses and the other factors mentioned above. Given the weak evidence indicating any potential for carcinogenicity, EPA has determined that quantification of risk using a non-linear approach (*i.e.,* RfD) will adequately account for all chronic toxicity, including carcinogenicity, which could result from exposure to penflufen. The NOAEL (38 mg/kg/day) used for establishing the chronic RfD is approximately 10-fold lower than the dose (approximately 300 mg/kg/day) that induced a marginal tumor response. The EPA has determined that the chronic population adjusted dose is protective of all long-term effects, including potential carcinogenicity, based on limited evidence for carcinogenicity (histiocytic sarcomas) in male rats. There is no mutagenicity concern for penflufen. The risk assessments conducted for penflufen are based on the most sensitive endpoints in the toxicity database and are protective of all effects observed in the toxicology database.

Specific information on the studies received and the nature of the adverse effects caused by penflufen as well as the NOAEL and the lowest-observed-adverse-effect-level (LOAEL) from the toxicity studies can be found at *http://www.regulations.gov* in document ''Penflufen. Human Health Risk Assessment to Support New Uses on Bulb Vegetables (Crop Group 3–07) and Sugar Beets.'' in pages 8–12 in docket ID number EPA–HQ–OPP–2015–0559.

B. Toxicological Points of Departure/Levels of Concern

Once a pesticide's toxicological profile is determined, EPA identifies toxicological points of departure (POD) and levels of concern to use in evaluating the risk posed by human exposure to the pesticide. For hazards that have a threshold below which there is no appreciable risk, the toxicological POD is used as the basis for derivation of reference values for risk assessment. PODs are developed based on a careful analysis of the doses in each toxicological study to determine the dose at which no adverse effects are observed (the NOAEL) and the lowest dose at which adverse effects of concern are identified (the LOAEL). Uncertainty/safety factors are used in conjunction with the POD to calculate a safe exposure level—generally referred to as a population-adjusted dose (PAD) or a reference dose (RfD)—and a safe margin of exposure (MOE). For non-threshold risks, the Agency assumes that any amount of exposure will lead to some degree of risk. Thus, the Agency estimates risk in terms of the probability of an occurrence of the adverse effect expected in a lifetime. For more information on the general principles EPA uses in risk characterization and a complete description of the risk assessment process, see *http://www2.epa.gov/pesticide-science-and-assessing-pesticide-risks/assessing-human-health-risk-pesticides.*

A summary of the toxicological endpoints for penflufen used for human risk assessment is discussed in Unit III.B. of the final rule published in the **Federal Register** of May 14, 2012 (77 FR 28278) (FRL–9341–8).

C. Exposure Assessment

1. *Dietary exposure from food and feed uses.* In evaluating dietary exposure to penflufen, EPA considered exposure under the petitioned-for tolerances as well as all existing penflufen tolerances in 40 CFR 180.664. EPA assessed dietary exposures from penflufen in food as follows:

i. *Acute exposure.* Quantitative acute dietary exposure and risk assessments are performed for a food-use pesticide, if a toxicological study has indicated the possibility of an effect of concern occurring as a result of a 1-day or single exposure.

Such effects were identified for penflufen. In estimating acute dietary exposure, EPA used the Dietary Exposure Evaluation Model software with the Food Commodity Intake Database (DEEM–FCID) Version 3.16. This software uses 2003–2008 food consumption data from the U.S. Department of Agriculture's (USDA's) National Health and Nutrition Examination Survey, What We Eat in America, (NHANES/WWEIA). As to residue levels in food, EPA used tolerance-level residues, default processing factors, and 100 percent crop treated (PCT) for all commodities.

ii. *Chronic exposure.* In conducting the chronic dietary exposure assessment EPA used the DEEM–FCID, Version 3.16 software with 2003–2008 food consumption data from the USDA's NHANES/WWEIA. As to residue levels in food, EPA used tolerance-level residues, default processing factors, and 100 PCT for all commodities.

iii. *Cancer.* EPA determines whether quantitative cancer exposure and risk assessments are appropriate for a food-use pesticide based on the weight of the evidence from cancer studies and other relevant data. Cancer risk is quantified using a linear or nonlinear approach. If sufficient information on the carcinogenic mode of action is available, a threshold or nonlinear approach is used and a cancer RfD is calculated based on an earlier noncancer key event. If carcinogenic mode of action data are not available, or if the mode of action data determines a mutagenic mode of action, a default linear cancer slope factor approach is utilized. Based on the data summarized in Unit III.A., EPA has determined that quantification of risk using a non-linear approach (*i.e.,* cRfD) will adequately account for all chronic toxicity, including carcinogenicity, which could result from exposure to penflufen. Cancer risk was assessed using the same exposure estimates as discussed in Unit III.C.1.ii., *chronic exposure.*

iv. *Anticipated residue and percent crop treated (PCT) information.* EPA did not use anticipated residue or PCT information in the dietary assessment for penflufen. Tolerance level residues and 100 PCT were assumed for all food commodities.

2. *Dietary exposure from drinking water.*

In drinking water, the residue of concern is penflufen parent and its degradates, penflufen-hydroxybutyl (Pen-3HB) and penflufen-pyrazolyl-AAP (AAP). The Agency used screening level water exposure models in the dietary exposure analysis and risk assessment for penflufen in drinking water. These simulation models take into account data on the physical, chemical, and fate/transport characteristics of penflufen. Further information regarding EPA drinking water models used in pesticide exposure assessment can be found at *http://www2.epa.gov/pesticide-science-and-assessing-pesticide-risks/about-water-exposure-models-used-pesticide.*

Based on the Surface Water Concentration Calculator (SWCC) and Pesticide Root Zone Model Ground Water (PRZM GW) models, the estimated drinking water concentrations (EDWCs) of penflufen for acute exposures are estimated to be 5.09 parts per billion (ppb) for surface water and 123 ppb for ground water. The EDWCs of penflufen for chronic exposures for non-cancer assessments are estimated to be 3.95 ppb for surface water and 84.8 ppb for ground water.

Modeled estimates of drinking water concentrations were directly entered into the dietary exposure model. For acute dietary risk assessment, the water concentration value of 123 ppb was used to assess the contribution to drinking water. For chronic dietary risk assessment, the water concentration of value 84.8 ppb was used to assess the contribution to drinking water.

3. *From non-dietary exposure.* The term ''residential exposure'' is used in this document to refer to non-occupational, non-dietary exposure (*e.g.,* for lawn and garden pest control, indoor pest control, termiticides, and flea and tick control on pets). Penflufen is not registered for any specific use patterns that would result in residential exposure.

4. *Cumulative effects from substances with a common mechanism of toxicity.* Section 408(b)(2)(D)(v) of FFDCA requires that, when considering whether to establish, modify, or revoke a tolerance, the Agency consider ''available information'' concerning the cumulative effects of a particular pesticide's residues and ''other substances that have a common mechanism of toxicity.''

EPA has not found penflufen to share a common mechanism of toxicity with any other substances, and penflufen does not appear to produce a toxic metabolite produced by other substances. For the purposes of this tolerance action, therefore, EPA has assumed that penflufen does not have a common mechanism of toxicity with other substances. For information regarding EPA's efforts to determine which chemicals have a common mechanism of toxicity and to evaluate the cumulative effects of such chemicals, see EPA's Web site at *http://www2.epa.gov/pesticide-science-and-assessing-pesticide-risks/cumulative-assessment-risk-pesticides.*

D. Safety Factor for Infants and Children

1. *In general.* Section 408(b)(2)(C) of FFDCA provides that EPA shall apply an additional tenfold (10X) margin of safety for infants and children in the case of threshold effects to account for prenatal and postnatal toxicity and the completeness of the database on toxicity and exposure unless EPA determines based on reliable data that a different margin of safety will be safe for infants and children. This additional margin of safety is commonly referred to as the FQPA Safety Factor (SF). In applying this provision, EPA either retains the default value of 10X, or uses a different additional safety factor when reliable

data available to EPA support the choice of a different factor.

2. *Prenatal and postnatal sensitivity.* No evidence of quantitative or qualitative susceptibility was seen in developmental toxicity studies in rats and rabbits. In the rat and rabbit developmental toxicity studies, maternal findings were limited to decreased body weight gain at the highest doses tested (HDT). No adverse effects were observed in rat or rabbit fetuses. In the rat multi-generation reproduction study, a slight decrease in litter size, delayed sexual maturation, decreased body weight and weight gain, and decreased brain, spleen, and thymus weights were noted in the offspring animals in the presence of less pronounced maternal toxicity (decreased body weight and weight gain, alteration in food consumption, decreased thymus weight, and decreased spleen weights) suggesting qualitative susceptibility.

3. *Conclusion.* EPA has determined that reliable data show the safety of infants and children would be adequately protected if the FQPA SF were reduced to 1X. That decision is based on the following findings:

i. The toxicity database for penflufen is complete.

ii. There is no concern for neurotoxicity and no need for a developmental neurotoxicity study or additional UFs to account for neurotoxicity. Although clinical signs were observed in acute and subchronic neurotoxicity studies with penflufen, there is a clear NOAEL for the effects seen and the endpoints and PODs selected for risk assessment are protective. The NOAELs used for risk assessment are 2x lower than where clinical signs were observed.

iii. Although there is some evidence of qualitative sensitivity of the young in the reproduction study, the effects are well characterized, and there is a clear NOAEL for effects seen. Also, the current risk assessments are based on the most sensitive endpoints derived from studies with NOAELs 5x lower than the doses at which offspring effects were observed in the reproductive toxicity study. Thus, the PODs selected for risk assessment are protective of potential offspring effects.

iv. There are no residual uncertainties identified in the exposure databases. The dietary food exposure assessments were performed based on 100 PCT and tolerance-level residues. EPA made conservative (protective) assumptions in the ground and surface water modeling used to assess exposure to penflufen in drinking water. These assessments will not underestimate the exposure and risks posed by penflufen.

E. Aggregate Risks and Determination of Safety

EPA determines whether acute and chronic dietary pesticide exposures are safe by comparing aggregate exposure estimates to the acute PAD (aPAD) and chronic PAD (cPAD). For linear cancer risks, EPA calculates the lifetime probability of acquiring cancer given the estimated aggregate exposure. Short-, intermediate-, and chronic-term risks are evaluated by comparing the estimated aggregate food, water, and residential exposure to the appropriate PODs to ensure that an adequate MOE exists.

1. *Acute risk.* Using the exposure assumptions discussed in this unit for acute exposure, the acute dietary exposure from food and water to penflufen will occupy 4.2% of the aPAD for all infants (<1 year old), the population group receiving the greatest exposure.

2. *Chronic risk.* Using the exposure assumptions described in this unit for chronic exposure, EPA has concluded that chronic exposure to penflufen from food and water will utilize 1.2% of the cPAD for all infants (<2 year old) the population group receiving the greatest exposure. There are no residential uses for penflufen.

3. *Short- and intermediate-term risk.* Short- and intermediate-term adverse effects were not identified; however, penflufen is not registered for any use patterns that would result in short- or intermediate-term residential exposures. Short- and intermediate-term risks are assessed based on short- and intermediate-term residential exposures plus chronic dietary exposure, respectively. Because there are no short- and intermediate-term residential exposures, and chronic dietary exposure has already been assessed under the appropriately protective cPAD (which is at least as protective as the POD used to assess short-term risk), no further assessment of short- or intermediate-term risks are necessary, and EPA relies on the chronic dietary risk assessment for evaluating short- and intermediate-term risks for penflufen.

4. *Aggregate cancer risk for U.S. population.* EPA assessed cancer risk using a non-linear approach (*i.e.,* RfD) since it adequately accounts for all chronic toxicity, including carcinogenicity, that could result from exposure to penflufen. As the chronic dietary endpoint and dose are protective of potential cancer effects, penflufen is not expected to pose an aggregate cancer risk.

5. *Determination of safety.* Based on these risk assessments, EPA concludes that there is a reasonable certainty that no harm will result to the general population, or to infants and children from aggregate exposure to penflufen residues.

IV. Other Considerations

A. Analytical Enforcement Methodology

Adequate enforcement methodology (high performance liquid chromatography and triple stage quadrupole mass spectrometry (HPLC/MS/MS)) is available to enforce the tolerance expression.

The method may be requested from: Chief, Analytical Chemistry Branch, Environmental Science Center, 701 Mapes Rd., Ft. Meade, MD 20755–5350; telephone number: (410) 305–2905; email address: *residuemethods@epa.gov.*

B. International Residue Limits

In making its tolerance decisions, EPA seeks to harmonize U.S. tolerances with international standards whenever possible, consistent with U.S. food safety standards and agricultural practices. EPA considers the international maximum residue limits (MRLs) established by the Codex Alimentarius Commission (Codex), as required by FFDCA section 408(b)(4). The Codex Alimentarius is a joint United Nations Food and Agriculture Organization/World Health Organization food standards program, and it is recognized as an international food safety standards-setting organization in trade agreements to which the United States is a party. EPA may establish a tolerance that is different from a Codex MRL; however, FFDCA section 408(b)(4) requires that EPA explain the reasons for departing from the Codex level.

The Codex has not established a MRL for penflufen.

C. Response to Comments

One comment was received in response to the Notice of Filing for PP# 5E8382. The commenter was opposing the use and sale of penflufen in the United States. The Agency understands the commenter's concerns and recognizes that some individuals believe that pesticides should be banned on agricultural crops. However, the existing legal framework provided by Section 408 of the Federal Food, Drug and Cosmetic Act (FFDCA) states that tolerances may be set when persons seeking such tolerances or exemptions have demonstrated that the pesticide meets the safety standard imposed by that statute. EPA has found that there is a reasonable certainty of no harm to humans after considering the toxicological studies and the exposure levels of humans to penflufen.

Three comments were received in response to the Notice of Filing for PP# 5F8379. One comment was in support of the Proposed Rule, while two comments were opposing any tolerance level above 0.00 ppm for any pesticides used in the U.S. The Agency understands the commenter's concerns and recognizes that some individuals believe that pesticides should be banned on agricultural crops. However, the existing legal framework provided by section 408 of the Federal Food, Drug and Cosmetic Act (FFDCA) states that tolerances may be set when persons seeking such tolerances or exemptions have demonstrated that the pesticide meets the safety standard imposed by that statute. In addition, both commenters indicated that IR–4 and Rutgers University are profiteering. The IR–4 program was created by Congress in 1963 in order to assist minor crop growers in the process of obtaining pesticide registrations. IR–4 National Coordinating Headquarters is located at Rutgers University in New Jersey and receives the majority (90%) of its funding from the USDA. It is the only publicly funded program that conducts research and submits petitions for tolerances. IR–4 operates in collaboration with USDA, the Land Grant University System, the agrochemical industry, commodity associations, and EPA. IR–4 identifies needs, prioritizes accordingly, and conducts research. The majority (over 80%) of IR–4's research is conducted on reduced-risk chemicals. Under the Pesticide Registration Improvement Act (PRIA), IR–4 works in cooperation with the registrant to request an exemption for the registration services. The exemption may be granted if the application is solely associated by simultaneous submission with a tolerance petition in connection with IR–4 and if it is in the public interest. This fee exemption serves as an incentive to pursue registration of minor uses supported by the IR–4 program. In addition to the work done in pesticide registration, IR–4 develops risk mitigation measures for existing registered products. Therefore, IR–4 and Rutgers University are not profiteering from registering pesticides.

A comment was submitted by the Environmental Health Program of the Center for Biological Diversity and was primarily concerned about environmental risks and Agency compliance with any relevant obligations under the Endangered Species Act. This comment is not relevant to the Agency's evaluation of safety of the penflufen tolerances; section 408 of the FFDCA focuses on potential harms to human health and does not permit consideration of effects on the environment.

D. Revisions to Petitioned-for Tolerances

Based on review of the data supporting the petitions, EPA has revised the petitioned-for tolerance on onion, green, subgroup 3–07B. Both representative commodities for crop group 3–07 were submitted for the new uses, which included different tolerances proposed for crop subgroup 3–07A and 3–07B. Although the petitioner requested separate tolerances (based on the Organization for Economic Cooperation and Development (OECD) calculation procedure), EPA has decided to establish a tolerance for crop group 3–07 at the level of qualification (LOQ) of the enforcement method (0.01 ppm), because maximum residues from crop subgroup 3–07A and subgroup 3–07B representative commodities were within a five-fold difference of each other, and because with residues in the field trials all less than the LOQ, the OECD calculation procedure stipulates that the LOQ is the appropriate tolerance level. Therefore, a single tolerance on the crop group vegetable, bulb, group 3–07 is appropriate.

V. Conclusion

Therefore, tolerances are established for residues of penflufen, in or on vegetable, bulb, group 3–07 at 0.01 ppm; beet, sugar, roots at 0.01 ppm; and beet, sugar, tops at 0.01 ppm.

VI. Statutory and Executive Order Reviews

This action establishes tolerances under FFDCA section 408(d) in response to a petition submitted to the Agency. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled "Regulatory Planning and Review" (58 FR 51735, October 4, 1993). Because this action has been exempted from review under Executive Order 12866, this action is not subject to Executive Order 13211, entitled "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355, May 22, 2001) or Executive Order 13045, entitled "Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997). This action does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA) (44 U.S.C. 3501 *et seq.*), nor does it require any special considerations under Executive Order 12898, entitled "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations" (59 FR 7629, February 16, 1994).

Since tolerances and exemptions that are established on the basis of a petition under FFDCA section 408(d), such as the tolerance in this final rule, do not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), do not apply.

This action directly regulates growers, food processors, food handlers, and food retailers, not States or tribes, nor does this action alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of FFDCA section 408(n)(4). As such, the Agency has determined that this action will not have a substantial direct effect on States or tribal governments, on the relationship between the national government and the States or tribal governments, or on the distribution of power and responsibilities among the various levels of government or between the Federal Government and Indian tribes. Thus, the Agency has determined that Executive Order 13132, entitled "Federalism" (64 FR 43255, August 10, 1999) and Executive Order 13175, entitled "Consultation and Coordination with Indian Tribal Governments" (65 FR 67249, November 9, 2000) do not apply to this action. In addition, this action does not impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act (UMRA) (2 U.S.C. 1501 *et seq.*).

This action does not involve any technical standards that would require Agency consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note).

VII. Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 180

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: September 30, 2016.

Michael Goodis,

Acting Director, Registration Division, Office of Pesticide Programs.

Therefore, 40 CFR chapter I is amended as follows:

PART 180—[AMENDED]

■ 1. The authority citation for part 180 continues to read as follows:

Authority: 21 U.S.C. 321(q), 346a and 371.

■ 2. In § 180.664, alphabetically add entries for ''beet, sugar, roots'', ''beet, sugar, tops'', and ''vegetable, bulb, group 3–07'' to the table in paragraph (a) to read as follows:

§ 180.664 Penflufen; tolerances for residues.

(a) * * *

Commodity	Parts per million
* * * * *	
Beet, sugar, roots	0.01 ppm
Beet, sugar, tops	0.01 ppm
* * * * *	
Vegetable, bulb, group 3–07	0.01 ppm
* * * * *	

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[FR Doc. 2016–25293 Filed 10–18–16; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 635

[Docket No. 150413357–5999–02]

RIN 0648–XE914

Atlantic Highly Migratory Species; Commercial Aggregated Large Coastal Shark and Hammerhead Shark Management Group Retention Limit Adjustment

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Temporary rule; inseason retention limit adjustment.

SUMMARY: NMFS is adjusting the commercial aggregated large coastal shark (LCS) and hammerhead shark management group retention limit for directed shark limited access permit holders in the Atlantic region from 45 LCS other than sandbar sharks per vessel per trip to 25 LCS other than sandbar sharks per vessel per trip. This action is based on consideration of the regulatory determination criteria regarding inseason adjustments. The retention limit will remain at 25 LCS other than sandbar sharks per vessel per trip in the Atlantic region through the rest of the 2016 fishing season or until NMFS announces via a notice in the **Federal Register** a fishery closure is warranted. This retention limit adjustment will affect directed shark limited access permit holders fishing for LCS in the Atlantic region.

DATES: This retention limit adjustment is effective at 11:30 p.m. local time October 19, 2016, through the end of the 2016 fishing season on December 31, 2016, or until NMFS announces via a notice in the **Federal Register** a fishery closure, if warranted.

FOR FURTHER INFORMATION CONTACT: Guý DuBeck or Karyl Brewster-Geisz 301–427–8503; fax 301–713–1917.

SUPPLEMENTARY INFORMATION: Atlantic shark fisheries are managed under the 2006 Consolidated Highly Migratory Species (HMS) Fishery Management Plan (FMP), its amendments, and implementing regulations (50 CFR part 635) issued under authority of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1801 *et seq.*).

Under § 635.24(a)(8), NMFS may adjust the commercial retention limit in the shark fisheries during the fishing season. Before making any adjustment, NMFS must consider specified regulatory criteria and other relevant factors. See § 635.24(a)(8)(i)–(vi). After considering these criteria as discussed below, NMFS concluded that reducing the retention limit of the Atlantic aggregated LCS and hammerhead management groups for directed shark limited access permit holders will slow the fishery catch rates to allow the fishery throughout the Atlantic region to remain open for the rest of the year. Since landings are projected to reach 80 percent before the end of the 2016 fishing season, NMFS is reducing the commercial Atlantic aggregated LCS and hammerhead shark retention limit from 45 to 25 LCS other than sandbar per vessel per trip.

NMFS considered the inseason retention limit adjustment criteria listed in § 635.24(a)(8), which says that:

- The amount of remaining shark quota in the Atlantic region based on dealer reports;

Based on dealer reports, 108.6 mt dw or 64 percent of the 168.9 mt dw shark quota for the aggregated LCS management group has already been harvested in the Atlantic region. This means that approximately 36 percent of the quota remains. Unless action is taken to slow harvest, fishermen in the Atlantic region may not have an opportunity to fish in the region for the remainder of the year.

- The catch rates of the aggregated LCS management group in the Atlantic region based on dealer reports;

Based on dealer reports, the current catch rates are too high to maintain an open season for the rest of the year. While fishermen are landing sharks within the per-trip retention limit of 45 LCS other than sandbar per trip per day, they are making multiple trips a day that result in high numbers of aggregated LCS being caught rapidly throughout the fishery. This high daily average catch rate means that aggregated LCS are being harvested too quickly to provide equitable fishing opportunities throughout the season. If the per trip limit is left unchanged, aggregated LCS would likely be harvested at such a high rate that the fishery would close in mid-October.

- Estimated date of the aggregated LCS management group closure based on when the landings are projected to reach 80 percent of the quota;

Once the landings reach 80 percent of the quota, NMFS would close the aggregated LCS management group as well as any other management group with ''linked quotas'' such as the Atlantic hammerhead shark management group. Current catch rates would likely result in landings reaching this limit by mid-October. A closure would preclude fishing opportunities in the Atlantic region for the remainder of the year. Reducing the trip limit is expected to reduce the catch rates and allow for the fishery to remain open for the remainder of the year.

- Effects of the adjustment on accomplishing the objectives of the 2006 Consolidated HMS FMP and its amendments;

Reducing the retention limit for the aggregated LCS and hammerhead management group from 45 to 25 LCS per trip would allow for fishing opportunities later in the year consistent with the FMP's objectives to provide equitable fishing opportunities throughout the fishing season and to limit bycatch and discards.

- Variations in seasonal distribution or migratory patterns of aggregated LCS based on scientific and fishery-based knowledge; and

The directed shark fisheries in the Atlantic region exhibit a mixed species composition, with a high abundance of aggregated LCS caught in conjunction with hammerhead sharks. As a result, by slowing the harvest and reducing landings on a per-trip basis, both fisheries could remain open for the remainder of the year.

- Effects of catch rates in one part of the Atlantic region precluding vessels in another part from having a reasonable opportunity to harvest a portion of the aggregated LCS management group quota.

Based on dealer reports, and given NMFS' notice to the regulated community (80 FR 74999, December 1, 2015; 81 FR 18541, March 31, 2016; and 81 FR 44798, July 11, 2016) that a goal of this year's fishery was to provide fishing opportunities throughout the fishing season, NMFS has concluded that the aggregated LCS quota is being harvested too quickly to meet conservation and management goals for the fishery. If the harvest of these species is not slowed down, the fishery would likely close in mid-October. Closing the fishery would prevent fishermen from other parts of the Atlantic region from having the same opportunities to harvest the aggregated LCS quota later in the year.

On December 1, 2015 (80 FR 74999), NMFS announced in a final rule that the aggregated LCS and hammerhead shark fisheries management groups for the Atlantic region would open on January 1 with a quota of 168.9 metric tons (mt) dressed weight (dw) (372,552 lb dw) and 27.1 mt dw (59,736 lb dw), respectively. NMFS had published a proposed rule on August 18, 2015 (80 FR 49974) and accepted public comment. In the final rule, NMFS also announced that if it appeared that the quota is being harvested too quickly, thus precluding fishing opportunities throughout the entire region (*e.g.,* if approximately 20 percent of the quota is caught at the beginning of the year), NMFS would consider reducing the commercial retention limit to 3 or fewer LCS other than sandbar sharks and then later consider increasing the retention limit to 45 LCS other than sandbar sharks per vessel per trip around July 15, 2016, after considering the appropriate regulatory adjustment criteria. In March 2016, dealer reports indicated that landings had exceeded 20 percent of the quota, and NMFS therefore reduced the commercial Atlantic aggregated LCS and hammerhead shark retention limit from 36 to 3 LCS other than sandbar per vessel per trip on April 2, 2016 (81 FR 18541; March 31, 2016) after considering the inseason retention limit adjustment criteria listed at § 635.24(a)(8). As NMFS announced in the 2016 shark season final rule (81 FR 44798; July 11, 2016), we increased the commercial Atlantic aggregated LCS and hammerhead shark retention limit from 3 to 45 LCS other than sandbar per vessel per trip after considering the regulatory criteria. Based on dealer reports through September 30, 2016, approximately 34 percent and 54 percent of the aggregated LCS and hammerhead shark quotas remain, respectively. At this point in the season, fishermen in the Atlantic region may not have an opportunity to fish in the region for the remainder of the year if the retention limits are not reduced.

Accordingly, as of 11:30 p.m. local time October 19, 2016, NMFS is reducing the retention limit for the commercial aggregated LCS and hammerhead shark management groups in the Atlantic region for directed shark limited access permit holders from 45 LCS other than sandbar sharks per vessel per trip to 25 LCS other than sandbar sharks per vessel per trip. If the vessel is properly permitted to operate as a charter vessel or headboat for HMS and is engaged in a for-hire trip, in which case the recreational retention limits for sharks and ''no sale'' provisions apply (§ 635.22(a) and (c)), or if the vessel possesses a valid shark research permit under § 635.32 and a NMFS-approved observer is onboard, then they are exempted from the retention limit adjustment.

All other retention limits and shark fisheries in the Atlantic region remain unchanged. This retention limit will remain at 25 LCS other than sandbar sharks per vessel per trip for the rest of the 2016 fishing season, or until NMFS announces via a notice in the **Federal Register** a fishery closure, is warranted.

The boundary between the Gulf of Mexico region and the Atlantic region is defined at § 635.27(b)(1) as a line beginning on the East Coast of Florida at the mainland at 25°20.4′ N. lat., proceeding due east. Any water and land to the north and east of that boundary is considered, for the purposes of quota monitoring and setting of quotas, to be within the Atlantic region.

Classification

Pursuant to 5 U.S.C. 553(b)(B), the Assistant Administrator for Fisheries, NOAA (AA), finds there is good cause to waive prior notice and an opportunity for public comment on this action, as notice and comment would be impracticable and contrary to the public interest. Providing prior notice and an opportunity for comment is impracticable because the catch and landings that need to be reduced are ongoing and must be reduced immediately to meet conservation and management objectives for the fishery. Continued fishing at those levels during the time that notice and comment would take place would likely result in early closure of the fishery, contrary to the objectives of the existing conservation and management measures in place for these species. These objectives include providing equitable fishing opportunities and ensuring that bycatch and discards are minimized. Allowing fishing to continue at the existing rates even for a limited time is contrary to these objectives and would thus be impracticable. It would also be contrary to the public interest because continued catch at the current rates, even for a limited period, could result in eventual early quota closures and potential overharvests. The AA also finds good cause to waive the 30-day delay in effective date pursuant to 5 U.S.C. 553(d)(3) for the same reasons. This action is required under § 635.28(b)(2) and is exempt from review under Executive Order 12866. NMFS has concluded that reducing the retention limit of the Atlantic aggregated LCS and hammerhead management groups for directed shark limited access permit holders will slow the fishery catch rates to allow the fishery throughout the Atlantic region to remain open for the rest of the year.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: October 14, 2016.

Emily H. Menashes,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2016–25299 Filed 10–14–16; 4:15 pm]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 130408348–3835–02]

RIN 0648–XE968

Fisheries of the Northeastern United States; Atlantic Herring Fishery; 2016 Management Area 1A Seasonal Annual Catch Limit Harvested

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Temporary rule; closure.

SUMMARY: NMFS is closing the directed fishery for Atlantic herring in Herring Management Area 1A, based on a projection that a prescribed trigger for that area has been reached. Federally permitted vessels may not fish for, possess, transfer, receive, land, or sell more than an incidental amount of Atlantic herring in or from Area 1A through December 31, 2016, and federally permitted dealers may not purchase more than this incidental amount of herring from federally permitted vessels for the duration of this action. This action is necessary to comply with the regulations implementing the Atlantic Herring Fishery Management Plan and is intended to prevent over harvest in Area 1A.

DATES: Effective 00:01 hr local time, October 18, 2016, through December 31, 2016.

FOR FURTHER INFORMATION CONTACT: Shannah Jaburek, Fishery Management Specialist, (978) 282–8456.

SUPPLEMENTARY INFORMATION: Regulations governing the Atlantic herring fishery can be found at 50 CFR part 648, including requirements for setting annual catch allocations. NMFS set the 2016 Area 1A sub-annual catch limit (ACL) at 30,102 mt, based on an initial 2016 sub-ACL allocation of 31,200 mt, minus a deduction of 936 mt for research set-aside catch, plus an increase of 133 mt to account for unharvested 2014 catch. Additionally, NMFS further reduced the Area 1A sub-ACL of 30,102 mt by 295 mt to allow for the fixed gear set-aside, that, if unharvested, will be added back into the Area 1A sub-ACL after November 1. NMFS established these values in the 2013 through 2015 specifications (78 FR 61828, October 1, 2013) and a final rule implementing sub-ACL adjustments for 2016 (81 FR 12420, March 9, 2015). For Area 1A, NMFS restricts herring catch to the seasonal period from June 1 through December 31. NMFS prohibits vessels from catching herring during the seasonal period from January 1 through May 31.

The Administrator, Greater Atlantic Region, NMFS (Regional Administrator), monitors the herring fishery catch in each of the management areas based on vessel and dealer reports, state data, and other available information. The regulations at § 648.201 require that when Regional Administrator projects that herring catch will reach 92 percent of the sub-ACL allocated in the Area 1A seasonal management area designated in the Atlantic Herring Fishery Management Plan (FMP), NMFS must prohibit, through notification in the **Federal Register**, herring vessel permit holders from fishing for, possessing, transferring, receiving, landing, or selling more than 2,000 lb (907.2 kg) of herring per trip or calendar day in or from the specified management area for the remainder of the fishing year.

The Regional Administrator has determined, based on vessel and dealer reports, state data, and other available information, that the herring fleet will have caught 92 percent of the herring sub-ACL allocated to Area 1A by October 18, 2016. Therefore, effective 00:01 hr local time, October 18, 2016, federally permitted vessels may not fish for, catch, possess, transfer, land, or sell more than 2,000 lb (907.2 kg) of herring per trip or calendar day, in or from Area 1A through December 31, 2016. With one exception, vessels that have entered port before 00:01 hr local time, October 18, 2016, may land and sell more than 2,000 lb (907.2 kg) of herring from Area 1A from that trip. The exception provides that a vessel may transit through Area 1A with more than 2,000 lb (907.2 kg) of herring on board, provided all herring was caught outside of Area 1A and all fishing gear is stowed and not available for immediate use as defined by § 648.2. In addition, all herring vessels must land in accordance with state landing restrictions.

Effective 00:01 hr local time, October 18, 2016, federally permitted dealers may not receive herring from federally permitted herring vessels that harvest more than 2,000 lb (907.2 kg) of herring from Area 1A through 2400 hr local time, December 31, 2016, unless it is from a trip landed by a vessel that entered port before 00:01 hr local time, October 18, 2016, and that catch is landed in accordance with state regulations.

Classification

This action is required by 50 CFR part 648 and is exempt from review under Executive Order 12866.

NMFS finds good cause pursuant to 5 U.S.C. 553(b)(B) to waive prior notice and the opportunity for public comment because it would be contrary to the public interest and impracticable. This action restricts the catch of herring in Area 1A for the remainder of the fishing year. Data indicating the herring fleet will have landed at least 92 percent of the 2016 sub-ACL allocated to Area 1A have only recently become available. Once these data become available, NMFS is required by Federal regulation to implement a 2,000-lb (907.2-kg) herring possession limit for Area 1A through December 31, 2016. The regulations at § 648.201(a)(1)(i) require such action to ensure that herring vessels do not exceed the 2016 sub-ACL allocated to Area 1A. If implementation of this closure is delayed to solicit prior public comment, the sub-ACL for Area 1A for this fishing year will likely be exceeded, thereby undermining the conservation objectives of the FMP. If sub-ACLs are exceeded, the excess must also be deducted from a future sub-ACL and would reduce future fishing opportunities. NMFS further finds, pursuant to 5 U.S.C. 553(d)(3), good cause to waive the 30-day delayed effectiveness period for the reasons stated above.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: October 13, 2016.

Emily H. Menashes,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2016–25202 Filed 10–14–16; 11:15 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 150916863–6211–02]

RIN 0648–XE879

Fisheries of the Exclusive Economic Zone Off Alaska; Pacific Cod by Pot Catcher/Processors in the Bering Sea and Aleutian Islands Management Area

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Temporary rule; closure.

SUMMARY: NMFS is prohibiting directed fishing for Pacific cod by catcher/processors using pot gear in the Bering Sea and Aleutian Islands management area (BSAI). This action is necessary to prevent exceeding the 2016 Pacific cod total allowable catch allocated to catcher/processors using pot gear in the BSAI.

DATES: Effective 1200 hours, Alaska local time (A.l.t.), October 18, 2016, through 2400 hours, A.l.t., December 31, 2016.

FOR FURTHER INFORMATION CONTACT: Josh Keaton, 907–586–7228.

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fishery in the BSAI exclusive economic zone according to the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area

(FMP) prepared by the North Pacific Fishery Management Council under authority of the Magnuson-Stevens Fishery Conservation and Management Act. Regulations governing fishing by U.S. vessels in accordance with the FMP appear at subpart H of 50 CFR part 600 and 50 CFR part 679.

The 2016 Pacific cod total allowable catch (TAC) allocated to catcher/processors using pot gear in the BSAI is 4,357 metric tons (mt) as established by the final 2016 and 2017 harvest specifications for groundfish in the BSAI (81 FR 14773, March 18, 2016) and reallocation (81 FR 69445, October 6, 2016).

In accordance with § 679.20(d)(1)(iii), the Administrator, Alaska Region, NMFS (Regional Administrator), has determined that the 2016 Pacific cod TAC allocated as a directed fishing allowance to catcher/processors using pot gear in the BSAI will soon be reached. Consequently, NMFS is prohibiting directed fishing for Pacific cod by pot catcher/processors in the BSAI.

After the effective date of this closure the maximum retainable amounts at § 679.20(e) and (f) apply at any time during a trip.

Classification

This action responds to the best available information recently obtained from the fishery. The Acting Assistant Administrator for Fisheries, NOAA (AA), finds good cause to waive the requirement to provide prior notice and opportunity for public comment pursuant to the authority set forth at 5 U.S.C. 553(b)(B) as such requirement is impracticable and contrary to the public interest. This requirement is impracticable and contrary to the public interest as it would prevent NMFS from responding to the most recent fisheries data in a timely fashion and would delay the closure of directed fishing for Pacific cod by pot catcher/processors in the BSAI. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of October 13, 2016.

The AA also finds good cause to waive the 30-day delay in the effective date of this action under 5 U.S.C. 553(d)(3). This finding is based upon the reasons provided above for waiver of prior notice and opportunity for public comment.

This action is required by § 679.20 and is exempt from review under Executive Order 12866.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: October 14, 2016.

Emily H. Menashes,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2016–25319 Filed 10–14–16; 4:15 pm]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register

Vol. 81, No. 202

Wednesday, October 19, 2016

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.

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2016–0499; FRL–9954–19–Region 9]

Approval and Promulgation of Implementation Plan; California; Calaveras County, Chico (Butte County), San Francisco Bay Area and San Luis Obispo County (Eastern San Luis Obispo) Base Year Emission Inventories for the 2008 Ozone Standards

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to approve revisions to the California State Implementation Plan (SIP) concerning the base year emission inventories (EIs) for four areas designated as nonattainment areas for the 2008 ozone National Ambient Air Quality Standards (2008 ozone NAAQS). The subject areas include Calaveras County, Chico (Butte County), San Francisco Bay Area and San Luis Obispo (Eastern San Luis Obispo). We are proposing to approve these revisions under the Clean Air Act (CAA or the Act).

DATES: Any comments on this proposal must arrive by November 18, 2016.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R09–OAR–2016–0499 at *http://www.regulations.gov*, or via email to Nancy Levin, Air Planning Office at *levin.nancy@epa.gov.* For comments submitted at *Regulations.gov*, follow the online instructions for submitting comments. Once submitted, comments cannot be removed or edited from *Regulations.gov*. For either manner of submission, the EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.*, on the Web, cloud, or other file sharing system). For additional submission methods, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section. For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *http://www2.epa.gov/dockets/commenting-epa-dockets.*

FOR FURTHER INFORMATION CONTACT: Nancy Levin, EPA Region IX, (415) 972–3848, *levin.nancy@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document, ‘‘we,’’ ‘‘us’’ and ‘‘our’’ refer to the EPA. This proposal addresses base year EIs for the Calaveras County, Chico (Butte County), San Francisco Bay Area and San Luis Obispo (Eastern San Luis Obispo) 2008 ozone NAAQS nonattainment areas. We are approving these base year EIs in a direct final action without prior proposal because we believe these SIP revisions are not controversial. If we receive adverse comments, however, we will publish a timely withdrawal of the direct final rule and address the comments in subsequent action based on this proposed rule. Please note that if we receive adverse comment on a particular base year EI, we may adopt as final those that are not the subject of an adverse comment.

We do not plan to open a second comment period, so anyone interested in commenting should do so at this time. If we do not receive adverse comments, no further activity is planned. For further information, please see the direct final action.

Dated: September 28, 2016.

Deborah Jordan,

Acting Regional Administrator, Region IX.

[FR Doc. 2016–25161 Filed 10–18–16; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

46 CFR Parts 401, 403, and 404

[USCG–2016–0268]

RIN 1625–AC34

Great Lakes Pilotage Rates—2017 Annual Review

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard proposes new base pilotage rates and surcharges using the methodology instituted in 2016. The changes would take effect 30 days after publication of a final rule. Rates for pilotage services on the Great Lakes were last revised in March 2016 and, by law, must be reviewed annually.

DATES: Comments and related material must be submitted to the online docket via *www.regulations.gov* on or before December 19, 2016. Requests for a public meeting must be submitted by November 18, 2016.

ADDRESSES: You may submit comments identified by docket number USCG–2016–0268 using the Federal eRulemaking Portal at *http://www.regulations.gov.* See the ‘‘Public Participation and Request for Comments’’ portion of the **SUPPLEMENTARY INFORMATION** section for further instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: For information about this document, call or email Mr. Todd Haviland, Director, Great Lakes Pilotage, Commandant (CG–WWM–2), Coast Guard; telephone 202–372–2037, email *Todd.A.Haviland@uscg.mil,* or fax 202–372–1914.

SUPPLEMENTARY INFORMATION:

Table of Contents for Preamble

I. Public Participation and Request for Comments

We view public participation as essential to effective rulemaking, and will consider all comments and material received during the comment period. Your comment can help shape the outcome of this rulemaking. 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.

We encourage you to submit comments through the Federal eRulemaking Portal at *http://www.regulations.gov.* If your material cannot be submitted using *http://www.regulations.gov,* contact the person in the **FOR FURTHER INFORMATION CONTACT** section of this document for alternate instructions. Documents mentioned in this notice, and all public comments, are in our online docket at *http://www.regulations.gov* and can be viewed by following that Web site's instructions. Additionally, if you go to the online docket and sign up for email alerts, you will be notified when comments are posted or a final rule is published.

We accept anonymous comments. All comments received will be posted without change to *http://www.regulations.gov* and will include any personal information you have provided. For more about privacy and the docket, you may review a Privacy Act notice regarding the Federal Docket Management System in the March 24, 2005, issue of the **Federal Register** (70 FR 15086).

We are not planning to hold a public meeting but will consider doing so if public comments indicate a meeting would be helpful. We would issue a separate **Federal Register** notice to announce the date, time, and location of such a meeting.

II. Abbreviations

APA American Pilots Association
BLS Bureau of Labor Statistics
CAD Canadian dollars
CFR Code of Federal Regulations
CPA Certified public accountant
GLPA Great Lakes Pilotage Authority (Canadian)
GLPMS Great Lakes Pilotage Management System
NAICS North American Industry Classification System
NPRM Notice of proposed rulemaking
NTSB National Transportation Safety Board
OMB Office of Management and Budget
RA Regulatory analysis
SBA Small Business Administration
§ Section symbol
SLSMC Saint Lawrence Seaway Management Corporation
U.S.C. United States Code
USD United States dollars

III. Basis and Purpose

The legal basis of this rulemaking is the Great Lakes Pilotage Act of 1960 (''the Act''),[1] which requires U.S. vessels operating ''on register'' [2] and foreign vessels to use U.S. or Canadian registered pilots while transiting the U.S. waters of the St. Lawrence Seaway and the Great Lakes system.[3] For the U.S. registered Great Lakes pilots (''pilots''), the Act requires the Secretary to ''prescribe by regulation rates and charges for pilotage services, giving consideration to the public interest and the costs of providing the services.'' [4] The Act requires that rates be established or reviewed and adjusted each year, not later than March 1. The Act requires that base rates be established by a full ratemaking at least once every 5 years, and in years when base rates are not established, they must be reviewed and, if necessary, adjusted. The Secretary's duties and authority under the Act have been delegated to the Coast Guard.[5]

The purpose of this notice of proposed rulemaking (NPRM) is to propose new base pilotage rates and surcharges for training and propose new methodology in projecting pilotage rates. This includes proposals to adjust the surcharge provision to stop collecting funds once the assigned value has been recovered for the season; modify the regulations to review pilot compensation once every 10 years, with cost-of-living adjustments added annually between reviews; rename Return on Investment as Working Capital Fund to better clarify the intent of this step; and move the audit deadline from April to January of each year in order to capture expenses in the rate sooner and to eliminate 1 year from the current 3-year lag in expenses being recognized in the rate. The new methodology in proposing rates changes pilot demand from peak to seasonal.

In addition to these changes to the ratemaking process, the Coast Guard proposes adding pilots to support a mandatory change point on the Saint Lawrence River between Iroquois Lock and the area of Ogdensburg, NY. We further propose to amend the regulation regarding delays so that cancellation charges can be assessed in an appropriate manner. Finally, we are seeking public comment on how we should proceed with weighting factors.

IV. Background

The vessels affected by this NPRM are those engaged in foreign trade upon the U.S. waters of the Great Lakes. United States and Canadian ''lakers,'' which account for most commercial shipping on the Great Lakes, are not affected.[6]

The U.S. waters of the Great Lakes and the St. Lawrence Seaway are divided into three pilotage districts. Pilotage in each district is provided by an association certified by the Coast Guard Director of Great Lakes Pilotage (''the Director'') to operate a pilotage pool. The Coast Guard does not control the actual compensation that pilots receive. The actual compensation is determined by the district associations, each of which uses different compensation practices.

District One, consisting of Areas 1 and 2, includes all U.S. waters of the St. Lawrence River and Lake Ontario. District Two, consisting of Areas 4 and 5, includes all U.S. waters of Lake Erie, the Detroit River, Lake St. Clair, and the St. Clair River. District Three, consisting of Areas 6, 7, and 8, includes all U.S. waters of the St. Mary's River; Sault Ste. Marie Locks; and Lakes Huron, Michigan, and Superior. Area 3 is the Welland Canal, which is serviced exclusively by the Canadian Great Lakes Pilotage Authority (GLPA) and, accordingly, is not included in the United States pilotage rate structure.

Areas 1, 5, and 7 have been designated by Presidential Proclamation [7] to be waters in which pilots must, at all times, be fully engaged in the navigation of vessels in their charge. Areas 2, 4, 6, and 8 have not been so designated because they are open bodies of water. While working in

[1] Public Law 86–555, 74 Stat. 259, as amended; currently codified as 46 U.S.C. Chapter 93.

[2] ''On register'' means that the vessel's certificate of documentation has been endorsed with a registry endorsement, and therefore, may be employed in foreign trade or trade with Guam, American Samoa, Wake, Midway, or Kingman Reef. 46 U.S.C. 12105, 46 CFR 67.17.

[3] 46 U.S.C. 9302(a)(1).

[4] 46 U.S.C. 9303(f).

[5] DHS Delegation No. 0170.1, para. II (92.f).

[6] 46 U.S.C. 9302. A ''laker'' is a commercial cargo vessel especially designed for and generally limited to use on the Great Lakes.

[7] Presidential Proclamation 3385, *Designation of restricted waters under the Great Lakes Pilotage Act of 1960,* December 22, 1960.

those undesignated areas, pilots must "be on board and available to direct the navigation of the vessel at the discretion of and subject to the customary authority of the master." [8]

The Coast Guard is required to establish new pilotage rates by March 1 of each year, employing a full ratemaking at least once every 5 years and an annual review and adjustment in the intervening years.[9] The Coast Guard will continue to review rates annually until we can stabilize the rates and ensure pilotage association revenues are in line with projections.

In 2016, we revised our ratemaking methodology to improve the ratemaking process. Some of the changes proposed in this document further refine the 2016 methodology.

V. Discussion of Proposed Rate Changes

We propose new rates, and surcharges under 46 CFR 401.401, for 2017. This section discusses the proposed rates using the ratemaking steps provided in 46 CFR part 404. We reviewed the independent accountant's financial reports for each association's 2014 expenses and revenues. Those reports, which include pilot comments on draft versions and the accountant's response to those comments, appear in the docket.[10] This year, we have reorganized the layout of this proposed rule to address the ratemaking steps for each pilotage district individually. This is only a formatting change to make the proposed rule easier to follow. We begin with District One, and some explanations in the section on District One will apply to similar changes in the other Districts.

A. District One

Recognize previous year's operating expenses (§ 404.101). First, we reviewed and accepted the accountant's final findings on the 2014 audit of association expenses.

Table 1 shows District One's recognized expenses.

TABLE 1—RECOGNIZED EXPENSES FOR DISTRICT ONE

Reported expenses for 2014	District One: Designated — St. Lawrence River	District One: Undesignated — Lake Ontario	Total
Operating Expenses:			
Other Pilotage Costs:			
Pilot subsistence/travel	$302,547	$228,222	$530,769
Applicant Pilot subsistence/travel	0	12,996	12,996
License insurance	20,231	22,480	42,711
Applicant Pilot license insurance	0	1,760	1,760
Payroll taxes	78,067	64,130	142,197
Applicant Pilot payroll taxes	0	0	0
Other	479	378	857
Total other pilotage costs	401,324	329,966	731,290
Pilot Boat and Dispatch Costs:			
Pilot boat expense	130,741	103,173	233,914
Dispatch expense	0	0	0
Payroll taxes	9,797	7,732	17,529
Total pilot and dispatch costs	140,538	110,905	251,443
Administrative Expenses:			
Legal—general counsel	2,173	1,505	3,678
Legal—shared counsel (K&L Gates)	8,783	6,932	15,715
Legal—USCG litigation	12,794	10,098	22,892
Insurance	21,829	17,226	39,055
Employee benefits	7,570	5,974	13,544
Payroll taxes	5,281	4,167	9,448
Other taxes	7,262	5,731	12,993
Travel	648	512	1,160
Depreciation/auto leasing/other	48,094	31,820	79,914
Interest	13,713	10,821	24,534
APA Dues	12,444	11,996	24,440
Utilities	8,916	418	9,334
Salaries	52,121	41,130	93,251
Accounting/Professional fees	5,142	4,058	9,200
Pilot Training	6,427	5,074	11,501
Applicant Pilot training	0	0	0
Other	8,866	6,546	15,412
Total Administrative Expenses	222,063	164,008	386,071
Total Operating Expenses (Other Costs + Pilot Boats + Admin)	763,925	604,879	1,368,804
Proposed Adjustments (Independent CPA):			
Pilot subsistence/travel	−15,712	−12,401	−28,113
Payroll taxes	−87	−68	−155
Applicant Pilot payroll taxes	0	2,347	2,347
TOTAL CPA ADJUSTMENTS	−15,799	−10,122	−25,921

[8] 46 U.S.C. 9302(a)(1)(B).

[9] 46 U.S.C. 9303(f).

[10] See "Summary—Independent Accountant's Report on Pilot Association Expenses, with Pilot Association Comments and Accountant's Responses."

TABLE 1—RECOGNIZED EXPENSES FOR DISTRICT ONE—Continued

Reported expenses for 2014	District One		Total
	Designated	Undesignated	
	St. Lawrence River	Lake Ontario	
Proposed Adjustments (Director):			
APA Dues	−1,867	−1,799	−3,666
2015 Surcharge Adjustment *	−92,766	−72,887	−165,653
Legal—shared counsel (K&L Gates)	−8,783	−6,932	−15,715
Legal—USCG litigation	−12,794	−10,098	−22,892
TOTAL DIRECTOR'S ADJUSTMENTS	−116,209	−91,717	−207,926
Total Operating Expenses (OpEx + Adjustments)	631,917	503,040	1,134,957

* District One collected $493,682 with an authorized 10% surcharge in 2015. The adjustment represents the difference between the collected amount and the authorized amount of $328,029 authorized in the 2015 final rule.

Project next year's operating expenses, adjusting for inflation or deflation (§ 404.102). We based our inflation adjustments on the Bureau of Labor Statistics' (BLS) data from the Consumer Price Index for the Midwest Region of the United States,[11] and reports from the Federal Reserve.[12] The adjustments for District One are shown in Table 2.

TABLE 2—INFLATION ADJUSTMENT, DISTRICT ONE

	District One		Total
	Designated	Undesignated	
Total Operating Expenses (Step 1)	$631,917	$503,040	$1,134,957
2015 Inflation Modification (@ −0.5%)	−3,160	−2,515	−5,675
2016 Inflation Modification (@2.2%)	13,833	11,012	24,844
2017 Inflation Modification (@2.1%)	13,494	10,742	24,237
Adjusted 2017 Operating Expenses	656,084	522,279	1,178,363

Determine number of pilots needed (§ 404.103). To determine the number of pilots needed for 2017, we reviewed the historic number of annual assignments in each area going back to 2007. Our demand model from the 2016 final rule allows pilots 10 days of recuperative rest each month between mid-April and mid-November, in order to better mitigate long-term fatigue. A U.S. registered pilot may spend several days in various ports in between assignments, which is not considered recuperative rest.

In 2016, we examined peak staffing primarily through an analysis of the maximum number of trips needed through designated waters at the end of each season. We propose modifying our pilotage demand calculation to focus instead on the pilot work cycle, including elements such as travel, rest, pilot boat time, and other items in addition to time on the bridge of the ship, and the number of assignments we reasonably expect pilots to be able to complete during the 9-month shipping season instead of during peak pilotage demand. The rest standards apply from April 15 through November 15 of each shipping season, which are non-peak periods. Thus, of the 270 days of the shipping season,[13] a pilot would be available for assignment on 200 of those days.[14] During the opening and closing of the season, however, we expect all of the working pilots to be available. This is critical at the end of the season to prevent a ship from getting stuck in the system due to lock maintenance schedules. We invite comment on these assumptions and how this model might impact operations and the recruitment and retention of pilots.

Tables 3 through 7 examine our proposed staffing model. We begin our analysis with the pilot assignment cycle first discussed in the 2016 rulemaking.[15] The pilot assignment cycle outlines the time needed to perform an assignment from beginning to end. This is shown in Table 3.

TABLE 3—PILOT ASSIGNMENT CYCLE FOR DISTRICT ONE

Pilot assignment cycle	District One	
	Area 1 (hours)	Area 2 (hours)
Average Through Transit Time *	10.8	11.0

[11] Available at *http://data.bls.gov/timeseries/CUUR0200SA0?data_tool=Xgtable*

[12] Available at *https://www.federalreserve.gov/monetarypolicy/fomcprojtabl20160316.htm*

[13] Nine months per shipping season × 30 days per month.

[14] Two-hundred and seventy days per season minus 70 days rest (7 non-peak months × 10 days rest per month).

[15] 81 FR 11932, Figure 14.

TABLE 3—PILOT ASSIGNMENT CYCLE FOR DISTRICT ONE—Continued

Pilot assignment cycle	District One	
	Area 1 (hours)	Area 2 (hours)
Travel	3.2	4.6
Delay	0.7	0.9
Admin	0.5	0.5
Total Assignment	15.2	17.0
Mandatory Rest	10	10
Pilot Cycle (hours/assignment)	25.2	27.0

* Updated since 2016 to reflect average through transit time based on current speed and other conditions as provided by pilot associations.

Using this data, we calculate the maximum number of assignments a pilot could conduct each year under perfect conditions with demand evenly distributed throughout the shipping season. This information follows in Table 4.

TABLE 4—CALCULATION OF MAXIMUM ASSIGNMENTS FOR DISTRICT ONE

Pilot assignments	District One	
	Area 1	Area 2
Seasonal Availability Goal (hours)	4,800	4,800
Pilot Cycle (hours/assignment)	25.2	27
Max Assignments per Pilot	190	178

Our model uses this maximum figure to calculate a projected number of assignments for each pilot in the 2017 shipping season. At this time, we can neither track assignments electronically nor track individual pilot cycle times. Additionally, the projected number of assignments per pilot reflects only actual assignments and does not include time the pilot is standing by and waiting for the next assignment. This calculation is detailed in Table 5.

TABLE 5—PROJECTED ASSIGNMENTS PER PILOT IN DISTRICT ONE

Assignments per pilot	District One	
	Area 1 (hours)	Area 2 (hours)
Max Assignments per Pilots	190	178
Efficiency Adjustment *	0.5	0.5
Projected Assignments per Pilot	95	89

* Recommended starting ratio per the 2013 bridge hour study (on page 23), available in the docket.

Next, we examine the historic number of assignments over the last nine shipping seasons, by Area, in District One. This will inform our final pilot strength calculation. The number of pilot assignments is detailed in Table 6.

TABLE 6—HISTORIC NUMBER OF ASSIGNMENTS IN DISTRICT ONE

Historic number of assignments	District One	
	Area 1	Area 2
2007	708	558
2008	632	480
2009	361	434
2010	518	591
2011	500	634
2012	479	632
2013	490	598
2014	612	637
2015	593	589
Average Assignments	544	573

Finally, using the historic average number of assignments from the last nine shipping seasons (Table 6) and the projected assignments per pilot (Table 5), we are able to calculate the projected need for pilot strength for District One. This calculation is in Table 7. In all districts, when the calculation results in a fraction of a pilot, we round pilot numbers up to the nearest whole pilot. We do this to avoid shortening our demand calculation and also to compensate for the role of the district presidents as both working pilots and representatives of their associations. We believe the rounding is justified to meet the needs of the staffing model and also to ensure the presidents of the pilot associations are able to effectively engage in meetings and communications with stakeholders throughout the Great Lakes region and the Coast Guard.

TABLE 7—PROJECTED PILOTS NEEDED IN DISTRICT ONE

Pilots needed	District One	
	Area 1 (hours)	Area 2 (hours)
Historic Average Assignments	544	573
Projected Assignments per Pilot	95	89
Projected Pilots Needed (unrounded)	5.71	6.44
Projected Pilots Needed (rounded)	6	7

Based on these tables, District One has a projected pilot need of 13 pilots for the 2017 season.

Proposed Mandatory Change Point Affecting Pilot Need

However, we also propose to add a mandatory change point in the vicinity of Iroquois Lock. In the 2016 NPRM, we proposed making Iroquois Lock a mandatory change point to enhance safety by mitigating fatigue on long pilotage runs. 80 FR 54487. However, we did not implement that proposal because the GLPA and Saint Lawrence Seaway Pilots Association informed us that they needed additional time to recruit, hire, and train additional pilots to implement this change. We propose adding the language, ''The Saint Lawrence River between Iroquois Lock and the area of Ogdensburg, NY, at the opening of the 2017 shipping season,'' to the list of mandatory change points in section 401.450. The transit between Snell Lock and Cape Vincent takes about 11 hours under ideal circumstances. We want to limit a U.S. registered pilot's assignment to 8 hours in designated waters in order to mitigate fatigue. Establishing this mandatory change point allows us to accomplish this goal.

Establishing this change point will increase the number of assignments and pilots needed in Area 1. Currently, about 40 percent of the assignments change at Iroquois Lock due to the night relief working rules or a slow moving vessel. We have historically counted this as one assignment even though two pilots are used to complete this assignment. For the purposes of calculating the number of additional assignments, we assume that 40 percent of trips currently switch pilots, while 60 percent will require a new pilot assignment. The historical average number of pilot assignments in District One, Area 1, is 544 per year (Table 6). If 60 percent of these will require an additional pilot assignment due to the new change point, 326 additional pilot assignments will be needed.[16] From Table 5, pilots in this area average 95 assignments per season, resulting in the need for an additional 3.4 pilots to cover the additional assignments. Again, we round the calculated number of pilots needed to the next whole pilot to help ensure an adequate supply of pilots available for assignment.

Based on these calculations, we propose four additional pilots to handle the increased number of assignments. The Saint Lawrence Seaway Pilots Association has communicated that it will have the necessary number of pilots trained at the beginning of the 2017 season. Therefore, we are proposing the addition of these pilots in the 2017 rulemaking, resulting in a total number of 17 pilots needed for District One (13 from Table 7 to handle existing demand, plus 4 to account for the Iroquois Lock change point).

We have coordinated with the Saint Lawrence Seaway Management Corporation (SLSMC), the Great Lakes Pilots Authority, and the Saint Lawrence Seaway Pilots Association, and concluded that the addition of the change point will not require capital expenses. The SLSMC will continue to allow the U.S. and Canadian registered pilots to use the Iroquois Lock for pilot changes. This avoids the need to purchase a new pilot boat and dock, as well as additional labor for support staff. If this changes, we will require District One to provide a plan for procuring a new pilot boat, dock, and additional support staff needed for this new change point, so that these costs can be included in a ratemaking.

We understand that District One plans to have all applicant pilots trained and working for the 2017 season. Therefore, Table 8 shows zero applicants, and consequently, no applicant surcharge for District One.

TABLE 8—PILOTS NEEDED; PILOTS PROJECTED TO BE WORKING

	District One
Needed pilots, period for which 2017 rates are in effect	17
Working pilots projected for 2017	17
Applicant pilots for 2017	0

Determine target pilot compensation (§ 404.104). In the 2016 ratemaking, we attempted to align the compensation of U.S. registered pilots with the Canadian registered pilots of the GLPA and set a target compensation of $326,114. We are proposing to freeze target compensation for 2017 at the 2016 levels for the following reasons. First, the methodology used to align target compensation in the 2016 ratemaking used the foreign exchange rate between the Canadian and U.S. dollar to convert Canadian compensation to United States compensation. The exchange rate has changed substantially from 1.149CAD:1USD in 2014 to 1.329CAD:1USD in 2015.[17] This is a change of nearly 20 percent. The volatility in exchange rates is dependent on factors external to the ratemaking, and we do not believe it is in the public interest to lower target pilot compensation by nearly 20 percent based on foreign exchange. Second, the system needs target pilot compensation stability in order to achieve and maintain workforce stability. Finally, the most challenging portion of this analysis is the conversion of Canadian benefits into roughly equivalent United States benefits. For example, the U.S. registered pilots invest their own money

[16] We calculated 544 average assignments per year × .6 will require a new pilot assignment.

[17] See *https://www.irs.gov/individuals/international-taxpayers/yearly-average-currency-exchange-rates.*

to own and operate the pilot associations, whereas the Canadian registered pilots do not. The Canadian registered pilots have a defined, government-backed pension, guaranteed time off, sick days, personal days, and medical benefits that require no out-of-pocket expenses. Our discussions with stakeholders, including the Canadian government, pilots, and industry, have highlighted the challenges of comparing benefits across international boundaries. We are not convinced that a single conversion from Canadian currency to United States currency properly accounts for the level of benefits provided to the Canadian registered pilots. We believe the most appropriate solution is to launch an independent, third-party study to examine pilot compensation and recommend a total compensation number. The Coast Guard is in the early stages of pursuing this study.

While we await the results of an independent third-party study, we propose maintaining the 2016 level for target pilot compensation for this ratemaking. The calculations of target pilot compensation for District One are displayed in Table 9.

TABLE 9—DISTRICT ONE TARGET PILOT COMPENSATION

	District One		Total
	Designated	Undesignated	
Target Pilot Compensation	$326,114	$326,114	$326,114
Number of Pilots (Step 3)	10	7	17
Total Target Pilot Compensation	$3,261,142	$2,282,799	$5,543,941

Determine working capital fund (proposed § 404.105). We propose changing the term for this step from ''Project return on investment'' to ''Determine working capital fund'' based on several discussions with the shippers, ports, and agents. We agree with the shippers, ports, and agents that this is more than a return on the monies the pilots have invested in their infrastructure. The intent of this step is to provide the pilots with working capital for future expenses associated with capital improvements, technology investments, and future training needs, with the goal of eliminating the need for surcharges. Even though we propose changing the name of this step, we do not propose changing the calculation.

We calculate the working capital fund by multiplying the 2014 average rate of return for new issues of high-grade corporate securities and Total Expenses (Adjusted Operating Expenses from Step 2 plus Total Target Pilot Compensation from Step 4). We use the Moody's AAA bond rate information to determine the average annual rate of return for new issues of high-grade corporate securities. The 2014 average annual rate of return for new issues of high-grade corporate securities was 4.16 percent.[18] The working capital fund calculation is shown in Table 10.

TABLE 10—DISTRICT ONE WORKING CAPITAL FUND CALCULATION

	District One		Total
	Designated	Undesignated	
Adjusted Operating Expenses (Step 2)	$656,084	$522,279	$1,178,363
Total Target Pilot Compensation (Step 4)	3,261,142	2,282,799	5,543,941
Total 2017 Expenses	3,917,226	2,805,078	6,722,304
Working Capital Fund (4.16%)	162,957	116,691	279,648

Project needed revenue for next year (proposed § 404.106). Table 11 shows District One's needed revenue, which is determined by adding the proposed § 404.102 operating expense, the proposed § 404.104 total target compensation, and the proposed § 404.105 working capital fund.

TABLE 11—REVENUE NEEDED

	District One		Total
	Designated	Undesignated	
Adjusted Operating Expenses (Step 2)	$656,084	$522,279	$1,178,363
Total Target Pilot Compensation (Step 4)	3,261,142	2,282,799	5,543,941
Working Capital Fund (Step 5)	162,957	116,691	279,648
Total Revenue Needed	4,080,183	2,921,770	7,001,952

Make initial base rate calculations (proposed § 404.107). To make our initial base rate calculations, we first establish a multi-year base period from which we can draw available and reliable data on actual pilot hours

[18] Based on Moody's AAA corporate bonds, which can be found at: *http://research.stlouisfed.org/fred2/series/AAA/downloaddata?cid=119.*

worked in each district's designated and undesignated waters. For the 2017 rates, we propose using data covering 2007 through 2015. Table 12 shows calculations of the average number of bridge hours over the last 9 shipping seasons.

TABLE 12—HOURS WORKED, 2007 THROUGH 2015, DISTRICT ONE

	District One	
	Designated (hours)	Undesignated (hours)
2015	5,743	6,667
2014	6,810	6,853
2013	5,864	5,529
2012	4,771	5,121
2011	5,045	5,377
2010	4,839	5,649
2009	3,511	3,947
2008	5,829	5,298
2007	6,099	5,929
Average	5,390	5,597

We are monitoring bridge hours and revenue projections for the season, and there is a great deal of variation in the system. Through the end of May 2016, projected bridge hours for the entire shipping season were up 45 percent in District One compared to the 9-year average, while revenue projection for the same period was only up 15 percent compared to our projected revenue needed. This suggested that the District One rate continued to under-generate needed revenue. However, by the end of July 2016, projected bridge hours for the entire shipping season were up 8.2 percent as compared to the 9-year average, and revenue projection was up 16 percent as compared to projected revenue needed, which suggests slight over-generation of revenue. We will continue to monitor traffic and revenue projections throughout the shipping season to see if any additional changes are needed.

Table 13 calculates new rates by dividing each association's projected needed revenue, from § 404.106, by the average hours shown in Table 12 and rounding to the nearest whole number.

TABLE 13—RATE CALCULATIONS

	District One	
	Designated	Undesignated
Revenue Needed (Step 6)	$4,080,183	$2,921,770
Average time on task 2007–2015	5,390	5,597
Hourly Rate	$757	$522

We now examine the calculations of the other two pilotage districts for 2017.

B. District Two

Recognize previous year's operating expenses (§ 404.101). We reviewed and accepted the accountant's final findings on the 2014 audits of association expenses.

Table 14 shows District Two's recognized expenses.

TABLE 14—RECOGNIZED EXPENSES FOR DISTRICT TWO

Reported expenses for 2014	District Two		Total
	Undesignated	Designated	
	Lake Erie	SES to Port Huron	
Operating Expenses:			
Other Pilotage Costs:			
Pilot subsistence/travel	$148,424	$222,635	$371,059
Applicant Pilot subsistence/travel	9,440	14,160	23,600
License insurance	52,888	79,333	132,221
Applicant Pilot license insurance	5,738	8,608	14,346
Payroll taxes	76,903	115,354	192,257
Applicant Pilot payroll taxes	8,344	12,516	20,860
Other	1,053	1,579	2,632
Total other pilotage costs	302,790	454,185	756,975
Pilot Boat and Dispatch Costs:			
Pilot boat expense	173,145	259,718	432,863
Dispatch expense	10,080	15,120	25,200
Employee benefits	72,662	108,992	181,654
Payroll taxes	8,472	12,707	21,179
Total pilot and dispatch costs	264,358	396,538	660,896
Administrative Expenses:			
Legal—general counsel	2,680	4,020	6,700
Legal—shared counsel (K&L Gates)	4,984	7,476	12,461
Legal—USCG litigation	8,371	12,557	20,928
Office rent	26,275	39,413	65,688
Insurance	9,909	14,863	24,772
Employee benefits	23,002	34,504	57,506
Payroll taxes	5,001	7,501	12,502

TABLE 14—RECOGNIZED EXPENSES FOR DISTRICT TWO—Continued

Reported expenses for 2014	District Two Undesignated Lake Erie	District Two Designated SES to Port Huron	Total
Other taxes	21,179	31,769	52,948
Depreciation/auto leasing/other	17,784	26,677	44,461
Interest	3,298	4,948	8,246
APA Dues	8,664	12,996	21,660
Utilities	15,429	23,144	38,573
Salaries	46,008	69,013	115,021
Accounting/Professional fees	9,410	14,115	23,525
Pilot Training	0	0	0
Other	11,343	17,012	28,355
Total Administrative Expenses	213,339	320,007	533,346
Total Operating Expenses (Other Costs + Pilot Boats + Admin)	780,488	1,170,729	1,951,217
Proposed Adjustments (Independent CPA):			
Depreciation/auto leasing/other	3,322	4,982	8,304
TOTAL CPA ADJUSTMENTS	3,322	4,982	8,304
Proposed Adjustments (Director):			
APA Dues	−1,300	−1,949	−3,249
2015 Surcharge Adjustment*	−85,782	−128,672	−214,454
Legal—shared counsel (K&L Gates)	−4,984	−7,476	−12,461
Legal—USCG litigation	−8,371	−12,557	−20,928
TOTAL DIRECTOR'S ADJUSTMENTS	−100,436	−150,655	−251,092
Total Operating Expenses (OpEx + Adjustments)	683,374	1,025,056	1,708,429

*District Two collected $540,284 with an authorized 10% surcharge in 2015. The adjustment represents the difference between the collected amount and the $325,830 authorized in the 2015 final rule.

Project next year's operating expenses, adjusting for inflation or deflation (§ 404.102). We based our inflation adjustments on BLS data from the Consumer Price Index for the Midwest Region of the United States,[19] and reports from the Federal Reserve.[20] The adjustments for District Two are shown in Table 15.

TABLE 15—INFLATION ADJUSTMENT, DISTRICT TWO

	District Two Undesignated	District Two Designated	Total
Total Operating Expenses (Step 1)	$683,374	$1,025,056	$1,708,429
2015 Inflation Modification (@ −0.5%)	−3,417	−5,125	−8,542
2016 Inflation Modification (@2.2%)	14,959	22,438	37,398
2017 Inflation Modification (@2.1%)	14,593	21,890	36,483
Adjusted 2017 Operating Expenses	709,509	1,064,259	1,773,767

Determine number of pilots needed (§ 404.103). To determine the number of pilots needed for 2017 in District Two, we followed the same steps discussed earlier in this proposed rule for District One. The resulting calculations follow in Tables 16 through 20.

TABLE 16—PILOT ASSIGNMENT CYCLE FOR DISTRICT TWO

Pilot assignment cycle	District Two Area 4 (hours)	District Two Area 5 (hours)
Average Through Transit Time*	17.0	6.5
Travel	4.6	3.2
Delay	0.7	0.4
Admin	0.5	0.5

[19] Available at *http://data.bls.gov/timeseries/CUUR0200SA0?data_tool=Xgtable*.

[20] Available at *https://www.federalreserve.gov/monetarypolicy/fomcprojtabl20160316.htm*.

TABLE 16—PILOT ASSIGNMENT CYCLE FOR DISTRICT TWO—Continued

Pilot assignment cycle	District Two	
	Area 4 (hours)	Area 5 (hours)
Total Assignment	22.8	10.6
Mandatory Rest	10	10
Pilot Cycle (hours/assignment)	32.8	20.6

* Updated since 2016 to reflect average through transit time based on current speed and other conditions as provided by pilot associations.

TABLE 17—CALCULATION OF MAXIMUM ASSIGNMENTS FOR DISTRICT TWO

Pilot assignments	District Two	
	Area 4	Area 5
Seasonal Availability Goal (hours)	4800	4800
Pilot Cycle (hours/assignment)	32.8	20.6
Max Assignments per Pilot	146	233

TABLE 18—PROJECTED ASSIGNMENTS PER PILOT IN DISTRICT TWO

Assignments per pilot	District Two	
	Area 4	Area 5
Max Assignments per Pilots	146	233
Efficiency Adjustment*	0.5	0.5
Projected Assignments per Pilot	73	117

* Recommended starting ratio per the 2013 bridge hour study (on page 23), available in the docket.

TABLE 19—HISTORIC NUMBER OF ASSIGNMENTS IN DISTRICT TWO

Historic number of assignments	District Two	
	Area 4	Area 5
2007	510	866
2008	444	616
2009	290	471
2010	460	821
2011	331	598
2012	351	603
2013	404	693
2014	624	1043
2015	576	946
Average Assignments	443	740

TABLE 20—PROJECTED PILOTS NEEDED IN DISTRICT TWO

Pilots needed	District Two	
	Area 4	Area 5
Historic Average Assignments	443	740
Projected Assignments per Pilot	73	117
Projected Pilots Needed (unrounded)	6.06	6.35
Projected Pilots Needed (rounded)	7	7

We round the calculated number of total pilots for District Two to the next whole pilot to help ensure that an adequate supply of pilots is available for assignment. Based on these tables, District Two has a projected need for 14 pilots for the 2017 season. At the beginning of the 2017 shipping season, they plan to have 13 working pilots and 2 applicants. We believe the second applicant is necessary to prepare for future retirements, given the extended training periods associated with new pilots. Currently, 4 of the pilots in District Two are over 62 years of age. These 4 pilots represent nearly 30 percent of the pilot strength in this association. Waiting until these pilots retire to replace them will result in significant delays. Therefore, we propose authorizing a surcharge in 2017, which we discuss in section ''E. Surcharges'' later in this preamble, to fund two applicant pilots in District Two.

TABLE 21—PILOTS NEEDED; PILOTS PROJECTED TO BE WORKING

	District Two
Needed pilots, period for which 2017 rates are in effect	14
Working pilots projected for 2017	13
Applicant pilots for 2017	2

Determine target pilot compensation (§ 404.104). Similar to our discussion and proposal for District One, for the 2017 NPRM, we propose maintaining the 2016 compensation levels. Thus, target pilot compensation for 2017 would be $326,114. Total target pilot compensation for District Two is calculated in Table 22.

TABLE 22—DISTRICT TWO TARGET PILOT COMPENSATION

	District Two		Total
	Undesignated	Designated	
Target Pilot Compensation	$326,114	$326,114	$326,114
Number of Pilots (Step 3)	6	7	13
Total Target Pilot Compensation	$1,956,685	$2,282,799	$4,239,485

Determine working capital fund (proposed § 404.105). The 2014 average annual rate of return for new issues of high-grade corporate securities was 4.16 percent.[21] We apply that rate to District Two's projected total operating and compensation expenses (from §§ 404.102 and 404.104) to determine the allowed working capital fund for the shipping season, as shown in Table 23.

TABLE 23—DISTRICT TWO WORKING CAPITAL FUND CALCULATION

	District Two		Total
	Undesignated	Designated	
Adjusted Operating Expenses (Step 2)	$709,509	$1,064,259	$1,773,767
Total Target Pilot Compensation (Step 4)	1,956,685	2,282,799	4,239,485
Total 2017 Expenses	2,666,194	3,347,059	6,013,252
Working Capital Fund (4.16%)	110,914	139,238	250,151

Project needed revenue for next year (proposed § 404.106). Table 24 shows District Two's needed revenue, determined by adding the proposed § 404.102 operating expense, the proposed § 404.104 total target compensation, and the proposed § 404.105 working capital fund.

TABLE 24—REVENUE NEEDED

	District Two		Total
	Undesignated	Designated	
Adjusted Operating Expenses (Step 2)	$709,509	$1,064,259	$1,773,767
Total Target Pilot Compensation (Step 4)	1,956,685	2,282,799	4,239,485
Working Capital Fund (Step 5)	110,914	139,238	250,151
Total Revenue Needed	2,777,108	3,486,296	6,263,403

Make initial base rate calculations (proposed § 404.107). To make our initial base rate calculations, we first establish a multi-year base period from which available and reliable data for actual pilot hours worked in each district's designated and undesignated waters can be drawn. For the 2017 rates, we propose using data covering 2007

[21] Based on Moody's AAA corporate bonds, which can be found at: *http://research.stlouisfed.org/fred2/series/AAA/downloaddata?cid=119*.

through 2015. Table 25 calculates the average number of bridge hours over the last 9 shipping seasons.

TABLE 25—HOURS WORKED, 2007 THROUGH 2015, DISTRICT TWO

	District Two	
	Undesignated (hours)	Designated (hours)
2015	6,535	5,967
2014	7,856	7,001
2013	4,603	4,750
2012	3,848	3,922
2011	3,708	3,680
2010	5,565	5,235
2009	3,386	3,017
2008	4,844	3,956
2007	6,223	6,049
AVERAGE	5,174	4,842

We are monitoring bridge hours and revenue projections for the season, and there is a great deal of variation in the system. Through the end of May 2016, projected bridge hours for the entire shipping season were up 22 percent in District Two compared to the 9-year average, and revenue projection was up 17 percent compared to projected revenue needed. This suggested a robust correlation between traffic and revenue in District Two. However, by the end of July 2016, projected bridge hours were down 3.4 percent as compared to the 9-year average, while revenue projection was up 21 percent compared to projected revenue needed, which suggests over-generation of revenue. We will continue to monitor traffic and revenue projections throughout the shipping season to see if any additional changes are needed.

Table 26 calculates new rates by dividing District Two's projected needed revenue, from § 404.106, by the average hours shown in Table 25 and rounding to the nearest whole number.

TABLE 26—RATE CALCULATIONS

	District Two	
	Undesignated	Designated
Revenue Needed (Step 6)	$2,777,108	$3,486,296
Average time on task 2007–2015	5,174	4,842
Hourly Rate	$537	$720

C. District Three

Recognize previous year's operating expenses (§ 404.101). We reviewed and accepted the accountant's final findings on the 2014 audits of association expenses.

Table 27 shows District Three's recognized expenses.

TABLE 27—RECOGNIZED EXPENSES FOR DISTRICT THREE

Reported Expenses for 2014	District Three		Total
	Undesignated	Designated	
	Lakes Huron, Michigan, and Superior	St. Mary's River	
Operating Expenses:			
Other Pilotage Costs:			
Pilot subsistence/travel	$424,935	$141,645	$566,580
Applicant pilot subsistence/travel	24,608	8,203	32,810
License insurance	14,304	4,768	19,072
Payroll taxes	110,567	36,856	147,423
Applicant pilot payroll taxes	9,082	3,027	12,109
Other	12,268	4,090	16,358
Total other pilotage costs	595,764	198,589	794,353
Pilot Boat and Dispatch Costs:			
Pilot boat costs	593,360	197,787	791,147
Dispatch costs	133,787	44,596	178,383
Payroll taxes	31,432	10,477	41,909

TABLE 27—RECOGNIZED EXPENSES FOR DISTRICT THREE—Continued

Reported Expenses for 2014	District Three		Total
	Undesignated	Designated	
	Lakes Huron, Michigan, and Superior	St. Mary's River	
Total pilot and dispatch costs	758,579	252,860	1,011,439
Administrative Expenses:			
Legal—general counsel	15,386	5,129	20,515
Legal—shared counsel (K&L Gates)	15,900	5,300	21,201
Legal—USCG litigation	23,422	7,807	31,229
Office rent	7,425	2,475	9,900
Insurance	11,050	3,683	14,733
Employee benefits	113,890	37,964	151,854
Other taxes	129	43	173
Depreciation/auto leasing/other	28,802	9,601	38,403
Interest	2,858	953	3,811
APA Dues	20,235	6,745	26,980
Dues and subscriptions	3,975	1,325	5,300
Utilities	33,083	11,028	44,111
Salaries	95,577	31,859	127,437
Accounting/Professional fees	27,492	9,164	36,656
Pilot Training	0	0	0
Other	9,318	3,106	12,424
Total Administrative Expenses	408,542	136,182	544,727
Total Operating Expenses (Other Costs + Pilot Boats + Admin)	1,762,885	587,631	2,350,518
Proposed Adjustments (Independent CPA):			
Pilot subsistence/Travel	−15,595	−5,198	−20,793
Payroll taxes	5,949	1,983	7,931
Pilot boat costs	−62,748	−20,916	−83,664
Legal—shared counsel (K&L Gates)	−1,590	−530	−2,120
Dues and subscriptions	−3,975	−1,325	−5,300
Other expenses	−375	−125	−500
TOTAL CPA ADJUSTMENTS	−78,334	−26,111	−104,445
Proposed Adjustments (Director):			
APA Dues	−3,035	−1,012	−4,047
Surcharge Adjustment *	−216,734	−72,245	−288,979
Legal—shared counsel (K&L Gates)	−14,310	−4,770	−19,080
Legal—USCG litigation	−23,422	−7,807	−31,229
TOTAL DIRECTOR'S ADJUSTMENTS	−257,502	−85,834	−343,335
Total Operating Expenses (OpEx + Adjustments)	1,427,050	475,687	1,903,738

* District Three collected $615,929 with an authorized 10% surcharge in 2015. The adjustment represents the difference between the collected amount and the authorized amount of $326,950 authorized in the 2015 final rule.

Project next year's operating expenses, adjusting for inflation or deflation (§ 404.102). We based our inflation adjustments on BLS data from the Consumer Price Index for the Midwest Region of the United States,[22] and reports from the Federal Reserve.[23] The adjustments for District Three are shown in Table 28.

TABLE 28—INFLATION ADJUSTMENT, DISTRICT THREE

	District Three		Total
	Undesignated	Designated	
Total Operating Expenses (Step 1)	$1,427,050	$475,687	$1,902,738
2015 Inflation Modification (@ −0.5%)	−7,135	−2,378	−9,514
2016 Inflation Modification (@2.2%)	31,238	10,413	41,651
2017 Inflation Modification (@2.1%)	30,474	10,158	40,632

[22] Available at *http://data.bls.gov/timeseries/CUUR0200SA0?data_tool=Xgtable.*

[23] Available at *https://www.federalreserve.gov/monetarypolicy/fomcprojtabl20160316.htm.*

TABLE 28—INFLATION ADJUSTMENT, DISTRICT THREE—Continued

	District Three		Total
	Undesignated	Designated	
Adjusted 2017 Operating Expenses	1,481,627	493,879	1,975,506

Determine number of pilots needed (§ 404.103). To determine the number of pilots needed for 2017 in District Three, we followed the same steps discussed earlier in this proposed rule for Districts One and Two. The resulting calculations follow in Tables 29 through 33.

TABLE 29—PILOT ASSIGNMENT CYCLE FOR DISTRICT THREE

Pilot assignment cycle	District Three		
	Area 6 (hours)	Area 7 (hours)	Area 8 (hours)
Average Through Transit Time *	22.5	7.1	21.6
Travel	2.4	3.6	3.7
Delay	1	0.3	3.3
Admin	0.5	0.5	0.5
Total Assignment	26.4	11.5	29.1
Mandatory Rest	10	10	10
Pilot Cycle (hours/assignment)	36.4	21.5	39.1

* Although transit times in Districts One and Two have been updated based on actual conditions, no similar change was required to reflect transit times in District Three.

TABLE 30—CALCULATION OF MAXIMUM ASSIGNMENTS FOR DISTRICT THREE

Pilot assignments	District Three		
	Area 6	Area 7	Area 8
Seasonal Availability Goal (hours)	4,800	4,800	4,800
Pilot Cycle (hours/assignment)	36.4	21.5	39.1
Max Assignments per Pilot	132	223	123

TABLE 31—PROJECTED ASSIGNMENTS PER PILOT IN DISTRICT THREE

Assignments per pilot	District Three		
	Area 6	Area 7	Area 8
Max Assignments per Pilots	132	223	123
Efficiency Adjustment *	0.5	0.5	0.5
Projected Assignments per Pilot	66	112	61

* Recommended starting ratio per the 2013 bridge hour study (on page 23), available in the docket.

TABLE 32—HISTORIC NUMBER OF ASSIGNMENTS IN DISTRICT THREE

Historic number of assignments	District Three		
	Area 6	Area 7	Area 8
2007	681	794	478
2008	423	309	252
2009	352	231	275
2010	547	352	338
2011	460	228	223
2012	436	267	243
2013	464	315	322
2014	729	426	575
2015	644	412	421
Average Assignments	526	370	347

TABLE 33—PROJECTED PILOTS NEEDED IN DISTRICT THREE

Pilots needed	District Three		
	Area 6	Area 7	Area 8
Historic Average Assignments	526	370	347
Projected Assignments per Pilot	66	112	61
Projected Pilots Needed (unrounded)	7.98	3.32	5.66
Projected Pilots Needed (rounded)	8	4	6

We round the calculated number of pilots needed by Area to the next whole pilot to help ensure an adequate supply of pilots are available for assignments. Based on these tables, District Three has a projected pilot need of 18 pilots for the 2017 season. However, at the beginning of the 2017 shipping season, they plan to have 15 working and registered pilots supplemented by 7 applicants. We believe the applicants are necessary to prepare for future retirements given the extended training periods associated with new pilots. Currently, 6 of the pilots who are trained or registered in District Three are over 61 years of age. These 6 pilots represent 30 percent of the current pilot strength for District Three, which is already less than the 18 pilots projected to be needed in 2017. If we wait until these pilots retire to begin replacing them, the system will experience significant delays due to a lack of available pilots. Therefore, we propose authorizing a surcharge, which we discuss in section E, below, to fund seven applicant pilots in District Three.

TABLE 34—PILOTS NEEDED; PILOTS PROJECTED TO BE WORKING

	District Three
Needed pilots, period for which 2017 rates are in effect	18
Working pilots projected for 2017	15
Applicant pilots for 2017	7

Determine target pilot compensation (§ 404.104). Similar to our discussion and proposal for Districts One and Two, we propose maintaining the 2016 compensation levels. Thus, target pilot compensation for 2017 would be $326,114. Total target pilot compensation for District Three is calculated in Table 35.

TABLE 35—DISTRICT THREE TARGET PILOT COMPENSATION

	District Three		Total
	Undesignated	Designated	
Target Pilot Compensation	$326,114	$326,114	$326,114
Number of Pilots (Step 3)	11	4	15
Total Target Pilot Compensation	$3,587,256	$1,304,457	$4,891,713

Determine working capital fund (proposed § 404.105). The 2014 average annual rate of return for new issues of high-grade corporate securities was 4.16 percent.[24] We apply that rate to District Three's projected total operating and compensation expenses (from §§ 404.102 and 404.104) to determine the allowed working capital fund for the shipping season, as shown in Table 36.

TABLE 36—DISTRICT THREE WORKING CAPITAL FUND CALCULATION

	District Three		Total
	Undesignated	Designated	
Adjusted Operating Expenses (Step 2)	$1,481,627	$493,879	$1,975,506
Total Target Pilot Compensation (Step 4)	3,587,256	1,304,457	4,891,713
Total 2016 Expenses	5,068,883	1,798,336	6,867,219
Working Capital Fund (4.16%)	210,866	74,811	285,676

Project needed revenue for next year (proposed § 404.106). Table 37 shows District Three's needed revenue, which is determined by adding the proposed § 404.102 operating expense, the proposed § 404.104 total target compensation, and the proposed § 404.105 working capital fund.

[24] Based on Moody's AAA corporate bonds, which can be found at: *http://research.stlouisfed.org/fred2/series/AAA/downloaddata?cid=119.*

TABLE 37—REVENUE NEEDED

	District Three		Total
	Undesignated	Designated	
Adjusted Operating Expenses (Step 2)	$1,481,627	$493,879	$1,975,506
Total Target Pilot Compensation (Step 4)	3,587,256	1,304,457	4,891,713
Working Capital Fund (Step 5)	210,866	74,811	285,676
Total Revenue Needed	5,279,748	1,873,147	7,152,895

Make initial base rate calculations (proposed § 404.107). To make our initial base rate calculations, we first establish a multi-year base period from which available and reliable data for actual pilot hours worked in each district's designated and undesignated waters can be drawn. For the 2017 rates, we propose using data covering 2007 through 2015. Table 38 calculates the average number of bridge hours over the last nine shipping seasons.

TABLE 38—HOURS WORKED, 2007 THROUGH 2015, DISTRICT THREE

	District Three	
	Undesignated (hours)	Designated (hours)
2015	22,824	2,696
2014	25,833	3,835
2013	17,115	2,631
2012	15,906	2,163
2011	16,012	1,678
2010	20,211	2,461
2009	12,520	1,820
2008	14,287	2,286
2007	24,811	5,944
Average	18,835	2,835

We are monitoring bridge hours and revenue projections for the season, and there is a great deal of variation in the system. Through the end of May 2016, projected bridge hours for the entire shipping season were down 10 percent in District Three as compared to the 9-year average, while revenue projection through May 2016 was up 9 percent compared to projected revenue needed. This suggested that the District Three rate was over-generating revenue. However, by the end of July 2016, projected bridge hours were up 23 percent as compared to the 9-year average, and revenue projection was up 19 percent as compared to projected revenue needed, which suggested a more robust correlation between traffic and revenue in District Three. We continue to monitor projections so that we can make changes if needed. In particular, we are considering removing the maximum ratio between designated and undesignated charges, which we established last year in § 404.107(b), if it appears to be artificially raising undesignated rates and lowering designated rates.

Table 39 calculates new rates by dividing District Three's projected needed revenue, from § 404.106, by the average hours shown in Table 38 and rounding to the nearest whole number.

TABLE 39—RATE CALCULATIONS

	District Three	
	Undesignated	Designated
Revenue Needed (Step 6)	$5,279,748	$1,873,147
Average time on task 2007–2015	18,835	2,835
Hourly Rate	$280	$661

D. Other Changes Affecting Ratemaking

Review and finalize rates (§ 404.108). In addition to the changes described earlier, we propose five additional changes for 2017 that will equally impact the pilot associations. First, we propose adding a requirement to the surcharge regulation in § 401.401. We propose that once a pilot association collects the amount of money allowable for recoupment, which is designated by the final rule, the pilot association's authorization to collect a surcharge for the remainder of that shipping season will terminate. This proposed change will prevent excess amounts from being recouped and should eliminate the need to make adjustments to the operating expenses for the following year. Turning to surcharges for 2017, we find that allowing associations to recoup necessary and reasonable training expenses, both to help achieve a full complement of needed pilots and to ensure skill maintenance and development for current pilots, will facilitate safe, efficient, and reliable pilotage, and is good cause for imposing a necessary and reasonable temporary surcharge, as authorized by 46 CFR 401.401.

In addition, we propose amending the cancellation charge provision in § 401.420(b) to ensure that it explicitly states that the minimum charge for a cancellation is 4 hours plus necessary and reasonable travel expenses for travel that occurs. Based on the feedback we received from the pilot associations, we believe the current language is not specific enough and will continue to cause confusion, as indicated by inquiries from both pilot associations and shipping agents. We view this charge as necessary to emphasize that pilots are a limited resource and encourage their efficient use. We are also removing ''after that pilot has begun travelling to the designated pickup place'' from § 401.420(b) to eliminate any confusion about the 4-hour minimum charge.

To expedite the recoupment of expenses, we also propose to adjust § 403.300(c) to require submission of an unqualified audit prepared in accordance with generally accepted accounting principles and all accompanying notes by January 31st of each year. This would require the pilot associations to complete their financial statements by January 24th in order to meet the January 31st deadline. Existing § 403.300(c) requires submission of an unqualified audit by April 1 of each year. Our goal is to allow our independent auditors to begin work much sooner and complete work on the third party audit in time for it to be used for the publication of the proposed rule that summer. This timeline would remove 1 year from the current 3-year gap between the actual expenses and their recoupment in the rate. We request comments regarding the feasibility of completing the required audits by January 31, and if it is not feasible, an explanation as to why and what other date would be appropriate.

We also propose the addition of new language in § 404.104 that would allow the Director to set compensation for a 10-year period to a compensation benchmark. The compensation benchmark would be based on the most relevant available non-proprietary information such as wage and benefit information from other pilotage groups. In the years in which a compensation benchmark is not set, target pilot compensation will be adjusted for inflation by using the CPI for the Midwest region or by a pre-determined amount that would be published prior to use. We believe this will promote target compensation stability and rate predictability.

The proposed changes to §§ 403.300(c) and 404.104 should assist the pilot associations with recruitment and retention and help the various stakeholders forecast budgets and pricing. These changes would apply only to the calculation of target pilot compensation; we do not propose any changes to the formula in which we use target pilot compensation to calculate the rate.

Finally, we seek public comment on how we should handle weighting factors in 46 CFR 401.400, which outlines the calculations for determining the weighting factors for a vessel subject to compulsory pilotage. This calculation determines which multiplication factor will be applied to the pilotage fees. We are not proposing any action in this proposed rule because we do not have sufficient data to make an informed decision.

The first option is to maintain the status quo. This would maintain the current weighting factors and continue to leave them out of the ratemaking calculation.

The second option for weighting factors is to remove them completely from the regulations and charge every vessel equally for pilotage service. This aligns with the current compensation model that a pilot should be compensated equally for their expertise across all areas of the Great Lakes. The ship's dimensions do not impact the experience and skill level of the pilot providing the service.

The third option is to incorporate weighting factors into the rulemaking through an additional step that examines and projects their impact on the revenues of the pilot associations. This might enable us to better forecast revenue, but it would add another variable to the projections in the rate methodology.

We request public comment specifically on which of these three options should be implemented for future ratemakings; in your comment, please explain why the option should be implemented.

E. Surcharges

Turning to surcharges for 2017, we find that allowing associations to recoup necessary and reasonable training expenses, both to help achieve a full complement of needed pilots and to ensure skill maintenance and development for current pilots, will facilitate safe, efficient, and reliable pilotage, and is good cause for imposing a necessary and reasonable temporary surcharge, as authorized by 46 CFR 401.401. For 2017, we anticipate that there will be two applicant pilots in District Two, and seven applicant pilots in District Three. Based on historic pilot costs, the stipend, per diem, and training costs for each applicant pilot are approximately $150,000 per shipping season. Thus, we estimate that the training expenses that each association will incur will be approximately $300,000 in District Two and $1,050,000 in District Three. Table 40 derives the proposed percentage surcharge for each district by comparing this estimate to each district's projected needed revenue.

TABLE 40—SURCHARGE CALCULATION BY DISTRICT

	District One	District Two	District Three
Projected Needed Revenue (§ 404.106)	$7,001,952	$6,263,403	$7,152,895
Anticipated Training Expenses	$0	$300,000	$1,050,000
Surcharge Needed *	0%	5%	15%

* All surcharge calculations are rounded up to the nearest whole percentage.

These surcharges would only be collected until the target amount is reached. This should eliminate the need to make adjustments to the operating expenses for the following year. We will ensure that these expenses are not included in future rulemakings in order to avoid double billing.

VI. Regulatory Analyses

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

A. Regulatory Planning and Review

Executive Orders 13563 and 12866 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive effects, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility.

This proposed rule has not been designated a ''significant regulatory action'' under section 3(f) of Executive Order 12866. Accordingly, this proposed rule has not been reviewed by the Office of Management and Budget (OMB).

We developed an analysis of the costs and benefits of the proposed rule to ascertain its probable impacts on industry. We consider all estimates and analysis in this Regulatory Analysis (RA) to be subject to change in consideration of public comments.

Table 41 summarizes the regulatory changes that are expected to have no costs, and any qualitative benefits associated with them. The table also includes proposed changes that affect portions of the methodology for calculating the proposed base pilotage rates. While these proposed changes affect the calculation of the rate, the costs of these changes are captured in the changes to the total revenue as a result of the proposed rate change (summarized in Table 42).

TABLE 41—REGULATORY CHANGES WITH NO COST OR COSTS CAPTURED IN THE PROPOSED RATE CHANGE

Proposed changes	Description	Basis for no costs	Benefits
Mandatory change point on the Saint Lawrence River between Iroquois Lock and the area of Ogdensburg, NY.	Propose a mandatory change point on the Saint Lawrence River between Iroquois Lock and the area of Ogdensburg, NY that would become effective at the beginning of the 2017 shipping season.	The addition of the change point will not require capital expenses. The only cost is for the new pilots, who are accounted for in the base pilotage rates and training surcharges (Table 43).	Staffing additional pilots will help meet the increased demand for pilots to handle the additional assignments anticipated to be caused by the new change point. Additional pilots due to this change point should also serve to mitigate any potential delays and any potential fatigue that would occur from high pilotage demand without them.
Demand model	Determine pilot demand using seasonal demand instead of peak demand.	Pilot staffing costs are accounted for in the base pilotage rates (Table 43).	More accurate estimate of the number of assignments we reasonably expect pilots to be able to complete during the 9-month shipping season instead of during peak pilotage demand.
Cancellation charges	Propose amending the cancellation charge provision in § 401.120(b) to ensure it explicitly states that the minimum charge for a cancellation is 4 hours plus necessary and reasonable travel expenses for that travel that occurs.	Clarification of existing text and current practice.	—Clarifies the current language to eliminate any potential confusion on the minimum charge for cancellations. —Clarification of the minimum charge ensures the recognition of pilots as a limited resource and encourages efficient use.
Surcharge provision	Propose adding a requirement to the surcharge regulation in § 401.401 to stop collecting funds once the assigned value has been recovered for the season.	Ensures the goal surcharge amount built into the year's rulemaking will not be surpassed, and prevents additional costs on industry.	Prevents excess amounts from being recouped from industry via the following year's rule.
Audit deadline	Propose to adjust § 403.300(c) to move the audit deadline from April 1 to January 31 of each year.	Adjusts the deadline for audit submission, but does not add additional work.	Allows independent auditors to begin work sooner and complete the audit in time for the proposed rule. This would eliminate 1 year from the current 3-year lag in expenses being recognized in the rate.
Rename Return on Investment	Propose renaming Return on Investment as Working Capital Fund.	Clarifies the intent of the fund but does not change the method of calculation. Costs are included in the total revenues.	Clarifies the intent of this fund.
Set Pilot compensation for a 10-year period.	Propose the addition of new language in § 404.104 that would allow the Director to set compensation for a 10-year period to a compensation benchmark.	Pilot staffing costs are accounted for in the base pilotage rates.	Promotes target compensation stability and rate predictability.

The following table summarizes the affected population, costs, and benefits of the regulatory requirements that are expected to have costs associated with them.

TABLE 42—REGULATORY ECONOMIC IMPACTS OF RATE CHANGE

Proposed change	Description	Affected population	Costs	Benefits
Rate Changes	Under the Great Lakes Pilotage Act of 1960, the Coast Guard is required to review and adjust base pilotage rates annually.	Owners and operators of 230 vessels journeying the Great Lakes system annually.	$2,664,574	—New rates cover an association's necessary and reasonable operating expenses. —Provides fair compensation, adequate training, and sufficient rest periods for pilots. —Ensures the association makes enough money to fund future improvements.

The Coast Guard is required to review and adjust pilotage rates on the Great Lakes annually. See Parts III and IV of this preamble for detailed discussions of the Coast Guard's legal basis and purpose for this rulemaking and for background information on Great Lakes pilotage ratemaking. Based on our annual review for this proposed rulemaking, we are adjusting the pilotage rates for the 2017 shipping season to generate for each district sufficient revenues to reimburse its necessary and reasonable operating expenses, fairly compensate trained and rested pilots, and provide an appropriate working capital fund to use for improvements. The rate changes in this proposed rule would, if codified, lead to an increase in the cost per unit of service to shippers in all three districts, and result in an estimated annual cost increase to shippers.

In addition to the increase in payments that would be incurred by shippers in all three districts from the previous year as a result of the proposed rate changes, we propose authorizing a temporary surcharge to allow the pilotage associations to recover training expenses that would be incurred in 2017. For 2017, we anticipate that there will be no applicant pilots in District One, two applicant pilots in District Two, and seven applicant pilots in District Three. With a training cost of $150,000 per pilot, we estimate that Districts Two and Three will incur $300,000 and $1,050,000 in training expenses, respectively. These temporary surcharges would generate a combined $1,350,000 in revenue for the pilotage associations. Therefore, after accounting for the implementation of the temporary surcharges across all three districts, the payments made by shippers during the 2017 shipping season are estimated to be approximately $2,664,574 more than the payments that were estimated in 2016 (Table 43).[25]

A draft regulatory analysis follows.

The purpose of this rulemaking is to propose new base pilotage rates and surcharges for training. The last full ratemaking was concluded in 2016.

Affected Population

The shippers affected by these rate changes are those owners and operators of domestic vessels operating on register (employed in foreign trade) and owners and operators of foreign vessels on routes within the Great Lakes system. These owners and operators must have pilots or pilotage service as required by 46 U.S.C. 9302. There is no minimum tonnage limit or exemption for these vessels. The statute applies only to commercial vessels and not to recreational vessels. United States-flagged vessels not operating on register and Canadian ''lakers,'' which account for most commercial shipping on the Great Lakes, are not required to have pilots by 46 U.S.C. 9302. However, these U.S.- and Canadian-flagged lakers may voluntarily choose to have a pilot.

We used 2013–2015 billing information from the GLPMS to estimate the average annual number of vessels affected by the rate adjustment. The GLPMS tracks data related to managing and coordinating the dispatch of pilots on the Great Lakes and billing in accordance with the services. Using that period, we found that a total of 407 unique vessels used pilotage services over the years 2013 through 2015. These vessels had a pilot dispatched to the vessel and billing information was recorded in the GLPMS. The number of invoices per vessel ranged from a minimum of 1 invoice per year to a maximum of 65 invoices per year. Of these vessels, 383 were foreign-flagged vessels and 24 were U.S.-flagged. The U.S.-flagged vessels are not required to have a pilot per 46 U.S.C. 9302, but they can voluntarily choose to have a pilot. U.S.-flagged vessels may opt to have a pilot for varying reasons such as unfamiliarity with designated waters and ports, or for insurance purposes.

Vessel traffic is affected by numerous factors and varies from year to year. Therefore, rather than the total number of vessels over the time period, an average of the unique vessels using pilotage services from 2013 through 2015 is the best representation of vessels estimated to be affected by this rule's proposed rate. From the years 2013–2015, an average of 230 vessels used pilotage services annually.[26] On average, 219 of these vessels are foreign-flagged vessels and 11 are U.S.-flagged vessels that voluntarily opt into the pilotage service.

Costs

The rate changes resulting from the new methodology would generate costs on industry in the form of higher payments for shippers. We calculate the cost in two ways in this RA, as the total cost to shippers and as a percentage of vessel operating costs.

Total Cost to Shippers

We estimate the effect of the rate changes on shippers by comparing the total projected revenues needed to cover costs in 2016 with the total projected revenues to cover costs in 2017, including any temporary surcharges authorized by the Coast Guard. The Coast Guard sets pilotage rates so that the pilot associations receive enough revenue to cover their necessary and reasonable expenses. The shippers pay these rates when they have a pilot as required by 46 U.S.C. 9302. Therefore, the aggregate payments of the shippers to the pilot associations are equal to the projected necessary revenues for the pilot associations. The revenues each year represent the total costs that shippers must pay for pilotage services, and the change in the revenues from the previous year is the additional cost to shippers from this proposed rulemaking.

[25] Total payments across all three districts are equal to the increase in payments incurred by shippers as a result of the rate changes plus the temporary surcharges applied to traffic in Districts One, Two, and Three.

[26] Some vessels entered the Great Lakes multiple years, affecting the average number of unique vessels utilizing pilotage services in any given year.

The effect of the rate changes on shippers is estimated from the District pilotage projected revenues and the proposed surcharges described in Section V of this preamble. We estimate that for the 2017 shipping season, the projected revenue needed for all three Districts is $20,418,252. Temporary surcharges on traffic in District Two and District Three would be applied for the duration of the 2017 season in order for the pilotage associations to recover training expenses incurred for applicant pilots. We estimate that the pilotage associations require an additional $300,000 and $1,050,000 in revenue for applicant training expenses in Districts Two and Three, respectively. This is an additional cost to shippers of $1,350,000 during the 2017 shipping season. Adding the projected revenue to the proposed surcharges, we estimate the pilotage associations' total projected needed revenue for 2017 would be $21,768,252. The 2017 projected revenues for the districts are from Tables 11, 24, and 37 of this preamble. To estimate the additional cost to shippers from this proposed rule, we compare the 2017 total projected revenues to the 2016 projected revenues. Because the Coast Guard must review and prescribe rates for the Great Lakes Pilotage annually, the effects are estimated as a single year cost rather than annualized over a 10-year period. In the 2016 rulemaking,[27] we estimated the total projected revenue needed for 2016, including surcharges, is $19,103,678. This is the best approximation of 2016 revenues as, at the time of this publication, we do not have enough audited data available for the 2016 shipping season to revise these projections. Table 43 shows the revenue projections for 2016 and 2017 and details the additional cost increases to shippers by area and district as a result of the rate changes and temporary surcharges on traffic in Districts One, Two, and Three.

TABLE 43—EFFECT OF THE PROPOSED RULE BY AREA AND DISTRICT

[$U.S.; Non-discounted]

Area	Revenue needed in 2016	2016 Temporary surcharge	Total 2016 Projected revenue	Revenue needed in 2017	2017 Temporary surcharge	Total 2017 Projected revenue	Additional costs of this proposed rule
Total, District One	$5,354,945	$450,000	*$5,804,945*	$7,001,953	$0	*$7,001,953*	$1,197,008
Total, District Two	5,629,641	300,000	*5,929,641*	6,263,404	300,000	*6,563,404*	633,763
Total, District Three	6,469,092	900,000	*7,369,092*	7,152,895	1,050,000	*8,202,895*	833,803
System Total	17,453,678	1,650,000	*19,103,678*	20,418,252	1,350,000	*21,768,252*	2,664,574

* Values may not sum due to rounding.

The resulting difference between the projected revenue in 2016 and the projected revenue in 2017 is the annual change in payments from shippers to pilots as a result of the rate change imposed by this proposed rule. The effect of the rate change in this proposed rule on shippers varies by area and district. The rate changes, after taking into account the increase in pilotage rates and the addition of temporary surcharges, would lead to affected shippers operating in District One, District Two, and District Three experiencing an increase in payments of $1,197,008, $633,763, and $833,803, respectively, from the previous year. The overall adjustment in payments would be an increase in payments by shippers of approximately $2,664,574 across all three districts (a 14 percent increase over 2016). Because the Coast Guard must review and prescribe rates for Great Lakes Pilotage annually, the effects are estimated as single year costs rather than annualized over a 10-year period.

Table 44 shows the difference in revenue by component from 2016 to 2017.[28] Although per pilot compensation is unchanged from the 2016 final rule, the majority of the increase in revenue is due to the addition of 8 pilots that were authorized in the 2016 rule. These eight pilots are currently training this year and will become full-time working pilots at the beginning of the 2017 shipping season. These pilots will be compensated at the target compensation established in the 2016 final rule ($326,114 per pilot). The addition of these pilots to full working status accounts for $2,608,913 of the increase. The remaining amount is attributed to inflation of operating expenses, working capital fund, and differences in the surcharges from 2016.

TABLE 44—DIFFERENCE IN REVENUE BY COMPONENT

Revenue component	Revenue needed in 2016	Revenue needed in 2017	Difference (2017 revenue − 2016 revenue)
Adjusted Operating Expenses	$4,677,518	$4,927,636	$250,118
Total Target Pilot Compensation	12,066,226	14,675,139	2,608,913
Working Capital Fund	709,934	815,475	105,541
Total Revenue Needed, without Surcharge	*17,453,678*	*20,418,250*	*2,964,572*
Surcharge	1,650,000	1,350,000	−300,000
Total Revenue Needed, with Surcharge	19,103,678	21,768,252	2,664,574

* Values may not sum due to rounding.

[27] 2016 projected revenues are from the 2016 rulemaking, 81 FR 11937, Figures 31 and 32.

[28] The 2016 projected revenues are from the 2016 rulemaking, 81 FR 11934, Figures 24 and 28. The 2017 projected revenues are from Tables 11, 24, 37, and 40 of this NPRM.

Pilotage Rates as a Percentage of Vessel Operating Costs

To estimate the impact of U.S. pilotage costs on the foreign vessels affected by the rate adjustment, we looked at the pilotage costs as a percentage of a vessel's costs for an entire voyage. The part of the trip on the Great Lakes using a pilot is only a portion of the whole trip. The affected vessels are often traveling from a foreign port, and the days without a pilot on the total trip often exceed the days a pilot is needed.

To estimate this impact, we used 2013–2015 vessel arrival data from the Coast Guard's Ship Arrival Notification System and pilotage billing data from the GLPMS. A random sample of 50 arrivals was taken from GLPMS data. To estimate the impact of pilotage costs on the costs of an entire trip, we estimated the length of each one way trip. We used the vessel name and the date of the arrival to find the last port of call before entering the Great Lakes system. The date of the departure from this port was used as the start date of the trip. To find the end date of the trip we used GLPMS data to find all the pilotage charges associated with this vessel during this trip in the Great Lakes system. The end date of the one way trip was taken as the last pilotage charge before beginning the trip to exit the system. We estimated the total operating cost by multiplying the number of days for each by the 2015 average daily operating cost and added this to the total pilotage costs from GLPMS for each trip. In 2015 the average daily operating costs (excluding fixed costs) for Great Lakes bulkers and tankers ranged roughly from $5,191 to $7,879.[29] The total pilotage charges for each trip were updated to the 2016 rates using the average rate increases in the Great Lakes Pilotage Rates 2013–2016 Annual Review and Adjustments final rules.[30] The total updated pilotage charges for each trip were then divided by the total operating cost of the trip. We found that for a vessel's one-way trips, the U.S. pilotage costs could account for approximately 16.99 percent[31] of the total operating costs for a foreign vessel's voyage using 2016 rates.

We also estimated the impact of the rate increase in this proposed rule. We took the same 50 trips and updated the pilotage costs to the proposed 2017 rates (average increase of 17 percent). With this proposed rule's rates for 2017, pilotage costs are estimated to account for 19.11 percent of total operating costs, or a 2.2 percentage point increase[32] over the current cost. The total operating costs do not include the fixed costs of the vessels. If these costs are included in the total costs, the pilotage rates as a percentage of total costs would be lower.

Benefits

This proposed rule would allow the Coast Guard to meet the requirements in 46 U.S.C. 9303 to review the rates for pilotage services on the Great Lakes. The rate changes would promote safe, efficient, and reliable pilotage service on the Great Lakes by ensuring rates cover an association's operating expenses; provide fair pilot compensation, adequate training, and sufficient rest periods for pilots; and ensures the association makes enough money to fund future improvements. The rate changes will also help recruit and retain pilots, which will ensure a sufficient number of pilots to meet peak shipping demand, which would help reduce delays caused by pilot shortages.

The proposed amendment of the cancellation charge in § 401.120(b) would prevent confusion and help ensure that it explicitly states that the minimum charge for a cancellation is 4 hours. The proposed limitation to the surcharge regulation in § 401.401 would prevent excess amounts from being recouped via the following year's rule. The proposed adjustment to § 403.300(c) to require submission of an unqualified audit by January 31st of each year would allow our independent auditors to begin work much sooner and complete work on the third party audit in time to be used for the publication of the proposed rule that summer. This timeline would remove 1 year from the current 3-year gap between the actual expenses and their recoupment in the rate. The proposed changes to § 404.104 will promote target compensation stability and rate predictability. The proposed changes to §§ 403.300(c) and 404.104 should assist the pilot associations with recruitment and retention and help the various stakeholders forecast budgets and pricing.

B. Small Entities

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

For the proposed rule, we reviewed recent company size and ownership data for the vessels identified in GLPMS and we reviewed business revenue and size data provided by publicly available sources such as MANTA[33] and ReferenceUSA.[34] As described in Section VI.A of this preamble, Regulatory Planning and Review, we found that a total of 407 unique vessels used pilotage services over the years 2013–2015. These vessels are owned by 119 entities. We found that of the 119 entities that own or operate vessels engaged in trade on the Great Lakes affected by this proposed rule, 104 are foreign entities that operate primarily outside of the United States. The remaining 15 entities are U.S. entities. We compared the revenue and employee data found in the company search to the Small Business Administration's (SBA) Table of Small Business Size Standards[35] to determine how many of these companies are small entities. Table 45 shows the NAICS codes of the U.S. entities and the small entity standard size established by the Small Business Administration.

[29] *''Ship operating costs: Current and future trends,''* Richard Grenier, Moore Stephens LLP, December 2015. The 2015 weighted average operating cost is estimated at $5,191 for a handysize bulker, $5,771 for a handymax bulker, and $7,879 for a product tanker. These costs include only the costs of operating and do not include any fixed costs of the vessels (such as amortization of vessel construction costs). The operating costs include crew wages, provisions, other crew costs, lubricating oils and store costs, spares, repair and maintenance, P&I insurance, marine insurance, registration costs, management fees, and sundry expenses.

[30] The average percentage changes in the rates for 2013–2016, were 1.87%, 2.5%, 10%, and 12%, respectively.

[31] For the random sample of 50 arrivals, the average of the pilotage costs as a percentage of the total operating costs was 16.9%. The percentages ranged from a low of 3.2% to a high of 35.2%.

[32] 19.1% of total operating costs in 2017—16.9% of total operating costs in 2016 = 2.2% incremental increase of pilotage costs as a percentage of total operating costs.

[33] See *http://www.manta.com/.*

[34] See *http://resource.referenceusa.com/.*

[35] Source: *https://www.sba.gov/contracting/getting-started-contractor/make-sure-you-meet-sba-size-standards/table-small-business-size-standards.* SBA has established a Table of Small Business Size Standards, which is matched to NAICS industries. A size standard, which is usually stated in number of employees or average annual receipts (''revenues''), represents the largest size that a business (including its subsidiaries and affiliates) may be considered in order to remain classified as a small business for SBA and Federal contracting programs.

TABLE 45—NAICS CODES AND SMALL ENTITIES SIZE STANDARDS

NAICS	Description	Small business size standard
238910	Site Preparation Contractors	$15 million.
441222	Boat Dealers	$32.5 million.
483113	Coastal & Great Lakes Freight Transportation	750 employees.
483211	Inland Water Freight Transportation	750 employees.
483212	Inland Water Passenger Transportation	500 employees.
487210	Scenic & Sightseeing Transportation, Water	$7.5 million.
488320	Marine Cargo Handling	$38.5 million.
488330	Navigational Services to Shipping	$38.5 million.
488510	Freight Transportation Arrangement	$15 million.

The entities all exceed the SBA's small business standards for small businesses. Further, these U.S. entities operate U.S.-flagged vessels and are not required to have pilots as required by 46 U.S.C. 9302.

In addition to the owners and operators of vessels affected by this proposed rule, there are three U.S. entities affected by the proposed rule that receive revenue from pilotage services. These are the three pilot associations that provide and manage pilotage services within the Great Lakes districts. Two of the associations operate as partnerships and one operates as a corporation. These associations are designated with the same NAICS industry classification and small-entity size standards described above, but they have fewer than 500 employees; combined, they have approximately 65 total employees. We expect no adverse effect to these entities from this proposed rule because all associations receive enough revenue to balance the projected expenses associated with the projected number of bridge hours and pilots.

We did not find any small not-for-profit organizations that are independently owned and operated and are not dominant in their fields. We did not find any small governmental jurisdictions with populations of fewer than 50,000 people. Based on this analysis, we found this proposed rulemaking, if promulgated, would not affect a substantial number of small entities.

Therefore, the Coast Guard certifies under 5 U.S.C. 605(b) that this proposed rule would not have a significant economic impact on a substantial number of small entities. If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this proposed rule would have a significant economic impact on it, please submit a comment to the Docket Management Facility at the address under **ADDRESSES**. In your comment, explain why you think it qualifies, as well as how and to what degree this proposed rule would economically affect it.

C. 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 proposed rule so that they can better evaluate its effects on them and participate in the rulemaking. If the proposed rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please consult Mr. Todd Haviland, Director, Great Lakes Pilotage, Commandant (CG–WWM–2), Coast Guard; telephone 202–372–2037, email *Todd.A.Haviland@uscg.mil,* or fax 202–372–1914. 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.

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).

D. Collection of Information

This proposed rule would call for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). This proposed rule would not change the burden in the collection currently approved by OMB under OMB Control Number 1625–0086, Great Lakes Pilotage Methodology.

E. 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 have determined that it is consistent with the fundamental federalism principles and preemption requirements described in Executive Order 13132. Our analysis follows.

Congress directed the Coast Guard to establish ''rates and charges for pilotage services.'' 46 U.S.C. 9303(f). This regulation is issued pursuant to that statute and is preemptive of state law as specified in 46 U.S.C. 9306. Under 46 U.S.C. 9306, a ''State or political subdivision of a State may not regulate or impose any requirement on pilotage on the Great Lakes.'' As a result, States or local governments are expressly prohibited from regulating within this category. Therefore, the rule is consistent with the principles of federalism and preemption requirements in Executive Order 13132.

While it is well settled that States may not regulate in categories in which Congress intended the Coast Guard to be the sole source of a vessel's obligations, the Coast Guard recognizes the key role that State and local governments may have in making regulatory determinations. Additionally, for rules with implications and preemptive effect, Executive Order 13132 specifically directs agencies to consult with State and local governments during the rulemaking process. If you believe this rule has implications for federalism under Executive Order 13132, please contact the person listed in the **FOR FURTHER INFORMATION** section of this preamble.

F. 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 discuss the effects of this proposed rule elsewhere in this preamble.

G. 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.

H. 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.

I. Protection of Children

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

J. 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.

K. Energy Effects

We have analyzed this proposed rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a ''significant energy action'' under that Executive 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.

L. Technical Standards

The National Technology Transfer and Advancement Act (15 U.S.C. 272, note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through the OMB, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.,* specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) that are developed or adopted by voluntary consensus standards bodies. This proposed rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

M. 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 (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. A preliminary environmental analysis checklist supporting this determination is available in the docket where indicated under the ''Public Participation and Request for Comments'' section of this preamble. This proposed rule is categorically excluded under section 2.B.2, and figure 2–1, paragraph 34(a) of the Instruction. Paragraph 34(a) pertains to minor regulatory changes that are editorial or procedural in nature. This proposed rule adjusts rates in accordance with applicable statutory and regulatory mandates. We seek any comments or information that may lead to the discovery of a significant environmental impact from this proposed rule.

List of Subjects

46 CFR Part 401

Administrative practice and procedure, Great Lakes, Navigation (water), Penalties, Reporting and recordkeeping requirements, Seamen.

46 CFR Part 403

Great Lakes, Navigation (water), Reporting and recordkeeping requirements, Seamen, Uniform System of Accounts.

46 CFR Part 404

Great Lakes, Navigation (water), Seamen.

For the reasons discussed in the preamble, the Coast Guard proposes to amend 46 CFR parts 401, 403, and 404 as follows:

Title 46—Shipping

PART 401—GREAT LAKES PILOTAGE REGULATIONS

■ 1. The authority citation for part 401 continues to read as follows:

Authority: 46 U.S.C. 2103, 2104(a), 6101, 7701, 8105, 9303, 9304; Department of Homeland Security Delegation No. 0170.1(II)(92.a), (92.d), (92.e), (92.f).

■ 2. Revise § 401.401 to read as follows:

§ 401.401 Surcharges.

To facilitate safe, efficient, and reliable pilotage, and for good cause, the Director may authorize surcharges on any rate or charge authorized by this subpart. Surcharges must be proposed for prior public comment and may not be authorized for more than 1 year. Once the approved amount has been received, the pilot association is not authorized to collect any additional funds under the surcharge authority and must cease such collections for the remainder of that shipping season.

■ 3. Revise § 401.405(a) to read as follows:

§ 401.405 Pilotage rates and charges.

(a) The hourly rate for pilotage service on—

(1) The St. Lawrence River is $757;

(2) Lake Ontario is $522;

(3) Lake Erie is $537;

(4) The navigable waters from Southeast Shoal to Port Huron, MI is $720;

(5) Lakes Huron, Michigan, and Superior is $280; and

(6) The St. Mary's River is $661.

* * * * *

■ 4. Revise § 401.420(b) to read as follows:

§ 401.420 Cancellation, delay, or interruption in rendition of services.

* * * * *

(b) When an order for a U.S. pilot's service is cancelled, the vessel can be charged for the pilot's reasonable travel expenses for travel that occurred to and from the pilot's base, and the greater of—

(1) Four hours; or

(2) The time of cancellation and the time of the pilot's scheduled arrival, or the pilot's reporting for duty as ordered, whichever is later.

* * * * *

■ 5. Amend § 401.450 as follows:
■ a. Redesignate paragraphs (b) through (j) as paragraphs (c) through (k), respectively; and
■ b. Add new paragraph (b) to read as follows:

§ 401.450 Pilotage change points.

* * * * *

(b) The Saint Lawrence River between Iroquois Lock and the area of Ogdensburg, NY beginning January 31, 2017;

* * * * *

PART 403—GREAT LAKES PILOTAGE UNIFORM ACCOUNTING SYSTEM

■ 6. The authority citation for part 403 continues to read as follows:

Authority: 46 U.S.C. 2103, 2104(a), 9303, 9304; Department of Homeland Security Delegation No. 0170.1(II)(92.a), (92.f).

■ 7. Revise § 403.300(c) to read as follows:

§ 403.300 Financial reporting requirements.

* * * * *

(c) By January 24 of each year, each association must obtain an unqualified audit report for the preceding year that is audited and prepared in accordance with generally accepted accounting principles by an independent certified public accountant. Each association must electronically submit that report with any associated settlement statements and all accompanying notes to the Director by January 31.

PART 404—GREAT LAKES PILOTAGE RATEMAKING

■ 8. The authority citation for part 404 continues to read as follows:

Authority: 46 U.S.C. 2103, 2104(a), 9303, 9304; Department of Homeland Security Delegation No. 0170.1(II)(92.a), (92.f).

■ 9. Amend § 404.103 as follows:
■ a. In paragraph (a), following the words ''dividing each area's'' remove the word ''peak'' and add, in its place, the word ''seasonal''; and
■ b. Revise paragraph (b) to read as follows:

§ 404.103 Ratemaking step 3: Determine number of pilots needed.

* * * * *

(b) Pilotage demand and the base seasonal work standard are based on available and reliable data, as so deemed by the Director, for a multi-year base period. The multi-year period is the 10 most recent full shipping seasons, and the data source is a system approved under 46 CFR 403.300. Where such data are not available or reliable, the Director also may use data, from additional past full shipping seasons or other sources, that the Director determines to be available and reliable.

* * * * *

■ 10. Revise § 404.104 to read as follows:

§ 404.104 Ratemaking step 4: Determine target pilot compensation benchmark.

At least once every 10 years, the Director will set a base target pilot compensation benchmark using the most relevant available non-proprietary information. In years in which a base compensation benchmark is not set, target pilot compensation will be adjusted for inflation using the CPI for the Midwest region or a published predetermined amount. The Director determines each pilotage association's total target pilot compensation by multiplying individual target pilot compensation by the number of pilots projected under § 404.103(d).

§ 404.105 [Amended]

■ 11. In § 404.105, remove the words ''return on investment'' and add, in their place, the words ''working capital fund.''

Dated: October 13, 2016.

Michael D. Emerson,
Director, Marine Transportation Systems, U.S. Coast Guard.

[FR Doc. 2016–25254 Filed 10–18–16; 8:45 am]
BILLING CODE 9110–04–P

Notices

Federal Register

Vol. 81, No. 202

Wednesday, October 19, 2016

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

October 11, 2016.

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 are requested regarding (1) 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; (2) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Comments regarding this information collection received by November 18, 2016 will be considered. Written comments should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), New Executive Office Building, 725 17th Street NW., Washington, DC 20502. Commenters are encouraged to submit their comments to OMB via email to: *OIRA_Submission@OMB.EOP.GOV* or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Copies of the submission(s) may be obtained by calling (202) 720–8958.

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.

Animal and Plant Health Inspection Service

Title: Specimen Submission.

OMB Control Number: 0579–0090.

Summary of Collection: The Animal Health Protection Act of 2002 (AHPA) is the primary Federal law governing the protection of animal health. The law gives the Secretary of Agriculture broad authority to detect, control, or eradicate pests or diseases of livestock or poultry. Disease prevention is the most effective method for maintaining a healthy animal population and for enhancing the United States' ability to globally compete in the trade of animals and animal products. VS Forms 10–4 and 10–4A, Specimen Submission are critical components of APHIS' disease surveillance mission. They are used routinely when specimens (such as blood, milk, tissue, or urine) from any animal (including cattle, swine, sheep, goats, horses, and poultry) are submitted to APHIS' National Veterinary Services Laboratories (NVSL) for disease testing. VS Form 5–38, Parasite Submission form, is completed by State veterinarians or other State representatives, accredited veterinarians, private laboratories, research institutions, and owners or producer.

Need and Use of the Information: Using APHIS form VS 10–4, State or Federal veterinarians, accredited veterinarians, or other State and Federal representatives will document the collection and submission of specimens for laboratory analysis. The form identifies the individual animal from which the specimen is taken as well as the animal's herd or flock; the type of specimen submitted, and the purpose of submitting the specimen. The National Tick Surveillance Program is based on the information submitted on VS Form 5–38, in addition to critical surveillance information needed for the Cattle Fever Tick Eradication Program. This information identifies the individual submitting the tick samples. Without the information APHIS would not have the critical information necessary to effectively operate a disease surveillance program.

Description of Respondents: State, Local or Tribal Government; Business or other for-profit.

Number of Respondents: 5,240.

Frequency of Responses: Reporting: On occasion.

Total Burden Hours: 8,716.

Ruth Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. 2016–24864 Filed 10–18–16; 8:45 am]

BILLING CODE 3410–34–P

APPALACHIAN STATES LOW-LEVEL RADIOACTIVE WASTE COMMISSION

Annual Meeting

TIME AND DATE: 10:00 a.m.–12:30 p.m. October 28, 2016.

PLACE: Harrisburg Hilton and Towers, One North Second Street, Harrisburg, PA 17101.

STATUS: The meeting will be open to the public.

MATTERS TO BE CONSIDERED:

Portions Open to the Public: The primary purpose of this meeting is to (1) Review the independent auditors' report of the Commission's financial statements for fiscal year 2015–2016; (2) Review the Low-Level Radioactive Waste (LLRW) generation information for 2015; (3) Consider a proposed budget for fiscal year 2017–2018; (4) Review recent regional and national developments regarding LLRW management and disposal; and (5) Elect the Commission's Officers.

Portions Closed to the Public: Executive Session, if deemed necessary, will be announced at the meeting.

CONTACT PERSON FOR MORE INFORMATION: Rich Janati, Administrator of the Commission, at 717–787–2163.

Rich Janati,

Administrator, Appalachian Compact Commission.

[FR Doc. 2016–25259 Filed 10–18–16; 8:45 am]

BILLING CODE P

COMMISSION ON CIVIL RIGHTS

Notice of Cancellation of Public Meeting of the Maine Advisory Committee

AGENCY: Commission on Civil Rights.

ACTION: Notice; cancellation of meeting.

SUMMARY: The U.S. Commission on Civil Rights published a document in the **Federal Register** of September 16, 2016, concerning the announcement of a meeting on October 18, 2016. That meeting has been cancelled.

FOR FURTHER INFORMATION CONTACT: Barbara de la Viez, 202–376–7533.

Correction

In the **Federal Register** of September 16, 2016, in FR Doc. 2016–22334, correct the **DATES** caption to read:

DATES: Tuesday, November 15, 2016; Tuesday, December 20, 2016; Tuesday, January, 17, 2017 and Tuesday, February 21, 2017.

Dated: October 13, 2016.

David Mussatt,

Supervisory Chief, Regional Programs Unit.

[FR Doc. 2016–25219 Filed 10–18–16; 8:45 am]

BILLING CODE 6335–01–P

DEPARTMENT OF COMMERCE

Census Bureau

Proposed Information Collection; Comment Request; 2018 End-to-End Census Test—Address Canvassing Operation

AGENCY: U.S. Census Bureau, 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: To ensure consideration, written comments must be submitted on or before December 19, 2016.

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(s) and instructions should be directed to Robin A. Pennington, Census Bureau, HQ–2K281N, Washington, DC 20233; (301) 763–8132 (or via email at *robin.a.pennington@census.gov*).

SUPPLEMENTARY INFORMATION:

I. Abstract

During the years preceding the 2020 Census, the Census Bureau will pursue its commitment to reduce the costs of conducting a decennial census, while maintaining our commitment to quality. In the 2018 Fiscal Year, the Census Bureau will be performing a 2018 End-to-End Census Test. This last major test before the 2020 Census has the stated purpose (1) to test and validate 2020 Census operations, procedures, systems, and field infrastructure together to ensure proper integration and conformance with functional and non-functional requirements, and (2) to produce a prototype of geographic and data products.

The Address Canvassing operation, beginning in the summer of 2017, is the first operation in the 2018 End-to-End Census Test. The purpose of the Address Canvassing operation is (1) to deliver a complete and accurate address list and spatial database for enumeration and tabulation, and (2) to determine the type and address characteristics for each living quarter.

The following objectives are crucial to a successful Address Canvassing operation:

- Test the listing and mapping capabilities required by In-Field Address Canvassing.
- Validate the creation of In-Field Address Canvassing workload by In-Office Address Canvassing.
- Conduct a listing quality control operation during In-Field Address Canvassing.

Background

For the 2010 Census, Address Canvassing field staff, referred to as listers, traversed almost every block in the nation to compare what they observed on the ground to the contents of the Census Bureau's address list. Listers verified or corrected addresses that were on the list, added new addresses to the list, and deleted addresses that no longer existed. Listers also collected map spot locations (*i.e.,* Global Positioning System coordinates) for each structure and added new streets.

In addition to Address Canvassing, the Census Bureau conducted the Group Quarters Validation (GQV) operation after the Address Canvassing operation and prior to enumeration for the 2010 Census. The purpose of the GQV operation was to improve the Group Quarters (GQ) frame. A GQ is a place where people live or stay, in a group living arrangement that is owned or managed by an entity or organization providing housing and/or services for the residents. This is not a typical household-type living arrangement, and residency is commonly restricted to those receiving specific services. Types of GQs include such places as college residence halls, residential treatment centers, skilled-nursing facilities, group homes, military barracks, correctional facilities, and workers' dormitories.

For the 2010 Census GQV operation, field staff visited a specific address to determine if it was a GQ, housing unit, transitory location (TL), a non-residential unit, or if it was nonexistent. If the address was a GQ or TL, the lister collected additional information needed for subsequent enumeration operations such as contact name. In support of a more efficient census design strategy, the 2020 Census will not conduct a separate operation to validate GQ information. Instead, the 2020 Census will validate GQ information during the Address Canvassing operation. This includes the collection of a contact name and phone number, as well as data about the type of GQ and the number of potential residents, which will be needed in enumeration operations during the census. The Address Canvassing Operation component of the 2018 End-to-End Census Test will be a test of the Address Canvassing field procedures planned for the 2020 Census Address Canvassing, as well as a validation study of the In-Office Address Canvassing that is planned. These processes are described in more detail below.

2020 Census Address Canvassing: In-Office Address Canvassing

In-Office Address Canvassing is the process of using empirical geographic evidence (*e.g.,* imagery, comparison of the Census Bureau's address list to partner-provided lists) to assess the current address list and make changes where necessary. This component detects and captures change from high quality administrative and third-party data, reducing the In-Field Address Canvassing workload.

In-Office Address Canvassing starts with Interactive Review (IR), which is an imagery-based review to assess the extent to which the number of addresses—both housing units and GQs—in the census address list are consistent with the number of addresses visible in current imagery. It also assesses the changes between the current imagery and an older vintage of imagery (around the time of 2010 Census Address Canvassing).

Results from IR inform the Active Block Resolution (ABR) process, which seeks to research and update areas identified with growth, decline, undercoverage of addresses, or overcoverage of addresses from the comparison of the two different vintages of imagery and counts of addresses in the Master Address File (MAF) maintained by the Census Bureau. In addition to using the results from IR, the ABR process uses other data sources to resolve the identified issues in the office and to update the MAF rather than sending these areas to In-Field Address Canvassing. The other data sources include local Geographic Information Systems (GIS) viewers available online, parcel data, local files acquired through the U.S. Census Bureau's Geographic Support System (GSS) program, and commercial data. Areas not resolved in the office become the universe of geographic areas worked during In-Field Address Canvassing.

2020 Census Address Canvassing: In-Field Address Canvassing

In-Field Address Canvassing is the process of having listers visit specific geographic areas to identify every place where people could live or stay, and then to compare what they see on the ground to the existing census address list and either verify or correct the address and location information. Listers also classify each living quarter (LQ) as a housing unit or GQ. Listers will knock on doors at every structure in an attempt to locate LQs. If someone answers, the lister will provide a Confidentiality Notice and ask about the address in order to verify or update the information, as appropriate. The lister will then ask if there are any additional LQs in the structure or on the property. If there are additional LQs, the lister will collect/update that information, as appropriate. If the lister does not find anyone at home, they will update the address list as best they can by observation.

II. Method of Collection

Universe

The 2018 End-to-End Census Test occurs in three sites within the continental United States: Pierce County, Washington, Providence County, Rhode Island, and Bluefield-Beckley-Oak Hill, West Virginia area. For the In-Field Address Canvassing data collection within the 2018 End-to-End Census Test, listers will knock on every door in their assigned blocks to ask residents about their living quarters. However, the Census Bureau expects that they would make contact with residents (*i.e.,* someone is at home) at most 25 percent of the time.

In-Field Address Canvassing

In-Field Address Canvassing will hire new field listers, who are primarily inexperienced with census listing activities. Listers will receive work assignments grouped by geography and in close proximity to the lister's residence (whenever possible). Field staff will use the Enterprise Census and Survey Enabling (ECaSE) platform's Listing and Mapping software.

Current Design Strategy

In order to assess and accomplish the stated objectives described above, In-Office Address Canvassing clerical staff will work every block in the three sites. The In-Office Address Canvassing process will identify blocks that create the universe of blocks for In-Field Address Canvassing. The Census Bureau estimates that the 2020 Census In-Field Address Canvassing workload will be approximately 25 percent.

III. Data

OMB Control Number: 0607–XXXX.

Form Number(s): NA.

Type of Review: Regular Submission.

Affected Public: Households/Individuals.

Estimated Number of Respondents: 43,965 Households.

Estimated Time per Response: 5 min/Household.

Estimated Total Annual Burden Hours: 3,664 hours.

Estimated Total Annual Cost to Public: The only cost to respondents is that of their time to respond.

Respondent's Obligation: Mandatory.

Legal Authority: Title 13 United States Code, Sections 141 and 193.

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.

Sheleen Dumas,

PRA Departmental Lead, Office of the Chief Information Officer.

[FR Doc. 2016–25253 Filed 10–18–16; 8:45 am]

BILLING CODE 3510–07–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[S–134–2016]

Foreign-Trade Zone 73—Baltimore, Maryland, Area; Application for Subzone; Jos. A. Bank Manufacturing Company; Hampstead and Eldersburg, Maryland

An application has been submitted to the Foreign-Trade Zones (FTZ) Board by the Maryland Aviation Administration, on behalf of the Maryland Department of Transportation, grantee of FTZ 73, requesting subzone status for the facilities of Jos. A. Bank Manufacturing Company, located in Hampstead and Eldersburg, Maryland. The application was submitted pursuant to the provisions of the Foreign-Trade Zones Act, as amended (19 U.S.C. 81a–81u), and the regulations of the FTZ Board (15 CFR part 400). It was formally docketed on October 13, 2016.

The proposed subzone would consist of the following sites: *Site 1* (38.5 acres) 500 Hanover Pike, Hampstead; *Site 2* (13.5 acres) 626 Hanover Pike, Hampstead; and, *Site 3* (3.2 acres) 1332 Londontown Blvd., Eldersburg. The proposed subzone would be subject to the existing activation limit of FTZ 73. No authorization for production activity has been requested at this time.

In accordance with the FTZ Board's regulations, Kathleen Boyce of the FTZ Staff is designated examiner to review the application and make recommendations to the Executive Secretary.

Public comment is invited from interested parties. Submissions shall be addressed to the FTZ Board's Executive Secretary at the address below. The closing period for their receipt is November 28, 2016. Rebuttal comments in response to material submitted during the foregoing period may be submitted during the subsequent 15-day period to December 13, 2016.

A copy of the application will be available for public inspection at the Office of the Executive Secretary, Foreign-Trade Zones Board, Room 21013, U.S. Department of Commerce, 1401 Constitution Avenue NW., Washington, DC 20230–0002, and in the

''Reading Room'' section of the FTZ Board's Web site, which is accessible via *www.trade.gov/ftz.*

For further information, contact Kathleen Boyce at *Kathleen.Boyce@trade.gov* or (202) 482–1346.

Dated: October 13, 2016.

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2016–25311 Filed 10–18–16; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[B–69–2016]

Foreign-Trade Zone (FTZ) 27—Boston, Massachusetts; Notification of Proposed Production Activity; Claremont Flock, a Division of Spectro Coating Corporation (Textile Flock); Leominster, Massachusetts

Claremont Flock, a Division of Spectro Coating Corporation (Claremont Flock), submitted a notification of proposed production activity to the FTZ Board for its facility in Leominster, Massachusetts within Subzone 27N. The notification conforming to the requirements of the regulations of the FTZ Board (15 CFR 400.22) was received on October 13, 2016.

Claremont Flock already has authority to produce textile flock using acrylic and rayon tow within Subzone 27N. The current request would add polyester tow as a material/component to the scope of authority. Pursuant to 15 CFR 400.14(b), additional FTZ authority would be limited to the specific foreign-status material/component described in the submitted notification (as described below) and subsequently authorized by the FTZ Board.

Production under FTZ procedures could exempt Claremont Flock from customs duty payments on polyester tow used in export production. On its domestic sales, Claremont Flock would be able to choose the duty rate during customs entry procedures that applies to textile flock (duty-free) for polyester tow (duty rate 7.5%). Customs duties also could possibly be deferred or reduced on foreign-status production equipment.

Public comment is invited from interested parties. Submissions shall be addressed to the Board's Executive Secretary at the address below. The closing period for their receipt is November 28, 2016.

A copy of the notification will be available for public inspection at the Office of the Executive Secretary, Foreign-Trade Zones Board, Room 21013, U.S. Department of Commerce, 1401 Constitution Avenue NW., Washington, DC 20230–0002, and in the ''Reading Room'' section of the Board's Web site, which is accessible via *www.trade.gov/ftz.*

For further information, contact Elizabeth Whiteman at *Elizabeth.Whiteman@trade.gov* or (202) 482–0473.

Dated: October 14, 2016.

Elizabeth Whiteman,

Acting Executive Secretary.

[FR Doc. 2016–25312 Filed 10–18–16; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

Renewal of Agency Information Collection for: Procedure for Parties on the Entity List To Request Removal or Modification of Their Listing

AGENCY: Bureau of Industry and Security, Department of Commerce.

ACTION: Notice of request for comments.

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 December 19, 2016.

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 Mark Crace, BIS ICB Liaison, (202) 482–8093, *Mark.Crace@bis.doc.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

This collection is needed to provide a procedure for persons or organizations listed on the Entity List to request removal or modification of the entry that affects them. The Entity List appears at 15 CFR part 744, Supp. No. 1. The Entity List is used to inform the public of certain parties whose presence in a transaction that is subject to the Export Administration Regulations (15 CFR parts 730–799) requires a license from the Bureau of Industry and Security (BIS). Such requests would be reviewed by the Departments of Commerce, State, and Defense, and Energy and Treasury as appropriate. The interagency decision, as communicated to the requesting entity by BIS, would be the final agency action on such a request. This is a voluntary collection.

II. 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.

III. Data

OMB Control Number: 0694–0134.

Title: Procedure for Parties on the Entity List to Request Removal or Modification of Their Listing.

Brief Description of Collection: This collection provides a procedure for persons or organizations listed on the Entity List to request removal or modification of the entry that affects them.

Type of Review: Extension without change of a currently approved collection.

Respondents: Business or other for-profit organizations.

Estimated Number of Respondents: 5.

Estimated Time per Response: 3 hours.

Estimated Total Annual Burden Hours: 15.

Estimated Total Annual Cost to Public: $0.

Sheleen Dumas,

PRA Departmental Lead, Office of the Chief Information Officer.

[FR Doc. 2016–25251 Filed 10–18–16; 8:45 am]

BILLING CODE 3510–33–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–952]

Narrow Woven Ribbons With Woven Selvedge From the People's Republic of China: Final Results of Antidumping Duty Administrative Review

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: On June 14, 2016, the Department of Commerce (the ''Department'') published the preliminary results of the administrative review of the antidumping duty order on narrow woven ribbons with woven selvedge (''NWR'') from the People's Republic of China (''PRC''). The period of review (''POR'') is September 1, 2014, through August 31, 2015. The review covers one company, Yama Ribbons Co., Ltd. (''Yama Ribbons''). We invited interested parties to comment on our preliminary results. None were received. Accordingly, for the final results, we continue to find that Yama Ribbons did not have reviewable transactions during the POR.

DATES: Effective October 19, 2016.

FOR FURTHER INFORMATION CONTACT: Aleksandras Nakutis or Karine Gziryan, AD/CVD Operations, Office IV, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–3147 and (202) 482–4081, respectively.

SUPPLEMENTARY INFORMATION:

Background

On June 14, 2016, the Department published the *Preliminary Results* [1] in accordance with section 751(a)(1)(B) of the Tariff Act of 1930, as amended (''the Act''). This review covers one company, Yama Ribbons Co., Ltd. (''Yama Ribbons''), for the POR of September 1, 2014, through August 31, 2015.[2] The Department determined in the underlying investigation that merchandise produced and exported by Yama Ribbons is excluded from the antidumping duty order.[3] However, merchandise which Yama Ribbons exports but did not produce, as well as merchandise Yama Ribbons produces but is exported by another company, remain subject to the *Order.* We invited interested parties to submit comments on the *Preliminary Results,* but no comments were received. The Department has conducted this review in accordance with section 751(a)(1)(B) of the Act.

Scope of the Order

The products covered by the order are narrow woven ribbons with woven selvedge. The merchandise subject to the order is classifiable under the Harmonized Tariff Schedule of the United States (''HTSUS'') subheadings 5806.32.1020; 5806.32.1030; 5806.32.1050 and 5806.32.1060. Subject merchandise also may enter under HTSUS subheadings 5806.31.00; 5806.32.20; 5806.39.20; 5806.39.30; 5808.90.00; 5810.91.00; 5810.99.90; 5903.90.10; 5903.90.25; 5907.00.60; and 5907.00.80 and under statistical categories 5806.32.1080; 5810.92.9080; 5903.90.3090; and 6307.90.9889. Although the HTSUS subheadings are provided for convenience and customs purposes, the written product description in the *Order* remains dispositive.[4]

Final Determination of No Shipments

As noted the in *Preliminary Results,* Yama Ribbons had no reviewable transactions of merchandise during the POR.[5] As there are no changes from, or comments upon, the *Preliminary Results,* the Department finds that there is no reason to modify its analysis. Therefore, we continue to find that Yama Ribbons did not have reviewable transactions during the POR.

Assessment

The Department has determined, and U.S. Customs and Border Protection (''CBP'') shall assess, antidumping duties on all appropriate entries covered by this review, in accordance with 19 CFR 351.212(b)(1).[6] The Department intends to issue assessment instructions to CBP 15 days after the date of publication of these final results of review. Pursuant to the Department's practice in non-market economy cases, because Yama Ribbons had no shipments of the subject merchandise during the POR, the Department intends to instruct CBP to liquidate entries of subject merchandise that entered under Yama Ribbons' rate at the PRC-wide rate of 247.26 percent.[7]

Cash Deposit Requirements

The following cash deposit requirements will be effective upon publication of the final results of this administrative review for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date of the final results of review, as provided by section 751(a)(2)(C) of the Act: (1) For exports of merchandise made by Yama Ribbons of merchandise it did not produce, the cash deposit rate is the PRC-wide rate of 247.26 percent, as stated in the *Order;* [8] (2) for previously investigated or reviewed PRC and non-PRC exporters which are not under review in this segment of the proceeding but which have been determined by Commerce to have a separate rate, the cash deposit rate will continue to be the exporter-specific rate published for the most recent 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 of 247.26 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(s) that supplied that non-PRC exporter. These deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers Regarding the Reimbursement of Duties

This notice serves as a final 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 POR. Failure to comply with this requirement could result in the Department's presumption that reimbursement of antidumping duties has occurred and the subsequent assessment of doubled antidumping duties.

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[1] *See Narrow Woven Ribbons with Woven Selvedge From the People's Republic of China: Preliminary Results of Antidumping Administrative Review; 2014–2015,* 81 FR 38671 (June 14, 2016) (''*Preliminary Results*'').

[2] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 80 FR 69193 (November 9, 2015) (''*Initiation Notice*'').

[3] *See Notice of Antidumping Duty Orders: Narrow Woven Ribbons With Woven Selvedge From Taiwan and the People's Republic of China: Antidumping Duty Orders,* 75 FR 53632 (September 1, 2010), as amended in *Narrow Woven Ribbons With Woven Selvedge From Taiwan and the People's Republic of China: Amended Antidumping Duty Orders,* 75 FR 56982 (September 17, 2010) (''*Order*'').

[4] For a complete description of the scope of the order, please *see* ''Decision Memorandum for Preliminary Results of Antidumping Duty Administrative Review: Narrow Woven Ribbons With Woven Selvedge from the People's Republic of China,'' from Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, to Paul Piquado, Assistant Secretary for Enforcement and Compliance (''Preliminary Decision Memorandum''), dated June 7, 2016.

[5] *See* Preliminary Decision Memorandum at 5.

[6] *See* 19 CFR 351.212(b)(1).

[7] For a full discussion of this practice, *see Non-Market Economy Antidumping Proceedings: Assessment of Antidumping Duties,* 76 FR 65694 (October 24, 2011).

[8] *See Order.*

Notification to Interested Parties

This notice also serves as a reminder to parties subject to the administrative protective order (''APO'') of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely notification of the destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

We are issuing and publishing these results and this notice in accordance with sections 751(a)(1) and 777(i) of the Act.

Dated: October 12, 2016.

Paul Piquado,

Assistant Secretary for Enforcement and Compliance.

[FR Doc. 2016–25306 Filed 10–18–16; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XE972

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 Enforcement Committee and 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, November 3, 2016, beginning at 9:30 a.m.

ADDRESSES: The meeting will be held at the Sheraton Providence Airport, 1850 Post Road, Warwick, RI 02886; phone: (401) 738–4000.

Council address: New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950.

FOR FURTHER INFORMATION CONTACT: Thomas A. Nies, Executive Director, New England Fishery Management Council; telephone: (978) 465–0492.

SUPPLEMENTARY INFORMATION:

Agenda

The Enforcement Committee will meet jointly with its Advisory Panel to discuss Cod-end certification. Also on the agenda is the review of Atlantic herring closure proposals (inshore and haddock protection). They will receive a presentation by the Anthropocene Institute. The Committee only will then meet in closed session to select new advisors. Other business will be discussed as needed.

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 Thomas A. Nies, Executive Director, at (978) 465–0492, at least 5 days prior to the meeting date.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: October 14, 2016.

Tracey L. Thompson,

Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2016–25264 Filed 10–18–16; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XE970

Pacific Fishery Management Council; Public Meeting

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice; public meeting.

SUMMARY: The Pacific Fishery Management Council's (Pacific Council) Ad Hoc Community Advisory Board (CAB) will hold a two-day meeting that is open to the public.

DATES: The CAB meeting will begin Wednesday, November 2, 2016 at 8 a.m. and recess when business for the day is completed. It will continue at 8 a.m. Thursday, November 3, 2016, adjourning when business for the day is completed.

ADDRESSES:

Meeting address: The meeting will be held at the Hotel Deca, Grand Ballroom, 4507 Brooklyn Avenue NE., Seattle, WA 98105; telephone: (206) 634–2000.

Council address: Pacific Council, 7700 NE. Ambassador Place, Suite 101, Portland, OR 97220–1384.

FOR FURTHER INFORMATION CONTACT: Mr. Jim Seger, Pacific Council; telephone: (503) 820–2416.

SUPPLEMENTARY INFORMATION: The primary purpose of the CAB meeting is to develop recommendations for the Pacific Council pertaining to plans for its five-year review of the groundfish trawl catch share program (implemented pursuant to Amendment 20 of its groundfish fishery management plan). The CAB's immediate task is to comment on the detailed outline (blueprint) for the review document. The CAB may also begin some initial work on the identification of issues that may be taken up as follow-on regulatory actions pursuant to the results of the review. Additionally, the CAB will receive a presentation from the Northwest Fisheries Science Center, Economic Data Collection Program on data collected from catch share program participants. The CAB's recommendations on the review will be conveyed for consideration by the Pacific Council at its November meeting in Garden Grove, California. During the November meeting, the Council will provide guidance to analysts that will be drafting the review.

Although non-emergency issues not contained in the meeting agenda may be discussed, those issues may not be the subject of formal action during the meeting. Action will be restricted to those issues specifically listed in this document and any issues arising after publication of this document that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the intent to take final action to address the emergency.

Special Accommodations

The meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Mr. Kris Kleinschmidt at (503) 820–2425 at least 10 business days prior to the meeting date.

Dated: October 14, 2016.

Tracey L. Thompson,

Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2016–25263 Filed 10–18–16; 8:45 am]

BILLING CODE 3510–22–P

COMMODITY FUTURES TRADING COMMISSION

Renewal of the Technology Advisory Committee

AGENCY: Commodity Futures Trading Commission.

ACTION: Notice.

SUMMARY: The Commodity Futures Trading Commission (Commission) is publishing this notice to announce the renewal of the Technology Advisory Committee (TAC). The Commission has determined that the renewal of the TAC is necessary and in the public's interest, and the Commission has consulted with the General Services Administration's Committee Management Secretariat regarding the TAC's renewal.

FOR FURTHER INFORMATION CONTACT: Ward P. Griffin, TAC Designated Federal Officer, at 202–418–5425 or *wgriffin@cftc.gov.*

SUPPLEMENTARY INFORMATION: The TAC's objectives and scope of activities shall be to conduct public meetings, to submit reports and recommendations to the Commission, and to otherwise assist the Commission in identifying and understanding the impact and implications of technological innovation in the financial services and commodity markets. The TAC will provide advice on the application and utilization of new technologies in financial services and commodity markets, as well as by market professionals and market users. The TAC will provide advice to the Commission on the appropriate level of investment in technology at the Commission to meet its surveillance and enforcement responsibilities, and advise the Commission on the need for strategies to implement rules and regulations to support the Commission's mission of ensuring the integrity of the markets.

The TAC will operate for two years from the date of renewal unless the Commission directs that the TAC terminate on an earlier date. A copy of the TAC renewal charter has been filed with the Commission; the Senate Committee on Agriculture, Nutrition and Forestry; the House Committee on Agriculture; the Library of Congress; and the General Services Administration's Committee Management Secretariat. A copy of the renewal charter will be posted on the Commission's Web site at *www.cftc.gov.*

Dated: October 14, 2016.

Christopher J. Kirkpatrick,

Secretary of the Commission.

[FR Doc. 2016–25294 Filed 10–18–16; 8:45 am]

BILLING CODE 6351–01–P

COUNCIL ON ENVIRONMENTAL QUALITY

Office of Federal Sustainability Employee Charging Guidance

AGENCY: Council on Environmental Quality.

ACTION: Notice of availability, *Guidance for Federal Agency Implementation of Workplace Charging Pursuant to the Fixing America's Surface Transportation (FAST) Act: Electric Vehicle Supply Equipment.*

SUMMARY: The Office of Federal Sustainability Council on Environmental Quality (CEQ) has issued to Federal agency Chief Sustainability Officers *Guidance for Federal Agency Implementation of Workplace Charging Pursuant to the Fixing America's Surface Transportation (FAST) Act: Electric Vehicle Supply Equipment.* The guidance outlines how Federal agencies can take advantage of workplace charging opportunities under the FAST Act, and provides an approach for a uniform fee for the use of existing and new hard-wired electric vehicle supply equipment (EVSE) with cordsets including alternating current (AC) Level 1 EVSE, AC Level 2 EVSE, or direct current fast chargers (DCFC), for the purposes of seeking reimbursement under the FAST Act. The document also describes how Federal agency Chief Sustainability Officers should coordinate with Federal agency fleet managers to report annually on the implementation of workplace charging in the Federal Automotive Statistical Tool (FAST).

DATES: The guidance is effective October 19, 2016.

ADDRESSES: The *Guidance for Federal Agency Implementation of Workplace Charging Pursuant to the Fixing America's Surface Transportation (FAST) Act: Electric Vehicle Supply Equipment* is available at: *https://www.whitehouse.gov/administration/eop/ceq/initiatives/sustainability.*

FOR FURTHER INFORMATION CONTACT: Dee Siegel, Office of Federal Sustainability, at *Dee_S_Siegel@ceq.eop.gov* or (202) 456–6224.

SUPPLEMENTARY INFORMATION: This guidance document applies only to Federal agency buildings not under the jurisdiction, custody, or control of the General Services Administration. Agencies are expected to follow the *Guidance for Federal Agency Implementation of Workplace Charging Pursuant to the Fixing America's Surface Transportation (FAST) Act: Electric Vehicle Supply Equipment* as part of their compliance with E.O. 13693.

Authority: E.O. 13693, 80 FR 15871.

Dated: October 14, 2016.

Christine Harada,

Federal Chief Sustainability Officer, Council on Environmental Quality.

[FR Doc. 2016–25270 Filed 10–18–16; 8:45 am]

BILLING CODE 3225–F7–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Defense Business Board; Notice of Federal Advisory Committee Meeting; Correction

AGENCY: DoD.

ACTION: Meeting notice; correction.

SUMMARY: On October 5, 2016 (81 FR 69052–69053), the Department of Defense published a notice announcing a meeting of the Defense Business Board. The Department of Defense announces that the meeting location has changed. All other information in the October 5, 2016 notice remains the same.

DATES: The public meeting of the Defense Business Board (''the Board'') will be held on Thursday, October 20, 2016. The meeting will begin at 10:15 a.m. and end at 11:45 a.m. (Escort required; see guidance in the **SUPPLEMENTARY INFORMATION** section, ''Public's Accessibility to the Meeting.'')

ADDRESSES: The meeting will now be held in Room 3E928 in the Pentagon, Washington, DC (Escort required; See guidance in the **SUPPLEMENTARY INFORMATION** section, ''Public's Accessibility to the Meeting.'')

FOR FURTHER INFORMATION CONTACT: The Board's Designated Federal Officer (DFO) is Roma Laster, Defense Business Board, 1155 Defense Pentagon, Room 5B1088A, Washington, DC 20301–1155, *roma.k.laster.civ@mail.mil,* 703–695–7563. For meeting information please contact Steven Cruddas, Defense Business Board, 1155 Defense Pentagon, Room 5B1088A, Washington, DC 20301–1155, *steven.m.cruddas.civ@mail.mil,* (703) 697–2168.

SUPPLEMENTARY INFORMATION: Due to difficulties beyond the control of the

Department of Defense, the Designated Federal Officer was unable to submit the **Federal Register** notice pertaining to the meeting address change to the Defense Business Board scheduled meeting for October 20, 2016, that ensured compliance with the requirements of 41 CFR 102–3.150(a). Accordingly, the Advisory Committee Management Officer for the Department of Defense waives the 15-calendar day notification requirement pursuant to 41 CFR 102–3.150(b).

This meeting is being held under the provisions of the Federal Advisory Committee Act (FACA) of 1972 (5 U.S.C., Appendix, as amended), the Government in the Sunshine Act of 1976 (5 U.S.C. 552b, as amended), and 41 CFR 102–3.140.

Under the provisions of the Federal Advisory Committee Act of 1972 (5 U.S.C., Appendix, as amended), the Government in the Sunshine Act of 1976 (5 U.S.C. 552b, as amended), and 41 CFR 102–3.150, the Department of Defense announces that the meeting location has changed.

Public's Accessibility to the Meeting: Pursuant to FACA and 41 CFR 102–3.140, this meeting is open to the public. Seating is limited and is on a first-come basis. All members of the public who wish to attend the public meeting must contact Steven Cruddas at the number listed in the **FOR FURTHER INFORMATION CONTACT** section to register and make arrangements for a Pentagon escort, if necessary. Public attendees requiring escort should arrive at the Pentagon Visitor's Center, located near the Pentagon Metro Station's south exit (the escalators to the left upon exiting through the turnstiles) and adjacent to the Pentagon Transit Center bus terminal, with sufficient time to complete security screening and be admitted to the Pentagon no later than 10:00 a.m. on October 20. Note: Pentagon tour groups enter through the Visitor's Center, so long lines could form well in advance. To complete security screening, please come prepared to present two forms of identification of which one must be a pictured identification card. Government and military DoD CAC holders without Pentagon access are not required to have an escort; however, they are still required to pass through the Visitor's Center to gain access to the Building.

Special Accommodations: Individuals requiring special accommodations to access the public meeting should contact Steven Cruddas so that appropriate arrangements can be made.

Dated: October 14, 2016.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2016–25320 Filed 10–18–16; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF ENERGY

National Nuclear Security Administration

Agency Information Collection Extension

AGENCY: National Nuclear Security Administration, U.S. Department of Energy.

ACTION: Notice and request for comments.

SUMMARY: The Department of Energy (DOE), pursuant to the Paperwork Reduction Act of 1995, intends to extend for three years, an information collection request with the Office of Management and Budget (OMB). Comments are invited on: (a) Whether the extended collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on 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 December 19, 2016. If you anticipate difficulty in submitting comments within that period, contact the person listed below as soon as possible.

ADDRESSES: Written comments may be sent to Richard Goorevich, Senior Policy Advisor, Office of Nonproliferation and Arms Control, National Nuclear Security Administration, U.S. Department of Energy, 1000 Independence Ave. SW., Washington, DC 20585, or by fax at 202–586–1348 or by email at *richard.goorevich@nnsa.doe.gov.*

FOR FURTHER INFORMATION CONTACT: Richard Goorevich, Senior Policy Advisor, Office of Nonproliferation and Arms Control, National Nuclear Security Administration, U.S. Department of Energy, 1000 Independence Ave. SW., Washington, DC 20585, or by fax at 202–586–1348 or by email at *richard.goorevich@nnsa.doe.gov.*

SUPPLEMENTARY INFORMATION: This information collection request contains: (1) OMB No.1910–5173; (2) Information Collection Request Title: The American Assured Fuel Supply Program; (3) Type of Review: Extension; (4) Purpose: The U.S. Department of Energy (DOE) created the American Assured Fuel Supply (AFS), a reserve of low enriched uranium (LEU) to serve as a backup fuel supply for foreign recipients to be supplied through U.S. persons or for domestic recipients, in the event of fuel supply disruption. DOE is committed to making the AFS available to eligible recipients in the case of supply disruptions in the nuclear fuel market. This effort supports the United States Government's nuclear nonproliferation objectives by supporting civilian nuclear energy development while minimizing proliferation risks. DOE published a Notice of Availability for AFS on August 18, 2011, and published an application on December 2, 2013, in the **Federal Register** to standardize the information that must be provided in a request to access the material in the AFS as set forth in the Notice of Availability 76 FR 51357, 51358. This application form is necessary in order for DOE to identify if applicants meet basic requirements for use of the AFS and implement this important nonproliferation initiative; (5) Annual Estimated Number of Respondents: 10; (6) Annual Estimated Number of Total Responses: 10; (7) Annual Estimated Number of Burden Hours: 8; (8) Annual Estimated Reporting and Recordkeeping Cost Burden: $1,800.

Statutory Authority: The Secretary of Energy is authorized pursuant to the Atomic Energy Act of 1954, as amended (Pub. L. 83–703), and the Nuclear Non-Proliferation Act of 1978 (NNPA) (Pub. L. 95–242) to encourage the widespread use of atomic energy for peaceful purposes, and to cooperate with other nations by distributing nuclear material where appropriate safeguards measures are in place to ensure the material is properly controlled and used for peaceful purposes. In 2005, DOE set aside a portion of its LEU inventory to be used to support the International Atomic Energy Agency's (IAEA) International Nuclear Fuel Bank (INFB) initiative, which is envisioned as an LEU reserve that will be administered by the IAEA and that will serve as a back-up for global supply disruptions. Congress later appropriated $49,540,000 in the Consolidated Appropriations Act, 2008 (Pub. L. 110–161) to fund a portion of the INFB. Congress, in the Explanatory Statement accompanying the House Appropriations Committee Print (which in the Act was given the same effect as a joint explanatory statement), noted that the INFB freed up DOE's LEU set-aside, and recommended DOE also ''allow U.S. interests to purchase uranium fuel from the Reliable Fuel Supply [now the AFS] in the event of supply disruption.'' (H. Approp. Cmte. Print at 592.)

The sale of LEU from the AFS will be conducted consistent with applicable law, the policies and guidance in the ''Secretary of Energy's 2008 Policy Statement of Management of the Department of Energy's Excess Uranium Inventory'' (March 11, 2008), and the DOE Excess Uranium Inventory Management Plan.

Issued in Washington, DC, on October 3, 2016.

Anne M. Harrington,

Deputy Administrator, Defense Nuclear Nonproliferation, National Nuclear Security Administration.

[FR Doc. 2016–25278 Filed 10–18–16; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL16–114–000]

Idaho Power Company; Notice of Institution of Section 206 Proceeding and Refund Effective Date

On October 12, 2016, the Commission issued an order in Docket No. EL16–114–000, pursuant to section 206 of the Federal Power Act (FPA), 16 U.S.C. 824e (2012), instituting an investigation into the justness and reasonableness of the Idaho Power Company's market-based rate authority in the Idaho Power balancing authority area. *Idaho Power Company,* 157 FERC ¶ 61,017 (2016).

The refund effective date in Docket No. EL16–114–000, established pursuant to section 206(b) of the FPA, will be the date of publication of this notice in the **Federal Register**.

Any interested person desiring to be heard in Docket No. EL16–114–000 must file a notice of intervention or motion to intervene, as appropriate, with the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, in accordance with Rule 214 of the Commission's Rules of Practice and Procedure, 18 CFR 385.214 (2016), within 30 days of the date of issuance of the order.

Dated: October 12, 2016.

Kimberly D. Bose,

Secretary.

[FR Doc. 2016–25247 Filed 10–18–16; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP16–496–000]

Tennessee Gas Pipeline Company, L.L.C.; Notice of Intent To Prepare an Environmental Assessment for the Proposed Lone Star Project and Request For Comments On Environmental Issues

The staff of the Federal Energy Regulatory Commission (FERC or Commission) will prepare an environmental assessment (EA) that will discuss the environmental impacts of the Lone Star Project involving construction and operation of facilities by Tennessee Gas Pipeline Company, L.L.C. (Tennessee) in San Patricio and Jackson Counties, Texas. The Commission will use this EA in its decision-making process to determine whether the project is in the public convenience and necessity.

This notice announces the opening of the scoping process the Commission will use to gather input from the public and interested agencies on the project. You can make a difference by providing us with your specific comments or concerns about the project. Your comments should focus on the potential environmental effects, reasonable alternatives, and measures to avoid or lessen environmental impacts. Your input will help the Commission staff determine what issues they need to evaluate in the EA. To ensure that your comments are timely and properly recorded, please send your comments so that the Commission receives them in Washington, DC on or before November 14, 2016.

If you sent comments on this project to the Commission before the opening of this docket on September 1, 2016, you will need to file those comments in Docket No. CP16–496–000 to ensure they are considered as part of this proceeding.

This notice is being sent to the Commission's current environmental mailing list for this project. State and local government representatives should notify their constituents of this proposed project and encourage them to comment on their areas of concern.

If you are a landowner receiving this notice, a pipeline company representative may contact you about the acquisition of an easement to construct, operate, and maintain the proposed facilities. The company would seek to negotiate a mutually acceptable agreement. However, if the Commission approves the project, that approval conveys with it the right of eminent domain. Therefore, if easement negotiations fail to produce an agreement, the pipeline company could initiate condemnation proceedings where compensation would be determined in accordance with state law.

Tennessee provided landowners with a fact sheet prepared by the FERC entitled ''An Interstate Natural Gas Facility On My Land? What Do I Need To Know?'' This fact sheet addresses a number of typically asked questions, including the use of eminent domain and how to participate in the Commission's proceedings. It is also available for viewing on the FERC Web site (*www.ferc.gov*).

Public Participation

For your convenience, there are three methods you can use to submit your comments to the Commission. The Commission encourages electronic filing of comments and has expert staff available to assist you at (202) 502–8258 or *efiling@ferc.gov.* Please carefully follow these instructions so that your comments are properly recorded.

(1) You can file your comments electronically using the *eComment* feature on the Commission's Web site (*www.ferc.gov*) under the link to *Documents and Filings.* This is an easy method for submitting brief, text-only comments on a project;

(2) You can file your comments electronically by using the *eFiling* feature on the Commission's Web site (*www.ferc.gov*) under the link to *Documents and Filings.* With eFiling, you can provide comments in a variety of formats by attaching them as a file with your submission. New eFiling users must first create an account by clicking on ''*eRegister.*'' If you are filing a comment on a particular project, please select ''Comment on a Filing'' as the filing type; or

(3) You can file a paper copy of your comments by mailing them to the following address. Be sure to reference the project docket number (CP16–496–000) with your submission: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Room 1A, Washington, DC 20426.

Summary of the Proposed Project

Tennessee proposes to construct and operate the following facilities as part of the Lone Star Project: (1) A new 10,915 horsepower compressor station (CS 3A) in San Patricio County, Texas; and (2) a new 10,500 horsepower compressor station (CS 11A) in Jackson County, Texas. The proposed facilities would be on Tennessee's existing Line 100 and would allow Tennessee to provide firm incremental transportation service of up to 300,000,000 cubic feet per day to the Corpus Christi Liquefaction, LLC facility currently under construction in San Patricio County, Texas.

The general location of the project facilities is shown in appendix 1.[1]

Land Requirements for Construction

Construction of the two compressor stations would disturb about 113 acres of land, of which 27 acres Tennessee would maintain for permanent operation of the Project. Construction of CS 3A would disturb about 72.2 acres of land, of which Tennessee would permanently maintain 13.4 acres during operation of the facility. The fenced compressor station site for CS 3A would account for about 12.5 acres, including the access road. Construction of CS 11A would disturb about 41.1 acres of land, of which Tennessee would permanently maintain 14.0 acres during operation of the facility, including the access road. The fenced compressor station site for CS 11A would account for approximately 12.2 acres.

The EA Process

The National Environmental Policy Act (NEPA) requires the Commission to take into account the environmental impacts that could result from an action whenever it considers the issuance of a Certificate of Public Convenience and Necessity. NEPA also requires us[2] to discover and address concerns the public may have about proposals. This process is referred to as ''scoping.'' The main goal of the scoping process is to focus the analysis in the EA on the important environmental issues. By this notice, the Commission requests public comments on the scope of the issues to address in the EA. We will consider all filed comments during the preparation of the EA.

In the EA we will discuss impacts that could occur as a result of the construction and operation of the proposed project under these general headings:

- geology and soils;
- land use;
- water resources, fisheries, and wetlands;
- cultural resources;
- vegetation and wildlife;
- air quality and noise;
- endangered and threatened species;
- socioeconomics;
- public safety; and
- cumulative impacts

We will also evaluate reasonable alternatives to the proposed project or portions of the project, and make recommendations on how to lessen or avoid impacts on the various resource areas.

The EA will present our independent analysis of the issues. The EA will be available in the public record through eLibrary. Depending on the comments received during the scoping process, we may also publish and distribute the EA to the public for an allotted comment period. We will consider all comments on the EA before making our recommendations to the Commission. To ensure we have the opportunity to consider and address your comments, please carefully follow the instructions in the Public Participation section, beginning on page 2.

With this notice, we are asking agencies with jurisdiction by law and/or special expertise with respect to the environmental issues of this project to formally cooperate with us in the preparation of the EA.[3] Agencies that would like to request cooperating agency status should follow the instructions for filing comments provided under the Public Participation section of this notice.

Consultations Under Section 106 of the National Historic Preservation Act

In accordance with the Advisory Council on Historic Preservation's implementing regulations for section 106 of the National Historic Preservation Act, we are using this notice to initiate consultation with the applicable State Historic Preservation Office (SHPO), and to solicit their views and those of other government agencies, interested Indian tribes, and the public on the project's potential effects on historic properties.[4] We will define the project-specific Area of Potential Effects (APE) in consultation with the SHPO as the project develops. On natural gas facility projects, the APE at a minimum encompasses all areas subject to ground disturbance (examples include contractor/pipe storage yards, compressor stations, and access roads). Our EA for this project will document our findings on the impacts on historic properties and summarize the status of consultations under section 106.

Environmental Mailing List

The environmental mailing list includes federal, state, and local government representatives and agencies; elected officials; environmental and public interest groups; Native American Tribes; other interested parties; and local libraries and newspapers. This list also includes all affected landowners (as defined in the Commission's regulations) who are potential right-of-way grantors, whose property may be used temporarily for project purposes, or who own homes within certain distances of aboveground facilities, and anyone who submits comments on the project. We will update the environmental mailing list as the analysis proceeds to ensure that we send the information related to this environmental review to all individuals, organizations, and government entities interested in and/or potentially affected by the proposed project. If we publish and distribute the EA, copies will be sent to the environmental mailing list for public review and comment. If you would prefer to receive a paper copy of the document instead of the CD version or would like to remove your name from the mailing list, please return the attached Information Request (appendix 2).

Becoming an Intervenor

In addition to involvement in the EA scoping process, you may want to become an ''intervenor'' which is an official party to the Commission's proceeding. Intervenors play a more formal role in the process and are able to file briefs, appear at hearings, and be heard by the courts if they choose to appeal the Commission's final ruling. An intervenor formally participates in the proceeding by filing a request to intervene. Instructions for becoming an intervenor are in the ''Document-less Intervention Guide'' under the ''e-filing'' link on the Commission's Web site. Motions to intervene are more fully

[1] The appendices referenced in this notice will not appear in the **Federal Register**. Copies of appendices were sent to all those receiving this notice in the mail and are available at *www.ferc.gov* using the link called ''eLibrary'' or from the Commission's Public Reference Room, 888 First Street NE., Washington, DC 20426, or call (202) 502–8371. For instructions on connecting to eLibrary, refer to the last page of this notice.

[2] ''We,'' ''us,'' and ''our'' refer to the environmental staff of the Commission's Office of Energy Projects.

[3] The Council on Environmental Quality regulations addressing cooperating agency responsibilities are at Title 40, Code of Federal Regulations, Part 1501.6.

[4] The Advisory Council on Historic Preservation's regulations are at Title 36, Code of Federal Regulations, Part 800. Those regulations define historic properties as any prehistoric or historic district, site, building, structure, or object included in or eligible for inclusion in the National Register of Historic Places.

described at *http://www.ferc.gov/resources/guides/how-to/intervene.asp.*

Additional Information

Additional information about the project is available from the Commission's Office of External Affairs, at (866) 208–FERC, or on the FERC Web site at *www.ferc.gov* using the ''eLibrary'' link. Click on the eLibrary link, click on ''General Search'' and enter the docket number, excluding the last three digits in the Docket Number field (*i.e.,* CP16–496). Be sure you have selected an appropriate date range. For assistance, please contact FERC Online Support at *FercOnlineSupport@ferc.gov* or toll free at (866) 208–3676, or for TTY, contact (202) 502–8659. The eLibrary link also provides access to the texts of formal documents issued by the Commission, such as orders, notices, and rulemakings.

In addition, the Commission offers a free service called eSubscription which allows you to keep track of all formal issuances and submittals in specific dockets. This can reduce the amount of time you spend researching proceedings by automatically providing you with notification of these filings, document summaries, and direct links to the documents. Go to *www.ferc.gov/docs-filing/esubscription.asp.*

Finally, public meetings or site visits will be posted on the Commission's calendar located at *www.ferc.gov/EventCalendar/EventsList.aspx* along with other related information.

Dated: October 12, 2016.

Kimberly D. Bose,

Secretary.

[FR Doc. 2016–25246 Filed 10–18–16; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #2

Take notice that the Commission received the following electric corporate filings:

Docket Numbers: EC16–164–000.

Applicants: Georgia Power Company.

Description: Amendment to August 8, 2016 Application of Georgia Power Company Pursuant to Section 203 of the Federal Power Act for Authorization to Sell Certain Transmission Facilities and Request for Expedited Action.

Filed Date: 10/12/16.

Accession Number: 20161012–5171.

Comments Due: 5 p.m. ET 11/2/16.

Docket Numbers: EC17–1–000.

Applicants: Entergy Mississippi, Inc.

Description: Supplement to October 3, 2016 Application of Entergy Mississippi, Inc. under Section 203 [Exhibits A through L and replacement Exhibit M].

Filed Date: 10/12/16.

Accession Number: 20161012–5184.

Comments Due: 5 p.m. ET 11/2/16.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER17–83–000.

Applicants: Midcontinent Independent System Operator, Inc.

Description: § 205(d) Rate Filing: 2016–10–13 _SA 2959 Northern States Power-Stoneray Power Partners GIA (J426) to be effective 10/14/2016.

Filed Date: 10/13/16.

Accession Number: 20161013–5149.

Comments Due: 5 p.m. ET 11/3/16.

Docket Numbers: ER17–84–000.

Applicants: PJM Interconnection, L.L.C.

Description: § 205(d) Rate Filing: First Revised ISA No. 4209, Queue No. X2–025/X4–019/Z1–090/AA2–171 to be effective 9/13/2016.

Filed Date: 10/13/16.

Accession Number: 20161013–5164.

Comments Due: 5 p.m. ET 11/3/16.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings 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: October 13, 2016.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2016–25242 Filed 10–18–16; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following electric corporate filings:

Docket Numbers: EC17–8–000.

Applicants: Noble Americas Energy Solutions LLC, Calpine Energy Services Holdco II LLC.

Description: Joint Application for Authorization under Section 203 of the Federal Power Act and Request for Waivers, Confidential Treatment, and Expedited Consideration of Noble Americas Energy Solutions LLC, *et al.*

Filed Date: 10/12/16.

Accession Number: 20161012–5166.

Comments Due: 5 p.m. ET 11/2/16.

Docket Numbers: EC17–9–000.

Applicants: Enel Cove Fort, LLC, Enel Stillwater, LLC, EGP Stillwater Solar, LLC, Origin Wind Energy, LLC, Chisholm View Wind Project, LLC, Prairie Rose Wind, LLC, Prairie Rose Transmission, LLC, Goodwell Wind Project, LLC, EFS Green Power Holdings, LLC.

Description: Application for Authorization Under Section 203 of the Federal Power Act and Request for Expedited Action of Enel Cove Fort, LLC, *et al.*

Filed Date: 10/12/16.

Accession Number: 20161012–5168.

Comments Due: 5 p.m. ET 11/2/16.

Docket Numbers: EC17–10–000.

Applicants: Osborn Wind Energy, LLC, Oliver Wind III, LLC.

Description: Application for Authorization Under Section 203 of the Federal Power Act and Request for Expedited Action of Osborn Wind Energy, LLC, *et al.*

Filed Date: 10/12/16.

Accession Number: 20161012–5181.

Comments Due: 5 p.m. ET 11/2/16.

Take notice that the Commission received the following exempt wholesale generator filings:

Docket Numbers: EG17–6–000.

Applicants: Broadview Energy JN, LLC.

Description: Broadview Energy JN, LLC submits Notice of Self-Certification of Exempt Wholesale Generator Status.

Filed Date: 10/13/16.

Accession Number: 20161013–5124.

Comments Due: 5 p.m. ET 11/3/16.

Docket Numbers: EG17–7–000.

Applicants: Broadview Energy KW, LLC.

Description: Broadview Energy KW, LLC submits Notice of Self-Certification of Exempt Wholesale Generator Status.

Filed Date: 10/13/16.
Accession Number: 20161013–5128.
Comments Due: 5 p.m. ET 11/3/16.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER15–486–003.
Applicants: Peninsula Power, LLC.
Description: Notification of Non-Material Change in Status of Peninsula Power, LLC.
Filed Date: 10/13/16.
Accession Number: 20161013–5132.
Comments Due: 5 p.m. ET 11/3/16.
Docket Numbers: ER16–2659–002.
Applicants: Grant Plains Wind, LLC.
Description: Supplement to October 3, 2016 Grant Plains Wind, LLC tariff filing.
Filed Date: 10/12/16.
Accession Number: 20161012–5176.
Comments Due: 5 p.m. ET 11/2/16.

Docket Numbers: ER17–75–000.
Applicants: PJM Interconnection, LLC.
Description: § 205(d) Rate Filing: Second Revised ISA No. 3837, Queue No. X4–048/Y2–089 to be effective 10/1/2016.
Filed Date: 10/12/16.
Accession Number: 20161012–5155.
Comments Due: 5 p.m. ET 11/2/16.

Docket Numbers: ER17–76–000.
Applicants: NorthWestern Corporation.
Description: § 205(d) Rate Filing: SA 789—Agreement with Jackson Contractor Group re Missoula College Project to be effective 10/14/2016.
Filed Date: 10/13/16.
Accession Number: 20161013–5025.
Comments Due: 5 p.m. ET 11/3/16.

Docket Numbers: ER17–77–000.
Applicants: Deseret Generation & Transmission Co-operative, Inc.
Description: Compliance filing: OATT Order No. 827 828 661, Compliance Filing to be effective 10/14/2016.
Filed Date: 10/13/16.
Accession Number: 20161013–5030.
Comments Due: 5 p.m. ET 11/3/16.

Docket Numbers: ER17–78–000.
Applicants: Southern California Edison Company.
Description: § 205(d) Rate Filing: SCE Combined Compliance Filing to be effective 10/14/2016.
Filed Date: 10/13/16.
Accession Number: 20161013–5037.
Comments Due: 5 p.m. ET 11/3/16.

Docket Numbers: ER17–79–000.
Applicants: Portland General Electric Company.
Description: Compliance filing: Combined Order 827 and 828 Compliance Filing to be effective 10/14/2016.
Filed Date: 10/13/16.
Accession Number: 20161013–5094.
Comments Due: 5 p.m. ET 11/3/16.

Docket Numbers: ER17–80–000.
Applicants: NorthWestern Corporation.
Description: § 205(d) Rate Filing: SA 793—Agreement with Montana DOT re West Laurel Interchange Project to be effective 10/14/2016.
Filed Date: 10/13/16.
Accession Number: 20161013–5102.
Comments Due: 5 p.m. ET 11/3/16.

Docket Numbers: ER17–81–000.
Applicants: Entergy Louisiana, LLC.
Description: Request for Authorization and Limited Waiver of Entergy Louisiana, LLC.
Filed Date: 10/13/16.
Accession Number: 20161013–5103.
Comments Due: 5 p.m. ET 11/3/16.

Docket Numbers: ER17–82–000.
Applicants: Southwest Power Pool, Inc.
Description: § 205(d) Rate Filing: Revisions to Attachment O to Clarify the ITP Process to be effective 12/12/2016.
Filed Date: 10/13/16.
Accession Number: 20161013–5144.
Comments Due: 5 p.m. ET 11/3/16.

Take notice that the Commission received the following public utility holding company filings:

Docket Numbers: PH17–2–000.
Applicants: Manulife Financial Corporation.
Description: Manulife Financial Corporation submits ERC 65–B Waiver Notification.
Filed Date: 10/13/16.
Accession Number: 20161013–5131.
Comments Due: 5 p.m. ET 11/3/16.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings 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: October 13, 2016.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2016–25243 Filed 10–18–16; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. EL17–3–000; QF99–32–015]

Gregory Power Partners LLC; Notice of Petition for Waiver

Take notice that on October 7, 2016, pursuant to section 292.205(c) of the Federal Energy Regulatory Commission's (Commission) Rules and Regulations, implementing the Public Utility Regulatory Policies Act of 1978, Gregory Power Partners LLC filed a petition for limited waiver of the Commission qualifying cogeneration facility operating and efficiency standards set forth in 18 CFR 292.205(a)(1)(2), for the rest of calendar year 2016 and 2017, all as more fully explained in the petition.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. Anyone filing a motion to intervene or protest must serve a copy of that document on the Petitioner.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 5 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comments: 5:00 p.m. Eastern Time on October 27, 2016.

Dated: October 12, 2016.

Kimberly D. Bose,

Secretary.

[FR Doc. 2016–25241 Filed 10–18–16; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. NJ17–1–000]

Oncor Electric Delivery Company LLC; Notice of Filing

Take notice that on October 4, 2016, Oncor Electric Delivery Company LLC submitted its tariff filing: Oncor Electric Delivery Company LLC TFO Rate Changes to be effective September 15, 2016.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant and all the parties in this proceeding.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 5 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for electronic review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5:00 p.m. Eastern Time on October 25, 2016.

Dated: October 12, 2016.

Kimberly D. Bose,

Secretary.

[FR Doc. 2016–25244 Filed 10–18–16; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. NJ17–2–000]

Oncor Electric Delivery Company LLC; Notice of Filing

Take notice that on October 4, 2016, Oncor Electric Delivery Company LLC submitted its tariff filing: Tex-La Electric Cooperative of Texas Tariff Rate Changes to be effective September 15, 2016.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant and all the parties in this proceeding.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 5 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

This filing is accessible online at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for electronic review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5:00 p.m. Eastern Time on October 25, 2016.

Dated: October 12, 2016.

Kimberly D. Bose,

Secretary.

[FR Doc. 2016–25248 Filed 10–18–16; 8:45 am]

BILLING CODE 6717–01–P

FEDERAL COMMUNICATIONS COMMISSION

Privacy Act System of Records

AGENCY: Federal Communications Commission.

ACTION: Notice of amendments to an existing system of records; two new routine use(s).

SUMMARY: The Federal Communications Commission (FCC or Commission) is amending an existing system of records, FCC/MB–1, Ownership Reports for Commercial and Noncommercial Broadcast Stations (previously FCC/MB–1, Ownership Report for Commercial Broadcast Stations), subject to the Privacy Act of 1974, as amended. This action is necessary to meet the requirements of the Privacy Act to publish in the **Federal Register** notice of the existence and character of records maintained by the agency. The FCC's Media Bureau (MB) will use the information contained in this altered system of records to administer the Commission's regulatory responsibilities that relate to ownership of commercial broadcast stations, including AM and FM radio and television (full power, Class A, and low power); ownership of noncommercial broadcast stations, including AM and FM radio and full-power television; and ownership of interests in daily newspapers that are subject to the Commission's media ownership rules.

DATES: Written comments are due on or before November 18, 2016. This action will become effective on November 28, 2016 unless comments are received that require a contrary determination.

ADDRESSES: Send comments to Leslie F. Smith, Privacy Manager, Information Technology (IT), Room 1–C216, Federal Communications Commission, 445 12th Street SW., Washington, DC 20554, or to *Leslie.Smith@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: Leslie F. Smith, (202) 418–0217, or *Leslie.Smith@fcc.gov,* and to obtain a copy of the Narrative Statement, which includes details of the proposed alterations to this system of records.

SUPPLEMENTARY INFORMATION: The FCC previously gave notice of this system of records, FCC/MB–1, Ownership Reports for Commercial and Noncommercial Broadcast Stations (previously FCC/

MB–1, Ownership Report for Commercial Broadcast Stations), by publication in the **Federal Register** on November 19, 2009 (74 FR 59978). This notice serves to update and amend FCC/MB–1 as a result of revised requirements that the FCC adopted for reporting certain ownership and/or attributable interests in broadcast stations.

FCC/MB–1

SYSTEM NAME:

Ownership Reports for Commercial and Noncommercial Broadcast Stations.

SECURITY CLASSIFICATION:

The Federal Communications Commission (FCC) Chief Information Officer (CIO) team will provide a security classification to this system based on NIST FIPS 199 standards.

SYSTEM LOCATION:

Media Bureau (MB), Federal Communications Commission (FCC), 445 12th Street SW., Washington, DC 20554.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

The categories of individuals covered by this system include but are not limited to:

(1) Licensees, permittees, and respondents, and other individuals or entities with interests therein that are required to file or have their interests reported on:

(a) FCC Form 2100, Schedule 323, ''Ownership Report for Commercial Broadcast Stations'' (formerly FCC Form 323) pursuant to 47 CFR 73.3615, 73.6026, and 74.797; and/or

(b) FCC Form 2100, Schedule 323–E, ''Ownership Report for Noncommercial Broadcast Stations'' (formerly FCC Form 323–E) pursuant to 47 CFR 73.3615;

(2) Contact individuals reported on:

(a) Form 2100, Schedule 323 (formerly Form 323), *e.g.,* representatives, relating to commercial AM, FM, and television (full power, Class A, and low power) broadcast stations, and/or newspapers that are subject to the Commission's media ownership rules, as required under 47 CFR 73.3555, etc.; and/or

(b) Form 2100, Schedule 323–E (formerly Form 323–E), *e.g.,* representatives, relating to noncommercial AM, FM, and full-power television broadcast stations;

(3) Individuals with ownership or attributable interests in media companies subject to the Commission's ownership rules or otherwise required to be reported on Form 2100, Schedule 323 (formerly Form 323), and/or Form 2100, Schedule 323–E (formerly Form 323–E); and

(4) Individuals who are married to or related (*i.e.,* parent-child or siblings, etc.) to other individuals who have attributable, reportable, and/or ownership interests and who must either file Form 2100, Schedule 323 (formerly Form 323), or have their interests reported on Form 2100, Schedule 323 (formerly Form 323).

CATEGORIES OF RECORDS IN THE SYSTEM:

The categories of records in this system include but are not limited to:

(1) Information that is required to be submitted on Form 2100, Schedule 323 (formerly Form 323), and/or Form 2100, Schedule 323–E (formerly Form 323–E), including the ownership or other interests of the licensee/permittee/respondent, mailing address, telephone number, email address, FCC Registration Number (FRN), Restricted Use FRN (RUFRN), listing type, relationship to licensee/permittee/respondent/other interest holder, positional interest, joint interest status, Tribal Nation/entity status, marital/familial relationship, and gender, ethnicity, race, and citizenship, etc.;

(2) All exhibits, organizational charts, correspondence, *i.e.,* letters, etc., supporting documentation, and other materials, etc., which are associated with processing Form 2100, Schedule 323 (formerly Form 323), and Form 2100, Schedule 323–E (formerly Form 323–E) submissions; and

(3) Any other records that are submitted in connection with or created as the result of the filing of Form 2100, Schedule 323 (formerly Form 323), and/or Form 2100, Schedule 323–E (formerly Form 323–E).

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

47 CFR 73.3555, 73.3615, 73.6026, and 74.797.

PURPOSES:

The information obtained from Form 2100, Schedule 323 (formerly Form 323), and Form 2100, Schedule 323–E (formerly Form 323–E) submissions is kept to administer the Commission's regulatory responsibilities that relate to the ownership of commercial broadcast stations, including AM and FM radio and television (full power, Class A, and low power); ownership of noncommercial broadcast stations, including AM and FM radio and full-power television; and ownership of interests in daily newspapers that are subject to the Commission's media ownership rules. The Commission uses these records in this system:

(1) To assess the data contained in responses to Form 2100, Schedule 323 (formerly Form 323), and/or Form 2100, Schedule 323–E (formerly Form 323–E), which the Commission uses to evaluate licensees' or permittees' compliance with the Commission's media ownership rules, etc., and other related uses. These forms are filed:

(a) To satisfy the biennial filing requirement (Biennial Ownership Report);

(b) As a validation and resubmission of a previously filed Biennial Ownership Report;

(c) In connection with the transfer of control or assignment of a broadcast station;

(d) By a permittee within 30 days after the grant of a construction permit and on the date that the permittee files its license application;

(e) As a certification of accuracy of the initial or post-consummation Ownership Report filed by the permittee in conjunction with its application for a station license; or

(f) As an amendment of a previously filed Ownership Report.

(2) To undertake studies of minority and female ownership that include but are not limited to: Studies that support the Commission's diversity policy goals and other ownership studies to support its statutory requirement to review the media ownership goals quadrennially to determine whether they are necessary in the public interest as the result of competition.

(3) Any other uses of Form 2100, Schedule 323 (formerly Form 323), and/or Form 2100, Schedule 323–E (formerly Form 323–E), within the Commission's authority.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, all or a portion of the records or information contained in this system may be disclosed to authorized entities, as is determined to be relevant and necessary, outside the FCC as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows. In each of these cases, the FCC will determine whether disclosure of the records is compatible with the purpose(s) for which the records were collected.

1. Public Access—Under the rules of the Commission, documents filed in MB's Consolidated Database System (CDBS) are publicly available. Form 2100, Schedule 323, and Form 2100, Schedule 323–E—the revised versions of Forms 323 and 323–E, respectively—will be implemented in MB's Licensing and Management System (LMS).

Documents filed in LMS are publicly available via the Commission's Web site;

2. Adjudication and Litigation—To the Department of Justice (DOJ), or other administrative body before which the FCC is authorized to appear, when: (a) The FCC or any component thereof; or (b) any employee of the FCC in his or her official capacity; or (c) any employee of the FCC in his or her individual capacity where DOJ or the FCC has agreed to represent the employee; or (d) the United States is a party to litigation or has an interest in such litigation, and the use of such records by the DOJ or the FCC is deemed by the FCC to be relevant and necessary to the litigation;

3. Financial Obligations under the Debt Collection Acts—To other Federal agencies for the purpose of collecting and reporting on delinquent debts as authorized by the Debt Collection Act of 1982 or the Debt Collection Improvement Act of 1996. A record from this system may be disclosed to any Federal, state, or local agency to conduct an authorized computer matching program in compliance with the Privacy Act of 1974, as amended, to identify and locate individuals who are delinquent in their repayment of certain debts owed to the U.S. Government. A record from this system may be used to prepare information on items considered income for taxation purposes to be disclosed to Federal, state, and local governments;

4. Law Enforcement and Investigation—To disclose pertinent information to the appropriate Federal, State, or local agency responsible for investigating, prosecuting, enforcing, or implementing a statute, rule, regulation, or order, where the FCC becomes aware of an indication of a violation or potential violation of a civil or criminal law or regulation;

5. Congressional Inquiries—To provide information to a congressional office from the record of an individual in response to an inquiry made from that congressional office made at the request of that individual;

6. Government-wide Program Management and Oversight—To the National Archives and Records Administration (NARA) for use in its records management inspections; to the Government Accountability Office (GAO) for oversight purposes; to DOJ in order to obtain that department's advice regarding disclosure obligations under the Freedom of Information Act (FOIA); or to the Office of Management and Budget (OMB) in order to obtain that office's advice regarding obligations under the Privacy Act;

7. Breach Notification—To appropriate agencies, entities, and persons when (a) the Commission suspects or has confirmed that the security or confidentiality of information in the system of records has been compromised; (b) the Commission has determined that as a result of the suspected or confirmed compromise there is a risk of harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs (whether maintained by the Commission or another agency or entity) that rely upon the compromised information; and (c) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with the Commission's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm; and

8. Non-Federal Personnel—To disclose information to contractors performing or working on a contract for the Federal Government.

DISCLOSURE TO CONSUMER REPORTING AGENCIES:

None.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

The Broadcast Station Ownership database is the repository for all electronically filed ownership reports and associated information, including exhibits (*e.g.,* organizational charts, appendices, scanned images, and all other supplementary documents and materials, etc.). All Form 323 and Form 323–E filings must be submitted electronically (*e.g.,* paper copy filings are not acceptable). Form 323 and Form 323–E filings are currently submitted via CDBS, at *https://www.fcc.gov/media/filing-systems-and-databases.* Filings on Form 2100, Schedule 323, and Form 2100, Schedule 323–E—the revised versions of Forms 323 and 323–E, respectively—will be submitted electronically via LMS, at *https://enterpriseefiling.fcc.gov/dataentry/login.html.*

RETRIEVABILITY:

Information in this system is publicly retrievable. The information may be viewed via the ''Public Access'' Search functionality in CDBS, at *https://www.fcc.gov/media/filing-systems-and-databases,* by clicking on the ''Ownership Search'' link. Information may be retrieved by searching electronically using a variety of parameters including the call sign, facility ID number, service, file number, application type, channel, frequency, community of license city and state, name of the licensee/permittee, or name/address of the person or entity holding the interest reported on Form 323 or Form 323–E. All ownership data can also be downloaded via a set of files that correspond to database tables from the Media Bureau Public CDBS Database Files Web site: *https://www.fcc.gov/media/radio/cdbs-database-public-files.* Information is retrieved internally via database commands by authorized FCC staff and contractors who have been granted permission to access the data. Form 2100, Schedule 323, and Form 2100, Schedule 323–E—the revised versions of Forms 323 and 323–E, respectively—will be implemented in LMS. Information filed in LMS may be viewed via the ''LMS Public Search'' functionality in LMS, at *https://enterpriseefiling.fcc.gov/dataentry/login.html.* LMS Public Database Tables may be downloaded from the LMS Public Database Files Web site: *https://enterpriseefiling.fcc.gov/dataentry/public/tv/lmsDatabase.html.*

SAFEGUARDS:

Information in these records and files is available to the public via the FCC Internet portal at: *https://www.fcc.gov/media/filing-systems-and-databases.* Access to the ownership records housed in the CDBS and LMS databases is restricted to authorized MB supervisory and staff and IT staff and contractors, who maintain the CDBS and LMS network computer databases. Other FCC staff and contractors may be granted access to this information, only on a ''need-to-know'' basis.

The CDBS and LMS databases are part of the FCC's computer network databases. The FCC's computer network is protected by a comprehensive and dynamic set of IT safety and security protocols and features that are designed to meet all Federal IT privacy standards, including those required by the National Institute of Standards and Technology (NIST) and the Federal Information Security Management Act (FISMA).

RETENTION AND DISPOSAL:

The information in this system is limited to electronic files, records, and data, which includes:

(1) The information that pertains to current filing requirements; and

(2) the information that pertains to historical records, which is used for archival purposes. The agency records control schedule N1–173–86–2, approved by NARA, authorizes permanent retention of original documents of information reported

pursuant to Sections 73.3613 and 73.3615 of the Commission's rules, including ownership reports (FCC Form 323). Until NARA approves an appropriate records schedule, any information in this system that is not covered by the agency records control schedule N1–173–86–2 will also be treated as permanent.

SYSTEM MANAGER(S) AND ADDRESS(ES):

Media Bureau (MB), Federal Communications Commission (FCC), 445 12th Street SW., Washington, DC 20554.

NOTIFICATION PROCEDURE:

Individuals wishing to determine whether this system of records contains information about them may do so by writing to Leslie F. Smith, Privacy Manager, Information Technology (IT), Federal Communications Commission (FCC), 445 12th Street SW., Washington, DC 20554 or *Leslie.Smith@fcc.gov.*

Individuals must furnish reasonable identification by showing any two of the following: Social security card; driver's license; employee identification card; Medicare card; birth certificate; bank credit card; or other positive means of identification, or by signing an identity statement stipulating that knowingly or willfully seeking or obtaining access to records about another person under false pretenses is punishable by a fine of up to $5,000.

Individuals requesting access must also comply with the FCC's Privacy Act regulations regarding verification of identity and access to records (5 CFR part 0, subpart E).

RECORD ACCESS PROCEDURES:

Access to Form 323 and Form 323–E submissions is available through the Commission's Web site as stated above, at *https://www.fcc.gov/media/filing-systems-and-databases.* Form 2100, Schedule 323, and Form 2100, Schedule 323–E—the revised versions of Forms 323 and 323–E, respectively—will be implemented in LMS, and documents filed in LMS are publicly available through the Commission's Web site. Individuals wishing to obtain additional information about records in this system should follow the Notification Procedure above.

CONTESTING RECORD PROCEDURES:

Individuals wishing to contest information pertaining to them in the system of records should follow the Notification Procedure above.

RECORD SOURCE CATEGORIES:

The sources for the information in this system are all entities that are required to file an ownership report, either biennially or at other occasions, under 47 CFR 73.3615, 73.6026, and 74.797 of the Commission's rules, and include but are not limited to:

(1) Licensees, permittees, and respondents, and other individuals or entities with interests therein that are required to file or have their interests reported on:

(a) FCC Form 2100, Schedule 323, ''Ownership Report for Commercial Broadcast Station'' (formerly Form 323) pursuant to 47 CFR 73.3615, 73.6026, and 74.797; and/or

(b) FCC Form 2100, Schedule 323–E, ''Ownership Report for Noncommercial Broadcast Stations'' (formerly Form 323–E) pursuant to 47 CFR 73.3615;

(2) Contact individuals reported on:

(a) Form 2100, Schedule 323 (formerly Form 323), *e.g.,* representatives, relating to commercial AM, FM, and television (full power, Class A, and low power) broadcast stations, and/or newspapers that are subject to the Commission's media ownership rules, as required under 47 CFR 73.3555, etc.; and/or

(b) Form 2100, Schedule 323–E (formerly Form 323–E), *e.g.,* representatives, relating to noncommercial AM, FM, and full-power television broadcast stations;

(3) Individuals with ownership or attributable interests in media companies subject to the Commission's ownership rules or otherwise required to be reported on Form 2100, Schedule 323 (formerly Form 323), and/or Form 2100, Schedule 323–E (formerly Form 323–E); and

(4) Individuals who are married to or related (*i.e.,* parent-child or siblings, etc.) to other individuals who have attributable, reportable, and/or ownership interests and who must either file Form 2100, Schedule 323 (formerly Form 323), or have their interests reported on Form 2100, Schedule 323 (formerly Form 323).

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 2016–25314 Filed 10–18–16; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060–0809]

Information Collection Being Reviewed by the Federal Communications Commission Under Delegated Authority

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burdens, and as required by the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3520), the Federal Communications Commission (FCC or Commission) invites the general public and other Federal agencies to take this opportunity to comment on the following information collections. Comments are requested concerning: Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; the accuracy of the Commission's burden estimate; ways to enhance the quality, utility, and clarity of the information collected; ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and ways to further reduce the information collection burden on small business concerns with fewer than 25 employees. The FCC may not conduct or sponsor a collection of information unless it displays a currently valid OMB control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid OMB control number.

DATES: Written PRA comments should be submitted on or before December 19, 2016. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all PRA comments to Nicole Ongele, FCC, via email to *PRA@fcc.gov* and to *Nicole.Ongele@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: For additional information about the information collection, contact Nicole Ongele at (202) 418–2991.

OMB Control Number: 3060–0809.

Title: Communications Assistance for Law Enforcement Act (CALEA).

Form Number: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for profit entities.

Number of Respondents and Responses: 200 respondents; 285 responses.

Estimated Time per Response: 12 hours average (range of 7.5 to 80 hours).

Frequency of Response: On occasion reporting requirements, recordkeeping and third party disclosure requirements.

Obligation to Respond: Mandatory and Voluntary. Statutory authority is contained in sections 105, 107(c), 109(b) and 301 of the Communications Assistance for Law Enforcement Act (CALEA), 47 U.S.C. 1004, 1006(c), 1008(b), and 229; Public Law 103–414, 108 Stat. 4279 (1994).

Total Annual Burden: 3,475 hours.

Total Annual Cost: No Cost.

Privacy Impact Assessment: No impact(s).

Nature and Extent of Confidentiality: CALEA records submitted pursuant to this information collection are not made available routinely for public inspection.

Needs and Uses: The Communications Assistance for Law Enforcement Act (CALEA) requires the Commission to create rules that regulate the conduct and recordkeeping of lawful electronic surveillance. CALEA was enacted in October 1994 to respond to rapid advances in telecommunications technology and eliminates obstacles faced by law enforcement personnel in conducting electronic surveillance. Section 105 of CALEA requires telecommunications carriers to protect against the unlawful interception of communications passing through their systems. Law enforcement officials use the information maintained by telecommunications carriers to determine the accountability and accuracy of telecommunications carriers' compliance with lawful electronic surveillance orders.

On May 12, 2006, the Commission released a *Second Report and Order and Memorandum Opinion and Order* in ET Docket No. 04–195, FCC 06–56, which became effective August 4, 2006, except for §§ 1.20004 and 1.2005 of the Commission's rules, which became effective on February 12, 2007. The Second Report and Order established new guidelines for filing section 107(c) petitions, section 109(b) petitions, and monitoring reports (FCC Form 445). CALEA section 107(c)(1) permits a petitioner to apply for an extension of time, up to two years from the date that the petition is filed, and to come into compliance with a particular CALEA section 103 capability requirement. CALEA section 109(b) permits a telecommunication carrier covered by CALEA to file a petition with the FCC and an application with the Department of Justice (DOJ) to request that DOJ pay the costs of the carrier's CALEA compliance (cost-shifting relief) with respect to any equipment, facility or service installed or deployed after January 1, 1995. The Second Report and Order required several different collections of information:

(a) Within 90 days of the effective date of the Second Report and Order, facilities based broadband Internet access and interconnected Voice over Interconnected Protocol (VOIP) providers newly identified in the First Report and Order in this proceeding were required to file system security statements under the Commission's rules. (Security systems are currently approved under the existing OMB Control No. 3060–0809 information collection).

(b) All telecommunications carriers, including broadband Internet access and interconnected VoIP providers, must file updates to their systems security statements on file with the Commission as their information changes.

(c) Petitions filed under Section 107(c), request for additional time to comply with CALEA; these provisions apply to all carriers subject to CALEA and are voluntary filings.

(d) Section 109(b), request for reimbursement of CALEA; these provisions apply to all carriers subject to CALEA and are voluntary filings.

Federal Communications Commission.

Marlene H. Dortch,

Secretary, Office of the Secretary.

[FR Doc. 2016–25212 Filed 10–18–16; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060–1060]

Information Collection Being Reviewed by the Federal Communications Commission Under Delegated Authority

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burdens, and as required by the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3520), the Federal Communications Commission (FCC or Commission) invites the general public and other Federal agencies to take this opportunity to comment on the following information collections. Comments are requested concerning: Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; the accuracy of the Commission's burden estimate; ways to enhance the quality, utility, and clarity of the information collected; ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and ways to further reduce the information collection burden on small business concerns with fewer than 25 employees. The FCC may not conduct or sponsor a collection of information unless it displays a currently valid OMB control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid OMB control number.

DATES: Written PRA comments should be submitted on or before December 19, 2016. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all PRA comments to Nicole Ongele, FCC, via email to *PRA@fcc.gov* and to *Nicole.Ongele@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: For additional information about the information collection, contact Nicole Ongele at (202) 418–2991.

SUPPLEMENTARY INFORMATION:

OMB Control No.: 3060–1060.

Title: Wireless E911 Coordination Initiative Letter.

Form No.: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: State, Local or Tribal Government.

Number of Respondents and Responses: 50 respondents; 50 responses.

Estimated Time per Response: 0.75 hours.

Frequency of Response: On occasion reporting requirement.

Obligation to Respond: Voluntary. Statutory authority for this collection is contained in Section 1 and 4(i) of the Communications Act.

Total Annual Burden: 38 hours.

Total Annual Cost: No cost.

Privacy Act Impact Assessment: No impact(s).

Nature and Extent of Confidentiality: There is no need for confidentiality.

Needs and Uses: This collection will be submitted as an extension after this 60-day comment period to the Office of Management and Budget (OMB) in order to obtain the full three-year clearance. This voluntary collection was implemented in a letter that was sent, following the FCC's Second E911 Coordination Initiative, to pertinent State officials who had been appointed to oversee their States' programs to implement emergency (E911) Phase II service. This collection is necessary so that the Commission can correct inaccuracies and have up-to-date information to ensure the integrity of the Commission's database of Public Safety Answering Points (PSAPs) throughout the nation. The accurate compiling and maintaining of this database is an inherent part of the Commission's effort to achieve the expeditious implementation of E911 service across the nation and to ensure homeland security.

Federal Communications Commission.

Marlene H. Dortch,

Secretary, Office of the Secretary.

[FR Doc. 2016–25211 Filed 10–18–16; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL DEPOSIT INSURANCE CORPORATION

FDIC Advisory Committee on Community Banking; Notice of Meeting

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Notice of open meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, Public Law 92–463 (Oct. 6, 1972), 5 U.S.C. App. 2, notice is hereby given of a meeting of the FDIC Advisory Committee on Community Banking, which will be held in Washington, DC. The Advisory Committee will provide advice and recommendations on a broad range of policy issues that have particular impact on small community banks throughout the United States and the local communities they serve, with a focus on rural areas.

DATES: Thursday, November 3, 2016, from 9:00 a.m. to 3:00 p.m.

ADDRESSES: The meeting will be held in the FDIC Board Room on the sixth floor of the FDIC Building located at 550 17th Street NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Requests for further information concerning the meeting may be directed to Mr. Robert E. Feldman, Committee Management Officer of the FDIC, at (202) 898–7043.

SUPPLEMENTARY INFORMATION: *Agenda:* The agenda will include a discussion of current issues affecting community banking. The agenda is subject to change. Any changes to the agenda will be announced at the beginning of the meeting.

Type of Meeting: The meeting will be open to the public, limited only by the space available on a first-come, first-served basis. For security reasons, members of the public will be subject to security screening procedures and must present a valid photo identification to enter the building. The FDIC will provide attendees with auxiliary aids (*e.g.,* sign language interpretation) required for this meeting. Those attendees needing such assistance should call (703) 562–6067 (Voice or TTY) at least two days before the meeting to make necessary arrangements. Written statements may be filed with the committee before or after the meeting. This Community Banking Advisory Committee meeting will be Webcast live via the Internet *http://fdic.windrosemedia.com.* Questions or troubleshooting help can be found at the same link. For optimal viewing, a high speed Internet connection is recommended. The Community Banking meeting videos are made available on-demand approximately two weeks after the event.

Federal Deposit Insurance Corporation.

Dated: October 14, 2016.

Robert E. Feldman,

Executive Secretary.

[FR Doc. 2016–25252 Filed 10–18–16; 8:45 am]

BILLING CODE 6714–01–P

FEDERAL MARITIME COMMISSION

Notice of Agreements Filed

The Commission hereby gives notice of the filing of the following agreements under the Shipping Act of 1984. Interested parties may submit comments on the agreements to the Secretary, Federal Maritime Commission, Washington, DC 20573, within twelve days of the date this notice appears in the **Federal Register**. Copies of the agreements are available through the Commission's Web site (*www.fmc.gov*) or by contacting the Office of Agreements at (202)–523–5793 or *tradeanalysis@fmc.gov.*

Agreement No.: 010099–063.

Title: International Council of Containership Operators.

Parties: A.P. Moller-Maersk A/S; CMA. CGM, S.A.; China COSCO Shipping Corporation Limited; Crowley Maritime Corporation; Evergreen Marine Corporation (Taiwan), Ltd.; Hamburg-Süd KG; Hanjin Shipping Co., Ltd.; Hapag-Lloyd AG; Hyundai Merchant Marine Co., Ltd.; Kawasaki Kisen Kaisha, Ltd.; Mediterranean Shipping Co. S.A.; Mitsui O.S.K. Lines, Ltd.; Neptune Orient Lines, Ltd.; Nippon Yusen Kaisha; Orient Overseas Container Line, Ltd.; Pacific International Lines (Pte) Ltd.; United Arab Shipping Company (S.A.G.); Wan Hai Lines Ltd.; Yang Ming Transport Marine Corp.; and Zim Integrated Shipping Services Ltd.

Filing Party: John Longstreth, Esq.; K & L Gates LLP; 1601 K Street NW.; Washington, DC 20006–1600.

Synopsis: The amendment deletes APL Co. Pte. Ltd. and its subsidiary American President Lines, Ltd. as a separate member of the Agreement, and records it under CMA CGM S.A. to reflect the merger of the companies.

Agreement No.: 012211–001.

Title: COSCON/Zim Slot Charter Agreement.

Parties: COSCO Container Lines Co. Ltd. and Zim Integrated Shipping Service, Ltd.

Filing Party: Eric C. Jeffrey, Esq.; Nixon Peabody; 799 9th Street NW., Suite 500; Washington, DC 20001.

Synopsis: The amendment would authorize the parties to update the service on which COSCON provides slots to Zim in the trade between China and the U.S. West Coast, and provide for an expiration date of March 31, 2017. The parties have requested expedited review.

Agreement No.: 012233–005.

Title: UASC/CMA CGM/PIL Vessel Sharing Agreement—Asia and U.S. West Coast Services.

Parties: United Arab Shipping Company (S.A.G.); CMA CGM S.A.; and Pacific International Lines (Pte) Ltd.

Filing Party: Joshua P. Stein; Cozen O'Connor; 1200 Nineteenth Street NW., Washington, DC 20036.

Synopsis: The amendment changes the name of the Agreement to the UASC/PIL Vessel Sharing Agreement—Asia and U.S. West Coast Services and deletes CMA CGM as a party to the Agreement. It also reflects the modified cooperation that will take place between UASC and PIL following CMA CGM's withdrawal from the Agreement.

Agreement No.: 012412–001.

Title: HMM/ZIM Slot Exchange Agreement.

Parties: Hyundai Merchant Marine Co., Ltd. and Zim Integrated Shipping Services, Ltd.

Filing Party: Mark E. Newcomb; ZIM American Integrated Shipping Services, Co. LLC; 5801 Lake Wright Dr.; Norfolk, VA 23508.

Synopsis: The amendment deletes Malaysia, Panama, Saudi Arabia, Singapore, Sri Lanka, Taiwan, Vietnam, and the Gulf of Mexico, and adds South Korea and Panama to the geographic scope of the agreement. It also updates the services on which the parties provide space to each other.

By Order of the Federal Maritime Commission.

Dated: October 14, 2016.

Rachel E. Dickon,

Assistant Secretary.

[FR Doc. 2016–25289 Filed 10–18–16; 8:45 am]

BILLING CODE 6731–AA–P

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisitions of Shares of a Bank or Bank Holding Company

The notificant listed below has 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 notice is available for immediate inspection at the Federal Reserve Bank indicated. The notice 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 November 3, 2016.

A. Federal Reserve Bank of Kansas City (Dennis Denney, Assistant Vice President) 1 Memorial Drive, Kansas City, Missouri 64198–0001:

1. *Otten Investments, LP, Norfolk, Nebraska, and Jarvis Otten, Norfolk, Nebraska individually and as general partners;* to acquire additional shares and control of FEO Investments, Inc., and thereby acquire shares and control of Elkhorn Valley Bank & Trust, both in Norfolk, Nebraska.

B. Federal Reserve Bank of Chicago (Colette A. Fried, Assistant Vice President) 230 South LaSalle Street, Chicago, Illinois 60690–1414:

1. *Matthew K. Murvay, Aliso Viejo, California;* to acquire control of Huron Valley Bancorp, Inc., and thereby control Huron Valley State Bank, both in Milford, Michigan.

Board of Governors of the Federal Reserve System, October 14, 2016.

Margaret McCloskey Shanks,

Deputy Secretary of the Board.

[FR Doc. 2016–25265 Filed 10–18–16; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL RESERVE SYSTEM

Agency Information Collection Activities; Announcement of Board Approval Under Delegated Authority and Submission to OMB

AGENCY: Board of Governors of the Federal Reserve System.

SUMMARY: The Board of Governors of the Federal Reserve System (Board or Federal Reserve) is adopting a proposal to revise, with extension for three years, the Annual Report of Holding Companies (FR Y–6), the Annual Report of Foreign Banking Organizations (FR Y–7), and the Report of Changes in Organizational Structure (FR Y–10). The revisions to the mandatory FR Y–6 and FR Y–7 information collections are effective with fiscal year-ends beginning December 31, 2016. The revisions to the mandatory FR Y–10 information collection are effective October 14, 2016.

On June 15, 1984, the Office of Management and Budget (OMB) delegated to the Board authority under the Paperwork Reduction Act (PRA) to approve of and assign OMB control numbers to collection of information requests and requirements conducted or sponsored by the Board. In exercising this delegated authority, the Board is directed to take every reasonable step to solicit comment. In determining whether to approve a collection of information, the Board will consider all comments received from the public and other agencies.

FOR FURTHER INFORMATION CONTACT: Federal Reserve Board Clearance Officer—Nuha Elmaghrabi—Office of the Chief Data Officer, Board of Governors of the Federal Reserve System, Washington, DC 20551 (202) 452–3829. Telecommunications Device for the Deaf (TDD) users may contact (202) 263–4869, Board of Governors of the Federal Reserve System, Washington, DC 20551.

OMB Desk Officer—Shagufta Ahmed—Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 10235, 725 17th Street NW., Washington, DC 20503.

SUPPLEMENTARY INFORMATION:

Final approval under OMB delegated authority of the revision, with extension for three years, of the following information collection:

Report titles: Annual Report of Holding Companies; Annual Report of Foreign Banking Organizations; Report of Changes in Organizational Structure; Supplement to the Report of Changes in Organizational Structure.

Agency form numbers: FR Y–6, FR Y–7, and FR Y–10 (extension, with revision); FR Y–10E (extension, without revision).

OMB control number: 7100–0297.

Frequency: FR Y–6: Annual; FR Y–7: Annual; FR Y–10: Event-generated; FR Y–10E: Event-generated.

Effective dates: FR Y–6 and FR Y–7: Beginning with fiscal year-ends December 31, 2016; FR Y–10: October 14, 2016.

Respondent type: Bank holding companies (BHCs), savings and loan holding companies (SLHCs), securities holding companies, and intermediate holding companies (IHCs) (collectively, holding companies (HCs)), foreign banking organizations (FBOs), state member banks unaffiliated with a BHC, Edge Act and agreement corporations, and nationally chartered banks that are not controlled by a BHC (with regard to their foreign investments only).

Estimated annual reporting hours: FR Y–6 initial: 130 hours; FR Y–6 ongoing: 26,549 hours; FR Y–7: 972 hours; FR Y–10 initial: 530 hours; FR Y–10 ongoing: 39,735 hours; FR Y–10E: 2,649 hours.

Estimated average hours per response: FR Y–6 initial: 10 hours; FR Y–6 ongoing: 5.5 hours; FR Y–7: 4 hours; FR Y–10 initial: 1 hour; FR Y–10 ongoing: 2.5 hours; FR Y–10E: 0.5 hour.

Number of respondents: FR Y–6 initial: 13; FR Y–6 ongoing: 4,827; FR Y–7: 243; FR Y–10 initial: 530; FR Y–10 ongoing: 5,298; FR Y–10E: 5,298.

Legal authorization and confidentiality: These information collections are mandatory as follows:

FR Y–6: Section 5(c)(1)(A) of the Bank Holding Company Act (BHC Act) (12 U.S.C. 1844(c)(1)(A)); sections 8(a) and 13(a) of the International Banking Act (IBA) (12 U.S.C. 3106(a) and 3108(a)); sections 11(a)(1), 25, and 25A of the Federal Reserve Act (FRA) (12 U.S.C. 248(a)(1), 602, and 611a); and sections 113, 165, 312, 618, and 809 of the Dodd-Frank Act (DFA) (12 U.S.C. 5361, 5365, 5412, 1850a(c)(1), and 5468(b)(1)).

FR Y–7: Sections 8(a) and 13(a) of the IBA (12 U.S.C. 3106(a) and 3108(a)); sections 113, 165, 312, 618, and 809 of the DFA (12 U.S.C. 5361, 5365, 5412, 1850a(c)(1), and 5468(b)(1)).

FR Y–10 and FR Y–10E**:** Sections 4(k) and 5(c)(1)(A) of the BHC Act (12 U.S.C. 1843(k) and 1844(c)(1)(A)); section 8(a) of the IBA (12 U.S.C. 3106(a)); sections 11(a)(1), 25(7), and 25A of the FRA (12 U.S.C. 248(a)(1), 321, 601, 602, 611a, 615, and 625); sections 113, 165, 312, 618, and 809 of the DFA (12 U.S.C. 5361, 5365, 5412, 1850a(c)(1), and 5468(b)(1)); and section 10(c)(2)(H) of the Home Owners' Loan Act (12 U.S.C. 1467a(c)(2)(H)).

The data collected in the FR Y–6, FR Y–7, FR Y–10, and FR Y–10E are not considered confidential. With regard to information that a banking organization may deem confidential, the institution may request confidential treatment of such information under one or more of the exemptions in the Freedom of Information Act (FOIA) (5 U.S.C. 552). The most likely case for confidential treatment will be based on FOIA exemption 4, which permits an agency to exempt from disclosure ''trade secrets and commercial or financial information obtained from a person and privileged and confidential'' (5 U.S.C. 552(b)(4)). To the extent an institution can establish the potential for substantial competitive harm, such information would be protected from disclosure under the standards set forth in *National Parks & Conservation Association* v. *Morton,* 498 F.2d 765 (D.C. Cir. 1974). Exemption 6 of FOIA might also apply with regard to the respondents' submission of non-public personal information of owners, shareholders, directors, officers and employees of respondents. Exemption 6 covers ''personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy'' (5 U.S.C. 552(b)(6)). All requests for confidential treatment would need to be reviewed on a case-by-case basis and in response to a specific request for disclosure.

The Federal Reserve proposes that the disclosure of the responses to the certification questions may interfere with home-country regulators' administration, execution, and disclosure of their stress-test regime and its results, and may cause substantial competitive harm to the FBO providing the information, and thus this information may be protected from disclosure under FOIA exemption 4.

Abstract: The FR Y–6 is an annual information collection submitted by top-tier HCs and non-qualifying FBOs. It collects financial data, an organization chart, verification of domestic branch data, and information about shareholders. The Federal Reserve uses the data to monitor HC operations and determine HC compliance with the provisions of the BHC Act, Regulation Y (12 CFR 225), the Home Owners' Loan Act (HOLA) and Regulation LL (12 CFR 238).

The FR Y–7 is an annual information collection submitted by qualifying FBOs to update their financial and organizational information with the Federal Reserve. The FR Y–7 collects financial, organizational, shareholder, and managerial information. The Federal Reserve uses the information to assess an FBO's ability to be a continuing source of strength to its U.S. operations and to determine compliance with U.S. laws and regulations.

The FR Y–10 is an event-generated information collection submitted by FBOs; top-tier HCs; securities holding companies as authorized under Section 618 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the Dodd-Frank Act) (12 U.S.C. 1850a(c)(1)); state member banks unaffiliated with a bank holding company (BHC); Edge and agreement corporations that are not controlled by a member bank, a domestic BHC, or an FBO; and nationally chartered banks that are not controlled by a BHC (with regard to their foreign investments only), to capture changes in their regulated investments and activities. The Federal Reserve uses the data to monitor structure information on subsidiaries and regulated investments of these entities engaged in banking and nonbanking activities. The FR Y–10E is a free-form supplement that may be used to collect additional structural information deemed to be critical and needed in an expedited manner.

Current Actions: On April 25, 2016, the Federal Reserve published a notice in the **Federal Register** [1] requesting public comment for 60 days on the proposal to revise, with extension, the FR Y–6, FR Y–7, FR Y–10, and FR Y–10E. Under the proposal, the revisions were to: (1) Modify the FR Y–6, FR Y–7, and FR Y–10 confidential treatment questions on reporting forms and instructions to align with the recently approved confidentiality check-box proposal,[2] (2) modify the FR Y–7 and FR Y–10 to incorporate U.S. IHCs formed under the final rule for enhanced prudential standards for FBOs (Regulation YY),[3] (3) clarifying the differences in reporting of additional companies by BHCs and Savings and Loan Holding Companies (SLHCs), adding a formula to calculate ownership percentage, and clarifying the signature requirements for employee stock ownership plans (ESOPs) and limited liability companies (LLCs), and (4) modify the FR Y–10 by removing the instructions for implementation of SLHCs from the General Instructions, removing the legal authority paragraph in the General Instructions, clarifying the instructions regarding the interest in sole partnership and sole member LLCs, separating the LAC for SLHCs into two codes, adding several new Glossary entries, and incorporating clarifying instructions that a nonbank subsidiary under a savings association does not meet the definition of a financial subsidiary. The comment period for this notice expired on June 24, 2016. The Federal Reserve received one comment letter from an industry association, which was outside the scope of the proposed changes. In addition, the Federal Reserve is extending the implementation date for the FR Y–10 to October 14, 2016.

Detailed Discussion of Public Comments

The following is a detailed discussion of the comments and responses.

The commenter requested an electronic filing option for the FR Y–6 Organizational Chart. After review and consideration, the Federal Reserve will provide the option of submitting the FR Y–6 report as a PDF file in an email attachment to reduce burden. The instructions will be updated to reflect this change.

The commenter stated the method for validating Legal Entity Identifiers (LEIs) is inaccurate particularly for LEIs issued prior to 2012. While the validation method is accurate based on the current standards for issuing an LEI, the Federal Reserve believes it can be removed since the one-time collection for existing LEIs has been completed. Upon consideration of the comment, the Federal Reserve will remove the LEI validation from the FR Y–10 online application.

Although the proposal did not include amendments to item 10 or the definition of an LLC on the FR Y–10, the commenter requested guidance on how to report foreign entities for that line item in the FR Y–10 and suggested that a mapping document be provided, which would list foreign entities with their corresponding U.S. legal structure. Alternatively, the commenter made a number of suggestions regarding how LLCs, in particular, are reported on the form, and one suggestion was to modify the definition of LLC to clarify when a

[1] 81 FR 24101 (April 25, 2016).

[2] 80 FR 52282 (August 28, 2015).

[3] The draft FR Y–6 reporting form and instructions associated with this proposal also include the language to collect information for U.S. IHCs of FBOs as discussed in the IHC proposal. See 81 FR 6265 (February 5, 2016) and 81 FR 35016 (June 1, 2016).

foreign entity should be reported as an LLC. After review and consideration, the Federal Reserve decided not to make these changes. Given the vast number of diverse organizational structures, the Federal Reserve believes that it is up to each respondent to apply judgement in determining whether a particular entity type fits within the legal entity structures listed in the form, including whether a foreign entity should be reported as an LLC. If a respondent determines that a business organization does not fit within any of the legal entity structures listed in the form, including the definition of LLC, it may report the legal entity as ''Other'' and provide a description of its unique characteristics.

The commenter requested clarification on how to report ownership interests in LLCs when the organization's governing documents are silent regarding the designation of a managing member and where an entity is designated as a manager (*i.e.,* actively manages the day-to-day operation of the LLC), but has no ownership interest in the LLC. In addition, the commenter suggested that a flowchart be provided in the instructions to indicate how to report these interests. After review and consideration, the Federal Reserve decided not to make these changes. Since each respondent's relationship with the LLC will vary and the determination of whether to report its ownership interest as a managing or non-managing member may depend upon a combination of factors, including applicable state laws, the respondent should consult with its legal staff to take into account these unique facts and circumstances and report its interest in the manner it deems most appropriate.

The commenter requested an established and consistent process for withdrawing an erroneous FR Y–10 report that should not have been filed. The Federal Reserve support incorporating procedures for this process and will consider adding them as part of a future proposal.

Finally, the commenter requested several other technical enhancements to the FR Y–10 online application: (1) Establish a process for withdrawing an FR Y–10 report that should not have been filed, (2) add straight-through processing of the FR Y–10 either directly from internal systems or through a data load process, (3) add a notification that informs the reporter after an event has been processed, (4) add foreign branch entities, (5) remove restriction in the FR Y–10 online application to allow reporters that own interest in the same entity to report their holdings differently, and (6) update the RSSD search function. The Federal Reserve need additional time to investigate whether these enhancements are feasible and may consider them as a part of a future proposal as costs and resources permit.

Board of Governors of the Federal Reserve System, October 13, 2016.

Robert deV. Frierson,

Secretary of the Board.

[FR Doc. 2016–25203 Filed 10–18–16; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL RESERVE SYSTEM

Notice of Proposals To Engage in or To Acquire Companies Engaged in Permissible Nonbanking Activities

The companies listed in this notice have given notice under section 4 of the Bank Holding Company Act (12 U.S.C. 1843) (BHC Act) and Regulation Y, (12 CFR part 225) to engage *de novo,* or to acquire or control voting securities or assets of a company, including the companies listed below, that engages either directly or through a subsidiary or other company, in a nonbanking activity that is listed in § 225.28 of Regulation Y (12 CFR 225.28) or that the Board has determined by Order to be closely related to banking and permissible for bank holding companies. Unless otherwise noted, these activities will be conducted throughout the United States.

Each notice is available for inspection at the Federal Reserve Bank indicated. The notice also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the question whether the proposal complies with the standards of section 4 of the BHC Act.

Unless otherwise noted, comments regarding the applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than November 15, 2016.

A. Federal Reserve Bank of San Francisco (Gerald C. Tsai, Director, Applications and Enforcement) 101 Market Street, San Francisco, California 94105–1579:

1. *H Bancorp LLC, Irvine, California,* to acquire additional shares of Bay Bancorp, Inc., and indirectly of Bay Bank, FSB, both in Columbia, Maryland, and thereby engage in operating a savings and loan association.

Board of Governors of the Federal Reserve System, October 14, 2016.

Margaret McCloskey Shanks,

Deputy Secretary of the Board.

[FR Doc. 2016–25267 Filed 10–18–16; 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 November 15, 2016.

A. Federal Reserve Bank of Cleveland (Nadine Wallman, Vice President) 1455 East Sixth Street, Cleveland, Ohio 44101–2566. Comments can also be sent electronically to *comments.applications@clev.frb.org:*

1. *Standard Financial Corporation, Murrysville, Pennsylvania;* to acquire Allegheny Valley Bancorp, Inc., and thereby acquire control of Allegheny Valley Bank of Pittsburgh, both of Pittsburgh, Pennsylvania.

B. Federal Reserve Bank of Kansas City (Dennis Denney, Assistant Vice President) 1 Memorial Drive, Kansas City, Missouri 64198–0001:

1. *Margaret Parker Platter Charitable Trust,* Osceola, Missouri; to become a

bank holding company by acquiring additional voting shares of SCC Bancshares, Inc., up to 26.03 percent, and thereby acquire shares of St. Clair County State Bank, both in Osceola, Missouri.

2. *Sunflower Reincorporation Sub, Inc.,* Salina, Kansas; to merge with Strategic Growth Bank Incorporated, El Paso, Texas; Strategic Growth Bancorp Incorporated, and thereby acquire Capital Bank SSB, both in El Paso, Texas; and First National Bancorp Incorporated, and thereby acquire The First National Bank of Santa Fe, both in Albuquerque, New Mexico.

Board of Governors of the Federal Reserve System, October 14, 2016.

Margaret McCloskey Shanks,

Deputy Secretary of the Board.

[FR Doc. 2016–25266 Filed 10–18–16; 8:45 am]

BILLING CODE 6210–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Proposed Information Collection Activity; Comment Request

Title: Personal Responsibility Education Program (PREP); Promising Youth Programs (PYP).

OMB No.: New Collection.

Description: The Personal Responsibility Education Program (PREP) grants provide education to adolescents on both abstinence and contraception for the prevention of pregnancy and sexually transmitted infections, including HIV/AIDS, as well as education on additional topics to prepare youth for adulthood. PREP programs are overseen by the Family and Youth Services Bureau (FYSB), in the Administration for Children and Families (ACF), in the U.S. Department of Health and Human Services (HHS).

The Promising Youth Programs (PYP) project supports PREP programming in two ways. First, it supports grantees as they collaborate with independent evaluators to conduct evaluations of their programs. Second, it is working to develop curricula for underserved youth. PYP is overseen by ACF's Office of Planning, Research, and Evaluation (OPRE). To support the PYP project, FYSB and OPRE seek approval to collect the following information:

(1) Abstract template: We will annually ask grantees and their independent evaluators to develop/update abstracts about their programs/evaluations.

(2) CONSORT (CONsolidated Standards Of Reporting Trials) diagram template: We will bi-annually ask grantees and their independent evaluators for information about study recruitment, enrollment, and retention.

(3) Baseline equivalence template: We will bi-annually ask grantees and their independent evaluators for information that demonstrates whether program and comparison groups are comparable.

(4) Implementation analysis plan template: In Year 2 of their grants we will ask grantees and their independent evaluators for information that outlines their implementation analysis plans.

(5) Youth discussions topic guide: We will hold discussions with youth from target populations about their perceptions of PREP-related programming.

Respondents: We will ask grantees and their independent evaluators for information related to (1), (2), (3), and (4). We will ask youth from target populations for information related to (5).

ANNUAL BURDEN ESTIMATES

[3 year information collection]

Instrument	Total number of respondents	Annual number of respondents	Number of responses per respondent per year	Average burden hours per response	Annual burden hours
(1) Abstract template	29	29	1	3	87
(2) CONSORT diagram template	29	29	2	1	58
(3) Baseline equivalence template	16	16	2	2	64
(4) Implementation analysis plan template	29	10	1	5	50
(5) Youth discussions topic guide	64	21	1	1.5	32

Estimated Total Annual Burden Hours: 291.

In compliance with the requirements of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Administration for Children and Families is soliciting public comment on the specific aspects of the information collection described above. Copies of the proposed collection of information can be obtained and comments may be forwarded by writing to the Administration for Children and Families, Office of Planning, Research and Evaluation, 330 C Street SW., Washington, DC 20201, Attn: OPRE Reports Clearance Officer. Email address: *OPREinfocollection@acf.hhs.gov.* All requests should be identified by the title of the information collection.

The Department specifically requests comments on (a) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted within 60 days of this publication.

Mary Jones,

ACF/OPRE Certifying Officer.

[FR Doc. 2016–25231 Filed 10–18–16; 8:45 am]

BILLING CODE 4184–37–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Community Living

Administration on Aging

Agency Information Collection Activities; Public Comment Request; State Annual Long-Term Care Ombudsman Report and Instructions

AGENCY: Administration for Community Living/Administration on Aging, HHS.

ACTION: Notice.

SUMMARY: The Administration on Aging (AoA) is announcing that the proposed collection of information listed below has been submitted to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995.

DATES: Submit written comments on the collection of information by November 18, 2016.

ADDRESSES: Submit written comments on the collection of information by fax 202.395.5806 or by email to *OIRA_submission@omb.eop.gov,* Attn: OMB Desk Officer for ACL.

FOR FURTHER INFORMATION CONTACT: Louise Ryan, telephone: (206) 615–2514; email: *louise.ryan@acl.hhs.gov.*

SUPPLEMENTARY INFORMATION: In compliance with 44 U.S.C. 3507, AoA has submitted the following proposed collection of information to OMB for review and clearance.

States provide the following data and narrative information in the report:

1. Numbers and descriptions of cases filed and complaints made on behalf of long-term care facility residents to the statewide ombudsman program;
2. Major issues identified that impact the quality of care and life of long-term care facility residents;
3. Statewide program operations; and
4. Ombudsman activities in addition to complaint investigation.
5. A new requirement to include organizational conflict of interest reporting as required by the reauthorized Older Americans Act and the LTC Ombudsman program rule at 45 CFR 1324.21.

The report form and instructions have been in continuous use, with minor modifications, since they were first approved by OMB for the FY 1995 reporting period. This current request is for a Revision of a Currently Approved Collection (ICR Rev), which will provide approval for FFY 2016–2018 with modifications to include organizational conflict of interest reporting as required by the reauthorized Older Americans Act, Section 712(f) and the LTC Ombudsman program rule at 45 CFR 1324.21.

The data collected on complaints filed with ombudsman programs and narrative on long-term care issues provide information to Centers for Medicare and Medicaid Services and others on patterns of concerns and major long-term care issues affecting residents of long-term care facilities. Both the complaint and program data collected assist the states and local ombudsman programs in planning strategies and activities, providing training and technical assistance and developing performance measures.

Comments in Response to the 60 Day Federal Register Notice

A notice was published in the **Federal Register**/Vol. 81, No. 126/Thursday, June 30, 2016 Notices, Pages 42712–42713, announcing that AoA was requesting modification of the current form and instructions to incorporate conflict of interest reporting requirements, directing readers to the AoA Web site where these documents are posted and providing an opportunity for public comment. One comment was received from the National Association of Ombudsman Programs (NASOP).

NASOP members disagreed with the burden estimate developed by AoA, stating: *Because an overwhelming majority of state long-term care ombudsman programs designate local ombudsman entities, those circumstances lead to a greater likelihood of organizational conflicts of interest. The burden is compounded by the number of local ombudsman entities within a state and will have multiple sources of reporting organizational conflicts at local or regional levels up to the states before states can report via NORS. Further, because approximately half of state long-term care ombudsman programs are housed within an umbrella agency, this also increases the likelihood that state programs have multiple organizational conflicts that must be identified, remedied or removed, and reported via NORS.*

In response to NASOP's concerns about burden estimates, we made a change in our estimated burden hours from one-half hour per state to one hour per state.

NASOP requested additions to the instructions and report form such as the ability to certify that there was no change in conflicts/remedies from the previous reporting year; and to allow for the ability to report a conflict and remedy that applies to many entities as a reporting entry. These suggestions were helpful and were incorporated into the instructions and form. They did not affect the estimated burden.

NASOP also recommended that AoA/ACL add a reporting option in a check box to indicate a state has identified a conflict, but the conflict has not been remedied. We do not intend to take this recommendation because it would be contrary to the rule and law which require states to identify, remove or remedy conflicts and to report on such remedies. ACL is providing on-going technical assistance to states on the implementation of the Ombudsman program rule, including technical assistance on conflicts of interest and steps to remedy any identified conflicts.

A reporting form and instructions may be viewed in the ombudsman section of the AoA Web site: *http://www.aoa.acl.gov/AoA_Programs/Elder_Rights/Ombudsman/index.aspx.* AoA estimates the burden of this collection and entering the additional report information as follows: Approximately 10 to 60 minutes per respondent, depending on the number of conflicts to report, with 52 state Ombudsman programs responding annually. This brings the total burden hours to approximately 7,753 hours, (149 hours on average per program) with 52 Offices of Long-Term Care Ombudsman programs responding annually.

Summary	Local Ombudsman programs	Office of state Ombudsman	Total burden hours	52 Programs (hours)
Hours	132.1	17	149.1	7,753

Dated: October 12, 2016.

Edwin L. Walker,

Acting Administrator and Assistant Secretary for Aging.

[FR Doc. 2016–25118 Filed 10–18–16; 8:45 am]

BILLING CODE 4154–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2016–N–2406]

Emerging Issues and Cross-Cutting Scientific Advances; Establishment of a Public Docket

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice; establishment of docket; request for comments.

SUMMARY: The Food and Drug Administration (FDA) is establishing a public docket to receive input on emerging issues and cross-cutting scientific advances that may impact FDA preparedness and inter-Agency activities. Interested parties are invited to submit comments regarding emerging technologies and cross-cutting scientific advances of importance to FDA. The focus is on areas that may impact FDA in 5 or more years.

DATES: Submit either electronic or written comments by October 21, 2019.

ADDRESSES: You may submit comments as follows:

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *http://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *http://www.regulations.gov.*
- If you want to submit a comment with confidential information that you do not wish to be made available to the public submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand delivery/Courier (for written/paper submissions):* Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Division of Dockets Management, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2016–N–2406 for ''Emerging Issues and Cross-Cutting Scientific Advances.'' Received comments will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *http://www.regulations.gov* or at the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

- Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *http://www.regulations.gov.* Submit both copies to the Division of Dockets Management. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *http://www.fda.gov/regulatoryinformation/dockets/default.htm.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *http://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Division of Dockets Management, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Donna Mendrick, National Center for Toxicological Research, Food and Drug Administration, 10903 New Hampshire Ave., Silver Spring, MD 20993, 301–796–8892, *Donna.Mendrick@fda.hhs.gov;* or Michael Morgan, Office of Regulatory Science and Innovation, Food and Drug Administration, 10903 New Hampshire Ave., Silver Spring, MD 20993, 240–402–3832, *Michael.Morgan@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: FDA is responsible for protecting the public health by assuring the safety, efficacy, and security of human and veterinary drugs, biological products, medical devices, our Nation's food supply, cosmetics, and products that emit radiation. FDA is tasked with advancing the public health by helping to speed innovations that protect the public health. FDA also has responsibility for regulating the manufacturing, marketing, and distribution of tobacco products, to protect the public health, and to reduce tobacco use by minors. Finally, FDA plays a significant role in the Nation's counterterrorism capability. FDA fulfills this responsibility by ensuring the security of the food supply, and by fostering development of medical products used to respond to deliberate and naturally emerging public health threats.

FDA's ability to achieve its mission relies on awareness of, and proactive preparedness for, emerging issues and scientific advances, which will impact the development of regulated products well in advance of formal FDA regulatory submissions (*e.g.,* 5–10 years). To realize this goal requires long-range horizon scanning by a cadre of scientific leaders from FDA, other government Agencies, interested stakeholders, and the public. Emerging sciences, such as synthetic biology, are expected to impact FDA regulated products in the relatively near term. The goal of this initiative is to identify issues and advances that will impact the Agency in the longer term and thus may be in their infancy.

FDA formed the Emerging Sciences Working Group to provide an FDA-wide science-based forum to identify and communicate scientific regulatory approaches, in order to prepare for anticipated high impact emerging science and technology. Additionally, the Emerging Sciences Working Group informs and advises Agency and FDA Center leadership on critical and cross-cutting issues likely to impact regulatory policy development.

The Emerging Sciences Working Group is seeking input from the public to identify emerging science and technology. Results from long range horizon scanning will assist FDA regarding emerging issues and cross-cutting scientific advances, which may impact FDA preparedness in the future.

Dated: October 13, 2016.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2016–25223 Filed 10–18–16; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket Nos. FDA–2016–E–0463; FDA–2016–E–0532; FDA–2016–E–2468]

Determination of Regulatory Review Period for Purposes of Patent Extension; REPATHA

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) has determined the regulatory review period for REPATHA and is publishing this notice of that determination as required by law. FDA has made the determination because of the submission of applications to the Director of the U.S. Patent and Trademark Office (USPTO), Department of Commerce, for the extension of a patent which claims that human biological product.

DATES: Anyone with knowledge that any of the dates as published (see the **SUPPLEMENTARY INFORMATION** section) are incorrect may submit either electronic or written comments and ask for a redetermination by December 19, 2016. Furthermore, any interested person may petition FDA for a determination regarding whether the applicant for extension acted with due diligence during the regulatory review period by April 17, 2017. See ''Petitions'' in the **SUPPLEMENTARY INFORMATION** section for more information.

ADDRESSES: You may submit comments as follows:

Electronic Submissions

Submit electronic comments in the following way:

• *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *http://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *http://www.regulations.gov.*

• If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

• *Mail/Hand delivery/Courier (for written/paper submissions):* Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

• For written/paper comments submitted to the Division of Dockets Management, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket Nos. FDA–2016–E–0463, FDA–2016–E–0532, and FDA–2016–E–2468 for ''Determination of Regulatory Review Period for Purposes of Patent Extension; REPATHA.'' Received comments will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *http://www.regulations.gov* or at the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

• *Confidential Submissions*—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *http://www.regulations.gov.* Submit both copies to the Division of Dockets Management. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *http://www.fda.gov/regulatoryinformation/dockets/default.htm.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *http://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Division of Dockets Management, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Beverly Friedman, Office of Regulatory Policy, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 6250, Silver Spring, MD 20993, 301–796–3600.

SUPPLEMENTARY INFORMATION:

I. Background

The Drug Price Competition and Patent Term Restoration Act of 1984 (Pub. L. 98–417) and the Generic Animal Drug and Patent Term Restoration Act (Pub. L. 100–670) generally provide that a patent may be extended for a period of up to 5 years so long as the patented item (human drug product, animal drug product, medical device, food additive, or color additive) was subject to regulatory review by FDA before the item was marketed. Under these acts, a product's regulatory review period forms the basis for determining the amount of extension an applicant may receive.

A regulatory review period consists of two periods of time: A testing phase and an approval phase. For human biological products, the testing phase begins when the exemption to permit the clinical investigations of the biological becomes effective and runs until the approval phase begins. The approval phase starts with the initial submission of an application to market the human biological product and continues until FDA grants permission to market the biological product. Although only a portion of a regulatory review period may count toward the actual amount of extension that the Director of USPTO may award (for example, half the testing phase must be subtracted as well as any time that may have occurred before the patent was issued), FDA's determination of the length of a regulatory review period for a human biological product will include all of the testing phase and approval phase as specified in 35 U.S.C. 156(g)(1)(B).

FDA has approved for marketing the human biologic product REPATHA (evolocumab). REPATHA is indicated as an adjunct to diet and maximally tolerated statin therapy for the treatment of adults with heterozygous familial hypercholesterolemia or clinical atherosclerotic cardiovascular disease, who require additional lowering of low density lipoprotein cholesterol (LDL–C) or as an adjunct to diet and other LDL-lowering therapies for the treatment of patients with homozygous familial hypercholesterolemia who require additional lowering of LDL–C. Subsequent to this approval, the USPTO received patent term restoration applications for REPATHA (U.S. Patent Nos. 8,030,457; 8,829,165; and 8,981,064) from Amgen Inc., and the USPTO requested FDA's assistance in determining the patents' eligibility for patent term restoration. In a letter dated April 29, 2016, FDA advised the USPTO that this human biological product had undergone a regulatory review period and that the approval of REPATHA represented the first permitted commercial marketing or use of the product. Thereafter, the USPTO requested that FDA determine the product's regulatory review period.

II. Determination of Regulatory Review Period

FDA has determined that the applicable regulatory review period for REPATHA is 2,267 days. Of this time, 1,901 days occurred during the testing phase of the regulatory review period, while 366 days occurred during the approval phase. These periods of time were derived from the following dates:

1. *The date an exemption under section 505(i) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355(i)) became effective:* June 14, 2009. FDA has verified the applicant's claim that the date the investigational new drug application became effective was on June 14, 2009.

2. *The date the application was initially submitted with respect to the human biological product under section 351 of the Public Health Service Act (42 U.S.C. 262)*: August 27, 2014. FDA has verified the applicant's claim that the biologics license application (BLA) for REPATHA (BLA 125522) was initially submitted on August 27, 2014.

3. *The date the application was approved:* August 27, 2015. FDA has verified the applicant's claim that BLA 125522 was approved on August 27, 2015.

This determination of the regulatory review period establishes the maximum potential length of a patent extension. However, the USPTO applies several statutory limitations in its calculations of the actual period for patent extension. In its applications for patent extension, this applicant seeks 895 days, 353 days, or 164 days of patent term extension, respectively.

III. Petitions

Anyone with knowledge that any of the dates as published are incorrect may submit either electronic or written comments and ask for a redetermination (see **DATES**). Furthermore, any interested person may petition FDA for a determination regarding whether the applicant for extension acted with due diligence during the regulatory review period. To meet its burden, the petition must be timely (see **DATES**) and contain sufficient facts to merit an FDA investigation. (See H. Rept. 857, part 1, 98th Cong., 2d sess., pp. 41–42, 1984.) Petitions should be in the format specified in 21 CFR 10.30.

Submit petitions electronically to *http://www.regulations.gov* at Docket No. FDA–2013–S–0610. Submit written petitions (two copies are required) to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

Dated: October 13, 2016.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2016–25221 Filed 10–18–16; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2004–E–0463]

Determination of Regulatory Review Period for Purposes of Patent Extension; PRILOSEC OTC

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) has determined the regulatory review period for PRILOSEC OTC and is publishing this notice of that determination as required by law. FDA has made the determination because of the submission of an application to the Director of the U.S. Patent and Trademark Office (USPTO), Department of Commerce, for the extension of a patent which claims that human drug product.

DATES: Anyone with knowledge that any of the dates as published (see the **SUPPLEMENTARY INFORMATION** section) are incorrect may submit either electronic or written comments and ask for a redetermination by December 19, 2016. Furthermore, any interested person may petition FDA for a determination regarding whether the applicant for extension acted with due diligence during the regulatory review period by April 17, 2017. See ''Petitions'' in the **SUPPLEMENTARY INFORMATION** section for more information.

ADDRESSES: You may submit comments as follows:

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *http://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *http://www.regulations.gov.*

• If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

• *Mail/Hand delivery/Courier (for written/paper submissions):* Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

• For written/paper comments submitted to the Division of Dockets Management, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2004–E–0463 for ''Determination of Regulatory Review Period for Purposes of Patent Extension; PRILOSEC OTC.'' Received comments will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *http://www.regulations.gov* or at the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

• Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *http://www.regulations.gov.* Submit both copies to the Division of Dockets Management. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *http://www.fda.gov/regulatoryinformation/dockets/default.htm.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *http://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Division of Dockets Management, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT:
Beverly Friedman, Office of Regulatory Policy, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 6250, Silver Spring, MD 20993, 301–796–3600.

SUPPLEMENTARY INFORMATION:

I. Background

The Drug Price Competition and Patent Term Restoration Act of 1984 (Pub. L. 98–417) and the Generic Animal Drug and Patent Term Restoration Act (Pub. L. 100–670) generally provide that a patent may be extended for a period of up to 5 years so long as the patented item (human drug product, animal drug product, medical device, food additive, or color additive) was subject to regulatory review by FDA before the item was marketed. Under these acts, a product's regulatory review period forms the basis for determining the amount of extension an applicant may receive.

A regulatory review period consists of two periods of time: A testing phase and an approval phase. For human drug products, the testing phase begins when the exemption to permit the clinical investigations of the drug becomes effective and runs until the approval phase begins. The approval phase starts with the initial submission of an application to market the human drug product and continues until FDA grants permission to market the drug product. Although only a portion of a regulatory review period may count toward the actual amount of extension that the Director of USPTO may award (for example, half the testing phase must be subtracted as well as any time that may have occurred before the patent was issued), FDA's determination of the length of a regulatory review period for a human drug product will include all of the testing phase and approval phase as specified in 35 U.S.C. 156(g)(1)(B).

FDA has approved for marketing the human drug product PRILOSEC OTC (omeprazole magnesium). PRILOSEC OTC is indicated for treatment of frequent heartburn for consumers 18 years of age and older. Subsequent to this approval, the USPTO received a patent term restoration application for PRILOSEC OTC (U.S. Patent No. 5,817,338) from AstraZeneca AB, and the USPTO requested FDA's assistance in determining this patent's eligibility for patent term restoration. In a letter dated October 19, 2004, FDA advised the USPTO that this human drug product had undergone a regulatory review period and that the approval of PRILOSEC OTC represented the first permitted commercial marketing or use of the product. Thereafter, the USPTO requested that FDA determine the product's regulatory review period.

II. Determination of Regulatory Review Period

FDA has determined that the applicable regulatory review period for PRILOSEC OTC is 2,045 days. Of this time, 804 days occurred during the testing phase of the regulatory review period, while 1,241 days occurred during the approval phase. These periods of time were derived from the following dates:

1. *The date an exemption under section 505(i) of the Federal Food, Drug, and Cosmetic Act (the FD&C Act) (21 U.S.C. 355(i)) became effective:* November 15, 1997. The applicant claims November 14, 1997, as the date the investigational new drug application (IND) became effective. However, FDA records indicate that the IND effective date was November 15, 1997, which was 30 days after FDA receipt of the IND.

2. *The date the application was initially submitted with respect to the human drug product under section 505(b) of the FD&C Act:* January 27, 2000. FDA has verified the applicant's claim that the new drug application (NDA) for PRILOSEC OTC (NDA 21–229) was initially submitted on January 27, 2000.

3. *The date the application was approved:* June 20, 2003. FDA has verified the applicant's claim that NDA 21–229 was approved on June 20, 2003.

This determination of the regulatory review period establishes the maximum potential length of a patent extension. However, the USPTO applies several statutory limitations in its calculations of the actual period for patent extension. In its application for patent extension, this applicant seeks 623 days of patent term extension.

III. Petitions

Anyone with knowledge that any of the dates as published are incorrect may submit either electronic or written comments and ask for a redetermination (see **DATES**). Furthermore, any interested person may petition FDA for a determination regarding whether the applicant for extension acted with due diligence during the regulatory review period. To meet its burden, the petition must be timely (see **DATES**) and contain sufficient facts to merit an FDA investigation. (See H. Rept. 857, part 1, 98th Cong., 2d sess., pp. 41–42, 1984.) Petitions should be in the format specified in 21 CFR 10.30.

Submit petitions electronically to *http://www.regulations.gov* at Docket No. FDA–2013–S–0610. Submit written petitions (two copies are required) to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

Dated: *October 13, 2016.*

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2016–25220 Filed 10–18–16; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket Nos. FDA–2015–E–2780; FDA–2015–E–2778; FDA–2015–E–2779]

Determination of Regulatory Review Period for Purposes of Patent Extension; PLEGRIDY

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) has determined the regulatory review period for PLEGRIDY and is publishing this notice of that determination as required by law. FDA has made the determination because of the submission of applications to the Director of the U.S. Patent and Trademark Office (USPTO), Department of Commerce, for the extension of a patent which claims that human biological product.

DATES: Anyone with knowledge that any of the dates as published (see the **SUPPLEMENTARY INFORMATION** section) are incorrect may submit either electronic or written comments and ask for a redetermination by December 19, 2016. Furthermore, any interested person may petition FDA for a determination regarding whether the applicant for extension acted with due diligence during the regulatory review period by April 17, 2017. See ''Petitions'' in the **SUPPLEMENTARY INFORMATION** section for more information.

ADDRESSES: You may submit comments as follows:

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *http://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *http://www.regulations.gov.*
- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand delivery/Courier (for written/paper submissions):* Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Division of Dockets Management, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket Nos. FDA–2015–E–2780; FDA–2015–E–2778; and FDA–2015–E–2779 for ''Determination of Regulatory Review Period for Purposes of Patent Extension; PLEGRIDY.'' Received comments will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *http://www.regulations.gov* or at the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

- Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *http://www.regulations.gov.* Submit both copies to the Division of Dockets Management. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *http://www.fda.gov/regulatoryinformation/dockets/default.htm.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *http://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Division of Dockets Management, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Beverly Friedman, Office of Regulatory Policy, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 6250, Silver Spring, MD 20993, 301–796–3600.

SUPPLEMENTARY INFORMATION:

I. Background

The Drug Price Competition and Patent Term Restoration Act of 1984 (Pub. L. 98–417) and the Generic Animal Drug and Patent Term Restoration Act (Pub. L. 100–670) generally provide that a patent may be extended for a period of up to 5 years so long as the patented item (human drug product, animal drug product, medical device, food additive, or color additive) was subject to regulatory review by FDA before the item was marketed. Under these acts, a product's regulatory review period forms the basis for determining the amount of extension an applicant may receive.

A regulatory review period consists of two periods of time: A testing phase and an approval phase. For human biological products, the testing phase begins when the exemption to permit the clinical investigations of the biological becomes effective and runs until the approval phase begins. The approval phase starts with the initial submission of an application to market the human biological product and continues until FDA grants permission to market the biological product. Although only a portion of a regulatory review period may count toward the actual amount of extension that the Director of USPTO may award (for example, half the testing phase must be subtracted as well as any time that may have occurred before the patent was issued), FDA's determination of the length of a regulatory review period for a human biological product will include all of the testing phase and approval phase as specified in 35 U.S.C. 156(g)(1)(B).

FDA has approved for marketing the human biologic product PLEGRIDY (peginterferon beta–1a). PLEGRIDY is indicated for treatment of patients with relapsing forms of multiple sclerosis. Subsequent to this approval, the USPTO received patent term restoration applications for PLEGRIDY (U.S. Patent Nos. 7,446,173; 8,017,733; and 8,524,660) from Biogen Idec MA Inc., and the USPTO requested FDA's assistance in determining the patents' eligibility for patent term restoration. In a letter dated October 15, 2015, FDA advised the USPTO that this human biological product had undergone a regulatory review period and that the approval of PLEGRIDY represented the first permitted commercial marketing or use of the product. Thereafter, the USPTO requested that FDA determine the product's regulatory review period.

II. Determination of Regulatory Review Period

FDA has determined that the applicable regulatory review period for PLEGRIDY is 2,643 days. Of this time, 2,186 days occurred during the testing phase of the regulatory review period, while 457 days occurred during the approval phase. These periods of time were derived from the following dates:

1. *The date an exemption under section 505(i) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355(i)) became effective:* May 23, 2007. FDA has verified the applicant's claim that the date the investigational new drug application became effective was on May 23, 2007.

2. *The date the application was initially submitted with respect to the human biological product under section 351 of the Public Health Service Act (42 U.S.C. 262)*: May 16, 2013. FDA has verified the applicant's claim that the biologics license application (BLA) for PLEGRIDY (BLA 125499) was initially submitted on May 16, 2013.

3. *The date the application was approved:* August 15, 2014. FDA has verified the applicant's claim that BLA 125499 was approved on August 15, 2014.

This determination of the regulatory review period establishes the maximum potential length of a patent extension. However, the USPTO applies several statutory limitations in its calculations of the actual period for patent extension. In its applications for patent extension, this applicant seeks 1,284 days, 762 days, or 346 days of patent term extension, respectively.

III. Petitions

Anyone with knowledge that any of the dates as published are incorrect may submit either electronic or written comments and ask for a redetermination (see **DATES**). Furthermore, any interested person may petition FDA for a determination regarding whether the applicant for extension acted with due diligence during the regulatory review period. To meet its burden, the petition must be timely (see **DATES**) and contain sufficient facts to merit an FDA investigation. (See H. Rept. 857, part 1, 98th Cong., 2d sess., pp. 41–42, 1984.) Petitions should be in the format specified in 21 CFR 10.30.

Submit petitions electronically to *http://www.regulations.gov* at Docket No. FDA–2013–S–0610. Submit written petitions (two copies are required) to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

Dated: October 13, 2016.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2016–25222 Filed 10–18–16; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2013–N–0825]

Agency Information Collection Activities; Proposed Collection; Comment Request; Premarket Approval of Medical Devices

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing an opportunity for public comment on the proposed collection of certain information by the Agency. Under the Paperwork Reduction Act of 1995 (the PRA), Federal Agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, and to allow 60 days for public comment in response to the notice. This notice solicits comments on requirements for premarket approval of medical devices.

DATES: Submit either electronic or written comments on the collection of information by December 19, 2016.

ADDRESSES: You may submit comments as follows:

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *http://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *http://www.regulations.gov.*
- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand delivery/Courier (for written/paper submissions):* Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Division of Dockets Management, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2013–N–0825 for ''Agency Information Collection Activities; Proposed Collection; Comment Request; Premarket Approval of Medical Devices'' Received comments will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *http://www.regulations.gov* or at the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

- Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *http://www.regulations.gov.* Submit both copies to the Division of Dockets Management. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *http://www.fda.gov/regulatoryinformation/dockets/default.htm.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *http://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Division of Dockets Management, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: FDA PRA Staff, Office of Operations, Food and Drug Administration, Three White Flint North 10A–12M, 11601 Landsdown St., North Bethesda, MD 20852, *PRAStaff@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3520), Federal Agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes Agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal Agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comments on these topics: (1) Whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

Premarket Approval of Medical Devices—21 CFR part 814—OMB Control Number 0910–0231—Extension

Under section 515 of the Federal Food, Drug, and Cosmetic Act (the FD&C Act) (21 U.S.C. 360e) all devices placed into class III by FDA are subject to premarket approval requirements. Premarket approval (PMA) is the process of scientific and regulatory review to ensure the safety and effectiveness of class III devices. An approved PMA is, in effect, a private license granted to the applicant for marketing a particular medical device. A class III device that fails to meet PMA requirements is considered to be adulterated under section 501(f) of the FD&C Act 21 U.S.C. 351(f)) and cannot be marketed. Premarket approval requirements apply differently to preamendments devices, postamendments devices, and transitional class III devices.

Manufacturers of class III preamendments devices, devices that were in commercial distribution before May 28, 1976, are not required to submit a PMA until 30 months after the issuance of a final classification regulation or until 90 days after the publication of a final regulation requiring the submission of a PMA, whichever period is later. FDA may allow more than 90 days after issuance of a final rule for submission of a PMA.

A postamendments device is one that was first distributed commercially on or after May 28, 1976. Postamendments devices determined by FDA to be substantially equivalent to preamendments class III devices are subject to the same requirements as the preamendments devices. FDA determines substantial equivalence after reviewing an applicant's premarket notification submitted in accordance with section 510(k) of the FD&C Act (21 U.S.C. 360(k)). Postamendments devices determined by FDA to be not substantially equivalent to either preamendments devices or postamendments devices classified into class I or II are ''new'' devices and fall automatically into class III. Before such devices can be marketed, they must have an approved premarket approval application or be must reclassified into class I or class II.

The Food and Drug Modernization Act of 1997 (FDAMA) (Pub. L. 105–115) was enacted on November 21, 1997, to implement revisions to the FD&C Act by streamlining the process of bringing safe and effective drugs, medical devices, and other therapies to the U.S. market. FDAMA added section 515(d)(6) to the FD&C Act, which provided that PMA supplements were required for all device changes that affect safety and effectiveness unless such changes are modifications to manufacturing procedures or method of manufacture. That type of manufacturing change will require a 30-day notice, or where FDA finds such notice inadequate, a 135-day PMA supplement.

The implementing regulations, contained in part 814 (21 CFR part 814), further specify the contents of a PMA for a medical device and the criteria FDA will employ in approving, denying, or withdrawing approval of a PMA and supplements to PMAs. The regulations' purpose is to establish an efficient and thorough procedure for FDA's review of PMAs and supplements to PMAs for class III medical devices. The regulations facilitate the approval of PMAs and supplements to PMAs for devices that have been shown to be reasonably safe and effective and otherwise meet the statutory criteria for approval. The regulations also ensure the denial of PMAs and supplements to PMAs for devices that have not been shown to be reasonably safe and effective and that do not otherwise meet the statutory criteria for approval.

The industry-wide burden estimate for PMAs is based on an FDA average fiscal year (FY) annual rate of receipt of PMA submissions data FY 2013 through 2015 and our expectation of submissions to come in the next few years. The burden data for PMAs is based on data provided by applicants by device type and cost element in an earlier study.

Reporting Burden: The reporting burden can be broken out by certain sections of the PMA regulations and the FD&C Act as follows:

§ 814.15(b)—Research Conducted Outside the United States. Each foreign study should be performed in accordance with the ''Declaration of Helsinki'' or the laws and regulations of the country in which the study was conducted. If the study was conducted in accordance with the laws of the country, the PMA applicant is required to explain to FDA in detail the differences between the laws of the country and the ''Declaration of Helsinki.'' Based on the number of PMAs received that contained studies from overseas, FDA estimates that the burden estimate necessary to meet this requirement is 50 hours.

§ 814.20—Application. Included in this requirement are the conduct of laboratory and clinical trials as well as the analysis, review, and physical preparation of the PMA application. FDA estimates that 35 applicants, including hospital re-manufacturers of single-use devices, will be affected by these requirements which are based on the actual average of FDA receipt of new PMA applications in FY 2013 through 2015. FDA's estimate of the hours per response (668) was derived through FDA's experience and consultation with industry and trade associations. In addition, FDA also based its estimate on the results of an earlier study that accounts for the bulk of the hourly burden for this requirement, which is identified by applicants.

§ 814.37(a) through (c) and (e)—PMA Amendments and Resubmitted PMAs. As part of the review process, FDA often requests the PMA applicant to submit additional information regarding the device necessary for FDA to file the PMA or to complete its review and make a final decision. The PMA applicant may, also on their own initiative, submit additional information to FDA during the review process. These amendments contain information ranging from additional test results, re-analysis of the original data set, to revised device labeling. Almost all PMAs received by the Agency have amendments submitted during the review process.

§ 814.39(a)—PMA Supplements. This information collection includes the requirements for the range of PMA supplements (panel track, 180-day fee-based, 180-day non-fee based, and real-time supplements).

§ 814.39(d)—Special PMA Supplements—Changes Being Affected. This type of supplement is intended to enhance the safety of the device or the safe use of the device. The number of PMA supplements received that fit this category averaged 88 per year based on the numbers received from FY 2013 through FY 2015. Because of the minimal data required to be included in this type of supplement, FDA estimates that the burden hours necessary to satisfy this requirement are 528 hours.

§ 814.39(f)—30-Day Notice. Under section 515(d) of the FD&C Act, modifications to manufacturing procedures or methods of manufacture that affect the safety and effectiveness of a device subject to an approved PMA do not require submission of a PMA supplement under paragraph (a) of this section and are eligible to be the subject of a 30-day notice. A 30-day notice shall describe in detail the change, summarize the data or information supporting the change, and state that the change has been made in accordance with the requirements of part 820 (21 CFR part 820). The applicant may distribute the device 30 days after the date on which FDA receives the 30-day notice, unless FDA notifies the applicant within 30 days from receipt of the notice, that it is not adequate.

§ 814.82(a)(9)—Postapproval Requirements. Postapproval requirements concerns approved PMAs that were not reclassified and require a periodic report. After approval, all PMAs require a submission of an annual report. A majority of the submitted PMAs require associated postapproval studies, *i.e.,* followup of patients used in clinical trials to support the PMA or additional preclinical information that is labor-intensive to compile and complete; the remaining PMAs require minimal information.

§ 814.84(b)—Periodic Reports. Postapproval requirements described in § 814.82(a)(7) require submission of an annual report for each approved PMA. FDA estimates that respondents will average about 10 hours in preparing their reports to meet this requirement. This estimate is based on FDA's experience and consultation with industry.

Expedited or Priority Review—Section 515(d)(5) of the FD&C Act. FDA will provide special review, which can include expedited processing of a PMA application, for certain devices intended to treat or diagnose life threatening or irreversibly debilitating diseases or conditions. To receive special review, the devices must meet one of the following criteria:

- The device represents a breakthrough technology;
- There are no approved alternatives;
- The use of the device offers significant advantages over existing approved alternatives;
- Availability is in the best interest of the patients.

Agreement Meeting—Section 520(g)(7) of the FD&C Act (21 U.S.C. 360j(g)(7)). Applicants planning to submit a PMA may submit a written request to reach agreement with FDA on the key parameters of the investigational plan.

Determination Meeting—Section 513(a)(3)(D) of the FD&C Act (21 U.S.C. 360c(a)(3)(D)). Applicants planning to submit a PMA may submit a written request to FDA for a meeting to determine the type of information (valid scientific evidence) necessary to support the effectiveness of their device.

Panel of Experts—Section 515(c)(3) of the FD&C Act. An original PMA or panel track PMA supplement is taken to an advisory panel of experts unless FDA determines that the information in the application substantially duplicates information which has previously been reviewed by the panel.

Day 100 Meeting—Section 515(d)(3) of the FD&C Act. FDA must, upon the written request of the applicant, meet with that party within 100 days of receipt of the filed PMA application to discuss the review status of the application. With the concurrence of the applicant, a different schedule may be established. Prior to this meeting, FDA must inform the applicant in writing of any identified deficiencies and what information is required to correct those deficiencies. FDA must also promptly notify the applicant if FDA identifies additional deficiencies or of any additional information required to complete Agency review.

Recordkeeping

§ 814.82(a)(5) and (a)(6)—Maintenance of Records. The recordkeeping burden under this section requires the maintenance of records, used to trace patients and the organization and indexing of records into identifiable files to ensure the device's continued safety and effectiveness. These records are required of all applicants who have an approved PMA.

PMAs have been required since 1976, and there are 725 active PMAs that could be subject to these requirements, based on actual FDA data, and approximately 30 new PMAs are approved every year. The aggregate burden for the estimated 422 PMA holders of approved original PMAs for the next few years is estimated to be 7,174 hours.

The applicant determines which records should be maintained during product development to document and/or substantiate the device's safety and effectiveness. Records required by the current good manufacturing practices for medical devices regulation (21 CFR part 820) may be relevant to a PMA review and may be submitted as part of an application. In individual instances, records may be required as conditions of approval to ensure the device's continuing safety and effectiveness.

FDA estimates the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN [1]

Activity/21 CFR or FD&C Act section	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response	Total hours
Research conducted outside the United States (814.15(b))	25	1	25	2	50
PMA application (814.20)	35	1	35	668	23,380
PMA amendments and resubmitted PMAs (814.37(a)–(c) and (e))	1,222	1	1,222	167	204,074
PMA supplements (814.39(a))	695	1	695	60	41,700
Special PMA supplement—changes being affected (814.39(d))	88	1	88	6	528
30-day notice (814.39(f))	1,710	1	1,710	16	27,360
Postapproval requirements (814.82(a)(9))	340	1	340	135	45,900
Periodic reports (814.84(b))	695	1	695	10	6,950
Agreement meeting (520(g)(7))	1	1	1	50	50
Expedited review request (515(d)(5) of the FD&C Act)	6	1	6	10	60
Determination Meeting (513(1)(3)(D) of the FD&C Act)	1	1	1	50	50
Panel meeting (515(c)(3) of the FD&C Act)	9	1	9	30	270
Day 100 meeting (515(d)(3) of the FD&C Act)	19	1	19	10	190
Total					350,562

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

TABLE 2—ESTIMATED ANNUAL RECORDKEEPING BURDEN [1]

Activity/21 CFR section	Number of recordkeepers	Number of records per recordkeeper	Total annual records	Average burden per recordkeeping	Total hours
Maintenance of records (814.82(a)(5) and (a)(6))	422	1	422	17	7,174

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

Dated: October 13, 2016.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2016–25232 Filed 10–18–16; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Solicitation for Applications From Individuals Interested in Being Appointed to 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.

Authority: 42 U.S.C. 217a, Section 222 of the Public Health Service Act, as amended. The Committee is governed by the provisions of Public Law 92–463, as amended (5 U.S.C. App. 2), which sets forth standards for the formation and use of advisory committees.

SUMMARY: The Office of the Assistant Secretary for Health (OASH), within the Department of Health and Human Services (HHS), is seeking nominations of qualified candidates to be considered for appointment as members of the Chronic Fatigue Syndrome Advisory Committee (CFSAC). CFSAC provides advice and recommendations to the Secretary of HHS, through the Assistant Secretary for Health (ASH), on a broad range of issues and topics related to myalgic encephalomyelitis/chronic fatigue syndrome (ME/CFS). The appointments of two Committee members are scheduled to end during the 2016 calendar year. Nominations of qualified candidates are being sought to fill the positions that are scheduled to be vacated.

DATES: Applications for individuals to be considered for appointment to the Committee must be received no later than 5 p.m. EDT on November 18, 2016 at the address listed below.

ADDRESSES: All nominations should be mailed or delivered to Commander, (CDR) Gustavo Seinos, MPH, Designated

Federal Officer, Chronic Fatigue Syndrome Advisory Committee, Office on Women's Health, Office of the Assistant Secretary for Health, Department of Health and Human Services, 200 Independence Avenue SW., Room 712E, Washington, DC 20201. Nomination materials, including attachments, may be submitted electronically to *cfsac@hhs.gov.*

FOR FURTHER INFORMATION CONTACT: CDR Gustavo Seinos, Designated Federal Officer, Chronic Fatigue Syndrome Advisory Committee, Office on Women's Health, Office of the Assistant Secretary for Health, Department of Health and Human Services, 200 Independence Ave. SW., Room 712E, Washington, DC 20201. Inquiries may also be made to *cfsac@hhs.gov.*

SUPPLEMENTARY INFORMATION: CFSAC was established on September 5, 2002. The purpose of the CFSAC is to provide advice and recommendations to the Secretary of HHS, through the ASH, on issues related to ME/CFS. The CFSAC advises and makes recommendations on a broad range of topics including: (1) Opportunities to improve knowledge and research about the epidemiology, etiologies, biomarkers and risk factors for ME/CFS; (2) research on the diagnosis, treatment, and management of ME/CFS and potential impact of treatment options; (3) strategies to inform the public, health care professionals, and the biomedical academic and research communities about ME/CFS advances; (4) partnerships to improve the quality of life of ME/CFS patients; and (5) strategies to insure that input from ME/CFS patients and caregivers is incorporated into HHS policy and research. The CFSAC charter is available at: *http://www.hhs.gov/advcomcfs/charter/index.html.* Management and support services for Committee activities are provided by staff from within the OASH. The ASH provides direction and guidance for services performed to support CFSAC activities and operation.

Nominations: OASH is requesting nominations to fill CFSAC positions scheduled to be vacated at the end of 2016. The Committee composition consists of seven scientists with demonstrated expertise in biomedical research applicable to ME/CFS, four individuals with demonstrated expertise in health care delivery, private health care services, insurance, and three patients/care givers of ME/CFS. The vacant positions are in the biomedical research category. Individuals selected for appointment to the Committee will serve as voting members and may be invited to serve terms of up to four years.

CFSAC members are authorized to receive a stipend for conducting Committee related business, including attending Committee meetings. Committee members also are authorized to receive per diem and reimbursement for travel expenses incurred for conducting Committee related business. To qualify for consideration of appointment to the Committee, an individual must possess demonstrated experience and knowledge in the designated fields or disciplines, as well as expert knowledge of the broad issues and topics pertinent to ME/CFS.

Nomination materials should be typewritten. If mailed, please submit original documents. The nomination materials should be submitted (postmarked or received) no later than 5:00 p.m. EDT on the specified date. The following information must be part of the nomination package submitted for each individual being nominated: (1) A letter of nomination that clearly states the name and affiliation of the nominee, the basis for the nomination (*i.e.,* specific attributes which qualify the nominee for service in this capacity), and a statement that the nominee is willing to serve as a member of the Committee; (2) the nominator's name, address, and daytime telephone number; (3) the home and/or work address, telephone number, and email address of the individual being nominated; and (4) a current copy of the nominee's curriculum vitae or resume, which should not exceed 10 pages. An individual may self-nominate. Federal employees should not be nominated for consideration of appointment to this Committee. Nominations that do not contain all of the above information will not be considered.

Electronic submissions: Nomination materials, including attachments, may be submitted electronically to *cfsac@hhs.gov.*

Regular, Express, or Overnight Mail: Written documents may be submitted to the following addressee only: CDR Gustavo Seinos, MPH, Designated Federal Officer, CFSAC, Office on Women's Health, Office of the Assistant Secretary for Health, Department of Health and Human Services, 200 Independence Ave. SW., Room 712E, Washington, DC 20201.

Telephone and facsimile submissions cannot be accepted.

Appointment to the Committee is made by the Secretary of HHS. The Department makes every effort to ensure that the membership of federal advisory committees is fairly balanced in terms of points of view represented. Every effort is made to ensure that a broad representation of geographic areas, females, ethnic and minority groups, and people with disabilities are given consideration for membership on federal advisory committees. Appointment to this Committee shall be made without discrimination on the basis of age, race, ethnicity, gender, sexual orientation, disability, and cultural, religious, or socioeconomic status. Nominations must state that the nominee is willing to serve as a member of CFSAC and appears to have no conflict of interest that would preclude membership. Candidates who are selected for appointment to the Committee are required to provide detailed information concerning such matters as financial holdings, consultancies, and research grants or contracts for an ethics analysis to be conducted to identify potential conflicts of interest.

Dated: October 14, 2016.

Nicole Greene,

Deputy Director, Office on Women's Health.

[FR Doc. 2016–25307 Filed 10–18–16; 8:45 am]

BILLING CODE 4150–42–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Human Genome Research Institute; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of a meeting of the Board of Scientific Counselors, National Human Genome Research Institute.

The meeting will be closed to the public as indicated below in accordance with the provisions set forth in section 552b(c)(6), Title 5 U.S.C., as amended for the review, discussion, and evaluation of individual intramural programs and projects conducted by the NATIONAL HUMAN GENOME RESEARCH INSTITUTE, including consideration of personnel qualifications and performance, and the competence of individual investigators, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Board of Scientific Counselors, National Human Genome Research Institute.

Date: November 1–2, 2016.

Time: November 1, 2016, 6:00 p.m. to 9:30 p.m.

Agenda: To review and evaluate personal qualifications and performance, and competence of individual investigators.

Place: Hyatt Regency Bethesda, One Bethesda Metro Center, Annex Room, 7400 Wisconsin Avenue, Bethesda, MD 20814.

Time: November 2, 2016, 8:00 a.m. to 6:30 p.m.

Agenda: To review and evaluate personal qualifications and performance, and competence of individual investigators.

Place: National Institutes of Health, Building 50, Louis Stokes Laboratories, Room 1328, 50, South Drive, Bethesda, MD 20892.

Contact Person: Monica Berger, Executive Secretary, Office of the Scientific Director, National Human Genome Research Institute, 50 South Drive, Bldg. 50, Rm 5222, Bethesda, MD 20892, 301–294–6873, *bergerm@mail.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.

(Catalogue of Federal Domestic Assistance Program Nos. 93.172, Human Genome Research, National Institutes of Health, HHS)

Dated: October 13, 2016.

Sylvia L. Neal,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2016–25214 Filed 10–18–16; 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 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: Heart, Lung, and Blood Initial Review Group; NHLBI Mentored Transition to Independence Review Committee.

Date: November 5–6, 2015.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: The William F. Bolger Center, 9600 Newbridge Drive, Potomac, MD 20854.

Contact Person: Giuseppe Pintucci, Ph.D., Scientific Review Officer, Office of Scientific Review/DERA, National Heart, Lung, and Blood Institute, 6701 Rockledge Drive, Room 7192, Bethesda, MD 20892, 301–435–0287, *Pintuccig@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: October 13, 2016.

Michelle Trout,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2016–25215 Filed 10–18–16; 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: SAMHSA Disaster Technical Assistance Center Disaster Behavioral Health Needs Assessment and Customer Satisfaction Surveys (OMB No. 0930–0325)—Revision

The Substance Abuse and Mental Health Services Administration (SAMHSA) is requesting approval for a revision to the data collection associated with the SAMHSA Disaster Technical Assistance Center (DTAC) Disaster Behavioral Health Needs Assessment and Customer Satisfaction Surveys (OMB No. 0930–0325), which expire on May 31, 2017. Specifically, SAMHSA DTAC plans to consolidate the Needs Assessment Survey and Customer Satisfaction Surveys into a single instrument. The new revised instrument, entitled SAMHSA DTAC Customer Feedback Survey (CFS), under this effort will also include a change in administration to make it appropriate for a single, streamlined survey.

The proposed data collection effort will provide feedback on the overall effectiveness of SAMHSA DTAC's services, ongoing needs at the national level, and areas that require enhanced technical assistance (TA) services.

SAMHSA DTAC will be responsible for administering the data collection instrument and analyzing the data. SAMHSA DTAC will use data from the instrument to inform current and future TA activities and to ensure these activities continue to align with state and local needs.

A three-year clearance is being requested. The SAMHSA DTAC CFS is designed to allow the agency to collect feedback on the overall effectiveness of the services provided by SAMHSA DTAC, as well as ongoing data regarding disaster behavioral health (mental health and substance use-related) needs at the national level and areas that require enhanced training and technical assistance (TA) services. This is the information that was previously collected as part of the SAMHSA DTAC Needs Assessment Survey (NAS) and Customer Satisfaction Survey (CSS). Data from this effort will continue to be used to improve services to jurisdictions, which will lead to (1) better integration of disaster behavioral health (DBH) needs with all-hazards disaster preparedness and response, and (2) improved outcomes at the state, territory, tribal, and local levels with less burden on participants. The new Customer Feedback Survey integrates and consolidates questions from the previously utilized NAS and CSS, which will reduce burden associated with the number of instruments and survey questions. SAMHSA DTAC will continue to be responsible for survey administration and analysis of the data collected, which SAMHSA will use to inform current and future training and TA activities. Table 1 shows the estimated burden associated with CFS data collection activities and the associated costs. It is anticipated that the survey will be administered once each year.

Participation in the Customer Feedback Survey will be solicited from all 50 states, the U.S. territories, and the District of Columbia. The survey will be administered to individuals who have requested TA within the six months prior to administration and those who are subscribed to DTAC's e-communications, *SAMHSA DTAC Bulletin,* or *The Dialogue,* at the time of administration. Internet-based technology will be used to collect data via web-based survey for data entry and management.

TABLE 1—ANNUALIZED ESTIMATE OF RESPONDENT BURDEN

Type of respondent	Instrument	Number of respondents	Number of responses	Total number of responses	Hours per response	Total burden hours
TA requestor, e-communications recipient, colleague of previous requestor.	DTAC Customer Feedback Survey.	200	1	200	0.5	100

Written comments and recommendations concerning the proposed information collection should be sent by November 18, 2016 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. 2016–25310 Filed 10–18–16; 8:45 am]

BILLING CODE 4162–20–P

DEPARTMENT OF HOMELAND SECURITY

Office of the Secretary

[Docket No. DHS–2016–0043]

Privacy Act of 1974; Department of Homeland Security/United States Citizenship and Immigration Services-007 Benefit Information System, System of Records

AGENCY: Privacy Office, Department of Homeland Security.

ACTION: Notice of Privacy Act system of records.

SUMMARY: In accordance with the Privacy Act of 1974, the Department of Homeland Security (DHS) proposes to update and reissue a current DHS system of records titled, ''DHS/United States Citizenship and Immigration Services (USCIS)-007 Benefit Information System'' system of records. DHS/USCIS collects, uses, and maintains the Benefit Information System records to administer immigrant or nonimmigrant benefit requests, ''hereinafter collectively referred to as ''benefit requests'' '' to process and adjudicate all benefit requests submitted for naturalization, lawful permanent residence, asylum, refugee status, and other immigrant and nonimmigrant benefits in accordance with U.S. immigration law. DHS/USCIS also uses the Benefit Information System to support national security by preventing individuals from fraudulently obtaining immigration benefits and by denying benefit requests submitted by individuals who pose national security or public safety threats. This system of records notice was previously published in the **Federal Register** on September 29, 2008, (73 FR 56596).

DHS/USCIS is updating this system of records to: (1) Update the system location to include international offices and replicated copies on unclassified and classified networks; (2) update the category of individuals to include interpreters, preparers, physicians, and sponsors; (3) expand the categories of records to clarify the data elements that USCIS collects from benefit requestors, beneficiaries, and family members', benefit sponsors; representatives; preparers and interpreters; and physicians; (4) separate routine use (N) into two separate routine uses (*i.e.,* (N), (O)) to provide clarity on information sharing with federal, state, tribal, or local government agencies and foreign government agencies for the repayment of loans; (5) update routine uses (W), (X), (Y), and (Z) to permit the sharing of information pursuant to a Computer Matching Agreement or other agreement, with the Department of Labor, with the public during the course of naturalization ceremonies, and with the Department of Treasury, respectively; (6) update retention schedules for each record type; (7) expand data elements used to retrieve records from the elements listed or a combination thereof; (8) update sources of records to include interpreters, preparers, and physicians; and (9) expand the system classification to provide notice that Benefit Information System records may be stored on both DHS unclassified and classified networks to allow for analysis and vetting consistent with existing DHS/USCIS authorities and purposes and this published notice. Additionally, this notice includes non-substantive changes to simplify the formatting and text of the previously published notice.

This updated system will be included in the Department of Homeland Security's inventory of record systems.

DATES: Submit comments on or before November 17, 2016. This updated system will be effective November 17, 2016.

ADDRESSES: You may submit comments, identified by docket number DHS–2016–0043 by one of the following methods:

- *Federal e-Rulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 202–343–4010.
- *Mail:* Jonathan R. Cantor, Acting Chief Privacy Officer, Privacy Office, Department of Homeland Security, Washington, DC 20528.

INSTRUCTIONS: All submissions received must include the agency name and docket number for this rulemaking. All comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided.

DOCKET: For access to the docket to read background documents or comments received, please visit *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: For general questions, please contact: Donald K. Hawkins, (202) 272–8000, Privacy Officer, U.S. Citizenship and Immigration Services, 20 Massachusetts Avenue NW., Washington, DC 20529. For privacy questions, please contact: Jonathan R. Cantor, (202) 343–1717, Acting Chief Privacy Officer, Privacy Office, Department of Homeland Security, Washington, DC 20528.

SUPPLEMENTARY INFORMATION:

I. Background

In accordance with the Privacy Act of 1974, 5 U.S.C. 552a, the Department of Homeland Security (DHS) United States Citizenship and Immigration Services (USCIS) proposes to update and reissue a current DHS system of records titled, ''DHS/USCIS–007 Benefit Information System'' system of records.

DHS/USCIS oversees lawful immigration and non-immigration to the United States and is responsible for the administration of immigration, non-immigration, and naturalization adjudication functions and for establishing immigration policies and priorities. In executing its mission, DHS/USCIS performs functions that include the intake, review, and adjudication of the following types of benefits:

(1) Family-Based; [1]
(2) Employment-Based; [2]
(3) Humanitarian-Based; [3]
(4) Adoption-Based; [4] and
(5) Citizenship and Naturalization-Based.[5]

The Benefits Information System SORN covers the processing of immigrant and nonimmigrant benefit requests and does not cover requests for asylum and refugee status. The Benefits Information System includes: Information provided by or on behalf of individuals who submit immigrant and nonimmigrant benefit requests; background check results collected as part of the USCIS-initiated background check process; and transactional data that indicates which steps of the adjudication process have been completed, such as an appointment to submit biometrics for a background check, other pending benefits, whether the benefit requestor may have engaged in fraudulent activity, or activities that adversely impact the national security or public safety of the United States that could bear on fitness or eligibility for the requested benefits.

Records covered by this Benefit Information System (BIS) SORN differ from records covered by the Alien File (A-File), Index, and National File Tracking SORN (see DHS/USCIS/ICE/CBP–001 Alien File, Index, and National File Tracking System of Records, November 21, 2013, 78 FR 69864). The A-File is the official record regarding the transactions of an individual as he or she passes through the U.S. immigration and inspection process. The A-File contains information relating to immigration benefits processing, protection of national security, and administering and enforcing immigration and nationality laws and related statutes. While USCIS is the custodian of the A-File, the three former Immigration and Naturalization Service (INS) agencies: USCIS, U.S. Customs and Border Protection (CBP), and U.S. Immigrations and Customs Enforcement (ICE), all contribute information to and use A-Files. The A-File SORN covers the paper and electronic copy A-File and/or Receipt File, supplemental forms, supplemental evidence, and identity history summaries (formally known as RAP sheets), but does not include all case processing and decisional data. The BIS SORN is specific to USCIS' collection, use, maintenance, dissemination, and storage of benefit request information, including case processing and decisional data not included in the A-file. USCIS records case processing information such as date USCIS received or filed benefit requests; benefit request status; location of record; other control number when applicable; fee receipt data; status of USCIS appointments and interviews; date of issuance of a notice; and whether the benefit request form was referred to the Fraud Detection and National Security Directorate for review. Decisional data such as approval/denial code is also stored in the BIS SORN.

USCIS is updating this system of records to (1) update system location to include international offices; (2) update category of individuals covered by this SORN, to include interpreters, preparers, and physicians, and sponsors; (3) expand the categories of records to clarify the data elements that USCIS collects from benefit requestors, beneficiaries, and family members; benefit sponsors; representatives; preparers and interpreters; and physicians; (4) separate routine use (N) has been separated into two separate routine uses (i.e., (N), (O)) to provide clarity on information sharing of information with federal, state, tribal, or local government agencies and foreign government agencies for the, respectively, in collecting the repayment of loans; later routine uses are being re-lettered for formatting; (5) update routine uses (W), (X), (Y), and (Z) to permit the sharing of information pursuant to a Computer Matching Agreement or other agreement, with the Department of Labor, with the public during the course of naturalization ceremonies, and with the Department of Treasury, respectively; (6) update retention schedules for each record type; (7) expand data elements used to retrieve records from the elements listed or a combination thereof; (8) update sources of records to include interpreters, preparers, and physicians; (9) expand the system classification to provide notice that Benefit Information System records may be stored on both DHS unclassified and classified networks to allow for analysis and vetting consistent with existing DHS/USCIS authorities and purposes and this published notice. Furthermore, this notice includes non-substantive changes to simplify the formatting and text of the previously published notice.

Consistent with DHS's information sharing mission, information stored in the DHS/USCIS–007 Benefit Information System may be shared with other DHS components that have a need to know the information to carry out their national security, law enforcement, immigration, intelligence, or other homeland security functions. In addition, DHS/USCIS may share information with appropriate federal, state, local, tribal, territorial, foreign, or international government agencies consistent with the routine uses set forth in this system of records notice. Even when a valid routine use permits disclosure of information from this system of records to a third party, in some cases such disclosure may not be permissible because of confidentiality laws and policies that limit the sharing of information regarding individuals applying for certain immigration or non-immigration benefits.

This updated system will be included in DHS's inventory of record systems.

II. Privacy Act

The Privacy Act embodies fair information practice principles in a statutory framework governing the means by which federal government agencies collect, maintain, use, and disseminate individuals' records. The Privacy Act applies to information that is maintained in a ''system of records.'' A ''system of records'' is a group of any records under the control of an agency from which information is retrieved by the name of an individual or by some identifying number, symbol, or other identifying particular assigned to the

[1] An individual may petition for relatives (or future relatives such as a fiancé(e) or a prospective adopted child) to immigrate to the United States.

[2] All foreign workers must obtain permission to work legally in the United States. Each employment category for admission has different requirements, conditions, and authorized periods of stay. USCIS offers the following employment-based categories: Temporary (nonimmigrant) worker, permanent workers, students and exchange visitors, and temporary visitors for business.

[3] USCIS provides a number of humanitarian programs and protection to assist individuals in need of shelter or aid from disasters, from oppression, for emergency medical issues, and for other urgent circumstances, including: Asylum; refugee; parole; deferred action; temporary protective status; battered spouse, children, and parents; and victims of human trafficking and other crimes.

[4] USCIS is responsible for determining the eligibility and suitability of the Prospective Adoptive Parents (individuals) looking to adopt and determining the eligibility of the child to immigrate to the United States.

[5] Naturalization is the manner in which a person not born in the United States voluntarily becomes a U.S. citizen.

individual. In the Privacy Act, an individual is defined to encompass U.S. citizens and lawful permanent residents. As a matter of policy, DHS extends administrative Privacy Act protections to all individuals when systems of records maintain information on U.S. citizens, lawful permanent residents, and visitors.

Below is the description of the DHS/USCIS–007 Benefit Information System System of Records.

In accordance with 5 U.S.C. 552a(r), DHS has provided a report of this system of records to the Office of Management and Budget and to Congress.

SYSTEM OF RECORDS

DEPARTMENT OF HOMELAND SECURITY (DHS)/UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES (USCIS)–007

SYSTEM NAME:

DHS/USCIS–007 Benefit Information System.

SECURITY CLASSIFICATION:

Unclassified, Sensitive, For Official Use Only. The data may be retained on classified networks, but this does not change the nature and character of the data until it is combined with classified information.

SYSTEM LOCATION:

Records are maintained in DHS/USCIS information technology (IT) systems (*e.g.,* Computer Linked Application Information Management System (CLAIMS) 3, CLAIMS 4, Adoptions Case Management System, Case and Activity Management for International Operations) and associated electronic and paper files located at USCIS Headquarters in Washington, DC and in DHS/USCIS service centers and domestic and international field offices. Records are replicated from the operational DHS/USCIS IT systems and maintained on DHS unclassified and classified networks.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Categories of individuals covered by this system include (1) persons who have filed, for themselves or on the behalf of others (benefit requestors and beneficiaries), benefit requests for immigration benefits under the Immigration and Nationality Act as amended, and/or who have submitted fee payments or received refunds from such benefit requests; (2) current, former, and potential derivatives of benefit requestors (family members); (3) sponsors (*e.g.,* employers, law enforcement officers, individuals); (4) attorneys and representatives recognized by USCIS and/or accredited by the Board of Immigration Appeals (Representatives); (5) interpreters; (6) individuals who assist in the preparation of the benefit request (Preparers); (7) individuals who make fee payments on behalf of the benefit requestor; and (8) physicians who conduct immigration related medical examinations.

CATEGORIES OF RECORDS IN THE SYSTEM:

Information about benefit requestor, beneficiaries, and family members may include:

- Full Name;
- Alias(es);
- Physical and Mailing Addresses;
- A-Number;
- USCIS Online Account Number;
- Social Security number (SSN);
- Date of birth and/or Death;
- Nationality;
- Country of Citizenship;
- Place of birth;
- Gender;
- Marital status;
- Military status;
- Phone and fax numbers;
- Email address;
- Immigration status;
- Government-issued identification (*e.g.,* passport, drivers' license):
  - Document type;
  - Issuing organization;
  - Document number;
  - Expiration date;
  - Benefit requested;
- Notices and communications, including:
  - Receipt notices;
  - Requests for Evidence;
  - Notices of Intent to Deny;
  - Proofs of benefit;
- Signature;
- Benefit request fee payment information (*e.g.,* credit card number, *Pay.gov* Payment Tracking Number); and
- Audio-visual recordings, including interviews and naturalization ceremonies.

Benefit-specific eligibility information about benefit requestor, beneficiaries, and family members may include:

- Other unique identifying numbers (*e.g.,* Department of State (DOS)-Issued Personal Identification Number, ICE Student and Exchange Visitor Number, USCIS E-Verify Company Identification Number);
- Arrival/Departure Information;
- Immigration history (*e.g.,* citizenship/naturalization certificate number, removals, explanations);
- Family relationships (*e.g.,* parent, spouse, sibling, child, other dependents) and Relationship Practices (*e.g.,* polygamy, custody, guardianship);
- USCIS Receipt/Case Number;
- Personal background information (*e.g.,* involvement with national security threats, criminal offenses, Communist party, torture, genocide, killing, injuring, forced sexual contact, limiting or denying others religious beliefs, service in military or other armed groups, work in penal or detention systems, weapons distribution, combat training);
- Records regarding organization membership or affiliation;
- Health information (*e.g.,* vaccinations, referrals, communicable diseases, physical or mental disorders, prostitution, drug or alcohol abuse);
- Travel history;
- Education history;
- Work history;
- Professional accreditation information;
- Financial information (*e.g.,* income, expenses, scholarships, savings, assets, property, financial support, supporter information, life insurance, debts, encumbrances, tax records);
- Supporting documentation as necessary (*e.g.,* birth, marriage, and divorce certificates; licenses; academic diplomas; academic transcripts; appeals or motions to reopen or reconsider decisions; explanatory statements; deoxyribonucleic acid (DNA) results; and unsolicited information submitted voluntarily by the benefit requestor or family members in support of a benefit request);
- Physical Description (*e.g.,* height, weight, eye color, hair color, race, ethnicity, identifying marks like tattoos or birthmarks);
- Biometric (*i.e.,* fingerprints and photographs) and other information (*i.e.,* race, ethnicity, weight, height, eye color, hair color) collected to conduct background checks;
- Description of relationships between benefit requestors, representative, preparers, and family members;
- Information regarding the status of Department of Justice (DOJ), Executive Office of Immigration Review (EOIR) proceedings, if applicable; and
- Case processing information such as date benefit requests were filed or received by USCIS; benefit request status; location of record; other control number when applicable; and fee receipt data.

Information about Benefit Sponsors may include:

- Full name;
- Gender;
- Physical and mailing addresses;
- Phone and fax numbers;
- Country of domicile;
- Date of birth;

- Place of birth;
- Citizenship information;
- SSN;
- A–Number;
- USCIS Online Account Number;
- Employment information;
- Financial information (*e.g.,* income, expenses, scholarships, savings, assets, property, financial support, supporter information, life insurance, debts, encumbrances, tax records);
- Position and relationship to an organization (*e.g.,* manager of a company seeking formal recognition by USCIS);
- Family relationships (*e.g.,* parent, spouse, sibling, natural, foster, and/or adopted child, other dependents); and
- Relationship practices (*e.g.,* polygamy, custody, guardianship).

Information about Representatives includes:

- Name;
- Law Firm/Recognized Organization;
- Physical and mailing addresses;
- Phone and fax numbers;
- Email address;
- Attorney Bar Card Number or equivalent;
- Bar membership;
- Accreditation date;
- Board of Immigration Appeals Representative Accreditation;
- Expiration date;
- Law Practice Restriction explanation; and
- Signature.

Information about Preparers and Interpreters may include:

- Full name;
- Organization;
- Business State ID number;
- Employer Tax Identification Number;
- Physical and mailing addresses;
- Email address;
- Phone and fax numbers;
- Relationship to benefit requestor; and
- Signature.

Information about individuals who make fee payments on behalf of the benefit requestor includes:

- Name;
- Email address;
- Phone number;
- Mailing address; and
- Payment information.

Information about Physicians may include:

- Full name;
- Organization name;
- Physical and mailing addresses;
- Professional experience;
- License number;
- Other Physician Identifying Number(s);
- Licensing state and date of issuance;
- Type of Degree/License (*i.e.,* medical doctor, doctor of osteopathy, or clinical psychologist);
- Type of medical practice;
- Examination dates of the benefit requestor;
- Clinical methods used to diagnose benefit requestor;
- Email address; and
- Signature.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Authority for maintaining this system is in Sections 103 and 290 of the INA, as amended (8 U.S.C. 1103 and 1360), the regulations issued pursuant thereto; and Section 451 of the Homeland Security Act of 2002 (Pub. L. 107–296).

PURPOSE(S):

The purpose of this system is to permit USCIS' collection, use, maintenance, dissemination, and storage of paper and electronic benefit request information, including case processing and decisional data not included in the A–File SORN (DHS/USCIS/ICE/CBP–001 Alien File, Index, and National File Tracking System of Records, November 21, 2013, 78 FR 69864). These records assist in the processing of immigrant and nonimmigrant benefit requests from the time when USCIS collects the information from the benefit requestor until the case reaches a final decision in the relevant case management system. This system of records does not cover requests for asylum or refugee status. This system of records notice enables DHS/USCIS to process benefit requests electronically; determine the status of pending benefit requests; account for and control the receipt and disposition of any fees and refunds collected; conduct searches pursuant to Freedom of Information Act (FOIA) and Privacy Act requests; and locate related physical and automated files to support DHS/USCIS responses to inquiries about these records.

DHS/USCIS maintains a replica of some or all of the data in the operating system on DHS unclassified and classified networks to allow for analysis and vetting consistent with the above stated purposes and this published notice.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, all or a portion of the records or information contained in this system may be disclosed outside DHS as a routine use pursuant to 5 U.S.C. 552a(b)(3). Even when a valid routine use permits disclosure of information from this system of records to a third party, in some cases such disclosure may not be permissible because of confidentiality laws and policies that limit the sharing of information regarding individuals applying for certain immigration or non-immigration benefits.

Information in this system of records contains information relating to persons who have pending or approved benefit requests for special protected classes and should not be disclosed pursuant to a routine use unless disclosure is otherwise permissible under the confidentiality statutes, regulations, or policies applicable to that information. For example, information relating to persons who have pending or approved benefit requests for protection under the Violence Against Women Act, Seasonal Agricultural Worker or Legalization claims, the Temporary Protected Status of an individual, and information relating to nonimmigrant visas protected under special confidentiality provisions should not be disclosed pursuant to a routine use unless disclosure is otherwise permissible under the confidentiality statutes, regulations, or policies applicable to that information. These confidentiality provisions do not prevent DHS from disclosing information to the U.S. Department of Justice (DOJ) and Offices of the United States Attorney as part of an ongoing criminal or civil investigation.

A. To the DOJ, including Offices of the United States Attorneys, or other federal agency conducting litigation or in proceedings before any court, adjudicative, or administrative body, when it is relevant or necessary to the litigation and one of the following is a party of the litigation or has an interest in such litigation:

1. DHS or any component thereof;
2. Any employee or former employee of DHS in his/her official capacity;
3. Any employee or former employee of DHS in his/her individual capacity when DOJ or DHS has agreed to represent the employee; or
4. The United States or any agency thereof.

B. To a congressional office from the record of an individual in response to an inquiry from that congressional office made at the request of the individual to whom the record pertains.

C. To the National Archives and Records Administration (NARA) or General Services Administration pursuant to records management inspections being conducted under the authority of 44 U.S.C. 2904 and 2906.

D. To an agency or organization for the purpose of performing audit or oversight operations as authorized by law, but only such information as is necessary and relevant to such audit or oversight function.

E. To appropriate agencies, entities, and persons when:

1. DHS suspects or has confirmed that the security or confidentiality of information in the system of records has been compromised;

2. DHS has determined that as a result of the suspected or confirmed compromise, there is a risk of identity theft or fraud, harm to economic or property interests, harm to an individual, or harm to the security or integrity of this system or other systems or programs (whether maintained by DHS or another agency or entity) that rely upon the compromised information; and

3. The disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with DHS' efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

F. To contractors and their agents, grantees, experts, consultants, and others performing or working on a contract, service, grant, cooperative agreement, or other assignment for DHS, when necessary to accomplish an agency function related to this system of records. Individuals provided information under this routine use are subject to the same Privacy Act requirements and limitations on disclosure as are applicable to DHS officers and employees.

G. To an appropriate federal, state, tribal, local, international, or foreign law enforcement agency or other appropriate authority charged with investigating or prosecuting a violation, enforcing, or implementing a law, rule, regulation, or order, when a record, either on its face or in conjunction with other information, indicates a violation or potential violation of law, which includes criminal, civil, or regulatory violations and such disclosure is proper and consistent with the official duties of the person making the disclosure.

H. To clerks and judges of courts exercising naturalization jurisdiction for the purpose of filing applications for naturalization and to enable such courts to determine eligibility for naturalization or grounds for revocation of naturalization.

I. To the Department of State for the purpose of assisting in the processing of benefit requests under the Immigration and Nationality Act, and all other immigration and nationality laws including treaties and reciprocal agreements.

J. To appropriate Federal, State, tribal, and local government law enforcement and regulatory agencies, foreign governments, and international organizations, as well as to other individuals and organizations during the course of an investigation by DHS or the processing of a matter under DHS jurisdiction, or during a proceeding within the purview of the immigration and nationality laws, when DHS deems that such disclosure is necessary to carry out its functions and statutory mandates to elicit information required by DHS to carry out its functions and statutory mandates.

K. To an appropriate Federal, State, local, tribal, foreign, or international agency, if the information is relevant and necessary to a requesting agencies decision concerning the hiring or retention of an individual, or issuance of a security clearance, license, contract, grant, or other benefit, or if the information is relevant and necessary to a DHS decision concerning the hiring or retention of an employee, the issuance of a security clearance, the reporting of an investigation of an employee, the letting of a contract, or the issuance of a license, grant, or other benefit and when such disclosure is appropriate to the proper performance of the official duties of the person making the request.

L. To the Office of Management and Budget in connection with the review of private relief legislation as set forth in OMB Circular No. A–19 at any stage of the legislative coordination and clearance process as set forth in the Circular.

M. To an attorney or representative (as defined in 8 CFR 1.1(j)) who is acting on behalf of an individual covered by this system of records in connection with any proceeding before DHS/USCIS or the Executive Office for Immigration Review.

N. To a federal, state, tribal, or local government agency to assist such agencies in collecting the repayment of loans, fraudulently or erroneously secured benefits, grants, or other debts owed to them or to the United States Government, or to obtain information that may assist USCIS in collecting debts owed to the United States Government.

O. To a foreign government to assist such government in collecting the repayment of loans, fraudulently or erroneously secured benefits, grants, or other debts owed to it, provided that the foreign government in question:

1. Provides sufficient documentation to establish the validity of the stated purpose of its request; and

2. Provides similar information to the United States upon request.

P. To a coroner for purposes of affirmatively identifying a deceased individual (whether or not such individual is deceased as a result of a crime).

Q. Consistent with the requirements of the Immigration and Nationality Act, to the Department of Health and Human Services (HHS), the Centers for Disease Control and Prevention (CDC), or to any State or local health authorities, to:

1. Provide proper medical oversight of DHS-designated civil surgeons who perform medical examinations of both arriving foreign nationals and of those requesting status as a lawful permanent resident; and

2. To ensure that all health issues potentially affecting public health and safety in the United States are being or have been, adequately addressed.

R. To a federal, state, or local government agency seeking to verify or ascertain the citizenship or immigration status of any individual within the jurisdiction of the agency for any purpose authorized by law.

S. To the Social Security Administration (SSA) for the purpose of issuing a Social Security number and card to an alien who has made a request for a Social Security number as part of the immigration process and in accordance with any related agreements in effect between the SSA, DHS, and the Department of State entered into pursuant to 20 CFR 422.103(b)(3); 422.103(c); and 422.106(a), or other relevant laws and regulations.

T. To a former employee of DHS, in accordance with applicable regulations, for purposes of responding to an official inquiry by a federal, state, or local government entity or professional licensing authority; or facilitating communications with a former employee that may be necessary for personnel-related or other official purposes when the Department requires information or consultation assistance from the former employee regarding a matter within that persons former area of responsibility.

U. To an individual's prospective or current employer to the extent necessary to determine employment eligibility (for example, pursuant to the Form I–140, *Immigrant Petition for Alien Worker*).

V. To a federal, state, or local agency, or other appropriate entities or individuals, or through established liaison channels to selected foreign governments, in order to provide intelligence, counterintelligence, or other information for the purposes of intelligence, counterintelligence, or antiterrorism activities authorized by U.S. law, or Executive Order.

W. To approved federal, state, and local government agencies that grant public benefits, licenses, grants, governmental credentials, or any other statutorily authorized purpose when the immigration status of the benefit applicant is legally required and an approved Memorandum of Agreement or Computer Matching Agreement (CMA) is in place between DHS and the entity.

X. To the Department of Labor for enforcement of labor certification violations and violations of U.S. labor laws.

Y. To the news media and the public during the course of naturalization ceremonies administered by USCIS or an Immigration Judge. Pursuant to 8 CFR 337.2 individuals to be naturalized are generally required to appear in a public ceremony, unless an appearance is specifically excused.

Z. To the Department of Treasury to perform initial processing of benefit requests and to accept and resolve payment and any related issues.

AA. To the news media and the public, with the approval of the Chief Privacy Officer in consultation with counsel, when there exists a legitimate public interest in the disclosure of the information, when disclosure is necessary to preserve confidence in the integrity of DHS, or when disclosure is necessary to demonstrate the accountability of DHS officers, employees, or individuals covered by the system, except to the extent the Chief Privacy Officer determines that release of the specific information in the context of a particular case would constitute an unwarranted invasion of personal privacy.

DISCLOSURE TO CONSUMER REPORTING AGENCIES:

Through the ICE Financial Operations—Burlington at DHS, Benefits Information Systems information may be shared with credit reporting agencies. The primary mission of the ICE Financial Operations—Burlington is to collect debts resulting from an individual's participation in DHS benefits programs. USCIS may share Benefits Information System information with the ICE Financial Operations—Burlington regarding fees charged during the various benefit requests processes to ensure collection of debts.

Pursuant to 5 U.S.C. 552a(b)(12), the Department of Treasury Financial Management Service, on behalf of USCIS, may disclose to consumer reporting agencies in accordance with the provision of 15 U.S.C. 1681, *et seq.* or the Federal Claims Collection Act of 1966 as amended (31 U.S.C. 3701, *et seq.*). The purpose of this disclosure is to aid in the collection of outstanding debts owed to the Federal Government, typically, to provide an incentive for debtors to repay delinquent Federal Government debts by making these part of their credit records.

Disclosure of records is limited to the individual's name, address, EIN/SSN, and other information necessary to establish the individual's identity; the amount, status, and history of the claim; and the agency or program under which the claim arose. The disclosure will be made only after the procedural requirements of 31 U.S.C. 3711(e) have been followed.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

DHS/USCIS stores records in this system electronically in the operational IT systems (such as CLAIMS 3 and CLAIMS 4), including on DHS unclassified and classified networks, or on paper in secure facilities in a locked drawer or behind a locked door. The records may be stored on magnetic disc, tape, within cloud service providers, and digital media.

RETRIEVABILITY:

Records may be retrieved by any of the data elements listed above or a combination thereof. This may include, but is not limited to, name, date of birth, Alien Number, SSN, USCIS Online Account Number, and Receipt Number.

SAFEGUARDS:

DHS/USCIS safeguards records in this system according to applicable rules and policies, including all applicable DHS automated systems security and access policies. DHS/USCIS has imposed strict controls to minimize the risk of compromising the information that is being stored. Access to the computer system containing the records in this system is limited to those individuals who have a need to know the information for the performance of their official duties and who have appropriate clearances or permissions.

RETENTION AND DISPOSAL:

DHS/USCIS stores the physical documents (paper forms) and supplemental documentation in the Alien File and processes benefit requests in the respective DHS/USCIS case management system. The A-File records are permanent whether hard copy or electronic. DHS/USCIS transfers the A-Files to the custody of NARA 100 years after the individual's date of birth.

Electronic benefits information is archived and disposed of in accordance with NARA-approved retention schedule for the respective USCIS systems.

- Electronic data pertaining to applications for naturalization will be deleted 15 years after the processing of the benefit being sought is completed. Information in the master file is destroyed 15 years after the last completed action with respect to the application.
- Electronic records pertaining to benefits other than naturalization completed by benefit requestors domestically are destroyed after the data is transferred to the electronic master file and verified. Information in the master file is destroyed 50 years after the last completed action with respect to the benefit.
- Electronic records pertaining to benefits requests other than naturalization and are completed by benefit requestors internationally are destroyed after the data is transferred to the electronic master file and verified. Information in the master file is destroyed 25 years after the last completed action with respect to the benefit.
- Electronic notices and communications associated with a benefit request, to include Approval or Denial letters, Requests for Evidence, Notices of Intent to Deny, Appeal/Motion Responses, etc. are retained for 13 years after the last completed action with respect to the benefit.
- Electronic appointments with USCIS are maintained for 60 days after the date of the appointment.
- Daily reports generated by associated information technology systems are maintained in accordance with the respective retention schedule and then destroyed.

Records replicated on the unclassified and classified networks for analysis and vetting will follow the same retention schedule.

SYSTEM MANAGER AND ADDRESS:

The DHS system manager is the Chief, Immigration Records and Identity Services, Records Division, U.S. Citizenship and Immigration Services, Department of Homeland Security, 20 Massachusetts Avenue NW., Washington, DC 20529.

NOTIFICATION PROCEDURE:

Individuals seeking notification of and access to any record contained in this system of records, or seeking to contest its content, may submit a request in writing to the National Records Center, Freedom of Information

Act (FOIA)/Privacy Act (PA) Office, P.O. Box 648010, Lee's Summit, MO 64064–8010. Specific FOIA information can be found at *http://www.dhs.gov/foia* under ''Contacts.'' If an individual believes more than one component maintains Privacy Act records concerning him or her, the individual may submit the request to the Chief Privacy Officer and Chief FOIA Officer, Department of Homeland Security, 245 Murray Drive SW., Building 410, STOP–0655, Washington, DC 20528.

When seeking records about yourself from this system of records or any other Departmental system of records, your request must conform with the Privacy Act regulations set forth in 6 CFR part 5. You must first verify your identity, meaning that you must provide your full name, current address, and date and place of birth. You must sign your request, and your signature must either be notarized or submitted under 28 U.S.C. 1746, a law that permits statements to be made under penalty of perjury as a substitute for notarization. While no specific form is required, you may obtain forms for this purpose from the Chief Privacy Officer and Chief FOIA Officer, *http://www.dhs.gov/foia* or 1–866–431–0486. In addition, you should:

- Explain why you believe the Department would have information on you;
- Identify which component(s) of the Department you believe may have the information about you;
- Specify when you believe the records would have been created; and
- Provide any other information that will help the FOIA staff determine which DHS component agency may have responsive records;

If your request is seeking records pertaining to another living individual, you must include a statement from that individual certifying his/her agreement for you to access his/her records.

Without the above information, the component(s) may not be able to conduct an effective search, and your request may be denied due to lack of specificity or lack of compliance with applicable regulations.

In processing requests for access to information in this system, USCIS will review the records in the operational system and coordinate with DHS to address access to records on the DHS unclassified and classified networks.

RECORD ACCESS PROCEDURES:

See ''Notification procedure'' above.

CONTESTING RECORD PROCEDURES:

See ''Notification procedure'' above.

RECORD SOURCE CATEGORIES:

DHS/USCIS obtains records from the benefit requestor, his or her Representative, Physician, Preparer, or Interpreter. DHS/USCIS personnel may input information as they process a case, including information from internal and external sources to verify whether a benefit requestor or family is eligible for the benefit requested. BIS also stores and uses information from the following USCIS, DHS, and other federal agency systems of records:

- DHS/USCIS/ICE/CBP–001 Alien File, Index, and National File Tracking System of Records, 78 FR 69864 (November 21, 2013);
- DHS/USCIS–002 Background Check Service, 72 FR 31082 (June 5, 2007);
- DHS/USCIS–003 Biometric Storage System, 72 FR 17172 (April 6, 2007);
- DHS/USCIS–005 Inter-Country Adoptions Security 72 FR 31086 (June 5, 2007);
- DHS/USCIS–006 Fraud Detection and National Security Records (FDNS) 77 FR 47411 (August 8, 2012);
- DHS/USCIS–010 Asylum Information and Pre-Screening, 75 FR 409 (January 5, 2010);
- DHS/CBP–011 U.S. Customs and Border Protection TECS, 73 FR 77778 (December 19, 2008);
- DHS/ICE–001 Student and Exchange Visitor Information System, 75 FR 412 (January 5, 2010);
- DHS/ICE–011 Immigration and Enforcement Operational Records System (ENFORCE), 80 FR 24269 (April 30, 2015);
- DHS/CBP–021 Arrival and Departure Information System (ADIS), 80 FR 72081 (November 18, 2015);
- DHS/NPPD–004 DHS Automated Biometric Identification System (IDENT), 72 FR 31080 (June 5, 2007);
- JUSTICE/EOIR–001 Records and Management Information System, 72 FR 3410 (January 25, 2007);
- JUSTICE/FBI–002 The FBI Central Records System, 72 FR 3410 (January 25, 2007);
- JUSTICE/FBI–009 Fingerprint Identification Records System (FIRS), 72 FR 3410 (January 25, 2007);
- DOL/ETA–7 Employer Application and Attestation File for Permanent and Temporary Alien Workers, 77 FR 1728, (January 10, 2012);
- STATE–05 Overseas Citizens Services Records, 73 FR 24343 (May 2, 2008);
- STATE–26 Passport Records, 76 FR 34966 (July 6, 2011);
- STATE–39 Visa Records, 77 FR 65245 (October 25, 2012); and
- TREASURY/FMS–017 Collections Records, 74 FR 23006 (May 15, 2009).

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

Dated: October 5, 2016.

Jonathan R. Cantor,

Acting Chief Privacy Officer, Department of Homeland Security.

[FR Doc. 2016–25192 Filed 10–18–16; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF HOMELAND SECURITY

Office of the Secretary

[Docket No. DHS–2016–0047]

Privacy Act of 1974; Department of Homeland Security/United States Citizenship and Immigration Services–017 Refugee Case Processing and Security Screening Information System of Records

AGENCY: Privacy Office, Department of Homeland Security.

ACTION: Notice of Privacy Act system of records.

SUMMARY: In accordance with the Privacy Act of 1974, the Department of Homeland Security (DHS) proposes to establish a new Department of Homeland Security system of records titled, ''DHS/United States Citizenship and Immigration Services (USCIS)–017 Refugee Case Processing and Security Screening Information'' system of records. DHS/USCIS collects, uses, and maintains records on individuals seeking refugee status.

This newly established system will be included in the Department of Homeland Security's inventory of record systems.

DATES: Submit comments on or before November 18, 2016. This new system will be effective November 18, 2016.

ADDRESSES: You may submit comments, identified by docket number DHS–2016–0047 by one of the following methods:

- *Federal e-Rulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 202–343–4010.
- *Mail:* Jonathan R. Cantor, Acting Chief Privacy Officer, Privacy Office, Department of Homeland Security, Washington, DC 20528.

Instructions: All submissions received must include the agency name and docket number for this rulemaking. All comments received will be posted without change to *http://www.regulations.gov*, including any personal information provided.

Docket: For access to the docket to read background documents or comments received, please visit *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: For general questions, please contact: Donald K. Hawkins, (202) 272–8030, Privacy Officer, U.S. Citizenship and Immigration Services, 20 Massachusetts Avenue NW., Washington, DC 20529. For privacy questions, please contact: Jonathan R. Cantor, (202) 343–1717, Acting Chief Privacy Officer, Privacy Office, Department of Homeland Security, Washington, DC 20528.

SUPPLEMENTARY INFORMATION:

I. Background

In accordance with the Privacy Act of 1974, 5 U.S.C. 552a, the DHS/USCIS proposes to establish a new DHS system of records titled, ''DHS/USCIS–017 Refugee Case Processing and Security Screening Information'' system of records.

A refugee is generally defined under U.S. law as a person who is outside his or her country of origin and is unable or unwilling to return because of past persecution or a well-founded fear of future persecution on account of race, religion, nationality, political opinion, or membership in a particular social group. In certain instances, under U.S. law, persons within their countries of nationality or habitual residence may be considered refugees for the purpose of admission to United States. The U.S. Refugee Admissions Program (USRAP) was created by the Executive Branch and authorized by Congress to admit foreign nationals who are outside the United States as refugees. An applicant must first be given access to the USRAP before he or she can be considered for eligibility as a refugee. The USRAP is an interagency partnership involving federal agencies, such as the Department of State (DOS) and DHS, and international and nongovernmental organizations working together, both overseas and domestically, to identify and admit qualified refugees for resettlement into the United States. Within DHS, USCIS has responsibility for adjudicating applications for refugee status and reviewing case decisions, and U.S. Customs and Border Protection (CBP) screens arriving refugees for admission at the port of entry.

Data on refugee applications are entered into the DOS-owned and operated Worldwide Refugee Admissions Processing System (WRAPS), which is an electronic case management system for refugee resettlement that is used by DOS Bureau of Population, Refugees, and Migration (PRM) and its worldwide partners and facilitates the refugee resettlement process. WRAPS contains case information and tracks the processing of refugee applications as they move through the required administrative and adjudicative steps until arrival in the United States.

USCIS is responsible for determining applicants' eligibility for refugee status based on in-person interviews with USCIS adjudicators. Refugee applicants are also subject to numerous biographic and biometric security checks. Refugees are considered for resettlement in the United States if they meet one of the three processing priorities established by DOS:

(1) The Office of the United Nations High Commissioner for Refugees (UNHCR), a U.S. Embassy, or a specially trained non-governmental organization refers them to the United States for resettlement consideration;

(2) Groups of special concern identified by the USRAP; or

(3) Family reunification cases (*i.e.*, spouses, unmarried children under 21, parents of persons lawfully admitted to the United States as refugees or asylees, or persons who are lawful permanent residents or U.S. citizens who previously had refugee or asylum status for designated nationalities).

Generally, refugees must be outside their country of origin or last habitual residence to be eligible for access to the USRAP; however the USRAP has legal authority to process refugees in their home countries in certain locations.

All refugee applicants, derivatives, and certain family members are subject to background security checks. As part of this process, refugee applicants undergo a series of biometric and biographic checks. USCIS may provide enhanced review and screening of certain refugee cases. Through close coordination with the federal law enforcement and intelligence communities, these checks are continually reviewed and enhanced. Additionally, in some instances these checks may involve reviewing social media to identify information on applicants related to national security concerns and/or the refugee eligibility determination.

If the USCIS adjudicator finds that the individual qualifies as a refugee and meets other U.S. admission criteria, the officer will approve or conditionally approve the refugee's application for resettlement and submit it to the Resettlement Support Center (RSC) for further processing. Conditional approvals become final once the results of all background checks have been received and reviewed by USCIS. Upon arrival in the United States, and after admission by a CBP Officer, USCIS creates the A-Files from the refugee travel packet and from documents forwarded from the RSC.

Individuals admitted to the United States as a refugee are required to apply for adjustment of status to that of a lawful permanent resident one year after admission as refugees. Until adjustment of status, persons admitted as refugees possess ''refugee status,'' unless such status is terminated by USCIS. Employment authorization for refugees admitted to the United States is incidental to refugee status. A refugee admitted to the United Statement may request derivative refugee status for his/her spouse and unmarried children under the age of 21 within two years of admission as a refugee by filing Form I–730, *Refugee/Asylee Relative Petition.* Refugees who wish to travel abroad may obtain a refugee travel document in order to facilitate their return to the United States. USCIS is also responsible for processing applications for permanent residency, employment authorization, and refugee travel documents, which are processed in the Computer Linked Applications Management System 3 (CLAIMS 3) and Case and Activity Management for International Operations (CAMINO). More information on these systems is available at *www.dhs.gov/privacy.* Benefit request forms are stored in either the A-File or Receipt File.

USCIS has established the Refugee Case Processing and Security Screening Information system of records to facilitate intake, adjudication, and review of refugee programs. USCIS uses Refugee Case Processing and Security Screening Information to track case status, as well as initiate, facilitate, and track biometric and biographic check screenings and to prevent the approval of any benefit prior to the review and completion of all background checks. Finally, these records are used by USCIS to generate statistical reports to assist with oversight of production and processing goals.

As a matter of policy, the regulations at 8 CFR 208.6 prohibiting disclosure of information contained in or pertaining to an alien's application for asylum, credible fear determination, or reasonable fear determination are applied to an alien's application or status as a refugee. USCIS affords information covered by the DHS/USCIS–017 Refugee Case Processing and Security Screening Information System SORN the confidentiality protections contained in 8 CFR 208.6, which strictly limits the disclosure of information to third parties. Information protected by 8 CFR 208.6 may not be disclosed without the written consent of the applicant, except as permitted by 8 CFR 208.6(c) or at the discretion of the Secretary of Homeland Security or the Attorney General of the United States.

Consistent with DHS's information sharing mission, information covered by the DHS/USCIS–017 Refugee Case Processing and Security Screening Information SORN may be shared with other DHS components that have a need-to-know the information to carry out their national security, law enforcement, immigration, intelligence, or other homeland security functions. In addition, DHS/USCIS may share information with appropriate federal, state, local, tribal, territorial, foreign, or international government agencies consistent with the confidentiality provisions of 8 CFR. 208.6 and with the routine uses set forth in this system of records notice.

This new system will be included in DHS's inventory of record systems.

II. Privacy Act

The Privacy Act embodies fair information practice principles in a statutory framework governing the means by which federal government agencies collect, maintain, use, and disseminate individuals' records. The Privacy Act applies to information that is maintained in a ''system of records.'' A ''system of records'' is a group of any records under the control of an agency from which information is retrieved by the name of an individual or by some identifying number, symbol, or other identifying particular assigned to the individual. In the Privacy Act, an individual is defined to encompass U.S. citizens and lawful permanent residents. As a matter of policy, DHS extends administrative Privacy Act protections to all individuals when systems of records maintain information on U.S. citizens, lawful permanent residents, and visitors.

Below is the description of the DHS/USCIS–017 Refugee Case Processing and Security Screening Information System of Records.

In accordance with 5 U.S.C. 552a(r), DHS has provided a report of this system of records to the Office of Management and Budget and to Congress.

System of Records

Department of Homeland Security (DHS)/United States Citizenship and Immigration Services (USCIS)–017

SYSTEM NAME:

DHS/USCIS–017 Refugee Case Processing and Security Screening Information

SECURITY CLASSIFICATION:

Unclassified, Sensitive, For Official Use Only. The data may be retained on classified networks, but this does not change the nature and character of the data until it is combined with classified information.

SYSTEM LOCATION:

Records are maintained in DHS/USCIS information technology (IT) systems and associated electronic and paper files located at USCIS Headquarters in Washington, DC and in DHS/USCIS service centers and domestic and international field offices to support USCIS Refugee, Asylum, and International Operations (RAIO) Refugee Affairs Division (RAD). The DHS/USCIS IT systems, as well as DOS IT systems that support the Refugee Case Processing and Security Screening Information include: The DOS WRAPS, USCIS CAMINO, and CLAIMS 3. Refugee application data and biographic check results for the principal applicant, derivatives, and other family members are processed in DOS WRAPS and USCIS CAMINO. Biometric check results for the refugee applicant and derivatives are stored in the USCIS Customer Profile Management System (CPMS). Applications for the adjustment of status, refugee travel documents, and follow-to-join benefit petitions Form I–730, are processed in USCIS CAMINO and CLAIMS 3. Records are replicated from the operational DHS/USCIS IT systems and maintained on DHS unclassified and classified networks.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Categories of individuals covered by this system include: (1) Individuals who have applied for admission to the United States under the USRAPS; (2) spouses (current and former) and children of a principal refugee applicant included in the refugee application; (3) principal refugee applicant's parents and relatives in the United States; (4) other individuals listed as part of the family tree and including points of contact in the United States and other individuals with whom the applicant associates; (5) individuals who have petitioned for follow-to-join (derivative) refugee or asylum status for their spouse and unmarried children under the age of 21 on Form I–730 *Refugee/Asylee Relative Petition;* (6) persons who complete refugee applications on behalf of the refugee applicant (*e.g.*, form preparers, interpreters); and (7) individuals associated with partner organizations such as Resettlement Support Centers and the United Nations High Commissioner for Refugees.

CATEGORIES OF RECORDS IN THE SYSTEM:

Information about benefit requestor and derivatives may include:

- Full name;
- Alias(es);
- Physical and mailing addresses;
- Date of birth;
- Place of birth;
- Gender;
- Ethnicity or tribal group;
- Religion;
- Present Citizenship or Nationality;
- Alien Number (A–Number);
- Resettlement Support Center Case Number;
- Receipt Number;
- USCIS Online Account Number;
- Social Security number (SSN), if any;
- Relationship to benefit requestor (*i.e.*, children under the age of 21 and spouse);
- Employment authorization eligibility and application history;
- Records regarding organization membership or affiliation;
- Supporting documentation as necessary (*e.g.*, birth, marriage, divorce certificates; licenses; academic diplomas; academic transcripts; appeals or motions to reopen or reconsider decisions; explanatory statements; and unsolicited information submitted voluntarily by the applicant or family members in support of a benefit request);
- Government-issued identification (*e.g.*, passport, driver license):
  - Document type;
  - Issuing organization;
  - Document number;
  - Expiration date;
  - Benefit requested;
- Notices and communications, including:
  - Receipt notices;
  - Requests for Evidence;
  - Notices of Intent to Deny;
  - Proofs of benefit;
- Phone and fax numbers;
- Email addresses;
- Social Media handles, associated identifiable information, and results;
- Marital status;
- Place of marriage;
- Arrival/Departure information;
- Immigration history (*e.g.*, citizenship/naturalization certificate number, removals, explanations);
- Family relationships (*e.g.*, parent, spouse, sibling, child, other dependents);
- Relationship practices *(e.g.*, polygamy, custody, guardianship);
- Personal background information (*e.g.*, involvement with national security threats, criminal offenses, Communist party affiliation, activity and/or affiliation with groups or organizations

abroad, torture, genocide, killing, injuring, forced sexual contact, limiting or denying others religious beliefs, service in military or other armed groups, work in penal or detention systems, weapons);

- Health information (*e.g.*, vaccinations, referrals, communicable diseases, physical or mental disorders, prostitution, drug or alcohol abuse);
- Employment authorization eligibility and application history;
- Professional accreditation information;
- Financial information (*e.g.*, income, expenses, scholarships, savings, assets, property, financial support, supporter information, life insurance, debts, encumbrances, tax records);
- Travel history;
- Explanation/description of foreign travel;
- Education history;
- Work history;
- Documents establishing identity and claimed relationship (*e.g.*, marriage record, civil or criminal history, medical records, education records, DNA results);
- Physical description (*e.g.*, height, weight, eye color, hair color, race, ethnicity, identifying marks like tattoos or birthmarks);
- Biometrics (*i.e.*, fingerprints and photographs) and other information (*e.g.*, race, ethnicity, weight, height, eye color, hair color);
- Background check results;
- Reports of investigations or derogatory information obtained from DHS and other federal systems;
- Refugee interview notes and assessments;
- Information regarding the status of Department of Justice (DOJ), Executive Office of Immigration Review (EOIR) proceedings, if applicable; and
- Case processing information such as date applications were filed or received by USCIS; application/petition status, location of record, other control number when applicable, and fee receipt data.

Information about the benefit requestor's parents and relatives in the United States and other individuals listed as part of the family tree and including points of contact in the United States and other individuals with whom the applicant associates:

- Name;
- Date of Birth;
- Relationship to the benefit requestor;
- Country of Birth;
- Address; and
- Background check results.

Information about Registrants, Preparers, and Interpreters may include:

- Full name;
- Organization;
- Business State ID number;
- Employer Tax Identification Number;
- Physical and mailing addresses:
- Email address;
- Phone and fax numbers;
- Relationship to applicant; and
- Signature.

Information about Accredited Representatives and Attorneys includes:

- Name;
- Law Firm/Recognized Organization;
- Physical and mailing addresses:
- Phone and fax numbers;
- Email address;
- Attorney Bar Card Number or equivalent;
- Bar membership;
- Accreditation date;
- Board of Immigration Appeals Representative Accreditation;
- Expiration date;
- Law Practice Restriction Explanation; and
- Signature.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Authority for maintaining this system is in Section 207 of the Immigration and Nationality Act (INA), as amended.

PURPOSE(S):

The purpose of this system is to collect, use, maintain, disseminate, and store refugee information, including the administration and adjudication of the review of refugee applications and follow-to-join applications for those who are seeking consideration for refugee resettlement, as well as applications for permanent residency, employment authorization, and travel abroad.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, all or a portion of the records or information contained in this system may be disclosed outside DHS as a routine use pursuant to 5 U.S.C. 552a(b)(3). Even when a valid routine use permits disclosure of information from this system of records to a third party, in some cases such disclosure may not be permissible because of confidentiality laws and policies that limit the sharing of information regarding individuals applying for refugee status.

Information in this system of records contains information relating to persons who have pending or approved refugee applications or pending or approved follow-to-join petitions should not be disclosed pursuant to a routine use unless disclosure is otherwise permissible under 8 CFR 208.6. These confidentiality provisions do not prevent DHS from disclosing information to the DOJ and Offices of the United States Attorneys as part of an ongoing criminal or civil investigation. These provisions permit disclosure to courts under certain circumstances as well, as provided under 8 CFR 208.6(c)(2). Subject to these restrictions:

A. To the DOJ, including Offices of the United States Attorneys, or other federal agency conducting litigation or in proceedings before any court, adjudicative, or administrative body, when it is relevant or necessary to the litigation and one of the following is a party of the litigation or has an interest in such litigation:

1. DHS or any component thereof;
2. Any employee or former employee of DHS in his/her official capacity;
3. Any employee or former employee of DHS in his/her individual capacity when DOJ or DHS has agreed to represent the employee; or
4. The United States or any agency thereof.

B. To a congressional office from the record of an individual in response to an inquiry from that congressional office made at the request of the individual to whom the record pertains.

C. To the National Archives and Records Administration (NARA) or other Federal Government agencies pursuant to records management inspections being conducted under the authority of 44 U.S.C. 2904 and 2906.

D. To an agency or organization for the purpose of performing audit or oversight operations as authorized by law, but only such information as is necessary and relevant to such audit or oversight function.

E. To appropriate agencies, entities, and persons when:

1. DHS suspects or has confirmed that the security or confidentiality of information in the system of records has been compromised;
2. DHS has determined that as a result of the suspected or confirmed compromise, there is a risk of identity theft or fraud, harm to economic or property interests, harm to an individual, or harm to the security or integrity of this system or other systems or programs (whether maintained by DHS or another agency or entity) that rely upon the compromised information; and
3. The disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with DHS's efforts to respond to the suspected or confirmed

compromise and prevent, minimize, or remedy such harm.

F. To contractors and their agents, grantees, experts, consultants, and others performing or working on a contract, service, grant, cooperative agreement, or other assignment for DHS, when necessary to accomplish an agency function related to this system of records. Individuals provided information under this routine use are subject to the same Privacy Act requirements and limitations on disclosure as are applicable to DHS officers and employees.

G. To an appropriate federal, state, tribal, local, international, or foreign law enforcement agency or other appropriate authority charged with investigating or prosecuting a violation or enforcing or implementing a law, rule, regulation, or order, when a record, either on its face or in conjunction with other information, indicates a violation or potential violation of law, which includes criminal, civil, or regulatory violations and such disclosure is proper and consistent with the official duties of the person making the disclosure.

H. To DOS, their contractors, agents, grantees, experts, consultants, or others performing or working on a contract, service, grant, cooperative agreement, or other assignment for DOS (*e.g.*, RSC, International Organization for Migration), when necessary to accomplish refugee case processing.

I. To federal and foreign government intelligence or counterterrorism agencies or components when DHS becomes aware of an indication of a threat or potential threat to national or international security, or when such use is to assist in anti-terrorism efforts and disclosure is appropriate to the proper performance of the official duties of the person making the disclosure.

J. To requesting foreign governments under appropriate information sharing agreements and there is a legitimate need to share information for law enforcement or national security purposes under 8 CFR 208.6.

DISCLOSURE TO CONSUMER REPORTING AGENCIES:

None.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

DHS/USCIS stores records in this system electronically or on paper in secure facilities in a locked drawer behind a locked door. The records may be stored on magnetic disc, tape, and digital media.

RETRIEVABILITY:

DHS/USCIS may retrieve records by any of the data elements listed above or a combination thereof. This may include name, date of birth, alias(es), place of birth, gender, ethnicity or tribal group, physical addresses, relatives addresses, A-Number, SSN, USCIS Online Account, Receipt Number, Resettlement Support Center Case Number, government-issued identification, notices and communications, phone numbers, and email addresses.

SAFEGUARDS:

DHS/USCIS safeguards records in this system according to applicable rules and policies, including all applicable DHS automated systems security and access policies. DHS/USCIS has imposed strict controls to minimize the risk of compromising the information that is being stored. Access to the computer system containing the records in this system is limited to those individuals who have a need to know the information for the performance of their official duties and who have appropriate clearances or permissions.

RETENTION AND DISPOSAL:

DHS/USCIS stores the physical documentation in the Alien File, and maintains refugee case processing and security screening information and follow-to-join applications in the respective case management systems. The A-File records are permanent whether hard copy or electronic. USCIS transfers the A-Files to the custody of NARA 100 years after the individual's date of birth.

NARA approved the CAMINO [N1–566–12–06] and CLAIMS 3 [N1–566–08–12] Retention Schedules.

CAMINO Master File automated records are maintained for 25 years after the case is closed and then destroyed.

CLAIMS 3 records are destroyed after the data is transferred to the electronic master file and verified. Information in the master file is destroyed 15 years after the last completed action with respect to the benefit. USCIS is proposing to update the CLAIMS 3 Retention Schedule to destroy records 50 years after the last completed action. This retention schedule allows USCIS to address any follow-up inquiries or requests related to the application, including inquiries related to law enforcement, public safety, and national security, and to respond to Freedom of Information Act/Privacy Act (FOIA/PA) matters.

The biometric check data is retained in CPMS, which is governed by a DHS-wide retention schedule. The records in CPMS are retained for 100 years from the individual's data of birth in accordance with the NARA Disposition Authority Number DAA–0563–2013–0001–0005.

SYSTEM MANAGER AND ADDRESS:

For refugee records, the DHS system manager is the Chief, Refugee Affairs Division, Refugee, Asylum, and International Operations Directorate, U.S. Citizenship and Immigration Services, Department of Homeland Security, 111 Massachusetts Avenue NW., Washington, DC 20529.

For refugee follow-to-join records, the DHS system manager is the Chief, International Operations Division, Refugee, Asylum, and International Operations Directorate, U.S. Citizenship and Immigration Services, Department of Homeland Security, 111 Massachusetts Avenue NW., Washington, DC 20529.

For refugee records relating to adjustment of status and travel, the DHS system manger is the Associate Director, Service Center Operations Directorate, U.S. Citizenship and Immigration Services, Department of Homeland Security, 111 Massachusetts Avenue NW., Washington, DC 20529.

NOTIFICATION PROCEDURE:

Individuals seeking notification of and access to any record contained in this system of records, or seeking to contest its content, may submit a request in writing to the National Records Center (NRC) FOIA/PA Office, P.O. Box 648010, Lee's Summit, MO, 64064–8010, whose contact information can be found at *http://www.dhs.gov/foia* under ''Contacts.'' If an individual believes more than one component maintains Privacy Act records concerning him or her, the individual may submit the request to the Chief Privacy Officer and Chief Freedom of Information Act Officer, Department of Homeland Security, 245 Murray Drive SW., Building 410, STOP–0655, Washington, DC 20528.

When seeking records about yourself from this system of records or any other Departmental system of records, your request must conform with the Privacy Act regulations set forth in 6 CFR part 5. You must first verify your identity, meaning that you must provide your full name, current address, and date and place of birth. You must sign your request, and your signature must either be notarized or submitted under 28 U.S.C. 1746, a law that permits statements to be made under penalty of perjury as a substitute for notarization. While no specific form is required, you may obtain forms for this purpose from the Chief Privacy Officer and Chief

Freedom of Information Act Officer, *http://www.dhs.gov/foia* or 1–866–431–0486. In addition, you should:

- Explain why you believe the Department would have information on you;
- Identify which component(s) of the Department you believe may have the information about you;
- Specify when you believe the records would have been created; and
- Provide any other information that will help the FOIA staff determine which DHS component agency may have responsive records;

If your request is seeking records pertaining to another living individual, you must include a statement from that individual certifying his/her agreement for you to access his/her records.

Without the above information, the component(s) may not be able to conduct an effective search, and your request may be denied due to lack of specificity or lack of compliance with applicable regulations.

RECORD ACCESS PROCEDURES:

See ''Notification procedure'' above.

CONTESTING RECORD PROCEDURES:

See ''Notification procedure'' above.

RECORD SOURCE CATEGORIES:

DHS/USCIS obtains records from the applicant, and his or her accredited representative, preparer, or interpreter. Other information sources include family members, federal databases for security screening checks, RSCs, the DOS Refugee Processing Center, resettlement agencies, international organizations, and local sources at overseas sites. DHS/USCIS personnel may input information as they process a case, including information from internal and external sources to verify whether a benefit requestor or family is eligible for the refugee benefit requested. Refugee Case Process and Security Screening also stores and uses information from the following USCIS, DHS, and other federal agency systems of records:

- DHS/USCIS/ICE/CBP–001 Alien File, Index, and National File Tracking System of Records, 78 FR 69864 (November 21, 2013);
- DHS/USCIS–002 Background Check Service, 72 FR 31082 (June 5, 2007);
- DHS/USCIS–003 Biometric Storage System, 72 FR 17172 (April 6, 2007);
- STATE–05, Overseas Citizen Services Records (May 2, 2008);
- STATE–26, Passport Records, (Mar. 24, 2015)STATE–39, DOS Visa Opinion Information Service (VOIS), 77 FR 65245, (Oct. 25, 2012);
- JUSTICE/FBI–002 The FBI Central Records System, 72 FR 3410 (January 25, 2007);
- DoD/A0025–2 Defense Biometric Services, 74 FR 48237, (September 22, 2009);
- DoD Detainee Biometric Information System, 72 FR 14534, (March 28, 2007); and
- DoD/A0025–2a Defense Biometric Identification Records System, 74 FR 17840, (April 17, 2009).

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

Dated: October 5, 2016.

Jonathan R. Cantor,

Acting Chief Privacy Officer, Department of Homeland Security.

[FR Doc. 2016–25195 Filed 10–18–16; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF HOMELAND SECURITY

Office of the Secretary

[Docket No. DHS–2016–0073]

Privacy Act of 1974; Department of Homeland Security United States Immigration Customs and Enforcement—011 Criminal Arrest Records and Immigration Enforcement Records System of Records

AGENCY: Privacy Office, Department of Homeland Security.

ACTION: Notice of Privacy Act System of Records.

SUMMARY: In accordance with the Privacy Act of 1974, the Department of Homeland Security (DHS) proposes to update, rename, and reissue a current DHS system of records titled, ''DHS// U.S. Immigration and Customs Enforcement (ICE)–011 Immigration and Enforcement Operational Records (ENFORCE)'' system of records. DHS/ ICE collects, uses, and maintains ENFORCE to support the identification, apprehension, and removal of individuals unlawfully entering or present in the United States in violation of the Immigration and Nationality Act, including fugitive aliens. DHS/ICE also uses ENFORCE to support the identification and arrest of individuals (both citizens and non-citizens) who commit violations of federal criminal laws enforced by DHS. This system of records is being created from a previously issued system of records, DHS/ICE 011–Immigration and Enforcement Operational Records (ENFORCE). *See* 80 FR 24,269 (Apr. 30, 2015).

DHS/ICE is updating this system of records to: Change the system of records name to ''DHS/ICE–011 Criminal Arrest Records and Immigration Enforcement Records (CARIER)'' System of Records; update and reorganize the categories of individuals for clarity; expand the categories of records to include recordings of detainee telephone calls and information about these calls, as well as information related to detainees' accounts for telephone or commissary services in a detention facility; update the system manager; clarify system location; and add twenty-five routine uses and modify twenty routine uses to describe how the Department of Homeland Security may share information from this system. Additionally, this notice includes non-substantive changes to simplify the formatting and text of the previously published notice.

This updated system will be included in the Department of Homeland Security's inventory of record systems.

DATES: Submit comments on or before November 18, 2016. This updated system will be effective November 18, 2016.

ADDRESSES: You may submit comments, identified by docket number DHS–2016–0073 by one of the following methods:

- *Federal e-Rulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 202–343–4010.
- *Mail:* Jonathan R. Cantor, Acting Chief Privacy Officer, Privacy Office, Department of Homeland Security, Washington, DC 20528.

Instructions: All submissions received must include the agency name and docket number for this rulemaking. All comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided.

Docket: For access to the docket to read background documents or comments received, please visit *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: For general questions, please contact: Amber Smith, (202–732–3300), Privacy Officer, U.S. Immigration and Customs Enforcement, 500 12th Street SW., Mail Stop 5004, Washington, DC 20536. For privacy questions, please contact: Jonathan R. Cantor, (202–343–1717), Acting Chief Privacy Officer, Privacy Office, U.S. Department of Homeland Security, Washington, DC 20528.

SUPPLEMENTARY INFORMATION:

I. Background

In accordance with the Privacy Act of 1974, 5 U.S.C. 552a, DHS/ICE is updating, renaming, and reissuing a DHS system of records now titled, ''DHS/Immigration and Enforcement (ICE)–011 Criminal Arrest Records and Immigration Enforcement Records (CARIER) System of Records.''

The DHS/ICE update to CARIER includes several changes. First, the system of records is being renamed to better align it with the purpose of the system. This system of records covers records documenting ICE's criminal arrests, and also those documenting most of ICE's immigration enforcement actions, such as the issuance of immigration detainers; the arrests, charging, detention, and removal of aliens for administrative immigration violations; the search for and apprehension of fugitive aliens; and ICE decisions concerning the grant or denial of parole to aliens. This system of records is being created from a previously issued system of records named, DHS/ICE 011–Immigration and Enforcement Operational Records (ENFORCE), 80 FR 24,269 (Apr. 30, 2015).

Second, this update seeks to clarify the types of individuals whose information is contained in this system of records. Some items in the category of individuals section have been reorganized and edited to more clearly identify the individuals whose records may be present in this system of records.

Third, the categories of records section has been expanded to provide a more detailed and complete list of the types of information contained in the system of records. The new categories of records added to the system of records are domestic and foreign criminal history information; information related to detainees' accounts for telephone or commissary services in a detention facility; and video recordings of detainees. The CARIER system of records also contains detainee voiceprints used to verify identity when a detainee is released under an alternative to detention program, as well as the actual audio recordings of detainee ''check-in'' telephone calls. Additionally, the CARIER system of records contains recordings of detainee telephone calls made from a detention facility and information about these calls such as the date, time, duration, and telephone number called (Note: Information for protected telephone calls, such as calls with an attorney, is not recorded).

Fourth, the system location and security classification have been updated to indicate that certain records may be replicated from ICE's Enforcement Integrated Database (EID) and stored on both DHS unclassified and classified networks to allow for analysis and vetting consistent with existing DHS/ICE authorities and purposes and this published notice.

Fifth, the title of the system manager has been updated.

Finally, DHS is proposing to add new routine uses that would allow ICE to share information from the CARIER system of records with the specified recipients for the specified purpose. DHS is also proposing to delete several routine uses and modify several others to clarify their meaning and/or to expand or limit the scope of the information shared. Several of the routine uses being added to or updated in the CARIER SORN are the same routine uses included in the Department of Homeland Security/U.S. Customs and Immigration Services (USCIS)/ICE/ Customs and Border Protection (CBP)-001 Alien File, Index, and National File Tracking (A-File) SORN. 78 FR. 69,864, (Nov. 21, 2013). Although both SORNs support the immigration enforcement mission, they often contain different information about aliens that may need to be shared. Therefore, identical or similar routine uses may be needed in both SORNs to ensure that immigration information can be shared as needed for law enforcement and other authorized purposes.

Below is a summary of the new routine uses and their corresponding letter:

(H) To prospective claimants and their attorneys for the purpose of negotiating the settlement of an actual or prospective claim against DHS or its current or former employees, in advance of the initiation of formal litigation or proceedings;

(J) To federal, state, local, tribal, or territorial government agencies, or other entities or individuals, or through established liaison channels to selected foreign governments, in order to provide intelligence, counterintelligence, or other information for the purposes of national security, intelligence, counterintelligence, or antiterrorism activities authorized by U.S. law, E.O., or other applicable national security directive;

(K) To federal and foreign government intelligence or counterterrorism agencies or components when DHS becomes aware of an indication of a threat or potential threat to national or international security, or when such disclosure is to support the conduct of national intelligence and security investigations or to assist in anti-terrorism efforts;

(P) To disclose information to the U.S. Department of Justice (DOJ) Executive Office of Immigration Review (EOIR) and to the Board of Immigration Appeals (the entities that adjudicate immigration cases), to the extent necessary to carry out their authorized duties pertaining to the adjudication of matters arising under the INA;

(DD) To DOJ and other law enforcement or custodial agencies to facilitate payments and reporting under the State Criminal Alien Assistance Program or similar programs;

(EE) To any law enforcement agency or custodial agency (such as a jail or prison) to serve that agency with notice of an immigration detainer, or to update or remove a previously issued immigration detainer, for an individual believed to be in that agency's custody;

(MM) To courts, magistrates, administrative tribunals, opposing counsel, parties, and witnesses, in the course of immigration, civil, or criminal proceedings (including discovery, presentation of evidence, and settlement negotiations), and when DHS determines that use of such records is relevant and necessary to the litigation before a court or adjudicative body when any of the following is a party to or have an interest in the litigation:

1. DHS or any component thereof;
2. Any employee of DHS in his/her official capacity;
3. Any employee of DHS in his/her individual capacity when DOJ or DHS has agreed to represent the employee; or
4. The United States, when DHS determines that litigation is likely to affect DHS or any of its components.

(NN) To federal, state, local, tribal, territorial, international, or foreign government agencies or entities for the purpose of consulting with that agency or entity:

1. To assist in making a determination regarding redress for an individual in connection with the operations of a DHS component or program;
2. To verify the identity of an individual seeking redress in connection with the operations of a DHS component or program; or
3. To verify the accuracy of information submitted by an individual who has requested such redress on behalf of another individual.

(OO) To federal, state, local, tribal, territorial, or foreign governmental agencies; multilateral governmental organizations; or other public health entities, for the purposes of protecting the vital interests of a data subject or other persons, including to assist such agencies or organizations during an epidemiological investigation, in facilitating continuity of care, in preventing exposure to or transmission of a communicable or quarantinable disease of public health significance, or to combat other significant public health threats.

(PP) To foreign governments for the purpose of providing information about their citizens or permanent residents, or family members thereof, during local or national disasters or health emergencies;

(QQ) To a coroner for purposes of affirmatively identifying a deceased individual (whether or not such individual is deceased as a result of a crime) or cause of death;

(RR) To a former employee of DHS for purposes of responding to an official inquiry by federal, state, local, tribal, or territorial government agencies or professional licensing authorities; or facilitating communications with a former employee that may be relevant and necessary for personnel-related or other official purposes, when DHS requires information or consultation assistance from the former employee regarding a matter within that person's former area of responsibility;

(SS) To federal, state, local, tribal, territorial, foreign, or international agencies, if the information is relevant and necessary to a requesting agency's decision concerning the hiring or retention of an individual, or the issuance, grant, renewal, suspension or revocation of a security clearance, license, contract, grant, or other benefit; or if the information is relevant and necessary to a DHS decision concerning the hiring or retention of an employee, the issuance of a security clearance, the reporting of an investigation of an employee, the letting of a contract, or the issuance of a license, grant or other benefit;

(TT) To a public or professional licensing organization when such information indicates, either by itself or in combination with other information, a violation or potential violation of professional standards, or reflects on the moral, educational, or professional qualifications of licensed professionals or who those seeking to become licensed professionals;

(UU) To an attorney or representative (as defined in 8 CFR 1.2, 202.1, 1001.1(f), or 1202.12) who is acting on behalf of an individual covered by this system of records in connection with any proceeding before U.S. Citizenship and Immigration Services (USCIS), ICE, U.S. Customs and Border Protection (CBP), or the EOIR, as required by law or as deemed necessary in the discretion of the Department;

(VV) To members of the public, with regard to disclosure of limited detainee biographical information for the purpose of facilitating the deposit of monies into detainees' accounts for telephone or commissary services in a detention facility;

(WW) To federal, state, local, tribal, or territorial government agencies seeking to verify or ascertain the citizenship or immigration status of any individual within the jurisdiction of the agency for any purpose authorized by law;

(XX) To DOJ or other federal agency conducting litigation or in proceedings before any court, adjudicative or administrative body, when necessary to assist in the development of such agency's legal and/or policy position;

(YY) To federal, state, local, tribal, and territorial courts or government agencies involved in criminal investigation or prosecution, pre-trial, sentencing, parole, probation, bail bonds, or any other aspect of the criminal justice process, and to defense counsel representing an individual in a domestic criminal proceeding, in order to ensure the integrity and efficiency of the criminal justice system by informing these recipients of the existence of an immigration detainer or the individual's status in removal proceedings, including removal or custodial status/location. Disclosure of the individual's Alien Registration Number (A-Number) and country of birth is also authorized to facilitate these recipients' use of the ICE Online Detainee Locator System for the purposes listed above;

(ZZ) To a foreign government to notify it concerning its citizens or residents who are incapacitated, an unaccompanied minor, or deceased;

(AAA) To family members, guardians, committees, friends, or other agents identified by law or regulation to receive notification, decisions, and other papers as provided in 8 CFR 103.8 from DHS or EOIR following verification of a familial or agency relationship with an alien when DHS is aware of indicia of incompetency or when an alien has been determined to be mentally incompetent by an immigration judge;

(BBB) To an organization or person in either the public or private sector, either foreign or domestic, when there is a reason to believe that the recipient is or could become the target of a particular terrorist activity or conspiracy, or when the information is relevant to the protection of life, property, or other vital interests of a person.

(CCC) To clerks and judges of courts exercising naturalization jurisdiction for the purpose of granting or revoking naturalization.

(DDD) To federal, state, local, tribal, territorial, foreign, or international agencies, after discovery of such information, if DHS determines: (1) The information is relevant and necessary to that agency's decision concerning the hiring or retention of an individual, or issuance of a security clearance, license, contract, grant, or other benefit; and (2) Failure to disclose the information is likely to create a substantial risk to government facilities, equipment or personnel; sensitive information; critical infrastructure; or public safety.

Below is a summary of the routine uses that are proposed to be modified or deleted, and their corresponding letter:

(A) Expanded scope to include sharing with the Offices of the United States Attorneys. Also removed sharing with a court, magistrate, administrative tribunal, opposing counsel, parties, and witnesses because routine use LL now permits sharing with these recipients.

(C) Updated to note that records will be provided specifically to the General Services Administration rather than to other Federal Government agencies.

(D) Updated to clarify that records will not be given to individuals, but to agencies or organizations performing the audit.

(E) Updated to add the risk of identity theft or fraud, and harm to economic or property interests as additional risks that DHS may determine may be a result of the suspected or confirmed compromise.

Routine use H in the previous version of the SORN, which authorized disclosure during court proceedings, has been removed and replaced by new routine use MM. The new routine use contains improved wording that is clearer about when disclosures may be made under these circumstances.

(I) Updated to enable DHS to share information when it deems that such disclosure is necessary to carry out its functions and statutory mandates.

(J) Former routine uses J and K have been removed and the sharing they permitted is now combined into one routine use that authorizes disclosure for the purposes of national security, intelligence, counterintelligence, or antiterrorism activities.

Routine use L in the previous version of the SORN has been removed and replaced by a new routine use K permitting sharing with federal and foreign government intelligence or counterterrorism agencies or components in support of national intelligence and security investigations or to assist in anti-terrorism efforts.

(N) Updated to clarify that in disclosing custodial location to family members, attorneys, and other agents acting on the behalf of an alien, the agency may also disclose if the alien was released from ICE custody and/or transferred to the custody of another agency. This authority was implied but not expressly stated in the previous version of routine use N. Also modified to clarify that disclosure is authorized to attorneys representing the alien in any legal proceeding, not only immigration proceedings.

(O) Updated to clarify that information can be shared for other purposes or activities within the scope of the EOIR contract.

(R) (previously routine use Q) Expanded scope to include sharing with domestic courts and to clarify agencies collecting the repayment of loans, or fraudulently or erroneously secured benefits.

(V) (previously routine use U) Expanded scope to include prosecutions and/or other law enforcement actions.

(W) (previously routine use V) Expanded scope to include sharing with federal, state, local, tribal, or territorial law enforcement or correctional agencies concerning individuals in ICE custody that are to be transferred to such agency's custody, in order to coordinate the transportation, custody, and care of the individuals.

(X) (previously routine use W) Expanded scope to include sharing in order to arrange other social services.

(Y) (previously routine use X) Updated to replace ICE with DHS.

(BB) (previously routine use CC) Expanded the sharing of custodial information to witnesses and individuals with a legal responsibility to act on behalf of or acting at the request of a victim or witness, as well as external victim notification systems.

(CC) (previously routine use Y) Scope is narrowed to exclude sharing in order to place an immigration detainer on an individual. Sharing in order to place a detainer is now covered by routine use DD. Additionally, this routine use previously was used when ICE was transferring an individual to another agency. It has been expanded to allow sharing during the course of transfer of custody of an individual either to or from ICE's custody.

(HH) (previously routine use BB) Expanded scope to include sharing with the attorney or guardian ad litem of an individual's child for purposes of allowing the attorney/guardian to identify the location or status of the individual.

(KK) (previously routine use FF) Expanded scope to include sharing with territorial government agencies or entities or multinational governmental agencies. It also expands the purposes of the sharing to developing and implementing new software or technology when the purpose of the software or technology is related to this system of records.

(LL) (previously routine use GG) Former routine use GG has been removed and the sharing it permitted is now contained in two new routine uses to improve clarity: Routine use LL permitting the disclosure of information via the ICE Online Detainee Locator System or any successor system, and routine use VV permitting the disclosure of information to facilitate the deposit of monies into detainees' accounts for telephone or commissary services in a detention facility.

Finally, there have been changes regarding the retention period for some records. Retention periods have been added for records concerning paroled aliens and fugitive aliens maintained in certain ICE information systems. Also, the fingerprints and photographs collected using the booking application EID Arrest Guide for Law Enforcement (EAGLE), previously known as Mobile IDENT, originally were stored for up to seven (7) days in the cache of an encrypted Government laptop or other IT device. Now they are stored for up to fifty (50) days.

Consistent with DHS's information sharing mission, information stored in the DHS/ICE–011 Criminal Arrest Records and Immigration Enforcement Records may be shared with other DHS Components that have a need to know the information to carry out their national security, law enforcement, immigration, intelligence, or other homeland security functions. In addition, DHS/ICE may share information with appropriate federal, state, local, tribal, territorial, foreign, or international government agencies consistent with the routine uses set forth in this system of records notice.

This updated system will be included in DHS's inventory of record systems.

II. Privacy Act

The Privacy Act embodies fair information principles in a statutory framework governing the means by which Federal Government agencies collect, maintain, use, and disseminate individuals' records. The Privacy Act applies to information that is maintained in a ''system of records.'' A ''system of records'' is a group of any records under the control of an agency from which information is retrieved by the name of an individual or by some identifying number, symbol, or other identifying particular assigned to the individual. In the Privacy Act, an individual is defined to encompass U.S. citizens and lawful permanent residents. As a matter of policy, DHS extends administrative Privacy Act protections to all individuals when systems of records maintain information on U.S. citizens, lawful permanent residents, and visitors.

Below is the description of the DHS/ICE–011 Criminal Arrest Records and Immigration Enforcement Records (CARIER) System of Records.

In accordance with 5 U.S.C. 552a(r), DHS has provided a report of this system of records to the Office of Management and Budget and to Congress.

System of Records

Department of Homeland Security (DHS)/U.S. Immigration and Enforcement Operations (ICE)–011

SYSTEM NAME:

DHS/ICE–011 Criminal Arrest Records and Immigration Enforcement Records

SECURITY CLASSIFICATION:

Unclassified; Controlled Unclassified Information (CUI). The data may be retained on the classified networks, but this does not change the nature and character of the data until it is combined with classified information.

SYSTEM LOCATION:

Records are maintained at DHS/ICE information technology (IT) systems (*e.g.,* the EID and the various ICE applications associated with it, Parole Case Tracking System (PCTS), Online Detainee Locator System (ODLS), Electronic Travel Document (eTD) System, the contractor-owned IT system supporting ICE's Alternatives to Detention (ATD) program) and associated electronic and paper files located at ICE Headquarters in Washington, DC, ICE field and attaché offices, contractor offices, and detention facilities operated by or on behalf of ICE, or that otherwise house individuals arrested or detained by ICE. Records are replicated from the operational DHS/ICE IT systems and maintained on DHS unclassified and classified networks used for analysis and vetting.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Categories of individuals covered by this system include (1) individuals arrested, detained, or removed from the United States for criminal or administrative violations of the Immigration and Nationality Act, or individuals issued a Notice to Appear in immigration court; (2) individuals who are the subject of an immigration detainer issued to another law enforcement or custodial agency; (3) individuals arrested by ICE for violations of criminal laws enforced by ICE or DHS; (4) individuals who fail to leave the United States after receiving a final order of removal, deportation, or exclusion, or who fail to report to ICE for removal after receiving notice to do so (fugitive aliens); (5) individuals who illegally re-enter the United States after departing pursuant to an order of voluntary departure or being removed from the United States (illegal re-entrants); (6) individuals who request to be removed at their own expense or are eligible for voluntary removal from the United States pursuant to sec. 250 of the Immigration and Nationality Act; (7) individuals who are granted parole into the United States under sec. 212(d)(5) of the Immigration and Nationality Act (parolees); (8) attorneys or representatives who represent individuals listed in the categories above; (9) other individuals whose information may be collected or obtained during the course of an immigration enforcement or criminal matter, such as witnesses, associates, and relatives; (10) persons who post or arrange bond for the release of an individual from ICE detention, or receive custodial property of a detained alien; and (11) prisoners of the U.S. Marshals Service held in ICE detention facilities.

CATEGORIES OF RECORDS IN THE SYSTEM:

Biographic, biometric, descriptive, historical, and other identifying data, including:

- Full Name;
- Alias(es);
- A-Number;
- Social Security number (SSN);
- Date of birth;
- Place of birth;
- Nationality;
- Fingerprint Identification Number (FIN);
- Federal Bureau of Investigation (FBI) number;
- Other unique identifying numbers (*e.g.,* federal, state, local and tribal identification numbers);
- Government-issued identification (*e.g.,* passport, drivers' license):
  - Document type;
  - Issuing organization;
  - Document number;
  - Expiration date;
- Visa information;
- Contact or location information (*e.g.,* known or possible addresses, phone numbers);
- Employment history;
- Education history;
- Immigration history (*e.g.,* citizenship/naturalization certificate number, removals, explanations);
- Domestic and foreign criminal history (*e.g.,* arrest, charges, dispositions, and sentencing, corresponding dates, jurisdictions);
- Physical Description (*e.g.,* height, weight, eye color, hair color, race, ethnicity, identifying marks like scars, tattoos, or birthmarks);
- Biometric (*i.e.,* fingerprints, voiceprints, iris images, photographs, and DNA samples). DNA samples required by DOJ regulation (*see* 28 CFR part 28) are collected and sent to the FBI. DNA samples are not retained or analyzed by DHS; and
- Information pertaining to ICE's collection of DNA samples, limited to the date and time of a successful collection and confirmation from the FBI that the sample was able to be sequenced. ICE does not receive or maintain the results of the FBI's DNA analysis (*i.e.,* DNA sequences).

Case-related data:

- Case number;
- Record number;
- Case category;
- Charges brought and disposition;
- Case agent;
- Data initiated and completed; and
- Other data describing an event involving alleged violations of criminal or immigration law (*i.e.,* location; date; time; type of criminal or immigration law violations alleged; type of property involved; use of violence, weapons, or assault against DHS personnel or third parties; attempted escape; and other related information).

Information presented to or collected by ICE during immigration and law enforcement proceedings or activities:

- Date of birth;
- Place of birth;
- Marital status;
- Education history;
- Employment history;
- Travel history; and
- Other information derived from affidavits, certificates, manifests, and other documents. This data typically pertains to subjects, relatives, associates, and witnesses.

Detention data on aliens:

- Immigration detainers issued;
- Transportation information;
- Detention-related identification numbers;
- Detention facility;
- Security, risk, and custody classification;
- Custody recommendation;
- Flight risk indication;
- Book-in/book-out date and time;
- Mandatory detention and criminal flags;
- Aggravated felon status;
- Other alerts;
- Information about an alien's release from custody on bond, recognizance, or supervision;
- Information related to prosecutorial discretion determinations;
- Property inventory and receipt;
- Information related to disciplinary issues or grievances;
- Documents and video recordings related to alleged misconduct and other incidents involving detainees; and
- Other detention-related information (*e.g.,* documentation of an allegation of sexual abuse or assault, documentation of strip and body cavity searches, documentation of reasons for segregation or other housing placement, documentation of participation in the orientation process).

Detention data for U.S. Marshals Service prisoners:

- Full Name;
- Date of birth;
- Country of birth;
- Identification numbers (*e.g.,* detainee, FBI, state);
- Book-in/book-out date and time; and
- Security classification.

Limited health information relevant to an individual's placement in an ICE detention facility or transportation requirements:

- Medical alerts or general information on physical disabilities or other special needs or vulnerabilities to facilitate placement in a facility or bed that best accommodates these needs. Medical records about individuals in ICE custody (*i.e.,* records relating to the diagnosis or treatment of individuals) are maintained in DHS/ICE—013 Alien Medical Records System of Records.

Progress, status, and final result of removal, prosecution, and other DHS processes and related appeals:

- Information relating to criminal convictions;
- Incarceration;
- Travel documents; and
- Other information pertaining to the actual removal of aliens from the United States.

Contact, biographical, and identifying data about Relatives, Attorneys or Representatives, Associates or Witnesses of an alien in proceedings initiated or conducted by DHS may include:

- Full Name;
- Date of birth;
- Place of birth; and
- Contact or location information (*e.g.,* addresses, phone numbers, business, or agency name).

Data concerning personnel of other agencies that arrested, or assisted or participated in the arrest or investigation of, or are maintaining custody of an individual whose arrest record is contained in this system of records may include:

- Full Name;

- Title;
- Contact or location information (*e.g.,* addresses, phone numbers, business, or agency name); and
- Other information.

Data about persons who post or arrange an immigration bond for the release of an individual from ICE custody, or receive custodial property of an individual in ICE custody may include:

- Full Name;
- Address;
- Phone numbers;
- SSN; and
- Other information.

Recordings of detainee telephone calls when responding as part of an alternative to detention program or of detainee calls made in detention facilities. Information about these calls may include:

- Date;
- Time;
- Duration; and
- Phone number called. (Note: Protected telephone calls, such as calls with an attorney, are not recorded and information about protected telephone calls is not retained.)

Information related to detainees' accounts for telephone or commissary services in a detention facility.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Authority for maintain this system is in 8 U.S.C. 1103, 1225, 1226, 1324, 1357, 1360, and 1365(a)(b); Title 18, United States Code, Chapters 27, 77, 85, 95, 109A, 110, 113, and 117; Title 31, United States Code, Chapter 53, Subchapter II; Title 50 Appendix, United States Code; The Tariff Act of 1930; Justice for All Act of 2004 (Pub. L. 108–405); DNA Fingerprint Act of 2005 (Pub. L. 109–162); Adam Walsh Child Protection and Safety Act of 2006 (Pub. L. 109–248); and 28 CFR part 28, "DNA-Sample Collection and Biological Evidence Preservation in the Federal Jurisdiction;" DHS Delegation Number 7030.2, Delegation of Authority to the Assistant Secretary for the Bureau of Immigration and Customs Enforcement and the Reorganization Plan Modification for the Department of Homeland Security (January 30, 2003).

PURPOSE(S):

The purposes of this system are:

1. To support the identification, arrest, charging, detention, and removal of individuals unlawfully entering or present in the United States in violation of the Immigration and Nationality Act, including fugitive aliens and illegal re-entrants.

2. To support the identification and arrest of individuals (both citizens and non-citizens) who commit violations of criminal laws enforced by ICE or DHS.

3. To track the process and results of administrative and criminal proceedings against individuals who are alleged to have violated the Immigration and Nationality Act or other laws enforced by DHS.

4. To support the grant or denial of parole, and tracking of individuals who seek or receive parole into the United States.

5. To provide criminal and immigration history information during DHS enforcement encounters, and to support background checks on applicants for DHS immigration benefits (*e.g.,* employment authorization and petitions).

6. To identify potential criminal activity, immigration violations, and threats to homeland security; to uphold and enforce the law; and to ensure public safety.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, all or a portion of the records or information contained in this system may be disclosed outside DHS as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

A. To the Department of Justice (DOJ), including Offices of the United States Attorneys, or other federal agency conducting litigation or in proceedings before any court, adjudicative, or administrative body, when it is relevant or necessary to the litigation and one of the following is a party to the litigation or has an interest in such litigation:

1. DHS or any component thereof;

2. Any employee or former employee of DHS in his/her official capacity;

3. Any employee or former employee of DHS in his/her individual capacity when DOJ or DHS has agreed to represent the employee; or

4. The United States or any agency thereof.

B. To a congressional office from the record of an individual in response to an inquiry from that congressional office made at the request of the individual to whom the record pertains.

C. To the National Archives and Records Administration (NARA) or General Services Administration pursuant to records management inspections being conducted under the authority of 44 U.S.C. 2904 and 2906.

D. To an agency or organization for the purpose of performing audit or oversight operations as authorized by law, but only such information as is necessary and relevant to such audit or oversight function.

E. To appropriate agencies, entities, and persons when:

1. DHS suspects or has confirmed that the security or confidentiality of information in the system of records has been compromised;

2. DHS has determined that as a result of the suspected or confirmed compromise, there is a risk of identity theft or fraud, harm to economic or property interests, harm to an individual, or harm to the security or integrity of this system or other systems or programs (whether maintained by DHS or another agency or entity) that rely upon the compromised information; and

3. The disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with DHS' efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

F. To contractors and their agents, grantees, experts, consultants, and others performing or working on a contract, service, grant, cooperative agreement, or other assignment for DHS, when necessary to accomplish an agency function related to this system of records. Individuals provided information under this routine use are subject to the same Privacy Act requirements and limitations on disclosure as are applicable to DHS officers and employees.

G. To an appropriate federal, state, local, tribal, territorial, international, or foreign law enforcement agency or other appropriate authority charged with investigating or prosecuting a violation, enforcing, or implementing a law, rule, regulation, or order, when a record, either on its face or in conjunction with other information, indicates a violation or potential violation of law, which includes criminal, civil, or regulatory violations and such disclosure is proper and consistent with the official duties of the person making the disclosure.

H. To prospective claimants and their attorneys for the purpose of negotiating the settlement of an actual or prospective claim against DHS or its current or former employees, in advance of the initiation of formal litigation or proceedings.

I. To federal, state, local, tribal, territorial, or foreign government agencies, as well as to other individuals and organizations during the course of an investigation by DHS or the processing of a matter under DHS's jurisdiction, or during a proceeding within the purview of immigration and nationality laws, when DHS deems that such disclosure is necessary to carry out its functions and statutory mandates or to elicit information required by DHS to carry out its functions and statutory mandates.

J. To federal, state, local, tribal, or territorial government agencies, or other entities or individuals, or through established liaison channels to selected foreign governments, in order to provide intelligence, counterintelligence, or other information for the purposes of national security, intelligence, counterintelligence, or antiterrorism activities authorized by U.S. law, E.O., or other applicable national security directive.

K. To federal and foreign government intelligence or counterterrorism agencies or components when DHS becomes aware of an indication of a threat or potential threat to national or international security, or when such disclosure is to support the conduct of national intelligence and security investigations or to assist in anti-terrorism efforts.

L. To any federal agency to enable such agency to make determinations regarding the payment of federal benefits to the record subject in accordance with that agency's statutory responsibilities.

M. To foreign governments for the purpose of coordinating and conducting the removal of aliens from the United States to other nations under the Immigration and Nationality Act (INA); and to international, foreign, intergovernmental, and multinational agencies, authorities, and organizations in accordance with law and formal or informal international arrangements.

N. To family members and attorneys or other agents acting on behalf of an alien in immigration or other legal proceedings, to assist those individuals in determining whether: (1) The alien has been arrested by DHS for immigration violations; (2) the location of the alien if in DHS custody; or (3) the alien has been removed from the United States, released from DHS custody, or transferred to the custody of another agency, provided however, that the requesting individuals are able to verify the alien's date of birth or A-Number, or can otherwise present adequate verification of a familial or agency relationship with the alien, such as a Form G–514 or other proof of representation in a legal proceeding (*e.g.,* notice of appearance, court appointment).

O. To the DOJ Executive Office of Immigration Review (EOIR) or its contractors, consultants, or others performing or working on a contract for EOIR, for the purpose of providing information about aliens who are or may be placed in removal proceedings so that EOIR may arrange for the provision of educational services to those aliens under EOIR's Legal Orientation Program, or for other purposes or activities within the scope of the EOIR contract.

P. To disclose information to the DOJ EOIR and to the Board of Immigration Appeals, to the extent necessary to carry out their authorized duties pertaining to the adjudication of matters arising under the INA.

Q. To attorneys or legal representatives for the purpose of facilitating group presentations to aliens in detention that will provide the aliens with information about their rights under U.S. immigration law and procedures.

R. To federal, state, tribal, territorial, or local government agencies or domestic courts to assist such agencies in collecting the repayment of loans, or fraudulently or erroneously secured benefits, grants, or other debts owed to them or to the United States Government, or to obtain information that may assist DHS in collecting debts owed to the United States Government.

S. To the Department of State in the processing of petitions or applications for benefits under the Immigration and Nationality Act, and all other immigration and nationality laws including treaties and reciprocal agreements; or when the Department of State requires information to consider or provide an informed response to a request for information from a foreign, international, or intergovernmental agency, authority, or organization about an alien or an enforcement operation with transnational implications.

T. To the Office of Management and Budget (OMB) in connection with the review of private relief legislation as set forth in OMB Circular No. A–19 at any stage of the legislative coordination and clearance process as set forth in the Circular.

U. To the U.S. Senate Committee on the Judiciary or the U.S. House of Representatives Committee on the Judiciary when necessary to inform members of Congress about an alien who is being considered for private immigration relief.

V. To federal, state, local, territorial, tribal, international, or foreign criminal, civil, or regulatory law enforcement authorities when the information is necessary for collaboration, coordination and de-confliction of investigative matters, prosecutions, and/or other law enforcement actions to avoid duplicative or disruptive efforts and to ensure the safety of law enforcement officers who may be working on related law enforcement matters.

W. To the U.S. Marshals Service (USMS) concerning USMS prisoners that are or will be held in detention facilities operated by or on behalf of ICE, and to federal, state, local, tribal, or territorial law enforcement or correctional agencies concerning individuals in DHS custody that are to be transferred to such agency's custody, in order to coordinate the transportation, custody, and care of these individuals.

X. To third parties to facilitate placement or release of an individual (*e.g.,* at a group home, homeless shelter) who has been or is about to be released from DHS custody but only such information that is relevant and necessary to arrange housing, continuing medical care, or other social services for the individual.

Y. To a domestic government agency or other appropriate authority for the purpose of providing information about an individual who has been or is about to be released from DHS custody who, due to a condition such as mental illness, may pose a health or safety risk to himself/herself or to the community. DHS will only disclose information about the individual that is relevant to the health or safety risk they may pose and/or the means to mitigate that risk (*e.g.,* the individual's need to remain on certain medication for a serious mental health condition).

Z. To a domestic law enforcement agency or other agency operating a sex offender registry for the purpose of providing notice of an individual's release from DHS custody or removal from the United States, when the individual is required to register as a sex offender, in order to assist those agencies in updating sex offender registries and otherwise carrying out the sex offender registration requirements within their jurisdictions.

AA. To a domestic law enforcement agency for the purpose of providing notice of an individual's release from DHS custody or removal from the United States, when the individual has a conviction(s) for a violent or serious crime(s) and the agency receiving the notification has an interest in the individual due to: (1) A pending investigation or prosecution, (2) parole or other forms of supervision, or (3) the individual's intended residence or location of release falling within the agency's jurisdiction.

BB. To victims and witnesses regarding custodial information, such as transfer to another custodial agency or location, release on bond, order of supervision, removal from the United States, or death in custody, about an individual who is the subject of a criminal or immigration investigation, proceeding, or prosecution. This would also authorize disclosure of custodial information to individuals with a legal responsibility to act on behalf of a victim or witness (*e.g.,* attorney, parent, legal guardian) and individuals acting at the request of a victim or witness; as well as external victim notification systems that make such information available to victims and witnesses in electronic form.

CC. To the Federal Bureau of Prisons (BOP) and other federal, state, local, territorial, tribal, and foreign law enforcement or custodial agencies for the purpose of facilitating the transfer of custody of an individual to or from that agency. This will include the transfer of information about unaccompanied minor children to the U.S. Department of Health and Human Services (HHS) to facilitate the custodial transfer of such children from DHS to HHS.

DD. To DOJ and other law enforcement or custodial agencies to facilitate payments and reporting under the State Criminal Alien Assistance Program or similar programs.

EE. To any law enforcement agency or custodial agency (such as a jail or prison) to serve that agency with notice of an immigration detainer, or to update or remove a previously issued immigration detainer, for an individual who is believed to be in that agency's custody.

FF. To DOJ, disclosure of DNA samples and related information as required by 28 CFR part 28.

GG. To DOJ, disclosure of arrest and removal information for inclusion in relevant DOJ law enforcement databases and for use in the enforcement of federal firearms laws (*e.g.,* Brady Handgun Violence Prevention Act, as amended by the NICS Improvement Amendments Act).

HH. To the attorney or guardian ad litem of an individual's child, or to federal, state, local, tribal, territorial, or foreign governmental or quasi-governmental agencies or courts, to confirm the location, custodial status, removal, or voluntary departure of an individual from the United States, in order to facilitate the recipients' exercise of responsibilities pertaining to the custody, care, or legal rights (including issuance of a U.S. passport) of the individual's children, or the adjudication or collection of child support payments or other similar debts owed by the individual.

II. To any person or entity to the extent necessary to prevent immediate loss of life or serious bodily injury, such as disclosure of custodial release information to witnesses who have received threats from individuals in custody.

JJ. To an individual or entity seeking to post or arrange, or who has already posted or arranged, an immigration bond for an alien to aid the individual or entity in (1) identifying the location of the alien; (2) posting the bond; (3) obtaining payments related to the bond; or (4) conducting other administrative or financial management activities related to the bond.

KK. To federal, state, local, tribal, territorial, or foreign government agencies or entities or multinational governmental agencies when DHS desires to exchange relevant data for the purpose of developing, testing, or implementing new software or technology whose purpose is related to this system of records.

LL. Limited detainee biographical information will be publicly disclosed via the ICE Online Detainee Locator System or any successor system for the purpose of identifying whether a detainee is in ICE custody and the custodial location.

MM. To courts, magistrates, administrative tribunals, opposing counsel, parties, and witnesses, in the course of immigration, civil, or criminal proceedings (including discovery, presentation of evidence, and settlement negotiations) and when DHS determines that use of such records is relevant and necessary to the litigation before a court or adjudicative body when any of the following is a party to or have an interest in the litigation:

1. DHS or any component thereof;
2. Any employee of DHS in his/her official capacity;
3. Any employee of DHS in his/her individual capacity when DOJ or DHS has agreed to represent the employee; or
4. The United States, when DHS determines that litigation is likely to affect DHS or any of its components.

NN. To federal, state, local, tribal, territorial, international, or foreign government agencies or entities for the purpose of consulting with that agency or entity:

1. To assist in making a determination regarding redress for an individual in connection with the operations of a DHS component or program;
2. To verify the identity of an individual seeking redress in connection with the operations of a DHS component or program; or
3. To verify the accuracy of information submitted by an individual who has requested such redress on behalf of another individual.

OO. To federal, state, local, tribal, territorial, or foreign governmental agencies; multilateral governmental organizations; or other public health entities, for the purposes of protecting the vital interests of a data subject or other persons, including to assist such agencies or organizations during an epidemiological investigation, in facilitating continuity of care, in preventing exposure to or transmission of a communicable or quarantinable disease of public health significance, or to combat other significant public health threats.

PP. To foreign governments for the purpose of providing information about their citizens or permanent residents, or family members thereof, during local or national disasters or health emergencies.

QQ. To a coroner for purposes of affirmatively identifying a deceased individual (whether or not such individual is deceased as a result of a crime) or cause of death.

RR. To a former employee of DHS for purposes of responding to an official inquiry by federal, state, local, tribal, or territorial government agencies or professional licensing authorities; or facilitating communications with a former employee that may be relevant and necessary for personnel-related or other official purposes, when DHS requires information or consultation assistance from the former employee regarding a matter within that person's former area of responsibility.

SS. To federal, state, local, tribal, territorial, foreign, or international agencies, if the information is relevant and necessary to a requesting agency's decision concerning the hiring or retention of an individual, or the issuance, grant, renewal, suspension or revocation of a security clearance, license, contract, grant, or other benefit; or if the information is relevant and necessary to a DHS decision concerning the hiring or retention of an employee, the issuance of a security clearance, the reporting of an investigation of an employee, the letting of a contract, or the issuance of a license, grant or other benefit.

TT. To a public or professional licensing organization when such information indicates, either by itself or in combination with other information, a violation or potential violation of professional standards, or reflects on the moral, educational, or professional qualifications of licensed professionals or those seeking to become licensed professionals.

UU. To an attorney or representative (as defined in 8 CFR 1.2, 202.1, 1001.1(f), or 1202.12) who is acting on behalf of an individual covered by this system of records in connection with any proceeding before U.S. Citizenship and Immigration Services (USCIS), ICE, U.S. Customs and Border Protection (CBP), or the EOIR, as required by law or as deemed necessary in the discretion of the Department.

VV. To members of the public, with regard to disclosure of limited detainee biographical information for the purpose of facilitating the deposit of monies into detainees' accounts for telephone or commissary services in a detention facility.

WW. To federal, state, local, tribal, or territorial government agencies seeking to verify or ascertain the citizenship or immigration status of any individual within the jurisdiction of the agency for any purpose authorized by law.

XX. To the Department of Justice (including Offices of the United States Attorneys) or other federal agency conducting litigation or in proceedings before any court, adjudicative, or administrative body, when necessary to assist in the development of such agency's legal and/or policy position.

YY. To federal, state, local, tribal, and territorial courts or government agencies involved in criminal investigation or prosecution, pre-trial, sentencing, parole, probation, bail bonds, or any other aspect of the criminal justice process, and to defense counsel representing an individual in a domestic criminal proceeding, in order to ensure the integrity and efficiency of the criminal justice system by informing these recipients of the existence of an immigration detainer or the individual's status in removal proceedings, including removal or custodial status/location. Disclosure of the individual's A-Number and country of birth is also authorized to facilitate these recipients' use of the ICE Online Detainee Locator System for the purposes listed above.

ZZ. To a foreign government to notify it concerning its citizens or residents who are incapacitated, an unaccompanied minor, or deceased.

AAA. To family members, guardians, committees, friends, or other agents identified by law or regulation to receive notification, decisions, and other papers as provided in 8 CFR 103.8 from the Department of Homeland Security or Executive Office for Immigration Review following verification of a familial or agency relationship with an alien when DHS is aware of indicia of incompetency or when an alien has been determined to be mentally incompetent by an immigration judge.

BBB. To an organization or person in either the public or private sector, either foreign or domestic, when there is a reason to believe that the recipient is or could become the target of a particular terrorist activity or conspiracy, or when the information is relevant to the protection of life, property, or other vital interests of a person.

CCC. To clerks and judges of courts exercising naturalization jurisdiction for the purpose of granting or revoking naturalization.

DDD. To federal, state, local, tribal, territorial, foreign, or international agencies, after discovery of such information, if DHS determines: (1) The information is relevant and necessary to that agency's decision concerning the hiring or retention of an individual, or issuance of a security clearance, license, contract, grant, or other benefit; and (2) Failure to disclose the information is likely to create a substantial risk to government facilities, equipment, or personnel; sensitive information; critical infrastructure; or public safety.

EEE. To the news media and the public, with the approval of the Chief Privacy Officer in consultation with counsel, when there exists a legitimate public interest in the disclosure of the information, when disclosure is necessary to preserve confidence in the integrity of DHS, or when disclosure is necessary to demonstrate the accountability of DHS's officers, employees, or individuals covered by the system, except to the extent the Chief Privacy Officer determines that release of the specific information in the context of a particular case would constitute an unwarranted invasion of personal privacy.

DISCLOSURE TO CONSUMER REPORTING AGENCIES:

None.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

ICE may store information in case file folders, cabinets, safes, or a variety of electronic or computer databases and storage media.

RETRIEVABILITY:

ICE may retrieve records by name, biometric identifiers, identification numbers including, but not limited to, A-Number, fingerprint identification number, SSN, case or record number if applicable, case related data, or a combination of other personal identifiers including, but not limited to, date of birth, and nationality.

SAFEGUARDS:

ICE safeguards records in this system in accordance with applicable rules and policies, including all applicable DHS automated systems security and access policies. Strict controls have been imposed to minimize the risk of compromising the information that is being stored. Access to the computer system containing the records in this system is limited to those individuals who have a need to know the information for the performance of their official duties and who have appropriate clearances or permissions.

RETENTION AND DISPOSAL:

ICE retains records of arrests, detentions, and removals in EID for one hundred (100) years; records concerning U.S. Marshals Service prisoners for ten (10) years; fingerprints and photographs collected using EAGLE application for up to fifty (50) days in the cache of an encrypted Government laptop or other IT device; Enforcement Integrated Database Data Mart (EID–DM), ENFORCE Alien Removal Module Data Mart (EARM–DM), and ICE Integrated Decision Support (IIDS) records for seventy-five (75) years; user account management records (UAM) for ten (10) years following an individual's separation of employment from federal service; statistical records for ten (10) years; audit files for fifteen (15) years; and backup files for up to one (1) month.

ICE retains records in the PCTS for 25 years from the termination of parole. The ODLS uses an extract of EID data about current detainees and detainees that were released during the last sixty (60) days. Records are retained in ODLS for as long as they meet the extract criteria. The eTD System stores travel documents for twenty (20) years. The ATD system's records are not yet the subject of a records schedule, however, ICE is in the process of developing one and will propose the records are retained for ten years from the end of the calendar year in which the alien is removed from the ATD program.

SYSTEM MANAGER AND ADDRESS:

Executive Associate Director, Office of Homeland Security Investigations, U.S. Immigration & Customs Enforcement, 500 12th Street SW., Washington, DC 20536.

NOTIFICATION PROCEDURE:

The Secretary of Homeland Security has exempted this system from the notification, access, and amendment procedures of the Privacy Act because it is a law enforcement system. However, ICE will consider individual requests to determine whether or not information may be released. Thus, individuals seeking notification of and access to any record contained in this system of records, or seeking to contest its content, may submit a request in writing to ICE's Freedom of Information Act (FOIA) Officer, whose contact information can be found at *http://www.ice.gov/foia* under ''Contacts.'' When seeking records about yourself from this system of records or any other Departmental system of records your request must conform with the Privacy Act regulations set forth in 6 CFR part 5. You must first verify your identity, meaning that you must provide your full name, current address, and date and place of birth. You must sign your request, and your signature must either be notarized or submitted under 28 U.S.C. 1746, a law that permits statements to be made under penalty of perjury as a substitute for notarization. While no specific form is required, you may obtain forms for this purpose from the Chief Privacy Officer and Chief Freedom of Information Act Officer, *http://www.dhs.gov/foia* or 1–866–431–0486. In addition you should provide the following:

• Explain why you believe the Department would have information on you;

• Identify which component(s) of the Department you believe may have the information about you;

• Specify when you believe the records would have been created; and

• Provide any other information that will help the FOIA staff determine which DHS component agency may have responsive records.

• If your request is seeking records pertaining to another living individual, you must include a statement from that individual certifying his/her agreement for you to access his/her records.

Without this bulleted information the component(s) may not be able to conduct an effective search, and your request may be denied due to lack of specificity or lack of compliance with applicable regulations.

In processing requests for access to information in this system, DHS/ICE will review not only the records in the operational system, but also the records that were replicated on the unclassified and classified networks, and based on this notice provide appropriate access to the information.

RECORD ACCESS PROCEDURES:

See ''Notification procedure'' above.

CONTESTING RECORD PROCEDURES:

See ''Notification procedure'' above.

RECORD SOURCE CATEGORIES:

Records in the system are supplied by several sources. In general, information is obtained from individuals covered by this system, and other federal, state, local, tribal, or foreign governments. More specifically, DHS/ICE–011 records derive from the following sources:

(a) Individuals covered by the system and other individuals (*e.g.,* witnesses, family members);

(b) Other federal, state, local, tribal, or foreign governments and government information systems;

(c) Business records;

(d) Evidence, contraband, and other seized material; and

(e) Public and commercial sources.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

The Secretary of Homeland Security, pursuant to 5 U.S.C. 552a(j)(2), has exempted this system from the following provisions of the Privacy Act: 5 U.S.C. 552a(c)(3), (c)(4); (d); (e)(1), (e)(2), (e)(3), (e)(4)(G), (e)(4)(H), (e)(5), (e)(8); (f); and (g). Additionally, the Secretary of Homeland Security, pursuant to 5 U.S.C. 552a(k)(2), has exempted this system of records from the following provisions of the Privacy Act: 5 U.S.C. 552a(c)(3); (d); (e)(1), (e)(4)(G), (e)(4)(H); and (f). When a record received from another system has been exempted in that source system under 5 U.S.C. 552a(j)(2) or (k)(2), DHS will claim the same exemptions for those records that are claimed for the original primary systems of records from which they originated and claims any additional exemptions set forth here.

Dated: October 5, 2016.

Jonathan R. Cantor,

Acting Chief Privacy Officer, Department of Homeland Security.

[FR Doc. 2016–25197 Filed 10–18–16; 8:45 am]

BILLING CODE 9111–28–P

DEPARTMENT OF HOMELAND SECURITY

[Docket No. DHS–2016–0084]

Homeland Security Science and Technology Advisory Committee

AGENCY: Science and Technology Directorate, DHS.

ACTION: Committee Management; Notice of Federal Advisory Committee Meeting.

SUMMARY: The Homeland Security Science and Technology Advisory Committee (HSSTAC) will meet on November 3–4, 2016 in Washington, DC. The meeting will be an open session with both in-person and webinar participation.

DATES: The HSSTAC will meet in-person Thursday, November 3, 2016, from 10 a.m.–4:25 p.m. and Friday, November 4, 2016, from 9 a.m.–3:30 p.m.

ADDRESSES: Homeland Security, 1120 Vermont Ave. NW., 8th Floor, Washington, DC 20005.

FOR FURTHER INFORMATION CONTACT: Michel Kareis, HSSTAC Designated Federal Official, S&T IAO STOP 0205, Department of Homeland Security, 245 Murray Lane, Washington, DC 20528–0205, 202–254–8778 (Office), 202–254–6176 (Fax) *Michel.Kareis@hq.dhs.gov* (Email).

SUPPLEMENTARY INFORMATION: Due to security requirements, screening pre-registration is required for this event. Please see the ''REGISTRATION'' section below.

The meeting may close early if the committee has completed its business.

I. Background

Notice of this meeting is given under the Federal Advisory Committee Act (FACA), 5 U.S.C. appendix (Pub. L. 92–463). The committee addresses areas of interest and importance to the Under Secretary for Science and Technology (S&T), such as new developments in systems engineering, cyber-security, knowledge management and how best to leverage related technologies funded by other Federal agencies and by the private sector. It also advises the Under Secretary on policies, management processes, and organizational constructs as needed.

II. Registration

To pre-register for the virtual meeting (webinar) please send an email to: *hsstac@hq.dhs.gov.* The email should include the name(s), title, organization/affiliation, email address, and telephone number of those interested in attending. For information on services for individuals with disabilities or to request special assistance at the meeting, please contact Michel Kareis as soon as possible.

If you plan to attend the meeting in-person you must RSVP by November 1, 2016. To register, email *hsstac@hq.dhs.gov* with the following subject line: RSVP to HSSTAC Meeting. The email should include the name(s), title, organization/affiliation, email address, and telephone number of those interested in attending.

III. Public Comment

At the end of each open session, there will be a period for oral statements. Please note that the oral statement period may end before the time indicated, following the last call for oral statements. To register as a speaker, contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

To facilitate public participation, we invite public comment on the issues to be considered by the committee as listed in the ''Agenda'' below. Written comments must be received by October 21, 2016. Please include the docket number (DHS–2016–0084) and submit via *one* of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Email: hsstac@hq.dhs.gov.* Include the docket number in the subject line of the message.
- *Fax:* 202–254–6176.
- *Mail:* Michel Kareis, HSSTAC Executive Director, S&T IAO STOP 0205, Department of Homeland Security, 245 Murray Lane, Washington, DC 20528–0205.

Instructions: All submissions received must include the words ''Department of Homeland Security'' and the docket number. Comments received will be posted without alteration at *http://www.regulations.gov.*

Docket: For access to the docket to read the background documents or comments received by the HSSTAC, go to *http://www.regulations.gov* and enter the docket number into the search function: DHS–2016–0084.

Agenda: Day 1: The morning session will cover updates for HSSTAC deliverables under development in the following Subcommittees: Commercialization, Social Media Working Group and IOT Smart Cities and will provide committee members an opportunity to input into the draft recommendations. A follow up discussion will be held on the request from the September webinar for contacts to be nominated for the Science Advisory Guide for Emergencies (SAGE). Science Advisory Guide for Emergencies is a tool approved as the S&T process for leadership to attain science support information concerning homeland security incidents/emergencies in order to mitigate, respond, and recover from those incidents. The second session will focus on a Quadrennial Homeland Security Review (QHSR) including an update on the material covered in the June meeting. Members will be asked to provide input into the QHSR material presented. Comments and questions from the public will follow the two morning sessions. The afternoon session will begin with a discussion led by DHS, Under Secretary for Science and Technology, Dr. Reginald Brothers on emerging threats to national security, priorities of the Under Secretary for Science and Technology, and the strategic plan for the Science and Technology Directorate. Committee members will be asked to provide feedback on the emerging national security threats. The final afternoon session will consist of discussions on the QHSR review for 2018. Members will be asked to provide input that is vital to the 2018 review and to form a subcommittee as a means to follow up on the topics discussed in more depth. This session will end with comments and questions from the public. *Day 2:* The morning session will begin with a briefing on the Internet of Things Smart Cities. A high value overview of the issues will be presented, followed by a discussion on best practices and lessons learned. Comments and questions from the public will follow the discussion. The afternoon session will include discussions on the 2017 HSSTAC Roadmap, science and technology topics, and issues or technology gaps that need to be addressed. The second session will cover a recap of comments from the HSSTAC, identification of a path forward for the year, and to determine if there is a need for more subcommittees on the issues discussed. There will be a period for public comment prior to adjourning the meeting.

Michel Kareis,

Executive Director, Homeland Security Science and Technology Advisory Committee.

[FR Doc. 2016–25323 Filed 10–14–16; 4:15 pm]

BILLING CODE 9110–9F–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLWO3200000–L19900000.PP0000]

Renewal of Approved Information Collection; OMB Control No. 1004–0114

AGENCY: Bureau of Land Management, Interior.

ACTION: 30-Day notice and request for comments.

SUMMARY: The Bureau of Land Management (BLM) has submitted an information collection request to the Office of Management and Budget (OMB) to continue the collection of information for the location, recording, and maintenance of mining claims and sites. The Office of Management and Budget (OMB) has assigned control number 1004–0114 to this information collection.

DATES: The OMB is required to respond to this information collection request within 60 days but may respond after 30 days. For maximum consideration, written comments should be received on or before November 18, 2016.

ADDRESSES: Please submit comments directly to the Desk Officer for the Department of the Interior (OMB #1004–0114), Office of Management and Budget, Office of Information and Regulatory Affairs, fax 202–395–5806, or by electronic mail at *OIRA_submission@omb.eop.gov.* Please provide a copy of your comments to the BLM. You may do so via mail, fax, or electronic mail.

Mail: U.S. Department of the Interior, Bureau of Land Management, 1849 C Street NW., Room 2134LM, Attention: Jean Sonneman, Washington, DC 20240.

Fax: To Jean Sonneman at 202–245–0050.

Electronic mail: jesonnem@blm.gov.

Please indicate ''Attn: 1004–0114'' regardless of the form of your comments.

FOR FURTHER INFORMATION CONTACT: Sonia Santillan, at 202–912–7123. Persons who use a telecommunication device for the deaf may call the Federal Information Relay Service at 1–800–877–8339, to leave a message for Ms. Santillan. You may also review the information collection request online at *http://www.reginfo.gov/public/.*

SUPPLEMENTARY INFORMATION: The Paperwork Reduction Act (44 U.S.C. 3501–3521) and OMB regulations at 5 CFR part 1320 provide that an agency may not conduct or sponsor a collection of information unless it displays a currently valid OMB control number. Until OMB approves a collection of information, you are not obligated to respond. In order to obtain and renew an OMB control number, Federal agencies are required to seek public comment on information collection and recordkeeping activities (see 5 CFR 1320.8(d) and 1320.12(a)).

As required at 5 CFR 1320.8(d), the BLM published a 60-day notice in the **Federal Register** on March 30, 2016 (81 FR 17730), and the comment period ended May 31, 2016. The BLM received no comments.

The BLM now requests comments on the following subjects:

1. Whether the collection of information is necessary for the proper functioning of the BLM, including whether the information will have practical utility;
2. The accuracy of the BLM's estimate of the burden of collecting the information, including the validity of the methodology and assumptions used;
3. The quality, utility and clarity of the information to be collected; and

4. How to minimize the information collection burden on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other forms of information technology.

Please send comments as directed under **ADDRESSES** and **DATES**. Please refer to OMB control number 1004–0114 in your correspondence. 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.

The following information pertains to this request:

Title: Recordation of Location Notices and Mining Claims; Payment of Fees (43 CFR parts 3832 through 3838).

OMB Control Number: 1004–0114.

Summary: The information that is collected in accordance with this control number enables the BLM to have records of mining claims and sites on Federal lands, and enables the BLM to determine which mining claims and sites claimants wish to continue to hold.

Frequency of Collection: On occasion, except Form 3830–2 (which may be filed annually) and annual FLPMA documents (which are to be filed annually when required).

Forms: Form 3830–2, Maintenance Fee Waiver Certification; and Form 3830–3, Notice of Intent to Locate a Lode or Placer Mining Claim(s) and/or a Tunnel Site(s) on Lands Patented under the Stock Raising Homestead Act of 1916, As Amended by the Act of April 16, 1993.

Description of Respondents: Mining claimants.

Estimated Annual Responses: 136,338.

Estimated Annual Burden Hours: 64,359.

Estimated Annual Non-Hour Costs: $1,699,860.

The estimated burdens are itemized in the following table:

A. Type of response	B. Number of responses	C. Time per response (minutes)	D. Total hours (Column B × Column C)
Notice of Intent to Locate Under the Stock Raising Homestead Act (43 CFR Part 3838) Form 3830–3	91	25	38
Locating Mining Claims or Sites (43 CFR Part 3832)	28,122	30	14,061
Recording a New Location Notice (43 CFR Part 3833, Subpart A)	28,122	30	14,061
Amending a Location Notice (43 CFR Part 3833, Subpart B)	3,586	30	1,793
Transfer of Interest (43 CFR Part 3833, Subpart C) or Acquisition of a Delinquent Co-Claimant's Interests in a Mining Claim or Site (43 CFR Part 3837)	27,530	30	13,765
Waiver from Annual Maintenance Fee (43 CFR Part 3835, Subpart A) Form 3830–2 and/or nonform data	22,828	20	7,609
Annual FLPMA Documents (43 CFR part 3835, subpart C) Form 3830–4	26,054	30	13,027
Deferring Assessment Work (43 CFR Part 3836, Subpart B)	5	60	5
Totals	136,338	....	64,359

Jean Sonneman,

Bureau of Land Management, Information Collection Clearance Officer.

[FR Doc. 2016–25228 Filed 10–18–16; 8:45 am]

BILLING CODE 4310–84–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLWO250000.L12200000.PM0000]

Information Collection; Permits for Recreation on Public Lands; OMB Control Number 1004–0119

AGENCY: Bureau of Land Management, Department of the Interior.

ACTION: 30-Day notice and request for comments.

SUMMARY: The Bureau of Land Management (BLM) has submitted an information collection request to the Office of Management and Budget (OMB) to continue the collection of information that enables the BLM to evaluate and process applications for commercial, competitive, and organized group recreational uses of the public lands, and individual use of special areas. The Office of Management and Budget (OMB) has assigned control number 1004–0119 to this collection.

DATES: The OMB is required to respond to this information collection request within 60 days but may respond after 30 days. For maximum consideration written comments should be received on or before November 18, 2016.

ADDRESSES: Submit comments directly to the Desk Officer for the Department of the Interior (OMB #1004–0119), Office of Management and Budget, Office of Information and Regulatory Affairs, fax 202–395–5806, or by electronic mail at: *mailto:OIRA_submission@omb.eop.gov.* Please provide a copy of your comments to the BLM via mail, fax, or electronic mail, as follows:

Mail: U.S. Department of the Interior, Bureau of Land Management,1849 C Street NW., Room 2134LM, Attention: Jean Sonneman, Washington, DC 20240.

Fax: to Jean Sonneman at 202–245–0050.

Electronic mail: jesonnem@blm.gov.

Please indicate ''Attn: 1004–0119'' regardless of the form of your comments.

FOR FURTHER INFORMATION CONTACT: David Ballenger at 202–912–7642. Persons who use a telecommunication device for the deaf may call the Federal Information Relay Service on 1–800–877–8339, to leave a message for Mr. Ballenger. You may also review the information collection request online at *http://www.reginfo.gov/public/do/PRAMain.*

SUPPLEMENTARY INFORMATION: The Paperwork Reduction Act (44 U.S.C. 3501–3521) and OMB regulations at 5 CFR 1320 provide that an agency may not conduct or sponsor a collection of information unless it displays a currently valid OMB control number. Until OMB approves a collection of information, you are not obligated to respond. In order to obtain and renew an OMB control number, Federal agencies are required to seek public comment on information collection and recordkeeping activities. (See 5 CFR 1320.8 (d) and 1320.12(a)).

As required at 5 CFR 1320.8(d), the BLM published a 60-day notice in the **Federal Register** on June 15, 2016 (81 FR 39064), and the comment period ended August 15, 2016. The BLM received no comments in response to the notice.

The BLM now invites comments on the following subjects:

1. Whether the collection of information is necessary for the proper functioning of the BLM, including whether the information will have practical utility;

2. The accuracy of the BLM's estimate of the burden of collecting the information, including the validity of the methodology and assumptions used;

3. The quality, utility and clarity of the information to be collected; and

4. How to minimize the information collection burden on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other forms of information technology.

Please send comments as instructed under the headings **DATES** and **ADDRESSES**, above. Please refer to OMB Control Number 1004–0119 in your correspondence. 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.

The following information is provided for the information collection:

Title: Permits for Recreation on Public Lands (43 CFR part 2930).

Forms: Form 2930–1, Special Recreation Permit Application.

OMB Control Number: 1004–0119.

Summary: This collection pertains to the management of recreation on public lands. The BLM is required to manage commercial, competitive and organized group recreational uses of the public lands, and individual use of special areas. This information allows the BLM to collect the required information to authorize and collect fees for recreation use on public lands. The currently approved information collection consists of the collection in accordance with 43 CFR part 2930, and Form 2930–1 (Special Recreation Permit Application and Permit).

Frequency of Collection: On occasion.

Estimated Annual Responses: 1,376.

Estimated Annual Burden Hours: 5,504.

Estimated Annual Non-hour Burden Cost: None.

Jean Sonneman,

Bureau of Land Management, Information Collection Clearance Officer.

[FR Doc. 2016–25277 Filed 10–18–16; 8:45 am]

BILLING CODE 4310–84–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–D–COS–POL–22111; PPWODIREP0] [PPMPSPD1Y.YM0000]

Notice of Availability and Request for Comments on Draft Director's Order #100 Resource Stewardship for the 21st Century

AGENCY: National Park Service, Interior.

ACTION: Notice of availability and request for comments.

SUMMARY: The National Park Service (NPS), under its authority at 54 U.S.C. 100101(a) *et seq.*, has prepared a new Director's Order setting forth the policies and procedures that will guide resource stewardship in the 21st century. This guidance will form a new framework for stewardship decision making within the NPS based upon an overarching resource stewardship goal described in the Order.

DATES: Written comments will be accepted until November 18, 2016.

ADDRESSES: Draft Director's Order #100 is available online at: *http://parkplanning.nps.gov/DO100* where readers may submit comments electronically.

FOR FURTHER INFORMATION CONTACT: Megan McKenna, Director's Order #100 Implementation Coordinator, National Park Service, at *megan_f_mckenna@nps.gov*, or by telephone at (970) 267–2123.

SUPPLEMENTARY INFORMATION: The NPS is updating its current system of internal written instructions. When these documents contain new policy or procedural requirements that may affect parties outside the NPS, they are first made available for public review and comment before being adopted. Director's Order #100 and a reference manual (subsequent to the Director's Order) will be issued. The draft Director's Order covers topics such as resource stewardship, Service-wide training, and decision making.

Before including your address, telephone 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 may 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.

Alma Ripps,

Chief, Office of Policy.

[FR Doc. 2016–25283 Filed 10–18–16; 8:45 am]

BILLING CODE 4312–52–P

JUDICIAL CONFERENCE OF THE UNITED STATES

Meeting of the Judicial Conference Advisory; Committee on Rules of Civil Procedure

AGENCY: Judicial Conference of the United States.

ACTION: Notice of open meeting.

SUMMARY: The Advisory Committee on Rules of Civil Procedure will hold a meeting on November 3, 2016, which will continue the morning of November 4, 2016, if necessary. The meeting will be open to public observation but not participation. An agenda and supporting materials will be posted at least 7 days in advance of the meeting at: *http://www.uscourts.gov/rules-policies/records-and-archives-rules-committees/agenda-books.*

DATES: November 3–4, 2016.

Time:

November 3, 2016: 1:30–5:00 p.m.
November 4, 2016 (if necessary): 9:00 a.m.–12:00 p.m.

ADDRESSES: Thurgood Marshall Federal Judiciary Building, Mecham Conference Center, Administrative Office of the United States Courts, One Columbus Circle NE., Washington, DC 20544.

FOR FURTHER INFORMATION CONTACT: Rebecca A. Womeldorf, Rules Committee Secretary, Rules Committee Support Office, Administrative Office of the United States Courts, Washington, DC 20544, telephone (202) 502–1820.

Dated: October 13, 2016.

Rebecca A. Womeldorf,

Rules Committee Secretary.

[FR Doc. 2016–25258 Filed 10–18–16; 8:45 am]

BILLING CODE 2210–55–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Edge Pharmacy; Decision and Order

On October 8, 2014, the Deputy Assistant Administrator, Office of

Diversion Control, Drug Enforcement Administration, issued an Order to Show Cause to Edge Pharmacy (hereinafter, Respondent), which proposed the revocation of its DEA Certificate of Registration FE1512501, pursuant to which it was authorized to dispense controlled substances in schedules II through V, as a retail pharmacy, at the registered location of 2039 E. Edgewood Drive, Lakeland, Florida. GE 1, at 1. As ground for the proposed actions, which also include the denial of any pending applications, the Show Cause Order alleged that Respondent's ''continued registration is inconsistent with the public interest.'' GE 1, at 1 (citing 21 U.S.C. 824(a)(4) and 823(f)).

More specifically, the Show Cause Order alleged that Respondent's ''pharmacists repeatedly failed to exercise their corresponding responsibility to ensure that controlled substances they dispensed were dispensed pursuant to prescriptions issued for legitimate medical purposes by practitioners acting within the usual course of their professional practice'' and that its ''pharmacists ignored readily identifiable red flags that [the] controlled substances prescribed were being diverted and dispensed despite unresolved red flags.'' *Id.* (citing 21 CFR 1306.04(a); *Holiday CVS, L.L.C., d/b/a CVS Pharmacy Nos. 219 and 5195,* 77 FR 62315, 62319 (2012)). The Show Cause Order further alleged that Respondent's ''pharmacists dispensed controlled substances when they knew or should have known that the prescriptions were not issued in the usual course of professional practice or for a legitimate medical purpose, including circumstances where the pharmacist knew or should have known that the controlled substances were abused and/or diverted by the customer.'' *Id.* at 2.

The Show Cause Order then alleged that Respondent's ''pharmacists filled numerous controlled substance prescriptions despite customers exhibiting multiple 'red flags' of . . . diversion that were never resolved before dispensing.'' *Id.* The Order alleged that these ''red flags''' included: (1) ''Multiple individuals presenting prescriptions for the same drugs in the same quantities from the same doctor''; (2) ''individuals presenting prescriptions for controlled substances known to be highly abused, such as oxycodone and hydromorphone''; (3) ''individuals paying high prices . . . for controlled substance [prescriptions] with cash''; and (4) ''individuals residing long distances from the pharmacy.'' *Id.*

As more specific examples, the Show Cause Order alleged that ''[o]n January 10, 2011, one or more . . . pharmacists dispensed large and substantially similar quantities of'' oxycodone 30 mg tablets ''to at least nine persons, including one customer who resided more than four hundred (400) miles from [it], two customers who resided more than one hundred fifty (150) miles from [it], and six customers who resided more than ninety (90) miles from'' it. *Id.* The Order further alleged that these ''customers were all prescribed thirty milligram tablets of oxycodone by the same doctor in quantities ranging from 168 to 224 tablets'' and that each of the prescriptions was ''facially invalid'' because it did not contain the patient's address. *Id.*

The Show Cause Order also alleged that ''[f]rom January 6 through January 7[,] 2011, one or more . . . pharmacists dispensed large and substantially similar quantities of'' oxycodone 30 mg tablets ''to at least sixteen persons, including eight customers who resided more than one hundred fifty (150) miles from [it], and four customers who resided more than one hundred (100) miles from'' it. *Id.* The Order further alleged that ''these customers were all prescribed thirty milligram tablets of oxycodone by the same doctor in quantities ranging from 168 to 224 tablets'' and that each of the prescriptions was ''facially invalid'' because it did not contain the patient's address. *Id.*

Next, the Show Cause Order alleged that ''[f]rom October 7 through October 28[,] 2011, one or more . . . pharmacists dispensed large and substantially similar quantities of hydromorphone to seventeen [persons], ten of whom resided more than one hundred (100) miles from'' it, and ''two of whom resided more than four hundred (400) miles away.'' *Id.* The Order alleged that ''sixteen'' of these prescriptions ''were written by the same doctor and only one . . . contained a patient address.'' *Id.* The Order then alleged that ''at least four'' of the hydromorphone prescriptions were ''in dosage amounts that, if taken as directed, far exceeded the recommended dosages of hydromorphone that should be taken on a daily basis'' and that ''[t]hese prescriptions were dispensed on October 21 and 27[,] 2011'' and July 5–6, 2012. *Id.*

The Show Cause Order also alleged that ''[f]rom January 4 through 23[,] 2013, one or more . . . pharmacists dispensed large quantities of'' of oxycodone 30 mg ''to at least'' 19 persons, 15 ''of whom resided more than 90 miles from [it] and eight of whom resided more than [150] miles away.'' *Id.* at 3. The Order alleged that ''[a]ll of these prescriptions were issued by the same doctor, and were purchased with cash by individuals willing to pay as much as eight dollars per tablet.'' *Id.* The Order also alleged that these prescriptions were facially invalid because they lacked the patient's address. *Id.*

The Show Cause Order then alleged that Respondent's ''pharmacists knew or should have known that the vast increase of customers seeking controlled substance prescriptions and the large number of customers residing long distances from [its] location and/or their respective physicians created a suspicious situation requiring increased scrutiny, and nonetheless failed in carrying out their responsibilities as a DEA registrant.'' *Id.* Continuing, the Order alleged that Respondent's ''pharmacists failed to exercise their corresponding responsibility'' under 21 CFR 1306.04(a) in dispensing controlled substances and either ''knew, or should have known, that a large number of the prescriptions for controlled substances that it filled were not issued for a legitimate medical purpose or were issued outside the usual course of professional practice.'' [1] *Id.* (citing cases).

Next, the Show Cause Order alleged that following the execution of an Administrative Inspection Warrant, DEA had obtained various records from

[1] In its Prehearing Statement, the Government provided notice that its expert witness in pharmacy practice would identify various red flags of diversion that were presented by the prescriptions ''and that there is no evidence that any of the red flags were resolved prior to distributing the controlled substances to the customers.'' Gov. Prehearing Statement, at 5. Subsequently, in its Supplemental Prehearing Statement, the Government provided notice that its Expert ''will opine on 127 additional prescriptions which the Government provided to Respondent's counsel'' and ''that the prescriptions were issued to individuals residing long distances both from Respondent's pharmacy and/or the physician who issued the prescriptions.'' Gov. Supplemental Prehearing Statement, at 3.

After identifying various cities where the patients resided, the Government provided notice that its Expert ''will testify that this type of red flag, with only a few exceptions, is not resolvable and the prescription should not be dispensed by a pharmacist exercising the appropriate standard of care and fulfilling his or her corresponding responsibility to ensure that a prescription for a controlled substances is issued for a legitimate medical purpose.'' *Id.* at 3–4. The Government also provided notice that its Expert will testify that ''exceptions'' [sic] that would make such a prescription resolvable were ''if a patient were travelling to a specialist of great renown, such as a physician working in a nationally recognized cancer treatment facility.'' *Id.* at 3 n.4. The Government then provided that its Expert ''will testify that he is unaware that any of the physicians prescribing the controlled substances at issue in this matter remotely fit that profile.'' *Id.*

Respondent and determined that it ''failed to create and maintain accurate records in violation of 21 U.S.C. 842(a)(5).'' *Id.* at 3. More specifically, the Order alleged that:

(1) Respondent's schedule II order forms did not contain the ''receipt date or quantity received in violation of 21 U.S.C. 827(b) and 21 CFR 1305.13(e)'';

(2) it ''failed to retain Copy 3 of'' its schedule II order forms ''as required by 21 CFR 1305.13(a) and 1305.17(a) and 21 U.S.C. 827(b)'';

(3) it ''failed to create a record of the quantity of each item received and the date received'' for controlled substances it ordered using the Controlled Substances Ordering System and ''also failed to electronically archive and link these records to the original order,'' both being required by 21 CFR 1305.22(g);

(4) that ''as supplier of controlled substances, [it] failed to forward Copy 2 of'' schedule II order forms to the Special Agent in Charge of the field division in which it is located, as ''required by 21 CFR 1305.13(d)''; and

(5) it also ''failed to record the date and quantity shipped'' on schedule II order forms, ''in violation of 21 CFR 1305.13(b).'' *Id.* at 3–4.

Finally, the Show Cause Order alleged that DEA conducted an audit of Respondent's handling of various schedule II drugs for ''the period [of] June 10, 2011, through February 4, 2013.'' *Id.* at 4. The Order then alleged that the audit found overages of the following drugs and amounts: 71,084 oxycodone 30 mg; 19,322 hydromorphone 8 mg; 10,460 methadone 10 mg; 5,542 morphine 60 mg; 4,451 hydromorphone 4 mg; 3,033 morphine 100 mg; and 1,338 morphine 30 mg. *Id.*

On November 14, 2014, Respondent filed a timely hearing request with the Office of Administrative Law Judges. Thereafter, the matter was assigned to Chief Administrative Law Judge John J. Mulrooney, II (hereinafter, CALJ), who proceeded to conduct extensive pre-hearing procedures. On February 19, 2015, Respondent's original counsel withdrew and new counsel entered an appearance. The same day, Respondent's new counsel informed the ALJ's law clerk that Respondent would be ''filing a waiver of hearing along with a written position on the matters of fact and law in accordance with 21 CFR 1316.49.'' GE 1, at 10.

Subsequently, on February 26, 2015, the Government filed a motion *in limine* to preclude Respondent from offering any of its evidence at the hearing. Respondent did not oppose the motion, and on March 3, 2016, the ALJ granted the motion. Letter from CALJ to the former Administrator (Mar. 23, 2015) (hereinafter, CALJ Ltr.). The same day, Respondent's counsel telephoned the CALJ's staff and stated that he would be filing its waiver of hearing by March 9, 2015, and that if he ''was unable to file the Hearing Waiver by that date, he would file a motion to allow a waiver of hearing with a subsequent filing of position.'' *Id.* However, on March 10, 2015, after Respondent failed to file the waiver or otherwise notify the ALJ as to why he had not done so, the CALJ's staff contacted Respondent's counsel to seek clarification. *Id.*

On March 12, 2015, before the evidentiary hearing was to be conducted, Respondent's counsel emailed the CALJ's staff stating that he had not filed the hearing waiver because he had been unable to complete the written statement ''[d]ue to several unforeseen matters in'' another DEA proceeding in which he was involved. Email from Respondent's Counsel to CALJ's Law Clerk, at 1 (Mar. 12, 2015). Respondent's counsel further advised that he had not sought leave to file the waiver immediately and the statement of position later because the Government's counsel would not consent. *Id.* Respondent's counsel further represented that while he intended to file the waiver prior to the scheduled date of the hearing, he would not file the waiver until he was ready to file Respondent's written statement of position. *Id.*

On March 16, 2015, the CALJ conducted a status conference after which Respondent's counsel filed a pleading in which Respondent waived its right to a hearing while seeking leave to file a written statement no later than March 21, 2015. CALJ Ltr., at 2. The CALJ then issued an order terminating the proceeding effective on March 21, 2015 while granting Respondent leave to file its written statement prior to that date. *Id.*

On March 20, 2015, Respondent filed its Statement of Position. In his March 23, 2015 letter to the former Administrator regarding the status of the proceeding, the CALJ noted that under the plain language of the Agency's regulation which allows a respondent to file a written statement of position, the time period for filing a written statement had expired as Respondent had not requested an extension of the time for filing a response to the Order Show Cause. *Id.* at 3. Moreover, because Respondent did not oppose the Government's Motion in Limine, ''it is foreclosed from offering hearing evidence.'' *Id.*

The CALJ then explained that ''strict adherence to the regulations, because of the procedural choices made by the Respondent in the course of this litigation, would result in either a non-hearing decision without the option of filing a statement of position, or hearing procedures where it was precluded (by its own tactical choices) of presenting evidence in its defense.'' *Id.* Continuing, the ALJ reasoned that:

> [a]lthough the Agency . . . has not been reticent in holding respondents responsible for the procedural omissions of their counsel, justice here will be better served by applying principles of reasonableness. In the interests of justice, I *sua sponte* find good cause to extend the Respondent's ability to respond to the Order to Show Cause in accordance with 21 CFR 1316.47(b), accept its Statement of Position on the Agency's behalf, and herein forward it to you for whatever consideration or actions (if any) you deem appropriate in this matter.

Id. (footnotes omitted).

Thereafter, the Government filed a motion in which it sought to clarify its obligations prior to submitting its Request for Final Agency Action. More specifically, the Government sought clarification as to whether, in light of Respondent's waiver of its right to a hearing, it was required to serve any further pleadings on Respondent's counsel. Motion for Clarification, at 1. It also sought clarification as to whether Respondent was ''entitled to continue to litigate this matter'' given the waiver. *Id.* at 1–2.

Respondent objected to the Government's motion. Resp. Objection to Motion for Clarification. In its objection, Respondent argued that while it had waived its right to a hearing, it was entitled to otherwise participate in the proceeding which was ongoing and to receive copies of any filings submitted by the Government and respond to them. *Id.* at 2–3.

Respondent also asserted that while ''the Government was similarly entitled to participate in the proceeding, it chose not to do so and opted to sit in silence when Respondent submitted its evidence and [written] position . . . [and] when the ALJ unambiguously announced his intention to terminate the proceeding upon receipt of Respondent's position.'' *Id.* at 3–4. In Respondent's view, the Government was entitled to participate in the hearing and ''could have objected [sic] cancellation of the hearing'' or ''could have presented its evidence in writing.'' *Id.* at 8. Respondent further maintained that the Government, by failing to present its evidence to the CALJ, ''allow[ed] the record before the ALJ to close without presenting [its] case.'' *Id.* Respondent also argued that this Decision and Order ''must be based on [the] record'' submitted by the CALJ and that because that record contains no evidence to support the allegations, the Government had not met its burden of proof. *Id.* at 9–10.

On review, I determined that it was unnecessary to decide whether either the Administrative Procedure Act or the Due Process Clause requires the Government to submit copies of any subsequent filings to Respondent. Order, at 3 (July 29, 2015). Rather, I exercised my discretion and directed the Government to provide a copy of its Request for Final Agency Action and the record submitted in support of its Request to Respondent. *Id.* at 3–4. Based on Respondent's waiver of its right to hearing, I concluded that Respondent had waived its right to submit evidence in refutation of the Government's case. *Id.* at 4. However, I again exercised my discretion and provided that Respondent could file a brief raising arguments challenging the sufficiency of the evidence, the Government's positions on matters of law, and the appropriate sanction. *Id.*

However, I rejected Respondent's contention that the Government was not allowed to continue litigating the matter because it chose to forgo making a record before the ALJ.[2] *Id.* at 4 n.2. Moreover, finding the reasons proffered by the CALJ insufficient to support a finding to excuse the untimely submission of its Statement of Position, I directed Respondent to address ''why there is good cause to excuse the untimeliness of its filing, paying particular attention as to why there is good cause to excuse the untimely submission of the attached affidavits.'' *Id.* And because the CALJ had issued an order terminating the proceeding effective March 21, 2015 and the CALJ did not rule on whether there was good cause to admit Respondent's Statement of Position until March 23, 2015 (after his jurisdiction had terminated pursuant to his own order), I directed Respondent to ''address whether, given the effective date of the ALJ's termination order, the ALJ had authority to admit its Statement of Position.'' *Id.*

Thereafter, Respondent filed a letter responding to my Order. Letter from Resp's. Counsel to the Acting Administrator (Aug. 7, 2015). Therein, Respondent asserted that it had faxed its Written Statement of Position on March 20, 1015, which is borne out by the fax cover sheet.[3] *Id.* at 1–2. As for whether there was good cause to accept its Written Statement of Position, Respondent argues that the CALJ erred in relying on 21 CFR 1301.43 when he concluded that it was foreclosed from filing its written statement of position because the time period for filing its hearing request had passed. *Id.* at 3. Respondent argues that after it filed its hearing request under 21 CFR 1301.43(a), the provisions of part 1301 no longer apply and the provisions of part D of 21 CFR part 1316 are controlling. *Id.* It further argues that 21 CFR 1316.49, the provision of Subpart D which applies to the waiver of a hearing, ''contains no provision for cancellation of the hearing'' and that ''no provision in Subpart D . . . indicat[es] the time period within which [it] may waive its opportunity to participate in the hearing and file its written statement.'' *Id.* In Respondent's view, it has been denied ''fair notice'' that ''having requested a hearing, it had to waive its opportunity to participate in a hearing and file its Statement . . . within 30 days of being served with the'' Show Cause Order. *Id.* And Respondent argues that the requirement that it file its written statement within 30 days of the date on which it was served with the Show Cause Order ''does not apply to a waiver and written statement filed after requesting a hearing.'' *Id.*

I reject these contentions because Respondent is simply trying to re-write the Agency's procedural rules to suit its own purpose. Under the Agency's rules, a person served with a Show Cause Order has two options for responding to it.[4] First, it can, ''within 30 days after the date of receipt of the order to show cause,'' file a request for a hearing as Respondent initially did. 21 CFR 1301.43(a). Alternatively, it can, ''within the period permitted for filing a request for a hearing, file with the Administrator a waiver of an opportunity for a hearing . . . together with a written statement regarding such person's position on the matters of fact and law involved in such hearing.'' *Id.* § 1301.43(c). *See also id.* § 1316.49 (''Any person entitled to a hearing may, within the period permitted for filing a request for a hearing . . . waiver of an opportunity for a hearing, together with a written statement regarding his position on the matters of fact and law involved in such hearing.'').[5]

Contrary to Respondent's contention, both the procedural rules found in 21 CFR part 1301 and Part 1316 apply to hearings conducted under 21 U.S.C. 823 and 824. *See* 21 CFR 1301.41(a) (''In any case where the Administrator shall hold a hearing on any registration or application therefore, the procedures for such hearing shall be governed generally by the adjudication procedures set forth in the Administrative Procedure Act (5 U.S.C. 551–559), and specifically by [21 U.S.C. 823–24], by §§ 1301.42–1301.46 of this part, and by the procedures for administrative hearings . . . set forth in §§ 1316.41–1316.67 of this chapter.'').[6] Thus, while Respondent argues that no regulation in part 1316 provides for the cancellation of a hearing, Part 1301 contains a provision which states that ''[i]f all persons entitled to a hearing . . . waive or are deemed to waive their opportunity for the hearing . . . the Administrator may cancel the hearing, if scheduled, and issue his/her final order pursuant to 1301.46 without a hearing.'' 21 CFR 1301.43(e). Thus, contrary to Respondent's understanding, this provision applies to its waiver, notwithstanding that it had previously requested a hearing. In any event, given that a hearing is only held on request of ''a person entitled to a hearing'' and is held ''for the purpose of receiving factual evidence regarding the issues involved in the denial, revocation or suspension of any registration,'' 21 CFR 1301.42, it is indisputable that a hearing can be cancelled when a respondent initially requests a hearing but then decides to waive its right to it.

Nor am I persuaded by Respondent's contention that it has been denied fair notice because once it requested a hearing, no provision in Subpart D sets forth the time period in which it was required to file its written statement if it subsequently decided to waive its right to a hearing. Resp's. Ltr., at 3. The Agency's regulations grant the right to file a written statement only when a hearing waiver is filed within the 30-day period or where a respondent establishes ''good cause'' for the

[2] I also rejected Respondent's contention that the Government had no procedural basis for requesting clarification and that I had no authority to respond to that motion. I did not, however, set forth my reasoning for rejecting these contentions.

[3] In his letter, Respondent devoted considerable argument to discussing why portions of the fax were date stamped after the deadline imposed by the CALJ. That, however, was not the issue, and was not mentioned in my July 29, 2015 Order.

[4] Of course, a person served with a Show Cause Order can also choose to not respond.

[5] While the wording of this provision clearly reflects a scrivener's error in that it is missing language to the effect that the person ''may file a'' waiver and written statement, it has never been construed as creating a right to file a written statement at any time thereafter.

[6] *See also* 21 CFR 1316.41 (''Procedures in any administrative hearing held under the Act are governed generally by the rule making and/or adjudication procedures set forth in the [APA] and specifically by the procedures set forth in this subpart, except where more specific regulations [set forth in other parts including parts 1301] apply.'').

untimely filing. 21 CFR 1301.43(d). Thereafter, no provision in the Agency's hearing regulations affords a respondent the right to file a written statement of position and to submit evidence. Given that the Agency's regulations do not provide any right to file a written statement after the initial 30-day period for responding to the Order to Show Cause, Respondent cannot claim that it has been denied ''fair notice'' that it had to submit its hearing request within the 30-day period.

Thus, while the Controlled Substances Act requires the Agency to provide a hearing conducted pursuant to the APA's procedures for adjudications, *see* 21 U.S.C. 824(c), the Agency provided Respondent with that opportunity and was prepared to provide it with that hearing. At that hearing, Respondent could have challenged the Government's evidence through, *inter alia,* the cross-examination of its witnesses. Respondent could also have presented evidence in its defense had it complied with the ALJ's pre-hearing orders. In short, the Agency is not required to provide Respondent with more procedural rights than Congress mandated in the CSA. *Cf. Vermont Yankee Nuclear Power Corp.* v. *NRDC,* 435 U.S. 519 (1978). And while the Agency has provided a limited right to submit a written statement, the Agency is not required to create a new procedural right to provide Respondent, which waived its right to a hearing only after months of largely unsuccessful pre-hearing litigation, with an alternative way of presenting evidence.

Respondent further argues that applying 21 CFR 1301.43 (the regulation requiring the filing of a written statement within 30 days of receipt of the Show Cause Order) to its circumstances, ''produces a result contrary to the Agency's interest in administrative efficiency.'' Resp's. Ltr., at 3. It argues that under the ALJ's interpretation, ''respondents who have made a timely request for hearing but later realize that they have no need or desire to participate in a hearing would be left with two choices: Continue to require the Agency to hold a hearing or abandon all opportunity to be heard in any manner whatsoever.'' *Id.* Respondent further argues that faced with this choice, ''such respondents would be strongly discouraged from waiving an unnecessary hearing and preventing a waste of Agency time and resources.'' *Id.* at 3–4.

This choice is, however, no different than that frequently confronted in litigation when a party recognizes that his opponent has a strong case and is likely to prevail at trial. Moreover, Respondent's proposed new procedural right would actually create the opposite incentive: Instead of submitting its written statement at the outset, it induces a respondent to litigate, knowing that if things go badly, it can then take a different tack by submitting its written statement. Moreover, in Respondent's view, it is also entitled to submit testimonial evidence in the form of affidavits and thus preclude the Government from cross-examining its witnesses.

Upon receipt of a Show Cause Order, a party is entitled to fair notice of the factual and legal basis for the actions proposed by the Government. 21 U.S.C. 824(c). And where a respondent chooses to litigate, the Government is obligated to provide a respondent with fair notice of the evidence it is likely to confront at the hearing. However, creating a new procedural right that allows a party, which has litigated for months on end, to then waive its right to a hearing on the eve of that hearing but nonetheless present its evidence in written form, does not in any sense promote administrative efficiency. To the contrary, it incentivizes litigation by providing two bites of the apple.[7]

Respondent also takes issue with the CALJ's application of the ''good cause'' standard in evaluating whether it Statement was timely submitted. Resp's. Ltr., at 4. And it further argues that even if the ''good cause'' standard applies, it has satisfied the standard. *Id.* I disagree.

As explained above, the two Agency rules that granted Respondent the right to file a written statement required it do so within the 30-day period for requesting a hearing. Putting that aside, DEA has applied the ''good cause'' standard in a variety of contexts in assessing whether an untimely filing should be excused, including to the untimely submission of a statement of position. *See Ronald A. Green,* 80 FR 50031 (2015) (deeming physician's pleading captioned as ''Response to First Amended Complaint and Motion to Dismiss,'' which was filed with the Agency more than three months after service of Show Cause Order as his statement of position, and applying ''good cause'' standard in assessing whether it was timely filed); *see also Rene Casanova,* 77 FR 58150, 58150 (2012) (upholding ALJ's application of good cause standard in denying untimely filed request for an extension to file exceptions); *Daniel B. Brubaker,* 77 FR 19322, 19323 (2012) (upholding ALJ's application of good cause standard in denying untimely motion to file supplemental prehearing statement out of time); *Kamir Garces-Mejias,* 72 FR 54931, 54932–33 (2007) (applying good cause standard in upholding ALJ's termination of hearing where respondent failed to comply with ALJ's order to file pre-hearing statement). *See also* 21 CFR 1301.43(d) (applying good cause standard in assessing whether an untimely hearing request should be excused); *id.* 1316.57 (''All documentary evidence and affidavits not submitted and all witnesses not identified at the prehearing conference shall be submitted or identified to the presiding officer as soon as possible, with a showing that the offering party had good cause for failing to so submit or identify at the prehearing conference.'').

Respondent further argues that even if the good cause standard applies to the submission of its written statement, it has satisfied the standard because the Agency has interpreted the standard ''with reference to case law'' applying the excusable neglect standard, and under that standard, it has demonstrated good cause. Resp's. Ltr., at 4. Respondent is correct that the Agency has interpreted the good cause standard in a manner that aligns it with the good cause standard of various federal rules of procedure. *See Keith Ky Ly,* 80 FR 29025, 29027–28 & n.2 (2015). Thus, Respondent's untimely filing of its Statement may be excused upon a showing of excusable neglect. Respondent, however, has failed to show excusable neglect.

As the basis of its argument, Respondent's counsel argues that he did not become counsel for Respondent until February 2015 when original counsel withdrew, at which time he ''discovered that the DEA had refused to return Respondent's records in violation of Agency policy and the clear directions of the Magistrate Judge who issued the administrative inspection warrant.'' Resp's. Ltr., at 4. He further maintains that he ''also discovered that the scanned images of those documents which had been provided to Respondent contained annotations that were not on the records when the DEA removed them from the pharmacy [and] also found the images to be illegible in part.'' *Id.* Continuing, he argues that ''[i]t was impossible for Respondent to know within 30 days of receiving the Order to Show Cause that the Government would rely on portions of the documents that the DEA refused to return to Respondent, since the Government first

[7] Unexplained by Respondent is whether, in its view, there is any limit to when it could waive its right to a hearing and submit a written statement. For example, could it require the Government to put on its case in chief, determine how strong the case was, and then waive its right to a hearing and submit a written statement?

revealed this on December 2, 2014 when [Government counsel] filed the Government's prehearing statement.'' *Id.* According to Respondent's counsel, he ''determined that a hearing under these circumstances would be futile'' and Respondent decided to waive its right to a hearing.[8] *Id.*

These arguments do not establish excusable neglect (or any other form of good cause), and certainly not with respect to Respondent's delay in filing its statement until approximately five months after it was served with the Show Cause Order. As for the contention that the Agency violated ''the clear directions of the Magistrate Judge'' because it refused to return the records to Respondent, Respondent does not identify any language in the Administrative Inspection Warrant which set a date by which the Government was required to return its records. Nor does it identify any court order issued by the Magistrate Judge requiring the return of the records with which the Government failed to comply.[9] As for Respondent's claims that some of the documents contained notations that were not on them when they were seized and that some of the documents were ''illegible in part,'' Respondent has not even identified which documents have these characteristics, let alone explain why these documents were relevant to the specific allegations raised by the Government. Moreover, to the extent the Government intended to rely on any document that was purportedly illegible, Respondent offers no explanation for why its previous counsel did not seek legible copies.

Also unpersuasive is Respondent's assertion that ''[i]t was impossible for [it] to know within 30 days of receiving the [Show Cause] Order that the Government would rely on portions of the documents that the DEA refused to return to'' it and that it did not know what documents it would rely on until December 2, 2014, when the Government filed its prehearing statement. The CALJ, however, granted Respondent an extension of time to allow it to file its prehearing statement on January 2, 2015, which it did. Moreover, even if Respondent did not know what documents the Government intended to rely on until December 2, 2014, this does not explain why Respondent then waited another three and a half months to file its written statement.

I further reject the contention that these circumstances rendered the hearing futile. Indeed, in cases brought against two related pharmacies which Respondent's current counsel also participated in and made similar arguments regarding the Government's purported unlawful retention of its records, I rejected the Government's dispensing allegations as unsupported by substantial evidence. *See Superior Pharmacy I and Superior Pharmacy II,* 81 FR 31310, 31334–337 (2016). I also rejected various recordkeeping allegations as not being supported by either the CSA or DEA regulations. *Id.* at 31338. And while I accepted the Government's audit allegations in *Superior,* I noted that the respondents had approximately 80 days from the date on which they were served with the show cause orders (at which time they also were provided with copies of their records) to file their prehearing statements and had ample time to conduct their own investigation of the allegations. *Id.* at 31337 n.62.

Notably, in the *Superior* matters, the respondents made similar arguments with respect to the audits and yet they provided charts which purported to show the results of their own audits when they filed their untimely exceptions to the ALJ's Recommended Decision. In declining to consider this evidence, I noted that there was no foundation for its consideration and that it was not newly discovered evidence; I also observed that Respondent ''did not identify any records that were necessary to complete their audits which were not provided to them when their records were returned.'' *Id.* So too here. Notably, as part of Respondent's Statement of Position, it submitted the affidavit of Victor Obi, the brother of Respondent's owner (and the owner of the two Superior Pharmacies), who avers that he is Respondent's independent pharmacy consultant. Resp.'s Position Statement, Attachment 3, at 1.

In the affidavit, Mr. Obi avers that he reviewed the purchasing, return and dispensing records for the pharmacy for the same audit period as used by the Government; Obi further avers that he conducted an audit of the various drugs and dosage strengths audited by the Government and disputes the results of the Government's audit for the various drugs. *Id.* at 3–6. Notably, Obi executed the affidavit on March 20, 2015. *Id.* at 6. Unexplained by Respondent is why Mr. Obi was unable to complete his audit before the date by which it was required to file its prehearing statement, or a supplemental prehearing statement which it could have filed without leave of the CALJ if it did so before 2 p.m. on February 20, 2015. *See* Preliminary Order Regarding Scope of Proceedings, Prehearing Ruling, & Protective Order, at 7 (Jan. 13, 2015).

Of further note, in its Pre-hearing Statement, Respondent represented that it intended to call a witness who was a former DEA Diversion Program Manager who ''will testify regarding errors in the audits performed by the agents/investigators involved in the investigation of Edge Pharmacy.'' Resp. Prehearing Statement, at 5. Presumably, Respondent's prior counsel would not have made this representation without the proposed witness having conducted an investigation of the audit allegations and found that there were errors. Yet when the Government field its Motion *in Limine* to preclude this witness's testimony on the ground that Respondent had ''fai[ed] to identify a single error'' in the audits, Motion *in Limine,* at 6; Respondent's new counsel did not oppose the motion, thus suggesting that this proposed witness had not, in fact, performed an audit.

Notably, Respondent's conclusion that a hearing would have been ''futile'' came only after months of pre-hearing litigation, and to the extent the hearing would have been futile, this was largely the result of the strategic choices made by its counsel. Although the record does not establish when Mr. Obi finally performed his audit, Respondent clearly had ample time to investigate the allegations and disclose its proposed evidence prior to the hearing if it believed the allegations were untrue. And while Respondent's prior counsel may well have been neglectful in failing to thoroughly investigate the allegations, that neglect is not excusable. *See Pioneer Inv. Servs. Co.* v. *Brunswick Assoc. Limited Partnership,* 507 U.S. 380, 397 (1993) (one who ''voluntarily chose [its] attorney as [its] representative in the action . . . cannot . . . avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of [its] lawyer-agent and is considered to have notice of all facts, notice of which can be charged upon the attorney'') (int. quotation and citation omitted). *See also*

[8] Respondent's counsel also devotes considerable discussion to the give and take between himself and Government counsel over the timing and filing of his written statement after he appeared in the proceeding. The discussion, however, adds nothing either way in determining whether Respondent has met the good cause standard as Respondent had been served with the Show Cause Order four months before it hired new counsel, and Respondent's prior counsel filed numerous pleadings on its behalf up until he withdrew.

[9] The warrant required only that a prompt return of the warrant itself be made. It appears that copies of the records were provided to Respondent's original counsel on October 16, 2014, the date on which Respondent was served with the Show Cause Order.

U.S. v. *$29,410.00 in U.S. Currency,* 600 Fed. Appx. 621, 623–24 (10th Cir. 2015) (excusable neglect not established where counsel failed to respond to an answer or interrogatories for over three months and offered no reasonable explanation); *Brodie* v. *Gloucester Township,* 531 Fed. Appx. 234, 237 (3d Cir. 2013) (excusable neglect not established to support extension of time to file notice of appeal when client's counsel ''could have filed a notice of appeal, but chose not to do so''); *A.W. Anderson* v. *Chevron Corp.,* 190 FRD. 5, 10 (D.D.C. 1999) (failure to oppose motion for attorneys' fees not excusable neglect when ''[t]he decision . . . was by any measure a calculated decision by [p]rior [c]ounsel''); *see also id.* at 11 (client ''bound by the strategic choices of her counsel that later turn out to be improvident'') (citing *Douglas* v. *Kemp,* 721 F.Supp. 358 (D.D.C. 1989)).

Nor has Respondent otherwise demonstrated good cause for filing its written statement more than four months after the fact.[10] Notably, in accepting Respondent's written statement, the CALJ noted that ''because of the procedural choices made by Respondent in the course of the litigation,'' specifically, its decision not to oppose the Government's Motion *in Limine* and its failure to file its written statement within the time allowed by the regulations, Respondent would be foreclosed from putting forward its defense. CALJ Ltr., at 4. Invoking 21 CFR 1316.47(b), the CALJ, notwithstanding his previous discussion of Respondent's procedural choices, then asserted that the interests of justice ''will be better served by applying principles of reasonableness'' and found, *sua sponte,* that there was good cause to extend Respondent's ability to respond to the Order to Show Cause and accepted its statement on the Agency's behalf. *Id.* (citing 21 CFR 1316.47(b)).

Under this regulation, ''[t]he Administrative Law Judge, *upon request and showing of good cause,* may grant a reasonable extension of the time allowed for response to an Order to Show Cause.'' 21 CFR 1316.47(b) (emphasis added). However, as explained above, in his August 7, 2015 filing, Respondent asserted that this provision does not apply to the filing of its written statement even though the statement is now its ''response to'' the Show Cause Order, and in any event, Respondent never requested an extension of time to file its written statement. In short, the plain language of this provision does not contemplate *sua sponte* rulings by the ALJ. Rather, it explicitly requires that the respondent in a proceeding seek an extension and imposes on a respondent the affirmative obligation to show ''good cause,'' neither of which were done here.

I am also unpersuaded by Respondent's after-the-fact assertion that there was good cause (in response to my Order) to excuse its belated filing because it could not prepare its Statement of Position until December 2, 2014, when the Government filed its Pre-Hearing Statement and notified it of what documents were to be used as evidence. Resp.'s Ltr., at 6. As set forth above, the regulation authorizes the granting of only ''a reasonable extension of time.'' 21 CFR 1316.47(b). While the reasonableness of an extension is dependent on the circumstances, here, Respondent's showing does not establish that it needed three and a half months after this date to file its written statement, and the extension clearly exceeds the bounds of reasonableness.

To be sure, in *Leonard Browder, d/b/a Lominick's Pharmacy, Family Pharmacy, Inc., Aiken Drug Co., Woodruff Drug Co.,* 57 FR 31214 (1992), the Agency's Decision noted that it had considered a respondent's statement of position, notwithstanding that it was not submitted until a year and a half after the respondent initially requested a hearing and after negotiations to settle the matter were unsuccessful. The decision is, however, bereft of any discussion as to the basis for accepting the respondent's statement of position and the then-applicable regulations, and thus, the decision is of limited precedential value.[11] No subsequent decision of the Agency has cited *Browder,* and as explained above, the Agency has long since made clear that the ''good cause'' standard is to be applied in determining whether to accept an untimely filing.

In accepting Respondent's statement, the CALJ also explained that he was ''applying principles of reasonableness.'' However, as explained above, courts generally do not allow parties to escape the consequences of deliberate strategic decisions made by their lawyers in litigation. *See Pioneer,* 507 U.S. at 397; *$29,410.00 in U.S. Currency,* 600 Fed. Appx. at 623–24; *Brodie,* 531 Fed. Appx. at 237; *A.W. Anderson* v. *Chevron Corp.,* 190 FRD. at 10. Here, Respondent had ample opportunity to investigate the allegations and prepare a defense. Moreover, even after it failed to oppose the Government's Motion *in Limine,* it nonetheless could have gone to hearing, where it could have cross-examined the Government's witnesses and attempted to show that the Government's evidence was not reliable.

In short, the Agency's procedural rules are clear and provided Respondent with ample means to protect its interests.[12] It could have filed its written statement within 30 days of receipt of the Show Cause Order. If Respondent had shown ''good cause,'' it could have filed its written statement even beyond the 30-day period for requesting a hearing if it did so within a reasonable period of time but not months later. And it could have gone to a hearing. Respondent does not, however, have the right to re-write the Agency procedural rules to fit its litigation strategy.[13]

In my Order addressing the Government's Motion for Clarification, I held that because Respondent had waived its right to a hearing, it had waived its right to submit any evidence in refutation of the Government's case.[14] I further deemed it unnecessary to decide whether, under the Agency's regulations (21 CFR 1301.43), Respondent's waiver of its right to a hearing also precludes it from challenging the sufficiency of the Government's evidence, as well as the Government's position on matters of law and the appropriate sanction. Instead, I exercised my discretion to allow

[10] Respondent could also have sought an extension of time to respond to the Show Cause Order, and upon a showing of good cause, the ALJ could have granted a reasonable extension of time to do so. 21 CFR 1316.47(b). However, Respondent did not avail itself of this provision.

[11] For example, in *Browder,* the Government may have consented to the filing, thus rendering it unnecessary for the respondent to establish good cause.

[12] In its August 7, 2015 response to my Order, Respondent argued that the untimely filing of its Statement of Position does not prejudice the Government. Yet, as explained later in this Decision, in its Objection to the Government's Motion for Clarification, Respondent claims that the record is now closed (Objection, at 7), because the Government failed to object to the cancellation of the hearing. It further argues that because the Government did not submit a statement of position to the CALJ, his ''report includes no evidence or argument in favor of the Government's case'' and thus, ''[t]he Government failed to carry the burden of proof assigned to it.'' *Id.* at 9. As Respondent Objection's make clear, its purpose in submitting its untimely Statement of Position is to prejudice the Government.

[13] In his letter to the former Administrator, the CALJ set forth in detail the procedural events which occurred from the date Respondent's former counsel withdrew and Respondent's new counsel entered an appearance, the various representations made by Respondent's new counsel, and as the CALJ explained, ''the failure on the part of Respondent's (new) counsel to honor the commitments made to the tribunal.'' CALJ Letter, at 2.

[14] In my Order, I directed the Government to provide Respondent with a copy of its Request for Final Agency Action as well as the record submitted in support of its Request. Order, at 4.

Respondent to file a brief limited to these issues.

While I adhere to that ruling in this matter, for future proceedings, I conclude that the waiver of the right to a hearing encompasses not only the waiver of the right to present evidence but the right to present legal arguments challenging the proceedings, including arguments challenging the sufficiency of the allegations, the sufficiency of the evidence, the Government's position on matters of law, and the appropriate sanction. In short, a party waiving its right to a hearing waives the right to be heard with respect to any issue under consideration.

Other Issues

As noted above, after Respondent waived its right to a hearing, the Government filed its Motion for Clarification. Therein, the Government sought clarification as to its obligations to provide copies of any documents submitted to me as well as whether Respondent had the right to continue to respond to its submissions. Mot. for Clarification, at 1–2.

Respondent objected to the Government's motion. In its Objection, it raised several contentions beyond those discussed above. Specifically, Respondent argued that once it waived its right to a hearing and the ALJ transmitted the record, the Government was not allowed to continue to litigate the proceeding. Resp.'s Objection, at 8–9. Respondent further argues that ''the Government had the opportunity to submit facts and arguments or present evidence at a hearing but chose not to do so'' even though it had the ''right to participate in a hearing.'' *Id.* at 6. Continuing, it argues that ''the Government made a strategic decision to allow Respondent to file its written position and sit in silence when the ALJ announced he would cancel the hearing'' and that ''[t]he Government could have objected [sic] the cancellation of the hearing'' or ''presented its evidence in writing'' but ''chose to remains mute while plotting to attempt to present its case directly to the Administrator in *ex parte* communications.'' *Id.* at 7. Thus, it argues that I must decide this matter based on the record transmitted to me by the ALJ. Finally, it argues that the Government has no basis for submitting its motion to me and that I have ''no authority under DEA regulations or the APA to respond to the Government's Motion.'' *Id.* at 9.

I reject Respondent's arguments. While it is true that Agency's procedural rules do not explicitly authorize the filing of a motion for clarification, the rules also do not explicitly authorize the filing of a variety of motions, including motions to enlarge the time to file a prehearing statement (which Respondent filed and the ALJ granted), motions to compel (which Respondent also filed but which the ALJ did not grant because Respondent did not make a sufficient showing to establish its entitlement to relief), and motions *in limine.*

Moreover, Respondent's position that while it was waiving its right to a hearing, it was entitled to continue to participate in the proceeding raised an issue of first impression. The Government was entitled to seek clarification of its obligations given the uncertainty created by Respondent's hearing waiver. As for Respondent's contention that I do not have authority to respond to the Government's motion, the APA specifically grants the Agency discretionary authority to ''issue a declaratory order to . . . remove uncertainty.'' 5 U.S.C. 554(e).

I also reject Respondent's contention that the Government is now foreclosed from presenting to me its evidence in support of the proposed revocation. In Respondent's view, the Government is simply a ''person'' under the Agency's regulation (21 CFR 1316.42(e)) entitled to a hearing or to participate in a hearing, or to submit a written statement of position. Respondent argues that ''a hearing may only be cancelled if all persons entitled to a hearing *or to participate in a hearing* waive their opportunity to participate in a hearing.'' Resp.'s Objection, at 6. It then argues that because ''the Government has the burden of proof . . . it must participate if a hearing is held'' and that ''a hearing can occur even if some, but not all parties choose not to participate.'' *Id.* And Respondent faults the Government for not objecting to the cancellation of the hearing or presenting its evidence in writing to the ALJ. *Id.* at 7.

Notwithstanding that 21 CFR 1316.42(e) defines the ''[t]he term *person* [to] include[] an individual, corporation, government or governmental subdivision or agency,'' when the Government initiates an Order to Show Cause proceeding, it is not a ''person entitled to a hearing and desiring a hearing'' within the meaning of 21 CFR 1316.47 (or 21 CFR 1301.43). Indeed, this language is fairly read as encompassing only the recipient of the Show Cause Order. *See* 21 CFR 1316.47 (''Any person entitled to a hearing and desiring a hearing shall, within the period permitted for filing, file a request for a hearing . . . .''); 21 CFR 1301.43(a) (''Any person entitled to a hearing pursuant to § 1301.32 or §§ 1301.34–1301.36 and desiring a heating shall, within 30 days *after the date of receipt of the order to show cause* . . . file with the Administrator a written request for a hearing in the form prescribed in § 1316.47 of this chapter.'') (emphasis added).

For the same reason, *i.e.,* because it initiated the proceeding, when the Government initiates an Order to Show Cause proceeding, it is not a ''person entitled to participate in a hearing pursuant to § 1301.34 or § 1301.35(b).'' 21 CFR 1301.43(b). With respect to § 1301.34, this provision applies to a narrow category of cases which are not initiated by the Government—specifically where an applicant seeks a registration to import a schedule I or II controlled substance. Under this provision, the Agency is required to give notice to registered manufacturers as well as other applicants for registration to manufacturer the same basic substance, and upon request of such manufacturer or applicant, the Agency ''shall hold a hearing on the application.'' 21 CFR 1301.34(a). While the Government does not initiate the proceeding, it may intervene in the proceeding as a ''person entitled to participate in a hearing.'' 21 CFR 1301.43(b). *See also e.g., Chattem Chemicals, Inc.,* 71 FR 9834, 9834 (2006), *pet. for rev. denied sub nom. Penick Corp, Inc.,* v. *DEA,* 491 F.3d 483, 493 (D.C. Cir. 2007); *Penick Corp., Inc.,* 68 FR 6947, 6947 (2003), *pet. for rev. denied sub nom. Noramco, Inc.,* v. *DEA,* 375 F.3d 1148, 1159 (D.C. Cir. 2004). Indeed, this is the only circumstance in which the Government can be fairly described as a ''person entitled to participate in a hearing.''[15]

As for its argument that the Government could have presented ''its evidence at a hearing before the ALJ or filed . . . its written position on the matters of fact and law'' with the ALJ, and thus, it should be barred from submitting its evidence to me, the Agency's longstanding and consistent practice is that where a party waives its right to a hearing, the Government is entitled to present its evidence directly to the Administrator, who is the ultimate factfinder. *Cf. Reckitt & Colman, Ltd.* v. *Administrator,* 788 F.2d

[15] 21 CFR 1301.43(b) also refers to the provisions of 1301.35(b), which allows for registered bulk manufacturers of a basic substance in schedule I or II (as well as applicants for registration to manufacture the basic substance) to ''participate in a hearing'' where the Government has issued a Show Cause Order proposing the denial of an application for registration ''to manufacture in bulk'' the same basic class and the applicant has requested a hearing. Here too, the Government is not a ''person entitled to participate in a hearing.'' Rather, it is the initiator of the proceeding.

22, 26 (quoting 5 U.S.C. 557(b) (''On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision. . . .'')).

This is so, even where the respondent has initially requested a hearing but subsequently either waives its right to a hearing or is deemed to have waived its right to a hearing by failing to comply with an ALJ's orders. *See Wheatland Pharmacy,* 78 FR 69441 (2013) (explicit waiver); *Al-Alousi, Inc.,* 70 FR 3561 (2005) (waiver deemed because of failure to file pre-hearing statement); *J & P Distributor,* 68 FR 43754 (2003) (withdrawal of hearing request); *DuVall's Drug Store, Inc.,* 54 FR 15031 (1989) (''As a result of Respondent's withdrawal of the earlier request for a hearing, the Administrator concludes that Respondent has waived any opportunity for a hearing on the issues raised in the Order to Show Cause, and issues this final order based upon the information contained in the DEA investigative file.''); *Faunce Drug Store,* 47 FR 30122, 30122–23 (1982) (waiver of hearing based on failure to file prehearing statement; ''[t]he law does not require this agency to go through the useless and wasteful exercise of convening a hearing for the presentation of both sides of the controversy when one side has failed to show that it has a case to be heard . . . . This Administration cannot permit the parties that appear before it to choose which orders to obey and which orders to disregard'').

Given Respondent's waiver of its right to a hearing, the Government was not required to put on its case before the CALJ or submit a written statement at that juncture. Rather, consistent with the Agency's longstanding practice, the Government was entitled to submit its Request for Final Agency Action and its supporting evidence directly to my Office.[16]

While acknowledging that the CALJ's letter to the former Administrator ''does not conform to the typical format of a recommended decision,'' Respondent further argues that it is a recommended decision as ''it provides a statement of reasoning and is clearly intended to constitute a transfer of the record to the Administrator.'' Resp.'s Objection, at n.17. However, the CALJ's letter is not a recommended decision and does not purport to be a transmittal of the record.

The CALJ's letter is not titled as a recommended decision and most importantly, it does not contain any of the required elements of a recommended decision, which include ''recommended findings of fact and conclusions of law, with reasons therefore; and [h]is recommended decision.'' 21 CFR 1316.65(a)(2). Indeed, the CALJ made no recommendation with respect to how the Agency should decide this matter. CALJ Letter, at 4 (''I . . . accept its Statement of Position on the Agency's behalf, and herein forward it to you for whatever consideration or action (if any) you deem appropriate in this matter.'').

So too, the CALJ's letter contains no statement to the effect that it is the certification and transmittal of the record. Nor was the CALJ's letter accompanied by the pleadings of the parties (with the exception of the Respondent's statement), the CALJ's orders, or other materials such as a listing of the procedural exhibits and a docket sheet. And of course, it does not include any evidence other than the affidavits attached to Respondent's statement.

That the CALJ's letter does not certify the record is for good reason, as his duty to certify the record exists only when a proceeding goes to a hearing or is resolved through summary disposition. 21 CFR 1316.52. Upon Respondent's waiver of its right to a hearing, the CALJ's jurisdiction over the matter ceased. Indeed, in his letter to the prior Administrator, the CALJ specifically noted that ''the authority of the administrative law judge commences and ends with the existence of a valid hearing request by one entitled to a hearing.'' CALJ Letter, at 4. I therefore also reject Respondent's contention that I am foreclosed from considering the Government's Request for Final Agency Action and the evidence submitted in support thereof.

The Unexecuted Declaration

On review of the Government's submission, my Office noted that one of the declarations submitted by the Government had not been executed. On August 15, 2016, I issued an Order directing the Government to notify my Office as to whether an executed copy of the declaration existed. Order (Aug. 15, 2016). I further ordered the Government, if an executed copy exists, to provide the executed declaration as well as an explanation as to why the executed copy was not submitted with its Request for Final Agency Action. *Id.* I also ordered the Government to serve a copy of its response to my Order on Respondent and allowed Respondent to file a response to the Government's filing no later than five (5) business days from the date of receipt of the Government's filing. *Id.*

On August 18, 2016, the Government filed its response to my Order and a motion to supplement/correct the record. Therein, the Government represented that while the declaration had been executed ''on August 28, 2015, and provided to Government counsel *via* email that same day[,] . . . the executed page was inadvertently omitted from the version of the declaration that was submitted to the Acting Administrator.' '' Government's Response to Order and Motion to Supplement/Correct the Record, at 1–2. The Government further moved to enter the executed declaration into the record arguing that there was ''no prejudice'' to Respondent. *Id.* at 2. In addition to providing a copy of the executed declaration, the Government attached a copy of an email from the Diversion Investigator, who was the affiant, which was sent to Government counsel on August 28, 2015 and has the subject line of ''Last page of Affidavit.'' *Id.* at 10. The email further states: ''Attached is the last page of the affidavit with my signature per our conversation.'' *Id.*

Respondent objects to the Government's motion. It argues that ''[t]here is no precedent for the Administrator to allow the Government to establish the evidentiary foundation for documents in the Investigative File after the File has been transferred to the Administrator for final agency action.'' Respondent's Response to the Government's Response to Order and Motion to Supplement the Record, at 2 (hereinafter, Response to Mot. to Supp.). It further argues that the Government is attempting to submit ''additional evidence into the record'' and that the Government has not made ''the requisite showing . . . to reopen the record'' or established ''good cause.'' *Id.* at 2–4 (citing 21 CFR 1319.57, a regulation which does not exist). And Respondent also contends that it would be prejudiced if I ''allowed the Government to enter the [s]ignature [p]age into the record of these proceedings.'' *Id.* at 5.

According to Respondent, ''[o]nce the Investigative File is transferred to [me] for final agency action, the Investigative File (and any pleadings or written statements) constitutes the record on which the'' final decision must be based. *Id.* at 3. Respondent then argues that the Government is seeking to reopen the record and therefore, the Government must show that the evidence ''was previously unavailable''

[16] A different result might obtain had Respondent sought summary disposition in its favor. Under that circumstance, the Government would have clearly been on notice that it needed to oppose the motion and demonstrate through affidavits the existence of disputed material facts, and thus failure to provide such affidavits/declaration at that juncture could well have been fatal to the Government's case. Respondent did not, however, move for summary disposition.

and that it ''would be material and relevant to the matter in dispute.'' *Id.* And Respondent contends that the Government's representation that it had received the signature page on August 28, 2015 but inadvertently failed to include the page when it submitted the Investigative File establishes that the evidence was available to the Government when it submitted the declaration. *Id.*

Contrary to Respondent's understanding, unlike in a proceeding conducted by an Administrative Law Judge, no rule of the Agency specifies the point at which the record is closed and can only be supplemented by filing a motion to re-open and demonstrating that the evidence was previously unavailable. *Cf.* 21 CFR 1316.65(c) (''Not less than twenty-five days after the date on which he caused copies of his report to be served upon the parties, the presiding officer shall certify to the Administrator the record. . . .''). Indeed, where a party has waived its right to a hearing and the Government has submitted a Request for Final Agency Action, the Government has, on occasion, filed a supplement to its Request for Final Agency Action and included additional information regarding criminal and state board proceedings. *See Keith Ky Ly,* 80 FR 29025, 29032 (2015); *Algirdas J. Krisciunas,* 76 FR 4940, 4941 n.3 (2011). As long as due process is not offended, such filings and the accompanying evidence have been accepted into the record without requiring any showing that the evidence was previously unavailable.[17]

In any event, the declaration is not additional evidence. Rather, but for an executed signature page, the same exact declaration was submitted by the Government with its Request for Final Agency Action and the Government was directed to serve a copy of its filing on Respondent.[18] Notably, Respondent did not move to strike the declaration as originally filed by the Government. Nor in its Reply to the Government's Request for Final Agency Action did Respondent raise any issue as to the validity of the declaration. *Cf. Noblett* v. *General Electric Credit Corp.,* 400 F.2d 442, 445 (10th Cir. 1968) (holding that ''[a]n affidavit that does not measure up to the standards of [old rule] 56(e) is subject to a motion to strike; and formal defects are waived in the absence of a motion or other objection'').

Respondent further argues that I should not accept the signed declaration because the Government has not established good cause [19] but only that it ''inadvertently omitted'' the signature page when it submitted the Request for Final Agency Action.[20] Response to Mot. to Supp., at 4. While Respondent argues that ''agency precedent does not recognized simple inadvertence as good cause,'' *id.* at 5; it is mistaken. For example, in *Tony Bui,* 75 FR 49979, 49980 (2010), the respondent's counsel used an incomplete address when he mailed the hearing request resulting in the hearing request being returned to respondent's counsel, and when the latter re-submitted the request, it was received out of time. While not specifically using the word ''inadvertence'' to describe the act of Respondent's counsel, the Agency nonetheless upheld the ALJ's ruling that good cause had been shown to excuse the untimely filing.[21]

To be sure, in determining whether to excuse an untimely filing, these cases have also looked at such factors as whether the offending party promptly corrected its omission and whether the opposing party was prejudiced. As for the first of these factors, upon being notified of the issue the Government has promptly corrected the omission. *Cf.* Fed. R. Civ. P. r.11 (a) (''The court must strike an unsigned paper unless the omission is promptly corrected after being called to the attorney's or party's attention.'').[22]

Respondent further argues that it will be prejudiced if the new declaration is admitted. Response to Mot. to Supp., at 5. Yet it makes no assertion that actually establishes prejudice. While the Government, in its Request for Final Agency Action, argued that Respondent failed to maintain accurate records and failed to electronically link CSOS records and specifically relied on the declaration, Respondent, in its Response to the Request for Final Agency Action, did not address the various recordkeeping allegations at all. *Compare* Request for Final Agency Action, at 28–30, *with* Respondent's Response to Request for Final Agency Action, at 2–27. Notably, Respondent offered no explanation as to why it did not address the allegations for which the declaration was offered, let alone argue that it deemed it unnecessary to do so because the declaration was legally insufficient.

Moreover, even now in response to the Government's Motion to admit the signed declaration, Respondent does not maintain that it will be prejudiced because when it prepared its response to the Request for Final Agency Action, it determined that the unsigned declaration was not legally sufficient to provide evidentiary support for those allegations and therefore did not address them. *See* Resp. to Gov. Response to Order and Motion to Supplement the Record, at 5–6. In short, because Respondent offers only conclusory assertions of prejudice, I accept the signed the declaration into the record.[23]

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[17] Respondent cites several Agency cases in support of its contention that a party must demonstrate that the evidence was previously unavailable when seeking to re-open the record. Respondent's Response to Government's Response to Order and Motion to Supplement the Record, at 3 (citing *Wesley G. Harline,* 64 FR 72678 (1999); *Robert M. Golden,* 61 FR 24808 (1996); *Bienvenido Tan,* 76 FR 17673 (2011)). However, in each of these proceedings, a hearing had been conducted by an ALJ and the record had been certified by the ALJ and transmitted to the Office of the Administrator/Deputy Administrator. *See Harline,* 64 FR at 72684–85; *Golden,* 61 FR at 24808. Moreover, in *Tan,* the ALJ had conducted the hearing and issued her recommended decision when the respondent sought to admit an affidavit addressing the ALJ's findings that he had failed to address several critical deficiencies identified by the ALJ in her decision. 76 FR at 17675. Thus, at that stage of the proceeding, the only remaining step for the ALJ (other than to address the respondent's request to re-open) was to certify and transmit the record.

[18] No claim is raised by Respondent that the Government failed to provide it with the declaration when it was served with the Request for Final Agency Action.

[19] Respondent cited to 21 CFR 1316.57 as support for its contention that the Government was required to establish ''good cause'' to accept its untimely filing. Respondent's Resp. to Motion to Supplement, at 4–5. This regulation applies, however, only where a hearing is being conducted by an ALJ. Nonetheless, for the purpose of this decision, I assume, without deciding that the ''good cause'' standard applies to the Government's motion.

[20] Actually, the Government did submit the signature page with its Request for Final Agency Action. The problem was that the page that was submitted did not include the DI's signature and date.

[21] Nor is this the only instance in which the Agency has excused negligent or inadvertence on the part of a respondent's attorney. In *Mark S. Cukierman, Denial of Government's Interlocutory Appeal,* 8–11 (No. 12–67) (unpublished), the Agency held that a respondent had established good cause to excuse the untimely filing of a hearing request when the attorney's assistant was directed to, but failed to file a hearing request before going on vacation, and on the due date, the attorney was unable to verify that the request was filed because he was undergoing dental surgery. Slip. Op., at 10. The Agency held that there was good cause notwithstanding that it found that ''Respondent's counsel should have been more diligent in supervising his subordinate to ensure that she had filed the request.'' *Id.*

[22] Even if this provision does not apply to affidavits or declarations, it nonetheless supports the notion of allowing a party to correct an oversight with respect to its filing as long as it acts promptly. Of further note is Fed. R. Civ. P. r. 56(e)(1). It provides that ''[i]f a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may . . . give an opportunity to properly support or address the fact[.]''

[23] Respondent further argues that it ''believes that the Signature Page itself and the accompanying email [submitted by the Government] raise issues''

Continued

Respondent's Surrender of Its Registration and Withdrawal Request

On August 30, 2016, Counsel for Respondent notified my Office that it would surrender its DEA Certificate of Registration effective at 11:59 p.m. that day. Letter from D. Linden Barber, Esq., to the Acting Administrator, at 1 (Aug. 30, 2011). Respondent's Counsel also advised that it had returned its unused order forms to the DEA Tampa Office and that it had delivered its controlled substances to a reverse distributor. *Id.*

While Respondent's surrender of its registration rendered moot the issue of whether its registration should be revoked, during the course of the proceeding Respondent filed a renewal application. No regulation of the Agency provides that the surrender of a registration also acts as the withdrawal of a pending application. To the contrary, under an Agency regulation, when an applicant has been served with a show cause order, the applicant must either show that ''good cause'' exists to allow it to withdraw its application or that ''withdrawal is in the public interest.'' 21 CFR 1301.16(a). Accordingly, my Office notified Respondent by email (which was copied to the Government) that for the matter to be dismissed, Respondent needed to request permission to withdraw its application. *See* 21 CFR 1301.16(a). My Office thus directed Respondent to address whether it was willing to withdraw its application.

Thereafter, Respondent's Counsel filed a letter requesting withdrawal. Letter from D. Linden Barber, Esq., to the Acting Administrator, at 1 (Aug. 31, 2011). Therein, Respondent's Counsel argued that withdrawal of its application ''is in the public interest as it accomplishes DEA's purpose in issuing the Order to Show Cause, namely, removing [Respondent's] authority to handle controlled substances.'' *Id.* Having considered Respondent's showing, I conclude that granting its withdrawal request is not ''in the public interest.'' 21 CFR 1301.16(a).

The Agency has set forth several factors it considers in determining whether the granting of a request to withdraw is in the public interest. *See Vincent G. Colisimo,* 79 FR 20911 20913 (2014); *Liddy's Pharmacy, L.L.C.,* 76 FR 48887, 48888 (2011). These factors include the potential prejudice to the Government were the request granted, the nature of the misconduct, the extent to which the Agency's resources have been expended in the litigation and review of the matter, whether the respondent has remained in business or professional practice, and whether the respondent has agreed to not reapply for registration. *See Colisimo,* 79 FR at 20913; *Liddy's,* 76 FR at 48888.

To be sure, Respondent's surrender of its registration serves the public interest to some degree by ending its authority to handle controlled substances. The Controlled Substances Act does not, however, prohibit a former registrant from reapplying for a registration for any particular period of time, and in fact, a former registrant can reapply immediately following its surrender of a registration. Notably, Respondent's counsel has represented only that his client ''ha[s] no intention of applying for a DEA Registration in the near future.'' Letter from D. Linden Barber, Esq., to the Acting Administrator, at 1 (Aug. 30, 2016). Thus, it is clear that Respondent intends to remain in business and reapply for a DEA registration.

Moreover, my Office has expended substantial resources in the review of this matter and the preparation of this Decision and Order. *See id.* As discussed below, that review has determined that Respondent's pharmacists committed egregious violations of the Controlled Substances Act.[24] However, were I to grant its request to withdraw, Respondent would escape the consequences of the findings of fact and legal conclusions that are warranted by the record in this proceeding. Under these circumstances, the potential prejudice to the Government is substantial and the harm to the public interest is manifest. *See Bobby D. Reynolds, et al.,* 80 FR 28643, 28643 n.2 (2015). I therefore conclude that granting Respondent's request to withdraw its application is not in public interest. 21 CFR 1301.16(a). I also conclude that Respondent has not demonstrated ''good cause'' to allow it to withdraw.

Having considered the record submitted by the Government, and the parties' legal arguments as to the sufficiency of the evidence, I make the following findings of fact.

Findings of Fact

Respondent is licensed by the Florida Board of Pharmacy as a Community Pharmacy. For much of this proceeding, Respondent was also the holder of DEA Certificate of Registration FE1512501, pursuant to which it was authorized to dispense controlled substances in schedules II through V as a retail pharmacy, at the registered address of 2039 E. Edgewood Drive, Lakeland, Florida. According to the registration records of the Agency, while Respondent's registration was due to expire on August 31, 2015, on July 8, 2015, it submitted a timely renewal application. This action kept its registration in effect until August 30, 2016, *see* 21 CFR 1301.36(i), when Respondent surrendered its registration. Letter from D. Linden Barber, Esq., to the Acting Administrator, at 1 (Aug. 20, 2016); *see also* 21 CFR 1301.36(i).

However, while Respondent no longer holds a registration, for reasons explained previously, Respondent's application remains pending in this proceeding. This precludes a finding of mootness. *See Liddy's Pharmacy, L.L.C.,* 76 FR at 48888.

Respondent is owned by Harrieth Aladiume. Gov. Declaration (hereinafter, GA) 3, at 1. Ms. Aladiume's brother is Victor Obi-Anadiume. *Id.* Mr. Obi-Anadiume is the owner of several pharmacies in the Tampa Bay area, including two pharmacies whose registrations I recently revoked.[25] *See Superior Pharmacy I and Superior Pharmacy II,* 81 FR 31309, 31341 (2016). Mr. Obi-Anadiume is also the owner of a third Tampa pharmacy (Jet Pharmacy); on March 31, 2015, Mr. Obi surrendered Jet's registration for cause.[26] GA 3, at 2.

In addition, Mr. Obi-Anadiume owns or owned two pain clinics: (1) 24th

and that it ''cannot identify any point of relation between the Signature Page and the email to indicate that the two documents have any connections to each other whatsoever.'' Response to Gov. Motion to Supplement the Record, at 4. Respondent further suggests that testimony or additional documentary evidence may be necessary to link the two documents. *Id.*

The Government, however, has submitted to me the entire declaration, which is signed and dated below the statement: ''I hereby declare under penalty of perjury that the forgoing is true and correct pursuant to 28 U.S.C. 1746.'' GA 2, at 6 (corrected). As the declaration has been signed and dated under the penalty of perjury, I deem it unnecessary to inquire into the ''connections'' between the email and the signature page.

[24] Various agency proceedings clearly establish that the Superior Pharmacies and Edge were owned by brother (Mr. Victor Obi) and sister (Ms. Harrieth Aladiume). *See Superior Pharmacy I and Superior Pharmacy II,* 81 FR 31310 (2016). So too, agency proceedings establish that Hills Pharmacy was owned by Ms. Hope Aladiume, another sister of Mr. Obi and Ms. Harrieth Aladiume. *Hills Pharmacy, L.L.C.,* 81 FR 49816 (2016).

While Victor Obi was a consultant to both Hills Pharmacy and Edge Pharmacy and participated in both proceedings by attending the hearing in *Hills* and providing an affidavit in *Edge,* the record in *Edge* does not establish that he was actively involved in the operation and management of the latter pharmacy. Thus, notwithstanding the familial links, the findings rendered in my decisions regarding the misconduct committed by Superior Pharmacies I and II and Hills would likely not be entitled to preclusive effect were Edge Pharmacy to apply for a new registration and could cause substantial prejudice to the Government.

[25] The Superior pharmacies were located at 3007 W. Cypress Street, Suite I, Tampa, Fl. 33609 and 5416 Town 'N' Country Blvd., Tampa, Fl. 33615.

[26] Jet Pharmacy was located at 2310 West Waters Ave., Suite J, Tampa, Fl.

Century Medical Clinic, located at 7747 W. Hillsborough Ave., Tampa, Fl., and (2) MD Plus Clinic, located at 2039 Edgewood Drive, Suite 110B, Lakeland, Fl. *Id.* The MD Plus Clinic was located in a suite adjacent to that occupied by Respondent. *Id.; see also* Gov. Declaration 1, Attachment B, at 1. On or about October 15, 2012, the State of Florida, Agency for Health Care Administration, served the MD Plus Clinic with an administrative complaint which sought to revoke its health care clinic license and impose administrative fines. GA 1, Attachment B, at 12–13. On March 26, 2013, Mr. Obi-Anadiume entered into a settlement agreement with the State on MD Plus's behalf, pursuant to which he surrendered its license.[27] *Id.* at 14, 18.

The Dispensing Allegations

On February 4, 2013, DEA Investigators executed an Administrative Inspection Warrant (AIW) at Respondent, pursuant to which they seized the schedule II prescriptions and other documents pertaining to Respondent's purchases and distributions of controlled substance. GA 3, at 1–2. The Investigators also created a mirror image of Respondent's computer data. *Id.* at 2. A review of the data showed that from January 1, 2011 through February 4, 2013, more than 93 percent of the schedule II dosage units dispensed by Respondent (463,392 out of 497,104 du) were dispensed pursuant to prescriptions written by six doctors employed by Mr. Obi-Anadiume, and nearly 85 percent of the dosage units were filled pursuant to prescriptions written by a single doctor, Victor Thiagaraj Selvaraj.[28] GE 10, at 1. The data also showed that 27 doctors (other than those employed by Mr. Obi) prescribed the remaining dosage units (33,742 du) dispensed by Respondent). *Id.*

According to one of the Investigators, following the seizure of the prescriptions, the prescriptions and their labels were scanned electronically and provided to Robert Parrado, R.Ph., who reviewed them and provided his opinion. GA 2. Mr. Parrado holds a Bachelor of Science in Pharmacy from the University of Florida and has been licensed as pharmacist in Florida since 1971. GA 1, at 1. Mr. Parrado has practiced as a pharmacist in both the hospital and community pharmacy setting and owned two pharmacies for approximately 19 years. *Id.*

Mr. Parrado was a member of the Florida Board of Pharmacy from December 2000 through February 2009 and served as both its Vice-Chairman (in 2003) and Chairman (in 2004). *Id.* While on the Board, he ''presided over numerous disciplinary matters,'' including some which involved the diversion of controlled substances. *Id.* Mr. Parrado testified that he is familiar with both federal and state laws and regulations applicable to the prescribing and dispensing of controlled substances including 21 CFR 1306.04(a); Florida Stat. Ann. §§ 465.016(1)(i), 465.023(1)(h), and 893.04(2)(a), and Fla. Admin. Code r.64B16–27.831. *Id.* at 1–2.

Mr. Parrado then opined as to the various steps a Florida pharmacist must take to ensure that any prescription ''is written pursuant to an appropriate physician-patient relationship, as well as being clinically appropriate and safe to dispense.'' *Id.* at 2. These included reviewing ''the patient's age, gender, address, current or previous medical conditions, drug allergies and condition being treated, [the] physician's address and specialty or area of practice,'' the ''appropriateness of therapy'' and whether there is ''any therapeutic duplication.'' *Id.* In addition, Mr. Parrado testified that the prescription must be reviewed to determine if it contains all required information including the patient's name and address, the prescriber's name and address, the prescriber's DEA number, the drug name, dosage form, strength, quantity, and instructions for use. *Id.*

Mr. Parrado further opined that when a controlled substance prescription is presented, a pharmacist must take additional steps to verify the legitimacy of the prescription and prevent potential abuse and diversion. *Id.* These include ''reviewing the quantity of the medication prescribed; appropriate dosage; the location of the patient's home from the physician and/or the pharmacy; trends in the physician's prescribing habits; and the number of pharmacies the patient has used for similar medications.'' *Id.* at 2–3. Mr. Parrado then opined that ''a reasonably prudent'' Florida pharmacist ''must be familiar with'' various indicia that create a suspicion that a controlled substance prescription may be abused or diverted. *Id.* Mr. Parrado termed these indicia ''red flags'' and explained that ''a 'red flag' is anything about a prescription that would cause the pharmacist to be concerned that the prescription was not issued for a legitimate medical purpose in the usual course of professional practice.'' These include:

1. There is a significant distance between the addresses of the patient and the prescriber and/or the pharmacy;
2. The prescription is for the highest strength and/or large quantities;
3. Multiple patients arrive at the pharmacy in close temporal proximity and present similar prescriptions which were issued by the same physician or clinic;
4. Patients are willing to pay large amounts using cash or cash equivalents (check or credit card) for narcotics when the same drugs are available at other pharmacies for lower prices;
5. The prescriber writes similar prescriptions for each patient for ''narcotics in identical or nearly identical quantities . . . regardless of the patient's individualized medical conditions'';
6. The prescriber issues cocktail prescriptions for such drugs as oxycodone, benzodiazepines, and carisoprodol;
7. The prescriber issues prescriptions for ''two or more'' drugs which are ''known to treat the same condition in the same manner,'' such as two immediate release opioids.

Id. at 3–4.

Mr. Parrado testified that ''[w]hen confronted with a red flag or red flags concerning a prescription for controlled substances, a pharmacist must try to resolve the red flags to determine whether . . . the prescriptions is legitimate'' and must do so ''prior to filling the prescription.'' *Id.* at 4. He testified that the steps taken depend on the type of red flag and may include questioning the patient and/or contacting the physician. *Id.* He also testified that ''[w]hen a pharmacist contacts a physician to address red flags presented by the prescription, the standard practice in Florida is for the pharmacist to note it on the

[27] The record does not include the complaint, and in any event, Mr. Obi was not required to admit to any of the allegations. GA 1, Attachment B, at 15.

[28] According to the online records of the Florida Department of Health (DOH), of which I take official notice, Dr. Selvaraj was Board Certified in Family Medicine but not pain medicine or anesthesiology. *See* 5 U.S.C. 557(c). Of further note, on November 5, 2013, the DOH ordered the emergency restriction of Dr. Selvaraj's license to practice medicine based on findings which included that he ''prescrib[ed] large quantities and types of Schedule II–IV controlled substances to Patients without adequate supporting documentation and without any legitimate medical purpose.'' *In re: The Emergency Restriction of the License of Victor Thiagaraj Selvaraj, M.D.,* at 65 (Fla. DOH, Nov. 5, 2013) (No. 2012–04201). The Board further concluded that ''Dr. Selvaraj violated Section 458.331(1)(q), Florida Statutes,'' which prohibits ''[p]rescribing, dispensing, [or] administering . . . any controlled substance, other than in the course of the physician's professional practice.'' *Id.* at 73.

Of further note, on March 21, 2016, Dr. Selvaraj voluntarily relinquished his medical license ''to avoid further administrative actions'' and ''agree[d] to never reapply for licensure as a Medical Doctor in the State of Florida.'' *See* Voluntary Relinquishment of License, at 1, *In re: The License of Victor Thiagaraj Selvaraj, M.D.* (Mar. 22, 2016). On August 16, 2016, the Florida Board of Medicine accepted Dr. Selvaraj's offer to voluntarily relinquish his medical license. *See id.* at Final Order, at 1–2.

prescription'' and ''[i]f there is no documentation on the prescription addressing the red flag and resolving the red flag, you can assume that the red flag was not resolved.'' *Id.*

Mr. Parrado further testified that ''[w]hile some red flags can be resolved, there are other red flags (or combination and patterns of red flags) that a pharmacist cannot resolve by contacting the physician, running a State prescription monitoring search, or obtaining more information from the patient.'' *Id.* As an example, Mr. Parrado set forth a scenario in which a pharmacist is:

> presented with (1) a group of patients who all travelled a significant distance to the pharmacy and/or to the physician to obtain controlled substance prescriptions; (2) patients arriving at the pharmacy on the same day with prescriptions from the same doctor for the same controlled substances; (3) . . . the controlled substance is a highly addictive and highly diverted drug.

Id. Mr. Parrado then explained that a phone call ''to the physician to verify the prescription would not resolve the red flag'' because while the ''call may establish that there is a relationship between the patient and the'' physician, there ''may not be a legitimate patient-physician relationship, and the prescription may not be for a legitimate medical purpose.'' *Id.* at 4–5.

Mr. Parrado then discussed various groups of prescriptions and whether the red flags presented by the prescriptions presented resolvable or unresolvable red flags. *Id.* at 5. The first of these were nine prescriptions for oxycodone 30 mg written on January 10, 2011 by Dr. Selvaraj of Mr. Obi-Anadiume's MD Plus Clinic which was located in the adjacent space. *Id.;* GE 3, at 1–9. Respondent filled each of the prescriptions the same day. GE 3, at 1–9.

The prescriptions were issued in the following quantities to the following patients (with the approximate distances they travelled to MD Plus and Respondent): 224 du to J.R. of Port Orange (113 miles); 224 du to C.R. of Middleburg (173 miles); 224 du to R.M. of Wesley Chapel (41 miles); 168 du to L.J. of Cocoa (96 miles); 168 du to D.J. of Melbourne (102 miles); 196 du to W.K. of Satsuma (141 miles); 224 du to J.H. of Ocala (98 miles); 196 du to C.S. of Jacksonville (197 miles); and 196 du to C.W. of Milton (450 miles). GE 3, at 1–9; GE 17, at 1–21. Each of the patients paid with cash or a cash equivalent with the prices ranging from $560 to $686 depending on the quantity. GE 3, at 1–9.

Regarding these nine prescriptions, Mr. Parrado testified:

> In my professional opinion, nine different individuals who (1) travel, on average, more than 156 miles to Respondent's pharmacy; (2) obtain prescriptions for large, and in some cases, identical amounts of 30 milligram oxycodone tablets from the same physician on the same day; and (3) pay between $560 and $686 for their prescriptions creates a situation that is too suspicious and indicates the prescriptions were not issued for a legitimate medical purpose. Therefore, the combination of events creates an unresolvable red flag which, applying the standard of practice of pharmacy in Florida, precludes a reasonably prudent pharmacist from dispensing these prescriptions.

GA 1, at 5.

Mr. Parrado then discussed nine oxycodone 30 prescriptions which were issued by Dr. L.C. of the MD Plus Clinic and dispensed by Respondent on January 6, 2011. *Id.* The prescriptions were issued in the following amounts to the following patients: 224 du to J.D., 196 du to D.W., and 168 du to T.T., all of Jacksonville (197 miles); 196 du to S.H. of Palatka (148 miles); 168 du to E.R. and 196 du to J.B., both of Interlachen (139 miles); 196 du to D.N. of Winter Haven; 196 du to J.B. of Port Orange (113 miles), and 224 du to M.H. of Maitland (66 miles). GE 3, at 10–18; GE 17, at 18, 22–31. Each of the patients paid with either cash or cash equivalents and the prescriptions ranged in priced from $516 for 168 du to $672 for 224 du. GE 3, at 10–18.

Regarding these prescriptions, Mr. Parrado testified:

> In my professional opinion, nine different individuals who (1) travel, on average, more than 134 miles to Respondent's pharmacy; (2) obtain prescriptions for large, and in some cases, identical amounts of 30 milligram oxycodone tablets from the same physician on the same day; and (3) pay between $516 and $672 for the prescriptions creates a situation that is too suspicious and indicates the prescriptions were not issued for a legitimate medical purpose. Therefore, the combination of events creates an unresolvable red flag which, applying the standard of practice of pharmacy in Florida, precludes a reasonable prudent pharmacist from dispensing the prescriptions.

GA 1, at 5.

Next, Mr. Parrado discussed seven oxycodone 30 prescriptions issued by Dr. L.C. of the MD Plus Clinic and dispensed by Respondent on January 7, 2011. *Id.* at 5–6. The prescriptions were issued in the following amounts to the following patients: 224 du to J.T.,[29] 196 du to K.W., and 196 du to R.D., all of Jacksonville (197 miles); 224 du to I.P. of St. Augustine (161 miles); 196 du to E.M. of Zephyrhills (30 miles); 168 du to T.M. of MacClenny (183 miles); and 196 du to L.L. of Ocala (98 miles). GE 3, at 19–25. With the exception of the prescription issued to E.M., each of the prescriptions was paid for with cash or cash equivalents, with the prices ranging from $504 to $672 depending on the quantity. *See id.;* GE 17, at 31–35.

Regarding these prescriptions, Mr. Parrado testified:

> In my professional opinion, seven different individuals who (1) travelled, on average, more than 150 miles to Respondent's pharmacy; (2) obtained prescriptions for large, and in some cases, identical amounts of 30 milligram oxycodone tablets; (3) obtained these prescriptions from the same physician on the same day; and (4) six of them paid between $504 and $672 for the prescriptions creates a situation that is too suspicious and indicates the prescriptions were not issued for a legitimate medical purpose. Therefore, the combination of events creates an unresolvable red flag which, applying the standard of practice of pharmacy in Florida, precludes a reasonable prudent pharmacist from dispensing the prescriptions.

GA 1, at 6.

Government Exhibit 3 contains additional prescriptions for oxycodone 30 that were issued by Dr. Selvaraj during the month of January 2013. Mr. Parrado testified that the prescriptions were ''all for large quantities of highly addictive opioids.'' GA 1, at 6. Among the prescriptions were those dispensed to the following patients, each of whom paid in cash or cash equivalents and who resided in the following towns (with the approximate distance to Respondent):

L.J. of Cocoa (102 miles) for 168 du at a cost of $1344;

E.V. of New Smyrna (113 miles) for 112 du at a cost of $896;

A.B. of Lake City (172 miles) for 168 du at a cost of $1260[30];

S.C. of Jacksonville (197 miles) for 150 du at a cost of $1200;

T.W. of Milton (450 miles) for 168 du at a cost of $1344;

L.M. of Lakeland (same town) for 168 du at cost of $1344;

M.E. of Cantonment (474 miles) for 150 du at a cost of $1200;

R.B. of Palatka (148 miles) for 168 du at a cost of $1344;

R.R. of Lakeland for 140 du at a cost of $1120;

C.C. of Cocoa for 140 du at a cost of $1120;

[29] Mr. Parrado also reviewed a medical record for J.T. which was provided by Respondent. I discuss Mr. Parrado's testimony regarding the medical record later in this decision.

[30] Later in his declaration, Mr. Parrado provided additional information regarding the legitimacy of A.B.'s prescription based on a partial patient file which was provided by Respondent and submitted by the Government with its Request for Final Agency Action. I discuss his testimony later in this decision.

L.S. of MacClenny (183 miles) for 100 du at a cost of $800.

GE 3, at 45–46, 49–50, 55–56, 59–60, 69–80; GE 17, at 49, 54, 57.

Mr. Parrado opined that these and the other prescriptions [31] presented unresolvable red flags based on: (1) The distances the patients were travelling, (2) the large quantities and in some instances identical amounts, (3) their issuance by a single doctor; and (4) the prices the patients were paying. GA 1, at 7. He then opined that ''based on the standard of practice of pharmacy in Florida,'' Respondent's pharmacists should not have filled the prescriptions. *Id.*

Mr. Parrado also addressed the 17 prescriptions contained in GE 12. Each of these prescriptions were issued by Dr. Selvaraj of the MD Plus Clinic between October 24 and October 29, 2012 and include prescriptions for oxycodone 30, Dilaudid (hydromorphone 4 and 8 mg), MS Contin (morphine sulfate continuous release 60 and 100 mg), and methadone. *See* GE 12. Earlier in his declaration, Mr. Parrado testified that ''the normal daily dose of hydromorphone is 24 milligrams.'' GA 1, at 6.

The Exhibit includes prescriptions for 180 oxycodone 30 and 120 Dilaudid 8 issued by Dr. Selvaraj on October 29, 2012 (and filled by Respondent the same day) to K.P. of Yulee, Florida, a distance of 222 miles from Respondent. GE 12, at 1–4; GE 17, at 75. K.P. paid $1350 in cash or cash equivalents for the oxycodone and another $360 for the Dilaudid, for a total of $1710. GE 12, at 2, 4. Were K.P. a legitimate chronic pain patient, her yearly costs for these two drugs would have totaled more than $20,000.[32]

Also on October 29, Dr. Selvaraj issued prescriptions for 70 oxycodone 30 and 112 Dilaudid 4, which Respondent filled, to L.G. of Micanopy, a distance of 120 miles from Respondent. *Id.* at 5–8; GE 17, at 77. L.G. paid $525 for the oxycodone and $168 for the Dilaudid in cash or cash equivalents. *Id.* at 6, 8. The Exhibit also includes prescriptions issued on October 24, 2012 by Dr. Selvaraj to T.W. of Milton, a distance of 450 miles, which Respondent filled the same day. *Id.* at 31–34. T.W. paid in cash or cash equivalents $1260 for 168 oxycodone 30 and $420 for 140 Dilaudid 8 mg, for a total of $1680. *Id.* at 32, 34.

Exhibit 11 contains several additional prescriptions which were written by Dr. Selvaraj on October 29 and filled by Respondent the same day. These include prescriptions for 160 oxycodone 30 and 56 Dilaudid 4 issued to S.K. of St. Augustine, the latter being 161 miles from Respondent. GE 11, at 55–58. S.K. paid $1200 for the oxycodone and $84 for the Dilaudid in cash or cash equivalents. *Id.* at 56, 58.

Also on October 29, Dr. Selvaraj issued prescriptions for 84 Dilaudid 8 and 56 MS Contin 100 to D.K. of Interlachen (139 miles), which Respondent filled the same day.[33] *Id.* at 49–53. The same day, Dr. Selvaraj issued a prescription for 140 Dilaudid 8 to S.C. of Hawthorne (127 miles). *Id.* at 53; GE 17, at 51. S.C. filled the prescription the same day, paying $420 in cash or cash equivalents. *Id.* And on October 29, Dr. Selvaraj issued a prescription to S.H., also of Hawthorne, for 56 MS Contin 60, which Respondent filled the same day. GE 12, at 9. Thus, here again, six out-of-town patients, all of whom travelled at least 126 miles to obtain the drugs, presented a total of 10 prescriptions for schedule II controlled substances on a single day.

On October 26, Dr. Selvaraj issued a prescription for 168 Dilaudid 8 to S.C. of Pensacola, Florida, a distance of 470 miles from Respondent. *Id.* at 11; GE 17, at 80. Respondent filled the prescription the same day, for which S.C. paid $504 in cash or cash equivalents. *Id.* at 12. (Of further note, the dosing instruction called for one tablet every four hours, *id.* at 11, or 48 mg per day, more than double the normal daily dose).

The Exhibit contains still more prescriptions for Dilaudid 8 with quantities ranging from 112 to 168 du and dosing instructions that exceeded the 24 mg normal daily dose and which were issued to C.W–O. and C.M. of Interlachen (139 miles), *id.* at 13–14, 21–22; J.S. of Gainesville (132 miles), *id.* at 15–16; and L.L. and B.K. of Ocala (98 miles). *Id.* at 19–20, 29–30. With respect to these prescriptions, each of the patients paid in cash or cash equivalents, with the prescriptions costing between $336 and $420. *Id.*

With respect to the prescriptions in GE 12, Mr. Parrado testified:

> In my professional opinion, (1) the distances travelled by these customers; (2) the type and quantities of the controlled substances prescribed; (3) the fact that the prescriptions were all issued by the same physician; and (4) the high prices paid for oxycodone all created a situation that is too suspicious and indicates the prescriptions were not issued for a legitimate medical purpose. Therefore, the combination of events creates an unresolvable red flag which, applying the standard of practice of pharmacy in Florida, precludes the pharmacist from dispensing the controlled substances.

GA 1, at 7.

With respect to the prescriptions found at pages 15–26 of GE 12, which were the Dilaudid prescriptions issued to C.W–O., C.M., J.S., L.L., as well the prescriptions for Dilaudid and methadone issued to T.P. of Satsuma (141 miles from Respondent) and dispensed on October 25, 2012, Mr. Parrado offered additional testimony as to why these prescriptions presented unresolvable red flags. *Id.* He testified that:

> based on my experience, no pharmacy would be confronted with six legitimate prescriptions issued to five different customers, all of whom resided at least 84 miles away from the pharmacy and acquired their prescriptions on the same day from the same physician. In reviewing the prescription number (''RX numbers'') printed on the labels . . . I can conclude that, out of ten consecutively filled schedule II prescriptions dispensed by this pharmacy on the same day, six of them were for out of town customers. This combination of events creates an unresolvable red flag which, applying the standard of practice of pharmacy in Florida, precludes a reasonably prudent pharmacist from dispensing the prescriptions.

Id. at 7–8. This reasoning applies equally to the prescriptions Respondent dispensed on October 29, 2012, when six patients, all of whom resided at least 126 miles from Respondent, presented 10 prescriptions for schedule II narcotics.[34]

Government Exhibit 13 contains 10 prescriptions for schedule II controlled substances that were issued by Dr. Selvaraj on October 22, 2012 and dispensed by Respondent the same day. GE 13, at 11–30. Notably, four of the patients received prescriptions for both oxycodone 30 and Dilaudid 8.

Specifically, Respondent dispensed 112 du of oxycodone 30 and 168 du of Dilaudid 8 to H.W. of Satsuma (141 miles). *Id.* at 13–16. H.W. paid $840 for the oxycodone and $504 for the Dilaudid. *Id.* at 14, 16.

Respondent dispensed 100 du of oxycodone 30 and 84 du of Dilaudid 8 to C.T. of Jacksonville (197 miles). *Id.* at

[31] The exhibit also includes multiple prescriptions for smaller quantities of oxycodone 30 which ranged from 56 du to 84 du. *See generally* GE 3. Here again, however, the patients were generally travelling long distances and paying in cash for the prescriptions.

[32] Were K.P. a terminally ill patient, it does not seem likely that she would travel 222 miles each way to obtain her medication.

[33] D.K. paid $252 for the Dilaudid and $84 for the MS Contin. GE 11, at 50, 52.

[34] The Rx numbers for the October 29 prescriptions begin at 2010345 and end at 2010356, with two single number gaps. GE 12, at 10; GE 11, at 50; *see also* GE 11, at 52, 54, 56, 58; GE 12, at 2, 4, 6, 8.

17–20. C.T. paid $750 for the oxycodone and $252 for the Dilaudid. *Id.* at 18, 20.

Respondent dispensed 112 oxycodone 30 and 56 Dilaudid 8 to SW., also of Jacksonville. *Id.* at 21–24. SW. paid $840 for the oxycodone and $168 for the Dilaudid. *Id.* at 22, 24.

And Respondent dispensed 120 oxycodone 30 and 168 Dilaudid 8 to J.T. of San Mateo (136 miles), which is south of Jacksonville. *Id.* at 27–30. J.T. paid $900 for the oxycodone and $504 for the Dilaudid.[35] *Id.* at 28, 30.

Regarding these prescriptions (as well as those in this Exhibit dispensed on next day), Mr. Parrado noted that ''the combination of events surrounded [sic] these prescriptions created an unresolvable red flag.'' GA 1, at 8. Mr. Parrado specifically noted ''the distances travelled by these customers,'' ''the type and quantities of the controlled substances,'' ''that the prescriptions were all issued by the same physician,'' and ''the high prices paid for [the] oxycodone.'' *Id.* Mr. Parrado then added that:

the ten prescriptions dispensed by Respondent[ ] . . . on October 22, 2012, create a situation that is too suspicious and indicates the prescriptions were not issued for a legitimate medical purpose. Based on my experience, no pharmacy would be confronted with ten legitimate prescriptions issued to six different customers, all of whom resided at least 104 miles away from the pharmacy and acquired their prescriptions on the same day from the same physician. Additionally, based on my review of the RX numbers printed on the labels,[36] I can conclude that, out of ten consecutively filled schedule II prescriptions filled by this pharmacy on the same day, all ten were issued to out of town customers. Therefore, the combination of events surrounded [sic] these prescriptions creates an unresolvable red flag which, applying the standard practice of pharmacy in Florida, precludes a reasonably prudent pharmacists [sic] from dispensing the prescriptions.

Id. (citing GE 13, at 11–30).

Still other examples of this are found in GE 14, which contains eight prescriptions for various schedule II drugs which were written on December 5, 2012 by Dr. Selvaraj and dispensed by Respondent on the same day for patients who lived in Ocala (98 miles), Interlachen (139 miles), Middleburg (173 miles), Citrus Springs (88 miles), Jacksonville (197 miles), and Holt (432 miles). GE 14, at 35–50. All but one of the patients paid with cash or cash equivalents. *See id.* The prescriptions include oxycodone 30 for 168 du dispensed to J.D. of Middleburg for $1260 and 150 du dispensed to D.E. of Jacksonville for $1125. *Id.* at 39–40, 43–44. Other prescriptions include Dilaudid 8 for 180 du to D.J. of Holt for $540 and 168 du to T.W. of Interlachen for $504, both of which provided for a dosing approximately double the normal daily dose of 24 mg. *Id.* at 45–46, 49–50.

Other prescriptions in GE 14 include those issued on December 10, 2012 by Dr. Selvaraj to C.R. of Citrus Springs for 112 Dilaudid 8 and 168 oxycodone 30, which Respondent filled the same day. GE 14, at 1–4. C.R. paid $1260 for the oxycodone and $336 for the Dilaudid in cash or cash equivalents. *Id.* at 2, 4. Also on December 10, 2012, Dr. Selvaraj issued to M.E. of Cantonment (474 miles) a prescription for 150 du of oxycodone 30, which Respondent filled the same day. *Id.* at 9–10. M.E. paid $1125 in cash or cash equivalent for the oxycodone. *Id.* at 10.

On December 6, 2012, Dr. Selvaraj issued a prescription to C.C. of Cocoa (96 miles) for 140 oxycodone 30, which Respondent filled the same day. *Id.* at 25–26. C.C. paid $1050 in cash or cash equivalents for the drugs. *Id.* at 26.

Also on December 6, 2012, Respondent filled prescriptions issued the same day by Dr. Selvaraj to M.K. of Jacksonville for 112 Dilaudid 4, 168 oxycodone 30, and 56 MS Contin 60. *Id.* at 27–32. M.K. paid $1260 for the oxycodone, $168 for the Dilaudid, and $70 for the MS Contin, in cash or cash equivalents. *Id.* at 28, 30, 32.

On December 6, Respondent filled a prescription issued the same day by Dr. Selvaraj for 168 oxycodone 30 to L.B., who also provided a Jacksonville address. *Id.* at 33–34. L.B. paid $1260 in cash or cash equivalents for the drugs. *Id.* at 34. Of further noted, Respondent's dispensing software assigned the prescription number 2010572 to L.B.'s prescription and the numbers 2010573 through 2010575 to M.K.'s prescriptions, which suggests that the prescriptions were presented in close temporal proximity. *Id.* at 28, 30, 32.

On December 4, 2012, Respondent filled prescriptions issued the same day by Dr. Selvaraj for 112 oxycodone 30 and 84 Dilaudid 8 to J.M., of Satsuma. GE 14, at 55–58. J.M. paid $840 for the oxycodone and $252 for the Dilaudid in cash or cash equivalents.[37] *Id.* at 56, 58.

Regarding the prescriptions in this Exhibit, Mr. Parrado testified that they presented the red flags of ''the distances travelled by [the] customers,'' ''the types and quantities of the controlled substances''; ''that the prescriptions were all issued by the same physician,'' and ''the high prices paid for [the] oxycodone.'' GA 1, at 8. While Parrado explained that these ''must be resolved prior to dispensing,'' thus suggesting that the red flags were resolvable, he concluded otherwise with respect to the eight prescriptions Respondent dispensed on December 5, 2012. GA 1, at 8–9. Specifically, he testified that:

the eight prescriptions dispensed by Respondent[] on December 5, 2012 create a situation that is too suspicious and indicates the prescriptions were not issued for a legitimate medical purpose. In my experience, no pharmacy would be confronted with eight legitimate prescriptions issued to seven different customers, all of whom resided at least 93 miles away from the pharmacy and acquired their prescriptions on the same day from the same physician. Also, after reviewing the RX numbers printed on the labels, I can also conclude that, out of ten consecutive schedule II prescriptions filled by Respondent on the same day . . . at least eight were issued to out of town customers. This combination of events creates an unresolvable red flag which, applying the standard of practice of pharmacy in Florida, precludes a reasonably prudent pharmacist from dispensing the prescriptions.

Id. at 8–9 (citing GE 14, at 35–50).

Mr. Parrado offered similar testimony with respect to the prescriptions dispensed by Respondent on November 26 and 29, 2012, which are found in GE 15. Each of the eleven prescriptions dispensed by Respondent on November 26 was issued by Dr. Selvaraj on the same day, with the patients travelling from Gibsonton (38 miles), Hawthorne (2 patients; 127 miles), St. Augustine (161 miles), New Smyrna (113 miles), Yulee (222 miles), Lake City (172 miles), Davenport (28 miles) and Micanopy (120 miles).[38] GE 15, at 35–56. Here again, Mr. Parrado explained that:

[t]hese prescriptions contained red flags that are too suspicious and indicate the prescriptions were not issued for a legitimate

[35] Other prescriptions dispensed by Respondent on this day include 56 Dilaudid 8 to C.H. of Palm Bay, Florida (approximately 101 miles from Respondent) and 120 Dilaudid 8 to D.M. of Milton (450 miles), both of whom paid cash or with cash equivalents. GE 13, at 11–12, 29–30.

[36] The RX numbers were consecutively numbered from 2010300 through 2010309. *See* GE 13, at 14, 16, 18, 20, 22, 24, 26, 28, and 30.

[37] GE 14 contains a total of 31 prescriptions which were written by Dr. Selvaraj for schedule II drugs and were filled by Respondent during the month of December 2012. The closest any of the patients lived from the MD Plus Clinic and Respondent was 69 miles. *See* GE 14, at 51–52 (S.C., who provided a Bradenton address).

[38] The prescriptions included 180 oxycodone 30 and 120 Dilaudid 8 issued to K.P. of Yulee, who paid $1350 for the oxycodone and $360 for the Dilaudid, GE 15, at 43–46; as well 168 oxycodone 30 and 112 Dilaudid 4 issued to L.G. of Micanopy, who paid $1266 for the oxycodone and $168 for the Dilaudid; both patients paid with cash or cash equivalents. *Id.* at 44, 46; 53–56. The prescriptions also included 168 oxycodone 30 issued to A.B. of Lake City, who paid $1260 in cash or cash equivalents. *Id.* at 47–48.

medical purpose. In my experience, no pharmacy would be confronted with eleven legitimate prescriptions issued to nine different customers, seven of whom resided at least 113 miles away from the pharmacy and acquired their prescriptions on the same day from the same physician. In reviewing the RX numbers printed on the labels, I can conclude that, out of fifteen consecutive schedule II prescriptions filled by the pharmacy at that time, eleven were for customers who resided at least 28 miles away from the Respondent's pharmacy. Therefore, the combination of events surrounding the prescriptions dispensed on November 26, 2012 . . . creates an unresolvable red flag which, applying the standard of practice of pharmacy in Florida, precludes a reasonably prudent pharmacist from dispensing the prescriptions.

GA 1, at 9–10. *See also id.* at 9 (discussing prescriptions dispensed by Respondent on Nov. 29, 2012 to: S.M. of Lake City (172 miles) for methadone and MS Contin; B.J. of Navarre (463 miles) for MS Contin; S.D. of Valrico (28 miles) for Dilaudid; W.B. of Interlachen for Dilaudid (139 miles); and T.A. of Ocala (98 miles) for Dilaudid) (''The combination of events surrounded [sic] these prescriptions creates an unresolvable red flag which, applying the standard of practice of pharmacy in Florida, precludes a reasonably prudent pharmacists [sic] from dispensing the prescriptions.'').

As noted above, Mr. Parrado also reviewed the medical records of several patients (whose prescriptions are discussed above) that Respondent provided to the Government as proposed exhibits prior to deciding to waive its right to a hearing.[39] These included those of A.B., who travelled from Lake City (172 miles) and filled a prescription for 168 oxycodone 30 on January 21, 2013. According to A.B.'s record, she first saw Dr. Selvaraj on September 20, 2011; according to the progress note, at this visit he prescribed 168 oxycodone 30, 56 Xanax 1 mg (a benzodiazepine) and 56 Soma (carisoprodol) 350 mg to her. RE 9, at 344–46.[40]

As Mr. Parrado noted, on the day of her initial visit to the MD Plus Clinic and Dr. V.S., A.B. was subjected to a drug screen and tested negative for opiates/morphine and benzodiazepines. *Id.* at 314. As Mr. Parrado then explained, her negative test was:

an indication she may have been opiate naïve at the time she obtained her prescriptions. However, the medical records indicate [that] she was prescribed a large dose of oxycodone (168-thirty milligram tablets) and a large dose of alprazolam, a benzodiazepine (Xanax, 56-one milligram tablets). These are also red flags for diversion.

GA 1, at 12.

Mr. Parrado further noted that at A.B.'s first visit, she was also prescribed carisoprodol, a drug that was placed in schedule IV of the CSA effective on January 12, 2012.[41] *Id.; see also* DEA, *Schedules of Controlled Substances: Placement of Carisoprodol Into Schedule IV,* 76 FR 77330 (2011). As Mr. Parrado testified, ''[t]he combination of these three drugs (oxycodone, alprazolam, and carisoprodol) constitutes one of the most commonly abused drug cocktails in the State of Florida and is an additional red flag for diversion.'' GA 1, at 12.

Mr. Parrado further noted that the visit notes contained ''various diagnoses [which] appear inconsistent and suspicious.'' *Id.* Specifically, the note for A.B.'s Dec. 13, 2011 visit lists a diagnosis of DDD or Degenerative Disc Disease yet the note for her next visit on January 10, 2012 contains no such notation and instead suggests she had a rotator cuff/shoulder issue. *Compare* RE 9, at 339 with *id.* at 336. Yet the former diagnosis then reappears in the notes for a February 2012 visit ''without explanation.'' GA 1, at 12 (citing RE 9, at 334).

Also, the notes for A.B.'s October and November 2011 visits indicate that the diagnosis was spondylosis, as that is the justification provided by the physician for prescribing more than a ''72 hour dose of [a] controlled substance . . . for chronic non/malignant pain.'' RE 9, at 341 (Nov. 15, 2011 visit) and *id.* at 343 (Oct. 18, 2011 visit). Yet this diagnosis does not appear in the note for her December 2011 or any subsequent visit. *See id.* at 308 (3/19/13), 310 (2/18/13), 311 (1/21/13), 317 (12/21/12), 319 (11/26/12), 321 (9/21/12), 323 (8/7/12), 325 (7/9/12), 327 (6/8/12), 329 (5/11/12), 332 (3/6/12), 334 (2/7/12), 336 (1/10/12), 339 (12/13/11).

Mr. Parrado also found that some visit notes intermittently listed a diagnosis of a disc bulge. Specifically, he noted that this diagnosis was listed in the December 13, 2011 note, but not in the January 10 and February 7, 2012 visit notes, only to re-appear in the March and May 2012, before disappearing until the December 21, 2012 note. GA 1, at 12; *see also* RE 9, at 339, 336, 334, 332, 329, 327, 325, 323, 321, 319, 317.

Mr. Parrado also reviewed the medical files provided by Respondent for J.T., one of the three patients from Jacksonville who, on January 7, 2011, obtained a prescription for a large dose of oxycodone 30 (224 du) from Dr. Selvaraj and filled it at Respondent. Included as an attachment to Mr. Parrado's declaration were two more oxycodone prescriptions that J.T. obtained from Dr. Selvaraj and filled at Respondent. GA 1, at Attachment A, at 3–6. These prescriptions, which were issued and filled on July 15, 2011, provided J.T. with 224 oxycodone 30 and 84 Percocet 10/325 (oxycodone/acetaminophen). *Id.*

As Mr. Parrado explained, J.T.'s medical record for his July 15, 2011 visit states: ''Looks like he has taken too much of medication [S]oma or Xanax.'' RE 9, at 1646; *see also* GA 1, at 12. The visit note further states ''Slurred Speech'' and that ''Pt is reluctant to go to ER'' but that he ''went to [the] ER eventually.'' RE9, at 1646; *see also* GA 1, at 12. Yet the visit note also has check marks indicating that J.T. was ''alert'' and ''oriented.'' RE9, at 1646; *see also* GA 1, at 12. Dr. Selvaraj nonetheless noted that he was keeping J.T. on the ''[s]ame meds as before.'' RE 9, at 1647.[42]

Respondent's Challenges to the Government's Evidence on the Dispensing Allegations

Respondent raises a variety of challenges to the Government's evidence on the dispensing allegations. Foremost are its challenges to Mr. Parrado's testimony and his credibility. These include: (1) That he has provided testimony that is inconsistent with testimony he gave in another proceeding; (2) that his opinions are invalid because they were based on incomplete information in that he was not provided with the pharmacy's due diligence records on the patients, and (3) that he expressed opinions outside of his expertise when he commented on the medical records. Respondent's Reply to Govt. Request for Final Agency Action, at 2–13. Respondent also argues that the Government has not met its burden of proof because it has not shown: (1) That the prescriptions were invalid, and (2) that its pharmacists did not resolve the red flags prior to

[39] According Mr. Parrado's declaration, Respondent's owner had stated in a sworn affidavit that it ''obtain[s] copies of certain medical records from the prescribing physician for [Respondent's] files.'' GA 1, at 11.

[40] While labeled at RE 9, the patient files were actually submitted by the Government as attachments to Mr. Parrado's declaration. However, the files were not assigned a GE number.

[41] However, at the time of A.B.'s first visit on September 20, 2011, carisoprodol was controlled under Florida law. *See* Fla. Sta. Ann. § 893.03(4)(jjj) (2011).

[42] Mr. Parrado further noted that J.T.'s chart ''never explained why [he] would travel from Jacksonville to Edge[] in order to obtain narcotics, a trip of approximately 197 miles.'' GA 1, at 12–13.

dispensing the controlled substances.[43] *Id.* at 13–21.

The Challenges to Mr. Parrado's Credibility

Respondent challenges Mr. Parrado's credibility arguing that the opinions in his declaration ''are in critical respects a direct contradiction to the sworn testimony that [he] gave in the Hills Pharmacy matter on March 10, 2015.'' Resp.'s Reply, at 4. Of greatest potential consequence here [44] is Respondent's contention that Mr. ''Parrado's previous testimony directly contradicts his offered opinion that the prescriptions submitted by the Government in [this matter] contain red flags that are unresolvable.'' *Id.* at 6.

According to Respondent, in the *Hills Pharmacy* matter (*see* 81 FR 49816 (2016)), Mr. Parrado ''testified that all of the red flags, even in combination, are resolvable.'' Resp.'s Reply, 6. As support for this contention, Respondent cites to three excerpts from Mr. Parrado's testimony in that matter.

Contrary to Respondent's understanding, Mr. Parrado's testimony in the *Hills Pharmacy* matter is not part of the record in this proceeding. Rather, as 5 U.S.C. 556(e) makes clear, ''[t]he transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the *exclusive record for decision* in accordance with section 557 of this title'' (emphasis added).

While Respondent attached various snippets of Mr. Parrado's testimony to its Reply to the Government's Request for Final Agency Action, I previously made clear that because Respondent waived its right to a hearing, it is barred from submitting *any evidence* in refutation of the Government's case. Order at 5 (July 29, 2016). This includes evidence of prior and purportedly inconsistent statements. Notably, Respondent's counsel also represented the respondent in *Hills Pharmacy,* whose hearing was held on March 10–11, 2015 and prior to Respondent's decision to waive its right to a hearing in this matter, and the Government's prehearing statements informed Respondent that Mr. Parrado would also testify that numerous prescriptions presented unresolvable red flags (Gov. Supplemental Prehearing Statement, at 3). Thus, if Respondent's counsel believed that Mr. Parrado would then give materially inconsistent testimony in this proceeding, he should have pursued impeachment of the testimony through the hearing process.

However, lest there be any concern on the part of the Court of Appeals that I have credited testimony which is inconsistent with his prior testimony, I have reviewed Mr. Parrado's testimony in the *Hills* matter and find that Respondent both ignores relevant portions of his testimony and otherwise mischaracterizes those portions cited in its Reply. For example, in its direct examination, the Government asked Mr. Parrado: ''are some red flags unresolvable?'' Tr. 60, *Hill Pharmacy, L.L.C.,* 81 FR 49815 (2016). After answering ''yes,'' Mr. Parrado was asked: ''[c]an you cite any examples?'' *Id.* Mr. Parrado answered: ''[r]ight off the top of my head, a group of multiple people traveling a long distance, all getting the exact same or very similar prescriptions from one physician and all coming in with very, very large quantities of cash, that would be unresolvable to me.'' *Id.* at 60–61. Then asked by the Government: ''And those would be prescriptions that you as a pharmacist would refuse to fill?'' Mr. Parrado answered: ''[a]bsolutely.'' *Id.* at 61. Mr. Parrado offered similar testimony that a prescription for oxycodone 30 which was presented by a patient who had travelled from St. Augustine and paid $784 in cash raised an unresolvable red flag when these red flags were occurring ''over and over every day.'' *Id.* at 70–71. *See also id.* at 84 (''[C]ould something like this happen once occasionally a person travels a long way and pays cash? Of course. Does it happen consistently day after day after day? No. That's what would be a nonresolvable red flag.'').

It is true that when asked on cross-examination if ''every red flag you've talked about today could potentially be resolved?'' Mr. Parrado's answered ''[t]hat's correct.'' Tr. 127. However, the question did not ask if the combination of the red flags (*i.e.,* that multiple patients, who travelled long distances and obtained prescriptions for large doses of oxycodone 30, a known drug of abuse, from the same doctor, presented those prescriptions to Respondent on the same day and at times in sequence, and were willing pay large sums of cash for the drugs) was resolvable.[45] Accordingly, I reject Respondent's contention that Mr. Parrado has given prior inconsistent testimony on the issue of whether certain prescriptions presented unresolvable red flags.

Respondent also argues that Mr. Parrado's opinions were based on inadequate information because he ''did not review any of Respondent's Due Diligence Checklists . . . when formulating his opinion'' and relied solely on the prescriptions and the printouts showing the distances between where the patients resided and Respondent. Resp. Reply, at 7. Once again, Respondent relies on Mr. Parrado's testimony from the *Hills* matter [46] notwithstanding that it is not evidence in the proceeding.

However, here too, the Government had disclosed to Respondent the substance of Mr. Parrado's testimony in this proceeding prior to Respondent's decision to waive the hearing and Respondent's counsel was familiar with Parrado's testimony in the *Hills* matter.

[43] Respondent also argues that I should reject the Government's request that I draw the adverse inference that Respondent's pharmacists did not resolve the red flags because Respondent did not produce any documentary evidence to support the assertions in the affidavits of its pharmacists that they resolved red flags. Respondent's Reply, at 21–24. I discuss my resolution of this issue later in this decision.

[44] Respondent also takes issue with Mr. Parrado's testimony that if a pharmacist does not document the resolution of red flags on the prescription itself, '''you can assume that the red flag was not resolved,''' arguing that there is no authority for this assertion and that ''pharmacists are also permitted to and commonly do maintain documentation in a separate file or in a computer system.'' Resp. Reply, at 4–5 (GA 1, at ¶ 13). Respondent further notes Mr. Parrado's testimony in *Hills Pharmacy* acknowledging that under Florida law governing a pharmacist's obligation to verify a patient's identity, a pharmacist can make a Xerox copy of the patient's identity and need not also document his resolution of this issue on the prescription. *Id.*

The *Hills Pharmacy* transcript is not part of the record of this proceeding, and in any event, because I find credible Mr. Parrado's testimony to the effect that the combination of red flags attendant with many of the prescriptions which were presented to the pharmacy on the same day or days rendered the red flags unresolvable, the issue of whether the pharmacists documented their attempted resolution of red flags is irrelevant.

[45] Respondent's counsel points to a further colloquy in the *Hills* matter, in which on cross-examination, he asked: ''Well, in fact . . . you said everything could be a red flag, right?'' and Mr. Parrado answered: ''And everything could be resolvable.'' Tr. 145 (quoted in Resp. Reply, at 6). However, Respondent's counsel then stated: ''No. Am I not asking'' to which Mr. Parrado replied: ''I'm sorry if I misunderstood your question.'' Tr. 145. In response, Respondent's counsel again asked: ''You have said everything could be a red flag, right?'' prompting the Government to object that Mr. Parrado ''did not say that'' and the ALJ sustained the objection. *Id.* The colloquy thus does not support Respondent's assertion that Mr. Parrado ''testified that all of the red flags, even in combination, are resolvable.'' Resp. Reply., at 6.

[46] That testimony involved a series of questions in which Mr. Parrado acknowledged that in determining ''whether a pharmacist followed the standard practice of pharmacy in filling a prescription, it would be helpful . . . to know what the pharmacist knew about the patient,'' the patient's condition, ''the patient's history with opioids'' and what the pharmacist knew about the prescriber. Tr. 177–78, *Hills Pharmacy,* 81 FR 49816. Even considering Mr. Parrado's testimony in *Hills,* as Mr. Parrado explained in this proceeding, ''given the nature and pattern of the red flags associated with these prescriptions, it appears the clinic and/or physicians may be complicit in the diversion of controlled substances. Thus, even if the pharmacist contacted the physicians to verify the prescriptions, that act would not resolve all the red flags presented by the prescriptions.'' GA 1, at 10.

Thus, if Respondent believed that Mr. Parrado's testimony in *Hills* was inconsistent with his testimony in this proceeding that numerous prescriptions presented unresolvable red flags, he should have pursued this by going to hearing where he could have cross-examined Mr. Parrado.

Moreover, as Mr. Parrado explained:

> While some red flags can be resolved, there are other red flags (or combination and patterns of red flags) that a pharmacist cannot resolve by contacting the physician, running a State prescription monitoring search, or obtaining more information from the patient. . . . For example, if you are presented with (1) a group of patients who all travelled a significant distance to the pharmacy and/or to the physician to obtain controlled substance prescriptions; (2) patients arriving at the pharmacy on the same day with prescriptions from the same doctor for the same controlled substances; (3) and the controlled substance is a highly addictive and highly diverted drug, such a combination of facts indicated that the physician may be complicit in the diversion. As a result, a call to the physician to verify the prescription would not resolve the red flag. The phone call may establish that there is a relationship between the patient and the practitioner, but there still may not be a legitimate patient-physician relationship, and the prescription may not be for a legitimate medical purpose.

GA 1, at 4–5. Indeed, as found above, Mr. Parrado identified multiple instances in which prescriptions were filled by Respondent, notwithstanding that the combination of red flags rendered the red flags unresolvable. Unexplained by Respondent is why, given the compelling level of suspicion created by the combinations of red flags, knowing the patient's history with opioids or purported condition would alter the conclusion that Dr. Selvaraj issued the prescriptions without a legitimate medical purpose.

Finally, Respondent argues that Mr. Parrado provided opinions outside of the scope of his expertise as a pharmacist when he offered various opinions on the contents of the medical records. Resp. Reply, at 11–13. However, with respect to Pt. A.B., it was entirely within Mr. Parrado's expertise as a pharmacist to note that she was prescribed a large dose of oxycodone, notwithstanding that on the day of her initial visit to Dr. Selvaraj she was subjected to a drug test and tested negative for opiates thus suggesting that she was opiate naïve, as well as that she was prescribed a large dose of alprazolam, while also testing negative for benzodiazepines. It was also clearly within Mr. Parrado's expertise as a pharmacist to note that the medical records show she was prescribed oxycodone, alprazolam and carisoprodol, and this combination of drugs ''constitutes one of the most commonly abused drug cocktails in the State of Florida and is an additional red flag for diversion.'' GA 1, at 12. Indeed, under the rules of the Florida Board of Pharmacy, a pharmacist is required to conduct prospective drug use review on each prescription and identify such issues as ''[o]ver-utilization,'' ''[d]rug-drug interactions,'' ''[i]ncorrect drug dosage,'' and ''[c]linical abuse/misuse.'' Fla. Admin. Code R.64B16–27.810 (1).

As for Mr. Parrado's discussion of Dr. V.S's frequently changing diagnoses of A.B., with the diagnoses disappearing only to reappear months later, even a lay person can recognize the inherently suspicious nature of this. While Respondent now argues that it did not obtain the records ''so that [its] pharmacists could review them and evaluate the physician's medical judgment, but . . . to ensure that a valid patient-prescriber relationship exist,'' Resp. Reply, at 12; Respondent fails to address why any pharmacist who reviewed these records [47] would believe that a valid patient-prescriber relationship existed given: (1) That A.B. tested negative for opiates at the first visit and yet Dr. Selvaraj prescribed a large dose of oxycodone to her, (2) that Dr. Selvaraj also prescribed other controlled substances to A.B., including alprazolam and carisoprodol which were known to be highly abused as a drug cocktail and did so at her first visit, and (3) the changing nature of the diagnoses.

Likewise, with respect to J.T., given that a pharmacist is required under the Board's rule to conduct prospective drug utilization review on every prescription and identify such issues as ''[c]linical misuse and abuse,'' Fla. Admin. Code R. 64B16–27.810, it is clearly within Mr. Parrado's expertise to opine on the appropriateness of dispensing the prescriptions (for 224 oxycodone 30 and 84 Percocet 10) given that J.T.'s medical record documents that his speech was slurred and that it ''looks like he has taken too much medication [S]oma or Xanax.'' Accordingly, I reject Respondent's contention with respect to Mr. Parrado's discussion of the medical records of these two patients.

[47] Mr. Parrado acknowledged that ''it is not within the standard of practice of pharmacy to regularly review medical records.'' GA 1, at 14. However, as he also explained, ''if Respondent's pharmacist had reviewed these records, they would have had additional reasons *not* to fill the prescriptions for controlled substances issued to A.B. [and] J.T.'' *Id.* Of further note, I adopt Mr. Parrado's discussion of the medical records only with respect to A.B. and J.T.

The Recordkeeping Allegations

In support of its recordkeeping allegations, the Government submitted the declaration of a Diversion Investigator (DI) who participated in the execution of the AIW at Respondent. GA 2, at 2. According to the DI:

> During the execution of the AIW, DEA personnel conducted various activities on the premises, including copying/seizing pharmacy records, receipts, and prescriptions. . . . Also seized was a copy of Respondent's controlled substance inventory. *See* GE 6. Based on this inventory, prescriptions, and the records of receipt which were provided by the pharmacy, DEA conducted an audit of Respondent's controlled substances. The results of the audit showed significant overages of seven different controlled substances[:] oxycodone 30 mg; methadone 10 mg; hydromorphone 4 mg and 8 mg; and morphine 30 mg, 60 mg, and 100 mg. *See* GE 4. For instance, the audit showed that Respondent had dispensed and/or disposed of twice as many 30-milligram oxycodone tablets as it had acquired.

Id.

The Government's other evidence regarding the audit includes a computation chart created by the DI showing the audit results for these drugs and dosage forms for the period of June 10, 2011 through February 4, 2013 which purports to show various overages. GE 4. Also submitted for the record is a drug inventory taken on June 10, 2011 which is signed by Respondent's pharmacy manager, GE 5, and a document which appears to be a spreadsheet of the schedule II orders placed by Respondent during 2011 (which includes the name of the distributor, the transaction date, order form number, quantity and package size, and the drug and its dosage). GE 6, at 1–5. While this Exhibit also includes the supplier's copy of several schedule II order forms [48] (as well as an invoice and a notice from an unidentified distributor stating that it was not filling the entire order), the Exhibit does not include a closing inventory. Moreover, at no point in her declaration did the DI state that a closing inventory was done on February 4, 2013 as listed on the computation chart. *See* GA 2, at 2. Nor did she otherwise explain how she performed the audit. *See id.* Accordingly, the Government has not

[48] DEA Schedule II order forms have three copies: A purchaser is required to submit the first two copies to the supplier and retain the third copy for its records. 21 CFR 1305.13)(a); *see also id.* at 1305.17(a). The supplier retains copy one and submits copy two to the Special Agent in Charge ''in the area in which the supplier is located.'' *Id.* § 1305.13(d). If, however, the supplier does not accept the order, ''the supplier must return'' copies one and two ''to the purchaser with a statement as to the reason.'' *Id.* § 1305.15(b).

established a sufficient foundation for giving weight to the audit results.

The DI, however, provided credible testimony that Respondent was missing various schedule II records. According to the DI, ''during the execution of the AIW, Respondent was unable to locate any records of receipt for 2011,'' and when Respondent's attorney was asked if the records ''could be located, [he] replied that he 'could not make records appear if they weren't here.' '' *Id.* The DI further testified that the attorney ''then called Respondent's [PIC] who confirmed that the receipt records for 2011 could not be located.'' *Id.*

According to the DI, she subsequently obtained information from the Agency Automation of Reports and Consolidated Orders System (ARCOS). *Id.* (discussing GE 3, at 1–5). Under DEA regulations, registered manufacturers and distributors are required to report to the Agency both acquisition and distribution transactions for various controlled substances included all schedule II drugs. 21 CFR 1304.33(c). The information was compiled in the document found at GE 6, at 1–5, which lists each filled schedule II order by distributor, transaction date, order form number, drug name, package size and quantity for the year 2011. Reviewing the list, the DI determined that Respondent was missing its Copy 3 for 103 different orders, these being the orders placed on or after February 4, 2011.[49] GA 2, at 3.

The DI also testified ''that Respondent failed to properly complete various'' Schedule II order forms ''by failing to state the number of packages shipped and/or the date shipped.'' *Id.* As an example, the DI cited an order form (GE 6, at 6) Respondent submitted on February 8, 2011 to Lifeline Pharmaceutical on which it listed two separate orders for 24 packages of 100 dosage units of oxycodone 30 mg tablets. GA 2, at 3. Apparently referring to the second line item which contains no entries for the national drug code, packages shipped, and date shipped, the DI testified that the order form ''shows an order for 24 packages of oxycodone 30 mg tablets but fails to show . . . how many, if any, of those packages were shipped.'' *Id.* The DI made the same assertion with respect to line items on several other order forms, noting that the order forms did not show the ''quantity received or dates received.'' *Id.*

According to the DI, these were violations of 21 CFR 1305.13(e). *Id.* The Government did not, however, produce any evidence showing that any portion of these particular line items was actually shipped.

The DI also testified that she found an order form which listed Respondent as the supplier of 6 packages of 100 du of Dilaudid 8 to Bellco Drug Corp. of North Amityville, New York, but that Respondent did not list the number of packages shipped and the date shipped. GA 2, at 3 (citing GE 9). The DI alleged that this was a violation of 21 CFR 1305.15(b). *Id.* at 4. The DI also testified that she found that Respondent ''failed to forward Copy 2 of the form to the Special Agent in Charge . . . of the DEA in the area where Respondent is located,'' which she alleged was a violation of 21 CFR 1305.13(d). *Id.* However, while the Government submitted a copy of a Return Authorization Form issued by Bellco which authorized Respondent to return the drugs to it, GE 8, at 2; it provided no further evidence that Respondent actually returned the drugs.

Finally, the DI testified that she examined records of Respondent's orders that were placed using the Controlled Substances Ordering System, which is an electronic system for ordering controlled substances. GA 2, at 4. According to the DI, ''Respondent presented only paper printouts and did not have any complying electronic data'' for 42 orders that it placed using the system. *Id.* at 4–5. The DI alleged that this was a violation of 21 CFR 1305.27(a).

Discussion

Under the CSA, ''[t]he Attorney General may deny an application for [a practitioner's] registration . . . if the Attorney General determines that the issuance of such registration . . . would be inconsistent with the public interest.'' 21 U.S.C. 823(f). In the case of a retail pharmacy, which is deemed to be a practitioner, *see* id. § 802(21), Congress directed the Attorney General to consider 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 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.

Id.

''[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'' to deny an application. *Id.; see also MacKay* v. *DEA,* 664 F.3d 808, 816 (10th Cir. 2011); *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); *see also Hoxie,* 419 F.3d at 482.[50]

Under the Agency's regulation, ''[a]t any hearing for the denial of a registration, the Administration shall have the burden of proving that the requirements for such registration pursuant to . . . 21 U.S.C. [§]823 . . . are not satisfied.'' 21 CFR 1301.44(d). In this matter, while I have considered all of the factors, the Government's evidence in support of its *prima facie* case is confined to factors two and four.[51] I find that the record provides

[49] While the ARCOS data includes orders placed in January 2011 and on February 1, 2011, *see generally* GE 6, at 1; the DI did not include any orders before February 4, 2011, GA 2, at 3; as federal law only requires that an order form be ''preserve[d] . . . for a period of two years.'' 21 U.S.C. 828(c)(2).

[50] 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 or applicant'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. Likewise, findings under a single factor can support the denial of an application.

[51] As to factor one, there is no evidence that the Florida Department of Health has either made a recommendation to the Agency with respect to Respondent, or taken any disciplinary action against Respondent. *See* 21 U.S.C. 823(f)(1). However, even assuming that Respondent currently possesses authority to dispense controlled substances under Florida law and thus meets a prerequisite for obtaining a new registration, this finding is not dispositive of the public interest inquiry. *See Mortimer Levin,* 57 FR 8680, 8681 (1992) (''[T]he Controlled Substances Act requires that the Administrator . . . make an independent determination [from that made by state officials] as to whether the granting of controlled substance privileges would be in the public interest.''). Accordingly, this factor is not dispositive either for, or against, the granting of Respondent's application. *Paul Weir Battershell,* 76 FR 44359, 44366 (2011) (citing *Edmund Chein,* 72 FR 6580, 6590 (2007), *pet. for rev. denied, Chein* v. *DEA,* 533 F.3d 828 (D.C. Cir. 2008)).

As to factor three, I acknowledge that there is no evidence that Respondent, its owner, its manager, or any of its pharmacists, has been convicted of an offense under either federal or Florida law ''relating substantial evidence that Respondent's pharmacists violated their corresponding responsibility when they dispensed many of the prescriptions at issue. I also find that the Government has established by substantial evidence that Respondent has failed to maintain accurate records, as well as other violations. Accordingly, I conclude that the Government has made a *prima facie* showing that granting Respondent's pending application ''would be inconsistent with the public interest.'' 21 U.S.C. 823(f). Because Respondent's written statement of position and its accompanying affidavits were not timely submitted and Respondent has not otherwise shown good cause for its untimely submission, I hold that Respondent has not rebutted the Government's *prima facie* showing. Because I find that Respondent's misconduct is egregious, I will order that Respondent's pending application be denied.

Factors Two and Four—The Respondent's Experience in Dispensing Controlled Substances and Compliance With Applicable Laws Related to Controlled Substances

The Dispensing Allegations

''Except as authorized by'' the CSA, it is ''unlawful for any person [to] knowingly or intentionally . . . manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance.'' 21 U.S.C. 841(a)(1). Under the Act, a pharmacy's registration authorizes it ''to dispense,'' *id.* § 823(f), which ''means to deliver a controlled substance to an ultimate user . . . by, or pursuant to the lawful order of, a practitioner.'' *Id.* § 802(10).

The CSA's implementing regulations set forth the standard for a lawful controlled substance prescription. 21 CFR 1306.04(a). Under the regulation, ''[a] prescription for a controlled substance to be effective must be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice.'' *Id.* Continuing, the regulation provides that:

[t]he responsibility for the proper prescribing and dispensing of controlled substances is upon the prescribing practitioner, *but a corresponding responsibility rests with the pharmacist who fills the prescription.* 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 section 309 of the Act (21 U.S.C. 829) and the person *knowingly filling* such a purported prescription . . . shall be subject to the penalties provided for violations of the provisions of law relating to controlled substances.[52]

Id. (emphasis added).

As the Agency has made clear, to prove a violation of the corresponding responsibility, the Government must show that the pharmacist acted with the requisite degree of scienter. *See JM Pharmacy Group, Inc., d/b/a Farmacia Nueva and Best Pharma Corp.,* 80 FR 28667, 28669 (2015). Thus, the Government can prove a violation by showing either that: (1) The pharmacist filled a prescription notwithstanding his/her actual knowledge that the prescription lacked a legitimate medical purpose; or (2) the pharmacist was willfully blind (or deliberately ignorant) to the fact that the prescription lacked a legitimate medical purpose. *See id.* at 28671–72. As to establishing that a pharmacist acted with ''willful blindness, proof is required that: '(1) the defendant must subjectively believe that there is a high probability that a fact exists and (2) the defendant must take deliberate actions to avoid learning of that fact.' '' *Id.* at 28672 (quoting *Global-Tech Appliances, Inc.,* v. *SEB S.A.,* 563 U.S. 754, 769 (2011)).

As found above, Mr. Parrado gave extensive testimony that numerous prescriptions that were written by Dr. Selvaraj (as well as other MD Plus doctors) presented ''red flags'' which created a strong suspicion as to whether the prescriptions were issued for a legitimate medical purpose. While Mr. Parrado testified that some of the red flags were potentially resolvable, he also identified numerous prescriptions that presented multiple red flags such that the combination of red flags created a level of suspicion of such compelling force that the issue of the legitimacy of the prescriptions was unresolvable. Specifically, Mr. Parrado identified as such those instances when on the same day, multiple patients, who had travelled long distances, presented prescriptions for large quantities of oxycodone 30 (and Dilaudid) which had been written by Dr. Selvaraj of the pain clinic, which was located next door and was owned by the brother of Respondent's owner, and were willing to pay large sums in cash (or cash equivalents) for the prescriptions.[53]

Respondent nonetheless argues that the Government's proof was inadequate to prove that its pharmacists knowingly dispensed (or were willfully blind to the fact) that the prescriptions lacked a legitimate medical purpose. Resp. Reply, at 15–18. It suggests that the Government must put forward ''direct evidence'' to show that prescriptions were issued unlawfully. *Id.* at 15.

Contrary to Respondent's understanding, the invalidity of a prescription can be proved by circumstantial evidence. *See, e.g., United States* v. *Leal,* 75 F.3d 219, 223 (6th Cir. 1996); *United States* v. *Veal,* 23 F.3d 985, 988 (6th Cir. 1994) (per curiam); *United States* v. *Hayes,* 595 F.2d 258, 261 (5th Cir. 1979). Indeed, Respondent undercuts its argument when it notes that in *Holiday CVS,* ''[t]he Agency has also found . . . that certain prescriptions were invalid due to a particular combination of 'red flags' apparent during a dispensing event: Multiple patients with addresses outside the state coming to the pharmacy to pay cash for the same 'high alert' medications in the same or similar quantities written by the same physician, who practices hundreds of miles away from the pharmacy.'' Resp. Reply, at 15–16 (citing 77 FR at 62318, 62345 n.105). Thus, circumstantial evidence can support a finding that a controlled substance prescription was issued without a legitimate medical purpose and that a pharmacist dispensed the prescription either having actual knowledge of that fact or acted with willful blindness to that fact.

Respondent attempts to distinguish *Holiday CVS,* arguing that the combination of red flags at issue there differs significantly from those at issue here. *Id.* at 16. Specifically, Respondent argues that in *Holiday CVS,* the patients travelled long distances from the doctors to the pharmacies, whereas here, the patients filled their prescriptions next door to their doctor and thus did what most people do—fill their prescription at a pharmacy near the doctor's office. *Id.* at 16–17. It also

to the manufacture, distribution or dispensing of controlled substances.'' 21 U.S.C. 823(f)(3). However, there are a number of reasons why even a person who has engaged in criminal misconduct may never have been convicted of an offense under this factor, let alone prosecuted for one. *Dewey C. MacKay,* 75 FR 49956, 49973 (2010), *pet. for rev. denied, MacKay* v. *DEA,* 664 F.3d 808 (10th Cir. 2011). The Agency has therefore held that ''the absence of such a conviction is of considerably less consequence in the public interest inquiry'' and is therefore not dispositive. *Id.*

[52] 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, the provision 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)).

[53] Because I agree with Mr. Parrado's analysis that numerous prescriptions presented combinations of red flags that were unresolvable even if the pharmacist called Dr. Selvaraj (and the other MD Plus doctors) or questioned the patient, the Government's failure to produce the patient profiles or the so-called ''due diligence checklists'' is irrelevant.

argues that because the MD Plus Clinic (whose doctors issued the overwhelming majority of the prescriptions) was a pain management clinic, ''it is not reasonable to expect Respondent's pharmacists to be suspicious when a higher than average number of customers from the clinic next door fill a prescription for an opioid, even if the quantity is high.'' *Id.* at 17. And finally, Respondent argues that in *Holiday CVS,* the prescriptions were presented by persons from out-of-state and that ''[n]one of the prescriptions in this case were filled for customers from out-of-state'' and that ''the customers who travelled from *out-of-town* did so to visit his or her physician in a particular specialty practice, not Respondent's pharmacy.'' *Id.* at 17–18. Respondent then argues that the ''customers also travelled a significantly shorter distance, by hundreds of miles, to visit the prescribing physician than the customers traveled in *Holiday CVS.*'' *Id.* at 18.

Respondent's proffered distinctions are not persuasive. As for the distinction that the customers were not from out-of-state and did not travel as far as the customers did in *Holiday CVS,* many of them nonetheless travelled substantial distances from their residences to the MD Plus Clinic to obtain the prescriptions when undoubtedly, there were legitimate pain management clinics located far closer to where they lived. As for the argument that the customers did not travel long distances to fill their prescriptions but simply did so next door, putting aside that it is not normal that patients would travel long distances to see a doctor for a legitimate medical condition unless that doctor was a specialist of some renown, the fairer inference, given that the clinic was owned by the brother of Respondent's owner, is that the patients filled the prescriptions at Respondent because they knew they could do so with no questions asked.

Nor am I persuaded by Respondent's contention that because the MD Plus Clinic was a pain clinic, it was not reasonable for Respondent's pharmacists to be suspicious of the prescriptions, even though they were frequently for a high quantity. As found above, doctors employed by Victor Obi, the brother of Respondent's owner, accounted for more than 93 percent of the schedule II dosage units dispensed by Respondent and Dr. Selvaraj's prescriptions alone accounted for nearly 85 percent of the schedule II dosage units dispensed. Significantly, Dr. Selvaraj had no specialty training in pain management and yet repeatedly prescribed large quantities of highly abused schedule II narcotics, to include oxycodone 30 and Dilaudid. And finally, the evidence shows that the patients were willing to pay large sums in cash or cash equivalents (frequently more than $1,000) for the prescriptions, which, if they were legitimate chronic pain patients, they would need on a monthly basis.

In short, the combination of red flags attendant with many of the prescriptions provided compelling circumstantial evidence that the prescriptions issued by Dr. Selvaraj lacked a legitimate medical purpose. Because I agree with Mr. Parrado that in various situations, the combination of red flags rendered the issue of the prescriptions' legitimacy unresolvable, I conclude that Respondent's pharmacists had actual knowledge that the prescriptions lacked a legitimate medical purpose. 21 CFR 1306.04(a). And because many of the prescriptions were clearly illegitimate, it does not matter that the Government, in support of its theory that some of the prescriptions presented resolvable red flags which were not resolved, produced only the prescriptions (which lacked documentation that the red flags were resolved) and no other evidence showing that the red flags were unresolved. As the Fifth Circuit has explained:

> Verification by the issuing practitioner on request of the pharmacist is evidence that the pharmacist lacks knowledge that the prescription was issued outside the scope of professional practice. But it is not an insurance policy against a factfinder's concluding that the pharmacist has the requisite knowledge despite a purported but false verification. . . . What is required by [a pharmacist] is the responsibility not to fill an order that purports to be a prescription but is not a prescription within the meaning of the statute because he knows that the issuing practitioner issued it outside the scope of medical practice.

United States v. *Hayes,* 595 F.2d 258, 260 (5th Cir. 1979). I therefore also reject Respondent's contention that the Government has not proved that its pharmacists violated 21 CFR 1306.04(a) because the Government did not present sufficient evidence to show that the red flags were not resolved prior to dispensing the prescriptions.[54] Reply to Request for Final Agency Action, at 18–19.

I therefore find that the record supports the conclusion that Respondent's pharmacists dispensed numerous prescriptions for schedule II narcotics, including oxycodone 30 and Dilaudid, knowing that the prescriptions were not issued for a legitimate medical purpose by a practitioner acting in the usual course of professional practice. 21 CFR 1306.04(a). This finding is relevant in assessing both Respondent's experience in dispensing controlled substances (Factor Two) and its compliance with applicable laws related to controlled substances (Factor Four). Most significantly, Respondent's dispensing violations are egregious and provide reason alone to conclude that its registration ''would be inconsistent with the public interest.'' 21 U.S.C. 823(f).

The Recordkeeping Allegations

The Government further argues that Respondent failed to keep accurate records. Request for Final Agency Action, at 28–30. As support for the allegations, the Government argues that after the DIs conducted the audit, Respondent ''was unable to account for significant overages [or] shortages of oxycodone, hydromorphone, and morphine.'' *Id.* at 28. It further argues that Respondent: (1) Failed to properly maintain its DEA Schedule II Order Forms to show the date on which it received controlled substances and the quantity received; (2) failed to retain Copy 3 of the Order Forms ''to the supplier''; (3) ''failed to accurately

[54] Because I conclude that many of the prescriptions presented unresolvable red flags and that the Respondent's pharmacists knew the prescriptions lacked a legitimate medical purpose, I need not address Respondent's contention that imposing liability based on its pharmacists' failure to document the resolution of red flags on the prescriptions ''defies the fundamental notion of fair notice.'' Reply to Request, at 19. In short, Respondent and its pharmacists had fair notice of what was required of them from the text of the Agency's corresponding responsibility rule, which provides that ''[a]n 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 section 309 of the Act (21 U.S.C. [§]829) and the person knowingly filling such a purported prescription, as well as the person issuing it, shall be subject to the penalties provided for violations of the provisions of law relating to controlled substances.'' 21 CFR 1306.04(a).

Based on Respondent's failure to produce evidence showing that it had resolved the red flags, the Government seeks an adverse inference that Respondent did not resolve the red flags. Req. for Final Agency Action, at 35–36. However, because I find persuasive Mr. Parrado's testimony that the circumstances surrounding the presentation of many of the prescriptions rendered the suspicion created by the attendant red flags unresolvable, I need not address Respondent's contention that the Government was inappropriately seeking to shift the burden of proof to it. *See* Reply to Req., at 21.

As for the Government's contention that Respondent dispensed prescriptions ''in an improper manner,'' because the prescriptions as issued lacked the patient's address, *see* Req. for Final Agency Action, at 28; for reasons explained elsewhere, I reject its contention. *See Superior Pharmacy I and Superior Pharmacy II,* 81 FR at 31336 n.58.

complete executed'' Schedule II Order Forms; (4) ''failed to accurately complete'' a Schedule II Order form ''when it acted as a supplier of controlled substances'' and ''failed to forward this form to the local DEA Special Agent in Charge''; and (5) failed to electronically link its receipts to the original orders it placed through the Controlled Substance Order System. *Id.* at 29–30.

As for the audit allegations, as found above, the Government's evidence does not provide a sufficient foundation to consider the audit results. I thus reject the audit allegations.

Nonetheless, the Government did put forward substantial evidence to support several of its recordkeeping allegations. As found above, during the execution of the AIW, Respondent could not produce its records of receipts for calendar year 2011 and upon review of the orders that were reported to the Agency's ARCOS database by Respondent's suppliers, the DI ultimately determined that Respondent was missing its copy of the Schedule II Order Forms (Copy 3) for 103 orders which were placed after February 4, 2011. Respondent was required to maintain these documents for two years. *See* 21 U.S.C. 828(c)(2) (''Every person who gives an order required under subsection (a) of this section shall, at or before the time of giving such order, make or cause to be made a duplicate thereof on a form to be issued by the Attorney General . . . and shall, if such order is accepted, preserve such duplicate for a period of two years and make it available for inspection and copying . . . .''). Respondent thus violated federal law by failing to maintain these order forms.[55]

[55] As for the allegations that various Order Forms contained entries which showed that drugs were ordered but that Respondent never completed the form to show how much of the order was received and the date it was received, the Government put forward no evidence to show that Respondent received any portion of the particular line items for which no quantity or date of receipt was noted. To the extent the Government believes that Respondent was obligated to note on the Order Form that no part of a particular line item was received, as I have previously explained, the regulation requires only that a purchaser record ''the number of commercial or bulk containers furnished on each item and the dates on which the containers are received by the purchaser.'' 21 CFR 1305.13(e). As I have previously explained, if no portion of a line item is received, then there is no date on which it is received. *See Superior Pharmacy,* 81 FR at 31338 & n.64. Thus, I reject the allegation.

The Government also alleged that Respondent had failed to provide a copy of an Order Form for the return of Dilaudid to a supplier to the Special Agent in Charge, as well as that it had failed to note on the Form the number of packages shipped and the date shipped. Req. for Final Agency Action, at 29–30. As the Government produced no evidence that Respondent actually returned the drugs, I reject the allegation.

The DI further found that upon reviewing Respondent's records of the orders it placed using the Controlled Substance Order System, there were 42 orders for which Respondent documented the receipt of controlled substances and the date received on a paper copy of the order form. Respondent did not, however, electronically link these records ''to the original order'' and archive the record. Respondent thus violated DEA's regulation. *See* 21 CFR 1305.22(g) (''When a purchaser receives a shipment, the purchaser must create a record of the quantity of each item received and the date received. The record must be electronically linked to the original order and archived.'').

The evidence with respect to Factor Four thus establishes that Respondent has failed to comply with several of the CSA's recordkeeping requirements. Of these violations, Respondent's failure to retain 103 schedule II order forms is especially egregious and provides further support for the conclusion that its registration ''would be inconsistent with the public interest.'' 21 U.S.C. 823(f).

Sanction

Where, as here, the Government has established grounds to deny an application, a respondent must then ''present[ ] sufficient mitigating evidence'' to show why it can be entrusted with a new 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), [DEA] has repeatedly held that where [an applicant] has committed acts inconsistent with the public interest, the [applicant] must accept responsibility for [its] actions and demonstrate that [it] will not engage in future misconduct.'' *Jayam Krishna-Iyer,* 74 FR 459, 463 (2009) (citing *Medicine Shoppe,* 73 FR 364, 387 (2008)); *see also Jackson,* 72 FR at 23853; *John H. Kennedy,* 71 FR 35705, 35709 (2006); *Cuong Tron Tran,* 63 FR 64280, 64283 (1998); *Prince George Daniels,* 60 FR 62884, 62887 (1995).

While an applicant must accept responsibility for its misconduct and demonstrate that it will not engage in future misconduct in order to establish that its registration is consistent with the public interest, DEA has repeatedly held that these are not the only factors that are relevant in determining the appropriate disposition of the matter. *See, e.g., Joseph Gaudio,* 74 FR 10083, 10094 (2009); *Southwood Pharmaceuticals, Inc.,* 72 FR 36487, 36504 (2007). Obviously, the egregiousness and extent of an applicant's misconduct are significant factors in determining the appropriate sanction. *See Jacobo Dreszer,* 76 FR 19386, 19387–88 (2011) (explaining that a respondent can ''argue that even though the Government has made out a *prima facie* case, his conduct was not so egregious as to warrant revocation''); *Paul H. Volkman,* 73 FR 30630, 30644 (2008); *see also Paul Weir Battershell,* 76 FR 44359, 44369 (2011) (imposing six-month suspension, noting that the evidence was not limited to security and recordkeeping violations found at first inspection and ''manifested a disturbing pattern of indifference on the part of [r]espondent to his obligations as a registrant''); *Gregory D. Owens,* 74 FR 36751, 36757 n.22 (2009).

So too, the Agency can consider the need to deter similar acts, both with respect to the respondent in a particular case and the community of registrants. *See Gaudio,* 74 FR at 10095 (quoting *Southwood,* 71 FR at 36503). *Cf. McCarthy* v. *SEC,* 406 F.3d 179, 188–89 (2d Cir. 2005) (upholding SEC's express adoption of ''deterrence, both specific and general, as a component in analyzing the remedial efficacy of sanctions'').

As found above, the record establishes that Respondent's pharmacists engaged in egregious misconduct by knowingly dispensing numerous controlled substance prescriptions for such highly abused narcotics as oxycodone 30 and hydromorphone that were issued outside of the usual course of professional practice and lacked a legitimate medical purpose. 21 CFR 1306.04(a). This misconduct strikes at the core of the CSA's purpose of preventing drug abuse and diversion. *See Gonzales* v. *Oregon,* 546 U.S. at 274. Respondent's failure to maintain numerous schedule II order forms is also egregious misconduct. The Agency has a manifest interest in deterring registrants from engaging in similar misconduct with respect to both the dispensing of controlled substances and the maintenance of required records.

Thus, the record fully supports the conclusion that Respondent's registration ''would be inconsistent with the public interest'' and that its application should be denied. 21 U.S.C. 823(f). And because Respondent failed to timely submit its Position Statement and the attached affidavits and has not demonstrated good cause to excuse its untimely filing, I do not consider whether the affidavits provide sufficient evidence to refute the Government's *prima facie* case. Accordingly, I will deny Respondent's application.

Order

Pursuant to the authority vested in me by 21 U.S.C. 823(f) and 28 CFR 0.100(b), I order that the application of Edge Pharmacy, L.L.C., for a DEA Certificate of Registration as a retail pharmacy, be, and it hereby is, denied. This Order is effectively immediately.

Dated: October 11, 2016.

Chuck Rosenberg,

Acting Administrator.

[FR Doc. 2016–25226 Filed 10–18–16; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Office of Justice Programs

[OJP (OJP) Docket No. 1728]

Meeting of the Global Justice Information Sharing Initiative Federal Advisory Committee

AGENCY: Office of Justice Programs, Justice.

ACTION: Notice of meeting.

SUMMARY: This is an announcement of a meeting of the Global Justice Information Sharing Initiative (Global) Federal Advisory Committee (GAC) to discuss the Global Initiative, as described at *www.it.ojp.gov/global.*

DATES: The meeting will take place on Tuesday, November 29, 2016, from 9:00 a.m. to 4:00 p.m. ET, and Wednesday, November 30, 2016, from 9:00 a.m. to 11:30 a.m. ET.

ADDRESSES: The meeting will take place at the Office of Justice Programs (in the Main Conference Room), 810 7th Street, Washington, DC 20531; Phone: (202) 514–2000 (**Note:** This is not a toll-free number).

FOR FURTHER INFORMATION CONTACT: J. Patrick McCreary, Global Designated Federal Employee (DFE), Bureau of Justice Assistance, Office of Justice Programs, 810 7th Street, Washington, DC 20531; Phone: (202) 616–0532 (**Note:** This is not a toll-free number); Email: *James.P.McCreary@usdoj.gov.*

SUPPLEMENTARY INFORMATION: This meeting is open to the public. Due to security measures, however, members of the public who wish to attend this meeting must register with Mr. J. Patrick McCreary at the above address at least seven (7) days in advance of the meeting. Registrations will be accepted on a space available basis. Access to the meeting will not be allowed without registration. All attendees will be required to sign in at the meeting registration desk. Please bring photo identification and allow extra time prior to the meeting.

Anyone requiring special accommodations should notify Mr. McCreary at least seven (7) days in advance of the meeting.

Purpose

The GAC will act as the focal point for justice information systems integration activities in order to facilitate the coordination of technical, funding, and legislative strategies in support of the Administrations justice priorities.

The GAC will guide and monitor the development of the global information sharing concept. It will advise the Assistant Attorney General, OJP; the Attorney General; the President (through the Attorney General); and local, state, tribal, and federal policymakers in the executive, legislative, and judicial branches. The GAC will also advocate for strategies for accomplishing a global information sharing capability.

Interested persons whose registrations have been accepted may be permitted to participate in the discussions at the discretion of the meeting chairman and with approval of the DFE.

J. Patrick McCreary,

Global DFE, Bureau of Justice Assistance, Office of Justice Programs.

[FR Doc. 2016–25217 Filed 10–18–16; 8:45 am]

BILLING CODE 4410–18–P

DEPARTMENT OF LABOR

Employee Benefits Security Administration

Exemptions From Certain Prohibited Transaction Restrictions

AGENCY: Employee Benefits Security Administration, Labor.

ACTION: Grant of Individual Exemptions.

SUMMARY: This document contains exemptions issued by the Department of Labor (the Department) from certain of the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (ERISA or the Act) and/or the Internal Revenue Code of 1986 (the Code). This notice includes the following: 2016–03, The Michael T. Sewell, M.D., P.S.C. Profit Sharing Plan, D–11813; 2016–04, Plumbers' Pension Fund, Local 130, U.A., D–11822; 2016–05, Sears Holdings 401(k) Savings Plan and the Sears Holdings Puerto Rico Savings Plan, D–11846 and D–11847; 2016–06, Sears Holdings 401(k) Savings Plan and the Sears Holdings Puerto Rico Savings Plan, D–11851 and D–11852; 2016–07, Liberty Media 401(k) Savings Plan, D–11858; 2016–08, Baxter International Inc., D–11866; and 2016–09, Sears Holdings 401(k) Savings Plan and the Sears Holdings Puerto Rico Savings Plan, D–11871 and D–11872.

SUPPLEMENTARY INFORMATION: A notice was published in the **Federal Register** of the pendency before the Department of a proposal to grant such exemption. The notice set forth a summary of facts and representations contained in the application for exemption and referred interested persons to the application for a complete statement of the facts and representations. The application has been available for public inspection at the Department in Washington, DC. The notice also invited interested persons to submit comments on the requested exemption to the Department. In addition the notice stated that any interested person might submit a written request that a public hearing be held (where appropriate). The applicant has represented that it has complied with the requirements of the notification to interested persons. No requests for a hearing were received by the Department. Public comments were received by the Department as described in the granted exemption.

The notice of proposed exemption was issued and the exemption is being granted solely by the Department because, effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 1 (1996), transferred the authority of the Secretary of the Treasury to issue exemptions of the type proposed to the Secretary of Labor.

Statutory Findings

In accordance with section 408(a) of the Act and/or section 4975(c)(2) of the Code and the procedures set forth in 29 CFR part 2570, subpart B (76 FR 66637, 66644, October 27, 2011) [1] and based upon the entire record, the Department makes the following findings:

(a) The exemption is administratively feasible;

(b) The exemption is in the interests of the plan and its participants and beneficiaries; and

(c) The exemption is protective of the rights of the participants and beneficiaries of the plan.

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[1] The Department has considered exemption applications received prior to December 27, 2011 under the exemption procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, 32847, August 10, 1990).

The Michael T. Sewell, M.D., P.S.C. Profit Sharing Plan (the Plan), Located in Bardstown, Kentucky

[Prohibited Transaction Exemption 2016–03; Exemption Application No. D–11813]

Exemption

The restrictions of section 406(a)(1)(A) and (D) and section 406(b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975, by reason of section 4975(c)(1)(A), (D) and (E) of the Code,[2] shall not apply to the cash sale (the Sale) by the individually-directed account (the Account) in the Plan of Michael T. Sewell, M.D. (Dr. Sewell) of a parcel of unimproved real property (the Property), to Dr. Sewell, a party in interest with respect to the Plan; provided that the following conditions are satisfied:

(a) The Sale is a one-time transaction for cash;

(b) The sales price for the Property is the greater of: $916,501; or the sum of the fair market value of the Property, as established by a qualified independent appraiser, and the fair market value of timber on the Property, as determined by a qualified independent timber appraiser, in separate, updated appraisals reports on the date of the Sale;

(c) The Account pays no real estate fees or commissions in connection with the Sale;

(d) The terms of the Sale are no less favorable to the Account than the terms the Account would receive under similar circumstances in an arm's length transaction with an unrelated party; and

(e) Michael T. Sewell, M.D., P.S.C. bears 100% of the costs of obtaining this exemption.

Written Comments

In the notice of proposed exemption (the Notice), the Department invited all interested persons to submit written comments and/or requests for a public hearing within 30 days of the publication, on April 28, 2016, of the Notice in the **Federal Register**. All comments were due by May 28, 2016. During the comment period, the Department received no comments or hearing requests from interested persons.

Accordingly, after giving full consideration to the entire record, the Department has decided to grant the exemption. The complete application file (Exemption Application No. D–11813), including all supplemental submissions received by the Department, is available for public inspection in the Public Disclosure Room of the Employee Benefits Security Administration, Room N–1515, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, refer to the Notice published in the **Federal Register** on April 28, 2016 at 81 FR 25433.

FOR FURTHER INFORMATION CONTACT: Mrs. Blessed Chuksorji-Keefe of the Department, telephone (202) 693–8567. (This is not a toll-free number.)

Plumbers' Pension Fund, Local 130, U.A. (the Plan, or the Applicant), Located in Chicago, IL

[Prohibited Transaction Exemption 2016–04; Exemption Application No. D–11822]

Exemption

The restrictions of section 406(a)(1)(A) and (D) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) and (E) of the Code,[3] shall not apply to the proposed sale (the Sale) of two commercial buildings (the Properties), by the Plan to the Plumbers' Pension Fund, Local 130, U.A. (the Union), a party in interest with respect to the Plan, provided that the following conditions are satisfied:

(a) The Sale is a one-time transaction for cash;

(b) The price paid by the Union to the Plan is equal to the greater of: (1) $1,640,000, or (2) the fair market value of the Properties, as determined by a qualified independent appraiser (the Independent Appraiser) as of the date of the Sale;

(c) The Plan does not pay any appraisal fees, real estate fees, commissions, costs or other expenses in connection with the Sale;

(d) The Plan trustees appointed by the Union (the Union Trustees) recuse themselves from: (1) Discussions and voting with respect to the Plan's decision to enter into the Sale; and (2) all aspects of the selection and engagement of the Independent Appraiser for the purposes of determining the fair market value of the Properties on the date of the Sale;

(e) The Plan trustees appointed by the employer associations (the Employer Trustees), who have no interest in the Sale: (1) Determine, among other things, whether it is in the interest of the Plan to proceed with the Sale; (2) review and approve the methodology used by the Independent Appraiser in the independent appraisal report (the Appraisal Report) that is being relied upon; and (3) ensure that such methodology is applied by the Independent Appraiser in determining the fair market value of the Properties on the date of the Sale; and

(f) The Sale is not part of an agreement, arrangement, or understanding designed to benefit the Union.

Written Comments

The Department invited all interested persons to submit written comments and/or requests for a public hearing with respect to the notice of proposed exemption, published on April 28, 2016, at 81 FR 25435. All comments and requests for a hearing were due by May 28, 2016.

During the comment period, the Department received one written comment and no requests for a public hearing. In a comment letter, dated May 19, 2016, a Plan participant suggests that the Sale price of the Properties be no less than the average of three different appraisals of the Properties, rather than based on a single appraisal. The commenter asserts that this is the standard practice for bids and should be used in this exemption because it is fair and equitable.

The Department acknowledges the participant's comment, but wishes to emphasize that the procedures (the Procedures) governing the filing and the processing of administrative exemptions from the prohibited transaction provisions of the Act, as amended, and the Code, as amended, (29 CFR 2570, October 27, 2011), do not require that an applicant obtain multiple appraisals of a property from different qualified independent appraisers. Specifically, section 2570.34(c)(4) of the Procedures refers to the preparation of a single appraisal report for a property by a qualified independent appraiser, who is acting solely on behalf of the affected plan. Moreover, section 2570.34(c)(4) of the Procedures describes the content of such appraisal report in subparagraphs (i)–(iii).

Accordingly, in the exemption request under consideration, the Department is of the view that the Independent Appraiser of the Properties has fulfilled the requirements mandated by Section 2570.34(c) of the Procedures.

In addition, the Department notes that the Sale is subject to several conditions that are meant to protect the Plan and

[2] For purposes of this exemption, references to specific provisions of Title I of the Act, unless otherwise specified, refer also to the corresponding provisions of the Code.

[3] For purposes of this exemption, references to specific provisions of Title I of the Act, unless otherwise specified, refer also to the corresponding provisions of the Code.

its participants and beneficiaries. In this regard, the Independent Appraiser will render an updated appraisal of the Properties, as of the date of the Sale. In addition, the price paid by the Union to the Plan will be equal to the greater of: (1) $1,640,000, or (2) the fair market value of the Properties, as determined by the Independent Appraiser as of the date of the Sale. Further, the Employer Trustees, who have no interest in the Sale, will review and approve the methodology used by the Independent Appraiser, and will ensure that such methodology is properly applied.

Accordingly, after giving full consideration to the entire record, the Department has decided to grant the exemption. The complete application file (Application No. D–11822), including all supplemental submissions received by the Department, is available for public inspection in the Public Disclosure Room of the Employee Benefits Security Administration, Room N–1515, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, refer to the Notice of Proposed Exemption published on April 28, 2016, at 81 FR 25435.

FOR FURTHER INFORMATION CONTACT: Mr. Joseph Brennan of the Department, telephone (202) 693–8456. (This is not a toll-free number.)

Sears Holdings 401(k) Savings Plan (the Savings Plan) and the Sears Holdings Puerto Rico Savings Plan (the PR Plan) (Collectively, the Plans), Located in Hoffman Estates, IL

[Prohibited Transaction Exemption 2016–05; Exemption Application Nos. D–11846 and D–11847]

Exemption

Section I. Covered Transactions

(a) The restrictions of sections 406(a)(1)(E), 406(a)(2), 406(b)(1), 406(b)(2), and 407(a)(1)(A) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(E) of the Code,[4] shall not apply to the acquisition and holding by the Savings Plan of certain subscription rights (the Rights) to purchase shares of common stock (the SC Stock) in Sears Canada Inc. (Sears Canada) in connection with an offering (the Offering) by Sears Holdings Corporation (Holdings) of shares of SC Stock, provided that the conditions as set forth, below, in Section II of this exemption were satisfied for the duration of the acquisition and holding; and

(b) The restrictions of sections 406(a)(1)(E), 406(a)(2), 406(b)(1), 406(b)(2), and 407(a)(1)(A) of the Act[5] shall not apply to the acquisition and holding of the Rights by the PR Plan in connection with the Offering of the SC Stock by Holdings, provided that the conditions as set forth in Section II of this exemption were satisfied for the duration of the acquisition and holding.

Section II. Conditions for Relief

(a) The receipt of the Rights by the Plans occurred in connection with the Offering, in which all shareholders of the common stock of Holdings (Holdings Stock), including the Plans, were treated in the same manner;

(b) The acquisition of the Rights by the Plans resulted from an independent act of Holdings, as a corporate entity;

(c) Each shareholder of Holdings Stock, including each of the Plans, received the same proportionate number of Rights based on the number of shares of Holdings Stock held by each such shareholder;

(d) All decisions with regard to the holding and disposition of the Rights by the Plans were made by a qualified independent fiduciary (the Independent Fiduciary) within the meaning of 29 CFR 2570.31(j);[6]

(e) The Independent Fiduciary determined that it would be in the interest of the Plans to sell all of the Rights received in the Offering by the Plans in blind transactions on the NASDAQ Global Select Market;

(f) No brokerage fees, commissions, subscription fees, or other charges were paid by the Plans with respect to the acquisition and holding of the Rights, or were paid to any affiliate of Holdings, Sears Canada, or the Independent Fiduciary, with respect to the sale of the Rights.

Section III. Definitions

(a) The term ''affiliate'' of a person includes:

(1) Any person directly or indirectly through one or more intermediaries, controlling, controlled by, or under common control with such person;

(2) Any officer, director, partner, employee, or relative, as defined in section 3(15) of the Act, of such person; and

(3) Any corporation or partnership of which such person is an officer, director, partner, or employee.

(b) The term ''control'' means the power to exercise a controlling influence over the management or policies of a person other than an individual.

Effective Date: This exemption is effective for the period beginning October 16, 2014, and ending November 7, 2014 (the Offering Period).

Written Comments

The Department invited all interested persons to submit written comments and/or requests for a public hearing with respect to the notice of proposed exemption (the Notice), published on May 12, 2016, at 81 FR 29705. All comments and requests for hearing were due by July 3, 2016. During the comment period, the Department received two comments from interested persons and no requests for a public hearing. A Savings Plan participant submitted a written comment and Holdings requested a clarification to the Notice. Furthermore, during the comment period, the Department received several phone inquiries that generally concerned matters outside the scope of the exemption.

Participant's Comment

In his comment letter of June 20, 2016, the participant represents that he is a Holdings' shareholder, who held a balance in the Savings Plan at the time of the Offering.[7] The participant states that ''it appears I did not benefit from

[4] For purposes of this exemption, unless indicated otherwise, references to section 406 of the Act should be read to refer as well to the corresponding provisions of section 4975 of the Code.

[5] The Applicant represents that there is no jurisdiction under Title II of the Act with respect to the PR Plan. Accordingly, the Department is not providing any exemptive relief from section 4975(c)(1)(E) of the Code for the acquisition and holding of the Rights by the PR Plan.

[6] 29 CFR 2570.31(j) defines a ''qualified independent fiduciary,'' in relevant part, to mean ''any individual or entity with appropriate training, experience, and facilities to act on behalf of the plan regarding the exemption transaction in accordance with the fiduciary duties and responsibilities prescribed by ERISA, that is independent of and unrelated to any party in interest engaging in the exemption transaction and its affiliates;'' in general, a fiduciary is presumed to be independent ''if the revenues it receives or is projected to receive, within the current federal income tax year from parties in interest (and their affiliates) [with respect] to the transaction are not more than 2% of such fiduciary's annual revenues based upon its prior income tax year. Although the presumption does not apply when the aforementioned percentage exceeds 2%, a fiduciary nonetheless may be considered independent based upon other facts and circumstances provided that it receives or is projected to receive revenues that are not more than 5% within the current federal income tax year from parties in interest (and their affiliates) [with respect] to the transaction based upon its prior income tax year.''

[7] The participant also submitted the same comment to the Department in D–11851 and D–11852, involving the Sears Notes Offering, 81 FR 29709 (May 12, 2016); and in D–11871 and D–11873, involving the Seritage Growth Offering, 81 FR 29713 (May 12, 2016).

[the Offering] as I should have'' because the price of Holdings Stock decreased following the Offering. The participant inquires whether the exemption should reverse this loss.

In response to the participant's comment, Holdings explains that while there have been fluctuations in the price of Holdings Stock during the relevant period, the Independent Fiduciary's decision to sell the Rights generated a positive gain for the Sears Holdings 401(k) Savings Plan Master Trust Stock Fund (the Stock Fund), of $200,557.36, net of fees and expenses. According to Holdings, changes in the value of a publicly-traded company's stock occur due to many factors, including the company's performance. Depending on the measurement period used, Holdings represents that it is possible that a contemporaneous decline in the price of Holdings Stock negated the positive gain for the Stock Fund. However, according to Holdings, the performance of Holdings Stock around the time of the Offering was beyond the control of the Plans and the Independent Fiduciary, and it was independent of any actions such fiduciary took with respect to the Rights received by the Plans.

Holdings also represents that it made the decision to commence the Offering, which was a corporate decision, and this decision was not fiduciary in nature. Further, Holdings states that no shareholder, including the Plans, had the ability to prevent the Offering. Therefore, the only decision presented to the shareholders, including the Plans' fiduciaries, was how to dispose of the Rights that were distributed during the Offering. Holdings represents that the Independent Fiduciary's decision to sell the Rights resulted in a significant deposit in the Stock Fund.

Holdings' Comment

The Applicant states that it originally requested relief from the restrictions of sections 406(a)(1)(A), 406(a)(1)(E), 406(a)(2), 406(b)(1), 406(b)(2), and 407(a)(1)(A) of the Act in the exemption application. However, the Applicant notes that the Department decided not to provide exemptive relief from section 406(a)(1)(A) of the Act in the Notice.

The Applicant believes the Plans' acquisition of the Rights to purchase Sears Canada Stock did not involve a prohibited ''sale or exchange, or leasing, of any property between the plan and a party in interest,'' as described in section 406(a)(1)(A) of the Act. The Applicant states that it provided the Rights automatically to all of its shareholders, including the Plans, in a manner similar to a stock dividend. The Applicant also points out that the Department has clarified that it ''does not view an acquisition of stock by means of a stock dividend or stock split as a prohibited transaction,'' in the Preamble to Final Regulation, Fiduciary Responsibility; Statutory Exemption for Certain Acquisitions, Sales, or Leases of Property, 45 FR 51194, 51196 (August 1, 1980). Therefore, the Applicant does not believe an exemption from section 406(a)(1)(A) is required in the subject case. Sears Holdings requests confirmation that the Department shares this view.

In response, the Department concurs that exemptive relief from section 406(a)(1)(A) of the Act is not applicable to the Plans' acquisition of the Rights.

Technical Correction

Section III(c) of the proposed exemption is redesignated as Section III(b) of this exemption.

Accordingly, after giving full consideration to the entire record, the Department has decided to grant the exemption. The complete application file (Application Nos. D–11846 and D–11847), including all supplemental submissions received by the Department, is available for public inspection in the Public Disclosure Room of the Employee Benefits Security Administration, Room N–1515, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, refer to the notice of proposed exemption published on May 12, 2016, at 81 FR 29705.

FOR FURTHER INFORMATION CONTACT: Mr. Scott Ness of the Department, telephone (202) 693–8561. (This is not a toll-free number.)

Sears Holdings 401(k) Savings Plan (the Savings Plan) and the Sears Holdings Puerto Rico Savings Plan (the PR Plan) (Collectively, the Plans), Located in Hoffman Estates, IL

[Prohibited Transaction Exemption 2016–06; Exemption Application Nos. D–11851 and D–11852]

Exemption

Section I. Covered Transactions

(a) The restrictions of sections 406(a)(1)(E), 406(a)(2), 406(b)(1), 406(b)(2), and 407(a)(1)(A) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(E) of the Code,[8] shall not apply to the acquisition and holding of certain subscription rights (the Rights) issued by Sears Holdings Corporation (Holdings) by the Savings Plan in connection with an offering (the Offering) by Holdings of unsecured obligations issued by Holdings (Notes) and warrants to purchase the common stock of Holdings (Warrants)(together referred to as Units), provided that the conditions as set forth, below, in Section II of this exemption were satisfied for the duration of the acquisition and holding; and

(b) The restrictions of sections 406(a)(1)(E), 406(a)(2), 406(b)(1), 406(b)(2), and 407(a)(1)(A) of the Act[9] shall not apply to the acquisition and holding of the Rights by the PR Plan in connection with the Offering of the Units by Holdings, provided that the conditions as set forth in Section II of this exemption were satisfied for the duration of the acquisition and holding.

Section II. Conditions for Relief

(a) The receipt of the Rights by the Plans occurred in connection with the Offering, in which all shareholders of the common stock of Holdings (Holdings Stock), including the Plans, were treated in the same manner;

(b) The acquisition of the Rights by the Plans resulted from an independent act of Holdings, as a corporate entity;

(c) Each shareholder of Holdings Stock, including each of the Plans, received the same proportionate number of Rights based on the number of shares of Holdings Stock held by each such shareholder;

(d) All decisions with regard to the holding and disposition of the Rights by the Plans were made by a qualified independent fiduciary (the Independent Fiduciary) within the meaning of 29 CFR 2570.31(j);[10]

[8] For purposes of this exemption, unless indicated otherwise, references to section 406 of the Act should be read to refer as well to the corresponding provisions of section 4975 of the Code.

[9] The Applicant represents that there is no jurisdiction under Title II of the Act with respect to the PR Plan. Accordingly, the Department is not providing any exemptive relief from section 4975(c)(1)(E) of the Code for the acquisition and holding of the Rights by the PR Plan.

[10] 29 CFR 2570.31(j) defines a ''qualified independent fiduciary,'' in relevant part, to mean ''any individual or entity with appropriate training, experience, and facilities to act on behalf of the plan regarding the exemption transaction in accordance with the fiduciary duties and responsibilities prescribed by ERISA, that is independent of and unrelated to any party in interest engaging in the exemption transaction and its affiliates;'' in general, a fiduciary is presumed to be independent ''if the revenues it receives or is projected to receive, within the current federal income tax year from parties in interest (and their affiliates) [with respect] to the transaction are not more than 2% of such fiduciary's annual revenues based upon its prior income tax year. Although the presumption does not apply when the aforementioned percentage exceeds 2%, a fiduciary

Continued

(e) The Independent Fiduciary determined that it would be in the interest of the Plans to sell all of the Rights received in the Offering by the Plans in blind transactions on the NASDAQ Global Select Market;

(f) No brokerage fees, commissions, subscription fees, or other charges were paid by the Plans with respect to the acquisition and holding of the Rights, or were paid to any affiliate of Holdings or the Independent Fiduciary, with respect to the sale of the Rights.

Section III. Definitions

(a) The term ''affiliate'' of a person includes:

(1) Any person directly or indirectly through one or more intermediaries, controlling, controlled by, or under common control with such person;

(2) Any officer, director, partner, employee, or relative, as defined in section 3(15) of the Act, of such person; and

(3) Any corporation or partnership of which such person is an officer, director, partner, or employee.

(b) The term ''control'' means the power to exercise a controlling influence over the management or policies of a person other than an individual.

Effective Date: This exemption is effective for the period beginning October 30, 2014, and ending November 18, 2014 (the Offering Period).

Written Comments

The Department invited all interested persons to submit written comments and/or requests for a public hearing with respect to the notice of proposed exemption (the Notice), published on May 12, 2016, at 81 FR 29709. All comments and requests for hearing were due by July 3, 2016. During the comment period, the Department received two comments from interested persons and no requests for a public hearing. A Savings Plan participant submitted a written comment, and Holdings requested a clarification to the Notice. Furthermore, during the comment period, the Department received several phone inquiries that generally concerned matters outside the scope of the exemption.

Participant's Comment

In his comment letter of June 20, 2016, the participant represents that he is a Holdings' shareholder, who held a balance in the Savings Plan at the time of the Offering.[11] The participant states that ''it appears I did not benefit from [the Offering] as I should have'' because the price of Holdings Stock decreased following the Offering. The participant inquires whether the exemption should reverse this loss.

In response to the participant's comment, Holdings explains that while there have been fluctuations in the price of Holdings Stock during the relevant period, the Independent Fiduciary's decision to sell the Rights generated a positive gain for the Sears Holdings 401(k) Savings Plan Master Trust Stock Fund (the Stock Fund), of $3,637,509.54, net of fees and expenses. According to Holdings, changes in the value of a publicly-traded company's stock occur due to many factors, including the company's performance. Depending on the measurement period used, Holdings represents that it is possible that a contemporaneous decline in the price of Holdings Stock negated the positive gain for the Stock Fund. However, according to Holdings, the performance of Holdings Stock around the time of the Offering was beyond the control of the Plans and the Independent Fiduciary, and it was independent of any actions such fiduciary took with respect to the Rights received by the Plans.

Holdings also represents that it made the decision to commence the Offering, which was a corporate decision, and this decision was not fiduciary in nature. Further, Holdings states that no shareholder, including the Plans, had the ability to prevent the Offering. Therefore, the only decision presented to the shareholders, including the Plans' fiduciaries, was how to dispose of the Rights that were distributed during the Offering. Holdings represents that the Independent Fiduciary's decision to sell the Rights resulted in a significant deposit in the Stock Fund.

Holdings' Comment

The Applicant states that it originally requested relief from the restrictions of sections 406(a)(1)(A), 406(a)(1)(E), 406(a)(2), 406(b)(1), 406(b)(2), and 407(a)(1)(A) of the Act in the exemption application. However, the Applicant notes that the Department decided not to provide exemptive relief from section 406(a)(1)(A) of the Act in the Notice.

The Applicant believes the Plans' acquisition of the Rights to purchase Sears Notes and Warrants did not involve a prohibited ''sale or exchange, or leasing, of any property between the plan and a party in interest,'' as described in section 406(a)(1)(A) of the Act. The Applicant states that it provided the Rights automatically to all of its shareholders, including the Plans, in a manner similar to a stock dividend. The Applicant also points out that the Department has clarified that it ''does not view an acquisition of stock by means of a stock dividend or stock split as a prohibited transaction,'' in the Preamble to Final Regulation, Fiduciary Responsibility; Statutory Exemption for Certain Acquisitions, Sales, or Leases of Property, 45 FR 51194, 51196 (August 1, 1980). Therefore, the Applicant does not believe an exemption from section 406(a)(1)(A) is required in the subject case. Sears Holdings requests confirmation that the Department shares this view.

In response, the Department concurs that exemptive relief from section 406(a)(1)(A) of the Act is not applicable to the Plans' acquisition of the Rights.

Technical Correction

Section III(c) of the proposed exemption is redesignated as Section III(b) of this exemption.

Accordingly, after giving full consideration to the entire record, the Department has decided to grant the exemption. The complete application file (Application Nos. D–11851 and D–11852), including all supplemental submissions received by the Department, is available for public inspection in the Public Disclosure Room of the Employee Benefits Security Administration, Room N–1515, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, refer to the notice of proposed exemption published on May 12, 2016, at 81 FR 29709.

FOR FURTHER INFORMATION CONTACT: Mr. Erin Hesse of the Department, telephone (202) 693–8546. (This is not a toll-free number.)

Liberty Media 401(k) Savings Plan (the Plan), Located in Englewood, CO

[Prohibited Transaction Exemption 2016–07; Exemption Application No. D–11858]

Exemption

Section I. Covered Transactions

The restrictions of sections 406(a)(1)(E), 406(a)(2), and 407(a)(1)(A)

nonetheless may be considered independent based upon other facts and circumstances provided that it receives or is projected to receive revenues that are not more than 5% within the current federal income tax year from parties in interest (and their affiliates) [with respect] to the transaction based upon its prior income tax year.''

[11] The participant also submitted the same comment to the Department in D–11846 and D–11847, involving the Sears Canada Offering, 81 FR 29705 (May 12, 2016); and in D–11871 and D–11873, involving the Seritage Growth Offering, 81 FR 29713 (May 12, 2016).

of the Act shall not apply to: (1) The acquisition by the Plan of certain stock subscription rights (the Rights) to purchase shares of Liberty Broadband Series C common stock (LB Series C Stock), in connection with a rights offering (the Rights Offering) held by Liberty Broadband Corporation (Liberty Broadband), a party in interest with respect to the Plan; and (2) the holding of the Rights by the Plan during the subscription period of the Rights Offering, provided that the conditions described in Section II below have been met.

Section II. Conditions for Relief

(a) The Plan's acquisition of the Rights resulted solely from an independent corporate act of Liberty Broadband;

(b) All holders of Liberty Broadband Series A common stock and Liberty Broadband Series C common stock (collectively, the LB Stock), including the Plan, were issued the same proportionate number of Rights based on the number of shares of LB Stock held by each such shareholder;

(c) For purposes of the Rights Offering, all holders of LB Stock, including the Plan, were treated in a like manner;

(d) The acquisition of the Rights by the Plan was made in a manner that was consistent with provisions of the Plan for the individually-directed investment of participant accounts;

(e) The Liberty Media 401(k) Savings Plan Administrative Committee (the Committee) directed the Plan trustee to sell the Rights on the NASDAQ Global Select Market, in accordance with Plan provisions that precluded the Plan from acquiring additional shares of LB Stock;

(f) The Committee did not exercise any discretion with respect to the acquisition and holding of the Rights; and

(g) The Plan did not pay any fees or commissions in connection with the acquisition or holding of the Rights, and did not pay any commissions to Liberty Broadband, Liberty Media Corporation, TruePosition, Inc., or any affiliates of the foregoing in connection with the sale of the Rights.

Effective Date: This exemption is effective for the period beginning on December 15, 2014, the date that the Plan received the Rights, until December 17, 2014, the date the Rights were sold by the Plan on the NASDAQ Global Select Market.

Written Comments

The Department invited all interested persons to submit written comments and/or requests for a public hearing with respect to the notice of proposed exemption, published on April 28, 2016, at 81 FR 25438. Liberty Media completed delivery of the notice of proposed exemption and accompanying notice to interested persons on May 3, 2016. However, the Department determined that certain elements of the notice of proposed exemption as published in the **Federal Register** were omitted from the materials sent to interested persons. Liberty Media represented, under penalty of perjury, that a corrected version of the notice of proposed exemption was provided to all interested persons on May 27, 2016. All comments and requests for hearing were due under the corrected version of the notice by June 26, 2016, 30 days following the date on which Liberty Media certified delivery was completed. During the comment period, the Department received no comments and no requests for a hearing from interested persons. Accordingly, after giving full consideration to the entire record, the Department has decided to grant the exemption. The complete application file (Application No. D–11858), including all supplemental submissions received by the Department, is available for public inspection in the Public Disclosure Room of the Employee Benefits Security Administration, Room N–1515, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, refer to the notice of proposed exemption published on April 28, 2016, at 81 FR 25438.

FOR FURTHER INFORMATION CONTACT: Mr. Scott Ness of the Department, telephone (202) 693–8561. (This is not a toll-free number.)

Baxter International Inc. (Baxter or the Applicant), Located in Deerfield, IL

[Prohibited Transaction Exemption 2016–08; Exemption Application No. D–11866]

Exemption

Section I. Transaction

The restrictions of sections 406(a)(1)(A) and (D) and sections 406(b)(1) and (2) of ERISA and sections 4975(c)(1)(A), (D), and (E) of the Code [12] shall not apply to the contribution of publicly traded common stock of Baxalta (the Contributed Stock) by Baxter (the Contribution) to the Baxter International Inc. and Subsidiaries Pension Plan (the Plan), provided:

(a) Fiduciary Counselors Inc. (the Independent Fiduciary) will represent the interests of the Plan, the participants, and beneficiaries with respect to the Contribution, including but not limited to, taking the following actions:

(i) Determining whether the Contribution is in the interests of the Plan and of its participants and beneficiaries, and is protective of the rights of participants and beneficiaries of the Plan;

(ii) Determining whether and on what terms the Contribution should be accepted by the Plan;

(iii) If the Contribution is accepted by the Plan, establishing and administering the process (subject to such modifications as the Independent Fiduciary may make from time to time) for liquidating the Contributed Stock, as is prudent under the circumstances;

(iv) Determining the fair market value of the Contributed Stock as of the date of the Contribution;

(v) Monitoring the Contribution and holding of Contributed Stock on a continuing basis and taking all appropriate actions necessary to safeguard the interests of the Plan; and

(vi) If the Contribution is accepted by the Plan, voting proxies and responding to tender offers with respect to the Contributed Stock held by the Plan;

(b) Solely for purposes of determining the Plan's minimum funding requirements (as determined under section 412 of the Code), adjusted funding target attainment percentage (AFTAP) (as determined under Treas. Reg. section 1.436–1(j)(1)), and funding target attainment percentage (as determined under section 430(d)(2) of the Code), the Plan's actuary (the Actuary) will not count as a contribution to the Plan any shares of Contributed Stock that have not been liquidated;

(c) For purposes of determining the amount of any Contribution, the Contributed Stock shall be deemed contributed only at the time it is sold, equal to the lesser of: (1) The proceeds from the sale of such Contributed Stock; or (2) the value of such Contributed Stock on the date of the initial contribution as determined by the Independent Fiduciary;

(d) The Contributed Stock represents no more than 20% of the fair market value of the total assets of the Plan at the time it is contributed to the Plan;

(e) The Plan pays no commissions, costs, or other expenses in connection with the Contribution, holding, or subsequent sale of the Contributed

[12] For purposes of this exemption, references to specific provisions of Title I of the Act, unless otherwise specified, refer also to the corresponding provisions of the Code.

Stock, and any such expenses paid by Baxter will not be treated as a contribution to the Plan;

(f) Baxter makes cash contributions to the Plan to the extent that the cumulative proceeds from the sale of the Contributed Stock at each contribution due date (determined under section 303(j) of ERISA) are less than the cumulative cash contributions Baxter would have been required to make to the Plan, in the absence of the Contribution. Such cash contributions shall be made until all of the Contributed Stock is sold by the Plan; and

(g) Baxter contributes to the Plan cash amounts needed for the Plan to attain an AFTAP (determined under Treas. Reg. section 1.436–1(j)(1)) of at least 80% as of the first day of each plan year during which the Plan holds Contributed Stock, as determined by the Actuary, without taking into account any unsold Contributed Stock as of April 1 of the plan year.

Effective Date: This exemption is effective as of May 9, 2016, the date the Contribution was received by the Plan.

Written Comments

The Department invited all interested persons to submit written comments and/or requests for a public hearing with respect to the notice of proposed exemption, published on April 28, 2016, at 81 FR 25441. All comments and requests for hearing were due by June 3, 2016. During the comment period, the Department received one substantive written comment, one substantive phone comment, and a variety of written and telephonic inquiries requesting information outside the scope of the proposed exemption. The Department did not receive any requests for a hearing from interested persons. A description of the comments and the Applicant's responses is below.

Participant Comments and Applicant's Responses

Among other things, the commenter expressed concern about exposing participants to additional risk from holding Baxalta stock in a transaction intended to benefit Baxter. The Applicant responds that participants in the Plan will not be subject to any additional risk from holding Baxalta stock because the value of the Baxalta stock at the time of the contribution was approximately $700 million, and the plan subsequently sold the stock for approximately $760 million, under the direction of the Independent Fiduciary. Accordingly, the Applicant represents that this transaction added about $760 million in cash to the pension plan. Furthermore, the Applicant notes that if Baxter had sold the stock and then put the cash into the Plan, it would have been required to pay taxes on the proceeds of the sale, which would have reduced the amount available to be contributed to the plan by approximately $266 million. Putting the stock into the Plan first and then selling the stock under the supervision of the Independent Fiduciary yielded significantly more money for the Plan and its participants.

The commenter also stated that the contribution of the Baxalta Stock would exceed the Plan's allocation for large cap stocks. In response, the Applicant explains that the Baxter Investment Committee has amended the investment policy to permit the 24% target allocation to be exceeded temporarily to allow the plan to accept the contribution of the Baxalta stock, which as described above was sold by the plan shortly after the contribution. Thereafter, the proceeds from the sale of the Baxalta stock will be invested in accordance with the investment policy.

Finally, the commenter expressed concern about potential IRS challenges to the transaction and litigation risk to the Plan from Baxalta shareholders if the stock price was depressed as a result of this transaction. The Applicant notes that prior to seeking this individual exemption, Baxter obtained a ruling from the IRS that specifically allows it to contribute the Baxalta stock to the Plan (a copy of which was also provided to the Department as part of the application process) on a tax-free basis. The Applicant further explains that, if for any reason there were an IRS challenge, it would be Baxter's responsibility to respond to the IRS challenge, and it would not affect the funding of the Plan. Similarly, according to the Applicant, there is very little risk of litigation from Baxalta shareholders because during the spin-off, shareholders were made aware that such a disposition of Baxalta stock was possible and the Independent Fiduciary who has been retained to sell the Baxalta stock on behalf of the Plan is required under the terms of its agreement to sell the stock in such a manner as to minimize the impact of the sales on the market for Baxalta shares.

The Department received one other comment from a plan participant who inquired into Baxter's financial ability to continue funding the Plan after spinning off half the company into Baxalta. The Applicant represents that Baxter does not anticipate that the spin-off of Baxalta will reduce Baxter's financial ability to continue funding the Plan. Although Baxter is now a smaller company, the Plan is also slightly smaller, because the portion of the Plan that benefits Baxalta employees was transferred to Baxalta, and Baxalta is responsible for funding that portion of the Plan (a new and distinct plan) after the spin-off. Finally, the Applicant states that the proposed exemption, if approved, would allow Baxter to make a one-time contribution to the plan of approximately $760 million. This contribution increased the assets of the Plan by over 20%, significantly improving the funded status of the Plan. The Applicant explains that this means that Baxter's cost of funding the Plan in the future will be reduced.

Applicant's Comment

The Applicant also submitted the Final Report from the Independent Fiduciary (the Final Report), detailing the Contribution and subsequent liquidation of the Baxalta Stock. Fiduciary Counselors represents that on May 9, 2016, State Street, the Plan's trustee, received the Baxalta Contribution from Baxter. The Final Report provides that, while the Baxalta Contribution skewed the Large Cap weighting above the targeted 24.0%, this was a temporary deviation and the allocation will return to pre-Baxalta Contribution levels once the Baxalta Stock is sold. Fiduciary Counselors started liquidating the Baxalta Stock on May 10, 2016, and completed the liquidation on June 2, 2016. The Plan realized $762,118,481.31 in gross proceeds. The Plan incurred $188,070.01 of fees and expenses as part of the liquidation program, with a net gain to the Plan of $761,930,411.30. Baxter reimbursed the Plan for such fees and expenses as well as additional portfolio accounting fees ($208.33), custody fees ($2,879.49), and trading fees ($203.00) for a total reimbursement to the Plan of $191,360.83.

After giving full consideration to the entire record, including all comments from interested persons and the responses from the Applicant, the Department has decided to grant the exemption, as described above. The complete application file (Application No. D–11866) is available for public inspection in the Public Disclosure Room of the Employee Benefits Security Administration, Room N–1515, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, refer to the notice of proposed exemption published on April 28, 2016, at 81 FR 25441.

FOR FURTHER INFORMATION CONTACT: Mr. Erin S. Hesse of the Department, telephone (202) 693–8546. (This is not a toll-free number.)

Sears Holdings 401(k) Savings Plan (the Savings Plan) and the Sears Holdings Puerto Rico Savings Plan (the PR Plan) (Together, the Plans), Located in Hoffman Estates, IL

[Prohibited Transaction Exemption 2016–09; Exemption Application Nos. D–11871 and D–11872, respectively]

Exemption

Section I. Transactions

The restrictions of sections 406(a)(1)(E), 406(a)(2), 406(b)(1), 406(b)(2), and 407(a)(1)(A) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(E) of the Code,[13] shall not apply, effective for the period beginning June 11, 2015, and ending July 2, 2015, to the acquisition and holding by the Savings Plan of certain subscription rights (the Rights) to purchase shares of common stock (Seritage Growth Stock) in Seritage Growth Properties (Seritage Growth), in connection with an offering (the Offering) by Sears Holdings Corporation (Holdings or the Applicant) of Seritage Growth Stock, provided that the conditions, as set forth below, were satisfied for the duration of the acquisition and holding; and

(b) The restrictions of sections 406(a)(1)(E), 406(a)(2), 406(b)(1), 406(b)(2), and 407(a)(1)(A) of the Act[14] shall not apply, effective for the period beginning June 11, 2015, and ending July 2, 2015, to the acquisition and holding of the Rights by the PR Plan in connection with the Offering of Seritage Growth Stock by Holdings, provided that the conditions, as set forth below, were satisfied for the duration of the acquisition and holding.

Section II. Conditions

(a) The receipt of the Rights by the Plans occurred in connection with the Offering, in which all shareholders of the common stock of Holdings (Holdings Stock), including the Plans, were treated in the same manner;

(b) The acquisition of the Rights by the Plans resulted solely from an independent act of Holdings, as a corporate entity;

(c) Each shareholder of Holdings Stock, including each of the Plans, received the same proportionate number of Rights based on the number of shares of Holdings Stock held by each such shareholder;

(d) All decisions with regard to the holding and disposition of the Rights by the Plans were made by a qualified independent fiduciary (the Independent Fiduciary) within the meaning of 29 CFR 2570.31(j);[15]

(e) The Independent Fiduciary determined that it would be in the interest of the Plans to sell all of the Rights received in the Offering by the Plans in blind transactions on the New York Stock Exchange; and

(f) No brokerage fees, commissions, subscription fees, or other charges were paid by the Plans with respect to the acquisition and holding of the Rights; or were paid to any affiliate of the Independent Fiduciary or Holdings, in connection with the sale of the Rights.

Effective Date: This exemption is effective for the Offering period, beginning June 11, 2015, and ending July 2, 2015.

Written Comments

In the notice of proposed exemption (the Notice), the Department invited all interested persons to submit written comments within 52 days of the publication, on May 12, 2016, of the Notice in the **Federal Register**. All comments were due by July 3, 2016. During the comment period, the Department received three comments from interested persons and no requests for a public hearing. Two Savings Plan participants submitted written comments. One participant supported the granting of the exemption, while the other did not. The third comment, which was submitted by the Applicant, requests several minor revisions and clarifications to the Notice.

Following is a discussion of the comment received by the Department from the objecting participant, and the one submitted by the Applicant. Also presented are the responses made by the Applicant to the participant's comment, as well as the Department's responses to the Applicant's comment.

Participant's Comment

In his comment letter of June 20, 2016, the participant represents that he is a Holdings' shareholder, who held a balance in the Savings Plan at the time of the Offering.[16] The participant states that ''it appears I did not benefit from [the Offering] as I should have'' because the price of Seritage Growth Stock decreased following the Offering. The participant inquires whether the exemption should reverse this loss.

In response to the participant's comment, the Applicant explains that while there have been fluctuations in the price of Holdings Stock during the relevant period, the Independent Fiduciary's decision to sell the Rights generated a positive gain for the Sears Holdings 401(k) Savings Plan Master Trust Stock Fund (the Stock Fund), of $4,106,921.19, net of fees and expenses. According to the Applicant, changes in the value of a publicly-traded company's stock occur due to many factors, including the company's performance. Depending on the measurement period used, the Applicant represents that it is possible that a contemporaneous decline in the price of Holdings Stock negated the positive gain for the Stock Fund. However, according to the Applicant, the performance of Holdings Stock around the time of the Offering was beyond the control of the Plans and the Independent Fiduciary. It was also independent of any actions such fiduciary took with respect to the Rights received by the Plans.

The Applicant also represents that Holdings made the decision to commence the Offering, which was a corporate decision, and was not fiduciary in nature. Further, the Applicant explains that no shareholder, including the Plans, had the ability to

[13] For purposes of this exemption, references to specific provisions of Title I of the Act, unless otherwise specified, refer also to the corresponding provisions of the Code.

[14] The Applicant represents that there is no jurisdiction under Title II of the Act with respect to the PR Plan because the PR Plan fiduciaries have not made an election under section 1022(i)(2) of the Act, whereby the PR Plan would be treated as a trust created and organized in the United States for purposes of tax qualification under section 401(a) of the Code. Accordingly, the Department is not providing exemptive relief from section 4975(c)(1)(E) of the Code for the acquisition and holding of the Rights by the PR Plan.

[15] 29 CFR 2570.31(j) defines a ''qualified independent fiduciary,'' in relevant part, to mean ''any individual or entity with appropriate training, experience, and facilities to act on behalf of the plan regarding the exemption transaction in accordance with the fiduciary duties and responsibilities prescribed under the Act, that is independent of and unrelated to any party in interest engaging in the exemption transaction and its affiliates;'' in general, a fiduciary is presumed to be independent ''if the revenues it receives or is projected to receive, within the current federal income tax year from parties in interest (and their affiliates) [with respect] to the transaction are not more than 2% of such fiduciary's annual revenues based upon its prior income tax year. Although the presumption does not apply when the aforementioned percentage exceeds 2%, a fiduciary nonetheless may be considered independent based upon other facts and circumstances provided that it receives or is projected to receive revenues that are not more than 5% within the current federal income tax year from parties in interest (and their affiliates) [with respect] to the transaction based upon its prior income tax year.''

[16] The participant also submitted the same comment to the Department in D–11851 and D–11852, involving the Sears Notes Offering, 81 FR 29709 (May 12, 2016); and in D–11846 and D–11847 involving the Sears Canada Offering, 81 FR 29705 (May 12, 2016).

prevent the Offering. Therefore, the only decision presented to the shareholders, including the Plans' fiduciaries, was how to dispose of the Rights that were distributed during the Offering. Because the Independent Fiduciary decided to sell the Rights, the Applicant represents that this event resulted in a significant deposit in the Stock Fund.

Applicant's Comment

1. *Scope of Exemptive Relief.* The Applicant states that it originally requested relief from the restrictions of sections 406(a)(1)(A), 406(a)(1)(E), 406(a)(2), 406(b)(1), 406(b)(2), and 407(a)(1)(A) of the Act in the exemption application. However, the Applicant explains that the Department decided not to provide exemptive relief from section 406(a)(1)(A) of the Act in the Notice.

The Applicant believes the Plans' acquisition of the Rights to purchase Seritage Growth Stock did not involve a prohibited ''sale or exchange, or leasing, of any property between the plan and a party in interest,'' as described in section 406(a)(1)(A) of the Act. The Applicant states that it provided the Rights automatically to all of its shareholders, including the Plans, in a manner similar to a stock dividend. The Applicant also points out that the Department has clarified that it ''does not view an acquisition of stock by means of a stock dividend or stock split as a prohibited transaction,'' in the Preamble to Final Regulation, Fiduciary Responsibility; Statutory Exemption for Certain Acquisitions, Sales, or Leases of Property, 45 FR 51194, 51196 (August 1, 1980). Therefore, the Applicant does not believe an exemption from section 406(a)(1)(A) is required in the subject case. Therefore, the Applicant requests confirmation that the Department shares this view.

The Department concurs that exemptive relief from section 406(a)(1)(A) of the Act is not applicable to the Plans' acquisition of the Rights and that the scope of relief set forth in Section I of the proposed exemption, and this exemption, is appropriate for the transactions covered herein.

2. *Purchase of Units in Stock Funds.* Page 29714 of the Notice states that the Plans allow participants to ''purchase units in certain stock funds which invest in Holdings Stock.'' The Applicant wishes to clarify that only one investment option in the Plans exists for the purpose of investment in Holdings Stock. The Stock Fund is held in the Sears Holdings 401(k) Savings Plan Master Trust, and participants in both the Savings Plan and the PR Plan own Holdings Stock through this one Stock Fund.

The Department notes this clarification to the Notice.

3. *Entities Adopting the Savings Plan.* Page 29714 of the Notice states that ''Sears, Roebuck and Co. (Sears Roebuck) and all of its wholly-owned (direct and indirect) subsidiaries (except Lands' End Inc. (Lands' End), Sears de Puerto Rico, Inc., Kmart Holding Corporation (Kmart), and its wholly-owned (direct and indirect) subsidiaries (excluding employees residing in Puerto Rico), and Sears Holdings Management Corporation, with respect to certain employees, have adopted the Savings Plan and are employers under such plan.'' The Applicant clarifies that Kmart Holding Corporation and its wholly-owned subsidiaries have adopted the Savings Plan and are employers under such plan (excluding employees residing in Puerto Rico). Also, the Applicant clarifies that employees of Sears de Puerto Rico, Inc. who reside in the United States participate in the Savings Plan.

The Department notes this clarification to the Notice.

4. *PR Plan and Holdings Stock.* Page 29715 of the Notice states that the PR Plan held ''39,782,55'' shares as of the record date. The Applicant clarifies that the number of shares held by the PR Plan has a misplaced decimal mark and should be revised to ''39,782.55'' shares.

The Department notes this clarification to the Notice.

5. *Holdings Description.* Page 29715 of the Notice states that Holdings ''is a retail merchant with full-line and specialty retail stores in,'' among other places, Canada. The Applicant points out that in October and November of 2014, Holdings entered into a series of transactions, including a rights offering, to de-consolidate Sears Canada Inc. As a result of these transactions, Sears Holdings no longer maintains a controlling interest in Sears Canada Inc. and no longer itself, maintains stores in Canada.

The Department notes this clarification to the Notice.

6. *Role of the Independent Fiduciary.* Page 29716 of the Notice states that the Plans' Independent Fiduciary, Evercore Trust Company N.A., conducted a due diligence process evaluating the rights offering, including discussions and correspondence, that enabled it ''to improve certain elements related to the Offering.'' The Applicant explains that, in pertinent part, Evercore's Independent Fiduciary Report states that its due diligence process enabled it to ''better understand a number of important elements related to the Rights Offering.''

The Department notes this clarification to the Notice.

Accordingly, after giving full consideration to the entire record, the Department has decided to grant the exemption. The complete application file (Exemption Application Nos. D–11871 and D–11872) and the written comments are available for public inspection in the Public Disclosure Room of the Employee Benefits Security Administration, Room N–1515, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, refer to the Notice published in the **Federal Register** on May 12, 2016 at 81 FR 29713.

FOR FURTHER INFORMATION CONTACT: Ms. Blessed Chuksorji-Keefe of the Department, telephone (202) 693–8567. (This is not a toll-free number.)

General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and/or section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of the Act, which among other things require a fiduciary to discharge his duties respecting the plan solely in the interest of the participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(B) of the Act; nor does it affect the requirement of section 401(a) of the Code that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

(2) These exemptions are supplemental to and not in derogation of, any other provisions of the Act and/or the Code, including statutory or administrative exemptions and transactional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction; and

(3) The availability of these exemptions is subject to the express condition that the material facts and representations contained in the application accurately describes all material terms of the transaction which is the subject of the exemption.

Signed at Washington, DC, this 14th day of October 2016.

Lyssa E. Hall,

Director of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor.

[FR Doc. 2016–25279 Filed 10–18–16; 8:45 am]

BILLING CODE 4510–29–P

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

[NARA–2017–004]

Records Schedules; Availability and Request for Comments

AGENCY: National Archives and Records Administration (NARA).

ACTION: Notice of availability of proposed records schedules; request for comments.

SUMMARY: The National Archives and Records Administration (NARA) publishes notice at least once monthly of certain Federal agency requests for records disposition authority (records schedules). Once approved by NARA, records schedules provide mandatory instructions on what happens to records when agencies no longer need them for current Government business. The records schedules authorize agencies to preserve records of continuing value in the National Archives of the United States and to destroy, after a specified period, records lacking administrative, legal, research, or other value. NARA publishes notice in the **Federal Register** for records schedules in which agencies propose to destroy records not previously authorized for disposal or reduce the retention period of records already authorized for disposal. NARA invites public comments on such records schedules, as required by 44 U.S.C. 3303a(a).

DATES: NARA must receive requests for copies in writing by November 18, 2016. Once NARA finishes appraising the records, we will send you a copy of the schedule you requested. We usually prepare appraisal memoranda that contain additional information concerning the records covered by a proposed schedule. You may also request these. If you do, we will also provide them once we have completed the appraisal. You have 30 days after we send to you these requested documents in which to submit comments.

ADDRESSES: You may request a copy of any records schedule identified in this notice by contacting Records Appraisal and Agency Assistance (ACRA) using one of the following means:

Mail: NARA (ACRA); 8601 Adelphi Road, College Park, MD 20740–6001.

Email: request.schedule@nara.gov.

FAX: 301–837–3698.

You must cite the control number, which appears in parentheses after the name of the agency that submitted the schedule, and a mailing address. If you would like an appraisal report, please include that in your request.

FOR FURTHER INFORMATION CONTACT: Margaret Hawkins, Director, by mail at Records Appraisal and Agency Assistance (ACRA); National Archives and Records Administration, 8601 Adelphi Road, College Park, MD 20740–6001, by phone at 301–837–1799, or by email at *request.schedule@nara.gov.*

SUPPLEMENTARY INFORMATION: Each year, Federal agencies create billions of records on paper, film, magnetic tape, and other media. To control this accumulation, agency records managers prepare schedules proposing records retention periods and submit these schedules for NARA's approval. These schedules provide for timely transfer into the National Archives of historically valuable records and authorize the agency to dispose of all other records after the agency no longer needs them to conduct its business. Some schedules are comprehensive and cover all the records of an agency or one of its major subdivisions. Most schedules, however, cover records of only one office or program or a few series of records. Many of these update previously approved schedules, and some include records proposed as permanent.

The schedules listed in this notice are media neutral unless otherwise specified. An item in a schedule is media neutral when an agency may apply the disposition instructions to records regardless of the medium in which it creates or maintains the records. Items included in schedules submitted to NARA on or after December 17, 2007, are media neutral unless the item is expressly limited to a specific medium. (See 36 CFR 1225.12(e).)

Agencies may not destroy Federal records without Archivist of the United States' approval. The Archivist approves destruction only after thoroughly considering the records' administrative use by the agency of origin, the rights of the Government and of private people directly affected by the Government's activities, and whether or not the records have historical or other value.

In addition to identifying the Federal agencies and any subdivisions requesting disposition authority, this notice lists the organizational unit(s) accumulating the records (or notes that the schedule has agency-wide applicability when schedules cover records that may be accumulated throughout an agency); provides the control number assigned to each schedule, the total number of schedule items, and the number of temporary items (the records proposed for destruction); and includes a brief description of the temporary records. The records schedule itself contains a full description of the records at the file unit level as well as their disposition. If NARA staff has prepared an appraisal memorandum for the schedule, it also includes information about the records. You may request additional information about the disposition process at the addresses above.

Schedules Pending

1. Department of Defense, National Guard Bureau (DAA–0168–2016–0003, 3 items, 2 temporary items). Records relating to legislative inquiries to agency leadership including routine or administrative information. Proposed for permanent retention are records relating to questions of policy, budget, appropriations and similar records.

2. Department of Defense, Office of the Secretary of Defense (DAA–0330–2016–0015, 1 item, 1 temporary item). Master files of an electronic information system used to track nominators and candidates of a program for business and community leaders to gain a greater awareness of national defense issues.

3. Department of Defense, Office of the Secretary of Defense (DAA–0330–2016–0016, 1 item, 1 temporary item). Records relating to employers who have pledged to provide a supportive work environment for members of the National Guard and Reserves.

4. Department of Energy, Agency-wide (DAA–0434–2016–0007, 2 items, 1 temporary item). Records relating to the Ombudsman program including case files. Proposed for permanent retention are the charter, mission statement, and statistical analysis.

5. Department of Health and Human Services, Office of the Secretary (DAA–0468–2016–0002, 8 items, 4 temporary items). Records of the Office of the Inspector General including routine correspondence, regulation support records, testimonies, and working papers. Proposed for permanent retention are substantive Congressional correspondence and mandated reports, policy records, and press releases.

6. Department of Homeland Security, Immigration and Customs Enforcement (DAA–0567–2015–0008, 8 items, 8 temporary items). Protective equipment records including incident case files, annual incident reports, proficiency and instructor certifications, body armor

requests, and related administrative materials.

7. Department of Justice, Agency-wide (DAA–0060–2016–0004, 1 item, 1 temporary item). Records relating to evaluation and selection of prospective employees, interns, and volunteers.

8. Department of Justice, INTERPOL Washington United States National Central Bureau (DAA–0060–2015–0002, 8 items, 8 temporary items). Records relating to United States representation to INTERPOL including reports, meeting minutes, agreements, and administrative records.

9. Department of Justice, Office of Information Policy (DAA–0060–2016–0005, 10 items, 7 temporary items). Records relating to oversight of Federal agency compliance with the Freedom of Information Act (FOIA). Records include report drafts, background and resource material gathered in preparing final reports, records relating to the administration of the FOIA, compliance monitoring, and legal advice to agencies. Proposed for permanent retention are Government-wide FOIA Reports, the Department of Justice Guide to the FOIA, and records of the Chief FOIA Officers Council.

10. Department of Transportation, Federal Transit Administration (DAA–0408–2013–0004, 2 items, 2 temporary items). General financial records, including Government Accountability Office exception files, and accountable officer designee records.

11. Department of Transportation, National Highway Traffic Safety Administration (DAA–0416–2015–0001, 1 item, 1 temporary item). Electronic information system used to facilitate the criminal investigation of odometer fraud.

12. Department of Transportation, Pipeline and Hazardous Materials Safety Administration (DAA–0571–2015–0001, 4 items, 4 temporary items). Web site records including internal and external Web sites, content management system, Web site logs and statistical compilations.

13. Department of Transportation, Pipeline and Hazardous Materials Safety Administration (DAA–0571–2015–0010, 1 item, 1 temporary item). Records pertaining to plans for responding to pipeline spills.

14. Department of Transportation, Pipeline and Hazardous Materials Safety Administration (DAA–0571–2015–0015, 1 item, 1 temporary item). Activity files to include quarterly and technical program activity reports.

15. National Archives and Records Administration, Government-wide (DAA–GRS–2014–0002, 21 items, 21 temporary items). General Records Schedule for employee acquisition records including classification standards, position descriptions, classification appeals, job vacancy case files and application packages, interview records, records relating to political appointments, special hiring authority program records, pre-appointment files, and administrative records of agency agreements with the Office of Personnel Management to process examination and certification of potential employees.

16. National Archives and Records Administration, Government-wide (DAA–GRS–2015–0007, 23 items, 23 temporary items). General Records Schedule for employee relations records such as Alternative Dispute Resolution files; Reasonable Accommodation program records; Equal Employment Opportunity program and complaint files; anti-harassment program records; labor management relations records; administrative grievance, disciplinary and adverse action files; displaced employee program records; and telework/alternative worksite program files.

17. Peace Corps, Overseas Posts (DAA–0490–2016–0012, 6 items, 6 temporary items). Records include administrative records, copies of policies and procedures, handbooks, logs, and emergency planning materials.

18. Securities and Exchange Commission, Office of Human Resources (DAA–0266–2016–0013, 2 items, 2 temporary items). Records of agency employee applications for assistance in repaying outstanding qualifying Federal student loans.

19. Securities and Exchange Commission, Office of Human Resources (DAA–0266–2016–0014, 1 item, 1 temporary item). Records of employee temporary work assignments with Federal, State, local, and American Indian tribal governments; colleges and universities; and other eligible organizations.

Laurence Brewer,

Chief Records Officer for the U.S. Government.

[FR Doc. 2016–25224 Filed 10–18–16; 8:45 am]

BILLING CODE 7515–01–P

NATIONAL SCIENCE FOUNDATION

Notice of Intent To Prepare an Environmental Impact Statement and Initiate Section 106 Consultation for Proposed Changes to Green Bank Observatory Operations, Green Bank, West Virginia and Notice of Public Scoping Meetings and Comment Period

AGENCY: National Science Foundation.

ACTION: Notice of intent to prepare an Environmental Impact Statement and Initiate Section 106 Consultation for proposed changes to Green Bank Observatory operations, Green Bank, West Virginia and notice of public scoping meetings and comment period.

SUMMARY: In compliance with the National Environmental Policy Act of 1969, as amended, the National Science Foundation (NSF) intends to prepare an Environmental Impact Statement (EIS) to evaluate potential environmental effects of proposed changes to operations at Green Bank Observatory, in Green Bank, West Virginia (Proposed Action). (See **SUPPLEMENTARY INFORMATION** for more details.) By this notice, NSF announces the beginning of the scoping process to solicit public comments and identify issues to be analyzed in the EIS. At this juncture, NSF welcomes public comments on the preliminary proposed alternatives and resource areas identified for analysis. NSF also intends to initiate consultation under section 106 of the National Historic Preservation Act to evaluate potential effects, if any, on historic properties as a result of the Proposed Action.

DATES: This Notice initiates the public scoping process for the EIS and the initiation of public involvement under section 106 per 36 CFR 800.2(d). Comments on the scope of the preliminary proposed alternatives and resource areas to be studied may be submitted verbally during the scoping meetings scheduled for November 9, 2016 (see details in **SUPPLEMENTARY INFORMATION**) or in writing until November 19, 2016. To be eligible for inclusion in the Draft EIS, all comments must be received prior to the close of the scoping period. NSF will provide additional opportunities for public participation upon publication of the Draft EIS.

ADDRESSES: You may submit written comments by either of the following methods:

• *Email to: envcomp-AST-greenbank@nsf.gov,* with subject line ‘‘Green Bank Observatory.’’

• *Mail to:* Elizabeth Pentecost, RE: Green Bank Observatory, National Science Foundation, 4201 Wilson Blvd., Suite 1045, Arlington, VA 22230.

EIS INFORMATION: Information will be posted, throughout the EIS process, at *www.nsf.gov/AST.*

FOR FURTHER INFORMATION CONTACT: For further information regarding the EIS process or Section 106 consultation, contact: Elizabeth Pentecost, National Science Foundation, Division of Astronomical Sciences, 4201 Wilson Blvd., Suite 1045, Arlington, VA 22230; telephone: (703) 292–4907; email: *epenteco@nsf.gov.*

SUPPLEMENTARY INFORMATION: Green Bank Observatory (GBO) is located in Pocahontas County, West Virginia adjacent to the Monongahela National Forest. NSF owns the GBO land, which consists of numerous parcels acquired by the U.S. Army Corps of Engineers in the 1950s, when GBO was formed as the first (and then, only) site of the National Radio Astronomy Observatory (NRAO). The Allegheny Trail passes through portions of the NRAO property along the Little Mountain ridgeline. GBO is the anchor and administrative site of the 13,000-square-mile National Radio Quiet Zone (NRQZ). GBO is located on approximately 2,200 acres in the NRQZ, where all radio transmissions are limited. Having telescopes within the NRQZ allows for detection of faint scientific signals that would otherwise be drowned-out by man-made signals. The GBO facilities include the Robert C. Byrd Green Bank Telescope, the largest fully steerable radio telescope in the world; the 43-meter Telescope; the Green Bank Solar Radio Burst Spectrometer; the 20-meter Geodetic Telescope; the 40-foot Telescope; the Interferometer Range; and previously operational telescopes.

The NSF Directorate for Mathematical and Physical Sciences, Division of Astronomical Sciences, through a series of academic community-based reviews, has identified the need to divest several facilities from its portfolio. This would allow NSF to retain the balance of capabilities needed to deliver the best performance on emerging and key science technology of the present decade and beyond. In 2012, NSF's Division of Astronomical Sciences' (AST's) portfolio review committee recommended divestment of the Green Bank Telescope (GBT) from the AST portfolio, stating the following: ''The GBT is the world's most sensitive single-dish radio telescope at wavelengths shorter than 10 cm; however, its capabilities are not as critical to *New World New Horizons* [astronomy and astrophysics decadal survey] science goals as the higher-ranked facilities.'' In response to these recommendations, in 2016, NSF completed a feasibility study to inform and define options for the Observatory's future disposition that would involve significantly decreasing or eliminating NSF funding of Green Bank Observatory. Alternatives to be evaluated in the EIS will be refined through public input, with preliminary proposed alternatives that include the following:

- Continued NSF investment for science-focused operations (No-Action Alternative)
- Collaboration with interested parties for science- and education-focused operations with reduced NSF-funded scope
- Collaboration with interested parties for operation as a technology and education park
- Mothballing of facilities (suspension of operations in a manner such that operations could resume efficiently at some future date)
- Deconstruction and site restoration

The purpose of the public scoping process is to determine relevant issues that will influence the scope of the environmental analysis, including identifying viable alternatives. At present, NSF has identified the following preliminary resource areas to analyze potential impacts: Air quality, biological resources, cultural resources, geological resources, solid waste generation, health and safety, socioeconomics, traffic, and groundwater resources. NSF will consult under section 106 of the National Historic Preservation Act and section 7 of the Endangered Species Act in coordination with this EIS process, as appropriate. Federal, state, and local agencies, along with other stakeholders that may be interested or affected by NSF's decision on this Proposed Action are invited to participate in the scoping process and, if eligible, may request to participate as a cooperating agency.

Scoping Meetings: NSF will host two public scoping meetings.

• *Afternoon meeting:* November 9, 2016, at 3:00 p.m. to 5:00 p.m., Green Bank Science Center, 155 Observatory Road, Green Bank, WV 24915, Telephone: (304) 456–2011.

• *Evening meeting:* November 9, 2016, at 6:00 p.m. to 8:00 p.m., Green Bank Science Center, 155 Observatory Road, Green Bank, WV 24915, Telephone: (304) 456–2011.

Oral comments provided at the scoping meetings will be transcribed by a court reporter. Please contact NSF at least one week in advance of the meeting if you would like to request special accommodations (*i.e.,* sign language interpretation, etc.).

Dated: October 13, 2016.

Suzanne H. Plimpton,

Reports Clearance Officer, National Science Foundation.

[FR Doc. 2016–25213 Filed 10–18–16; 8:45 am]

BILLING CODE 7555–01–P

POSTAL REGULATORY COMMISSION

[Docket No. R2017–1; Order No. 3565]

Market Dominant Price Adjustment

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing a recently-filed Postal Service notice of inflation-based rate adjustments affecting market dominant domestic and international products and services, along with numerous proposed classification changes. The adjustments and other changes are scheduled to take effect January 22, 2017. This notice informs the public of the filing, invites public comment, and takes other administrative steps.

DATES: *Comments are due:* November 1, 2016.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov.* Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on filing alternatives.

FOR FURTHER INFORMATION CONTACT: David A. Trissell, General Counsel, at 202–789–6820.

SUPPLEMENTARY INFORMATION:

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I. Introduction and Overview

On October 12, 2016, the Postal Service filed a notice of inflation-based rate adjustments affecting market dominant domestic and international products and services, along with numerous proposed classification changes.[1] The intended effective date is January 22, 2017. Notice at 1.

Contents of filing. The Postal Service's filing consists of the Notice which the

[1] United States Postal Service Notice of Market Dominant Price Adjustment, October 12, 2016 (Notice).

Postal Service represents addresses the data and information required under 39 CFR 3010.12; three attachments (Attachments A–C) to the Notice; and six sets of workpapers filed as library references. *See id.*

Attachment A presents the proposed rate and classification changes to the Mail Classification Schedule (MCS). *Id.* Attachment A. The other attachments address workshare discounts and related information and the price cap calculation. *See* Notice, Attachments B and C, respectively.

The library references present supporting financial documentation for the five classes of mail and for First-Class Mail International. *See* Notice at 6–7. The First-Class Mail International library reference was filed under seal.[2]

Planned price adjustments. The Postal Service's planned percentage changes by class are, on average:

Market dominant class	Price adjustment authority (%)
First-Class Mail	0.780
Standard Mail	0.895
Periodicals	0.832
Package Services	1.007
Special Services	2.536

Notice at 7.

Most of the planned adjustments entail increases to market dominant rates and fees; however, in a few instances, the Postal Service proposes either no adjustment or a decrease. In addition, price adjustments for products within classes vary from the average, sometimes substantially. *See, e.g., id.* at 15, 24 (Table 5 showing range for First-Class Mail products and Table 8 showing range for Standard Mail products).

Proposed classification changes. The Postal Service proposes numerous classification changes in its Notice and identifies the impact on the MCS in Attachment A. *Id.* at 56–58; *id.* Attachment A.

II. Initial Administrative Actions

The Commission hereby provides public notice of the Postal Service's filing and pursuant to 39 CFR 3010.11 establishes Docket No. R2017–1 to consider the planned price adjustments in rates and fees for market dominant postal products and services, as well as the related classification changes, identified in the Postal Service's October 12, 2016 Notice. The Commission invites comments from interested persons on whether the Notice is consistent with 39 U.S.C. 3622 and the requirements of 39 CFR part 3010. Comments are due no later than November 1, 2016.

The Commission has posted the public portions of the Postal Service's filing on its Web site at *http://www.prc.gov.* The Commission will post revisions to the filing (if any) or other documents the Postal Service submits in this docket on its Web site, along with related Commission documents, comments, or other submissions, unless such filings are the subject of an application for non-public treatment. The Commission's policy on access to documents filed under seal appears in 39 CFR part 3007.

Pursuant to 39 U.S.C. 505, the Commission appoints Lauren A. D'Agostino to represent the interests of the general public (Public Representative) in this proceeding.

III. Ordering Paragraphs

It is ordered:

1. The Commission establishes Docket No. R2017–1 to consider planned price adjustments in rates and fees for market dominant postal products and services and related classification changes identified in the Postal Service's October 12, 2016 Notice.
2. Comments on the planned price adjustments and related classification changes are due no later than November 1, 2016.
3. Pursuant to 39 U.S.C. 505, Lauren A. D'Agostino is appointed to serve as an officer of the Commission (Public Representative) to represent the interests of the general public in this proceeding.
4. The Commission directs the Secretary of the Commission to arrange for prompt publication of this notice in the **Federal Register**.

By the Commission.

Stacy L. Ruble,

Secretary.

[FR Doc. 2016–25207 Filed 10–18–16; 8:45 am]

BILLING CODE 7710–FW–P

[2] *See* Notice of the United States Postal Service of Filing of USPS–LR–R2017–1/NP1, October 12, 2016.

POSTAL REGULATORY COMMISSION

[Docket Nos. CP2017–7; CP2017–8; CP2017–9; and CP2017–10]

New Postal Products

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing recent Postal Service filings for the Commission's consideration concerning negotiated service agreements. This notice informs the public of the filing, invites public comment, and takes other administrative steps.

DATES: *Comments are due:* October 21, 2016 (Comment due date applies to all Docket Nos. listed above)

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov.* Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on filing alternatives.

FOR FURTHER INFORMATION CONTACT: David A. Trissell, General Counsel, at 202–789–6820.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Introduction

The Commission gives notice that the Postal Service filed request(s) for the Commission to consider matters related to negotiated service agreement(s). The request(s) may propose the addition or removal of a negotiated service agreement from the market dominant or the competitive product list, or the modification of an existing product currently appearing on the market dominant or the competitive product list.

Section II identifies the docket number(s) associated with each Postal Service request, the title of each Postal Service request, the request's acceptance date, and the authority cited by the Postal Service for each request. For each request, the Commission appoints an officer of the Commission to represent the interests of the general public in the proceeding, pursuant to 39 U.S.C. 505 (Public Representative). Section II also establishes comment deadline(s) pertaining to each request.

The public portions of the Postal Service's request(s) can be accessed via the Commission's Web site (*http://www.prc.gov*). Non-public portions of the Postal Service's request(s), if any, can be accessed through compliance with the requirements of 39 CFR 3007.40.

The Commission invites comments on whether the Postal Service's request(s) in the captioned docket(s) are consistent with the policies of title 39. For request(s) that the Postal Service states concern market dominant product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3622, 39 U.S.C. 3642, 39 CFR part 3010, and 39 CFR part 3020, subpart B. For request(s) that the Postal Service states concern competitive product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3632, 39 U.S.C. 3633, 39 U.S.C. 3642, 39 CFR part 3015, and 39 CFR part 3020, subpart B. Comment deadline(s) for each request appear in section II.

II. Docketed Proceeding(s)

1. *Docket No(s).:* CP2017–7; *Filing Title:* Notice of United States Postal Service of Filing a Functionally Equivalent Global Expedited Package Services 3 Negotiated Service Agreement and Application for Non-Public Treatment of Materials Filed Under Seal; *Filing Acceptance Date:* October 13, 2016; *Filing Authority:* 39 CFR 3015.5; *Public Representative:* Curtis E. Kidd; *Comments Due:* October 21, 2016.

2. *Docket No(s).:* CP2017–8; *Filing Title:* Notice of United States Postal Service of Filing a Functionally Equivalent Global Expedited Package Services 3 Negotiated Service Agreement and Application for Non-Public Treatment of Materials Filed Under Seal; *Filing Acceptance Date:* October 13, 2016; *Filing Authority:* 39 CFR 3015.5; *Public Representative:* Curtis E. Kidd; *Comments Due:* October 21, 2016.

3. *Docket No(s).:* CP2017–9; *Filing Title:* Notice of United States Postal Service of Filing a Functionally Equivalent Global Expedited Package Services 3 Negotiated Service Agreement and Application for Non-Public Treatment of Materials Filed Under Seal; *Filing Acceptance Date:* October 13, 2016; *Filing Authority:* 39 CFR 3015.5; *Public Representative:* Kenneth R. Moeller; *Comments Due:* October 21, 2016.

4. *Docket No(s).:* CP2017–10; *Filing Title:* Notice of United States Postal Service of Filing a Functionally Equivalent Global Expedited Package Services 3 Negotiated Service Agreement and Application for Non-Public Treatment of Materials Filed Under Seal; *Filing Acceptance Date:* October 13, 2016; *Filing Authority:* 39 CFR 3015.5; *Public Representative:* Kenneth R. Moeller; *Comments Due:* October 21, 2016.

This notice will be published in the **Federal Register**.

Stacy L. Ruble,

Secretary.

[FR Doc. 2016–25274 Filed 10–18–16; 8:45 am]

BILLING CODE 7710–FW–P

POSTAL REGULATORY COMMISSION

[Docket Nos. CP2017–5 and CP2017–6]

New Postal Products

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing recent Postal Service filings for the Commission's consideration concerning negotiated service agreements. This notice informs the public of the filing, invites public comment, and takes other administrative steps.

DATES: *Comments are due:* October 20, 2016 (Comment due date applies to all Docket Nos. listed above).

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov.* Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on filing alternatives.

FOR FURTHER INFORMATION CONTACT: David A. Trissell, General Counsel, at 202–789–6820.

SUPPLEMENTARY INFORMATION:

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I. Introduction

The Commission gives notice that the Postal Service filed request(s) for the Commission to consider matters related to negotiated service agreement(s). The request(s) may propose the addition or removal of a negotiated service agreement from the market dominant or the competitive product list, or the modification of an existing product currently appearing on the market dominant or the competitive product list.

Section II identifies the docket number(s) associated with each Postal Service request, the title of each Postal Service request, the request's acceptance date, and the authority cited by the Postal Service for each request. For each request, the Commission appoints an officer of the Commission to represent the interests of the general public in the proceeding, pursuant to 39 U.S.C. 505 (Public Representative). Section II also establishes comment deadline(s) pertaining to each request.

The public portions of the Postal Service's request(s) can be accessed via the Commission's Web site (*http://www.prc.gov*). Non-public portions of the Postal Service's request(s), if any, can be accessed through compliance with the requirements of 39 CFR 3007.40.

The Commission invites comments on whether the Postal Service's request(s) in the captioned docket(s) are consistent with the policies of title 39. For request(s) that the Postal Service states concern market dominant product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3622, 39 U.S.C. 3642, 39 CFR part 3010, and 39 CFR part 3020, subpart B. For request(s) that the Postal Service states concern competitive product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3632, 39 U.S.C. 3633, 39 U.S.C. 3642, 39 CFR part 3015, and 39 CFR part 3020, subpart B. Comment deadline(s) for each request appear in section II.

II. Docketed Proceeding(s)

1. *Docket No(s).:* CP2017–5; *Filing Title:* Notice of United States Postal Service of Filing a Functionally Equivalent Global Expedited Package Services 3 Negotiated Service Agreement and Application for Non-Public Treatment of Materials Filed Under Seal; *Filing Acceptance Date:* October 12, 2016; *Filing Authority:* 39 CFR 3015.5; *Public Representative:* Jennaca D. Upperman; *Comments Due:* October 20, 2016.

2. *Docket No(s).:* CP2017–6; *Filing Title:* Notice of United States Postal Service of Filing a Functionally Equivalent Global Expedited Package Services 3 Negotiated Service Agreement and Application for Non-Public Treatment of Materials Filed Under Seal; *Filing Acceptance Date:* October 12, 2016; *Filing Authority:* 39 CFR 3015.5; *Public Representative:* Jennaca D. Upperman; *Comments Due:* October 20, 2016.

This notice will be published in the **Federal Register**.

Stacy L. Ruble,

Secretary.

[FR Doc. 2016–25190 Filed 10–18–16; 8:45 am]

BILLING CODE 7710–FW–P

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 32317; 812–14508]

ETF Managers Group, LLC and ETF Managers Trust; Notice of Application

October 13, 2016.

AGENCY: Securities and Exchange Commission ("Commission").

ACTION: Notice of an application under section 6(c) of the Investment Company Act of 1940 ("Act") for an exemption from section 15(a) of the Act and rule 18f–2 under the Act, as well as from certain disclosure requirements in rule 20a–1 under the Act, Item 19(a)(3) of Form N–1A, Items 22(c)(1)(ii), 22(c)(1)(iii), 22(c)(8) and 22(c)(9) of Schedule 14A under the Securities Exchange Act of 1934, and Sections 6–07(2)(a), (b), and (c) of Regulation S–X (''Disclosure Requirements''). The requested exemption would permit an investment adviser to hire and replace certain sub-advisers without shareholder approval and grant relief from the Disclosure Requirements as they relate to fees paid to the sub-advisers.

APPLICANTS: ETF Managers Trust (the ''Trust''), a Delaware statutory trust registered under the Act as an open-end management investment company that may offer one or more series of shares, and ETF Managers Group, LLC, a Delaware limited liability company registered as an investment adviser under the Investment Advisers Act of 1940 (the ''Initial Adviser,'' and, collectively with the Trust, the ''Applicants'').

DATES: *Filing Dates:* The application was filed July 1, 2014, and amended on July 1, 2016.

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 November 8, 2016, and should be accompanied by proof of service on the applicants, in the form of an affidavit or, for lawyers, a certificate of service. Pursuant to rule 0–5 under the Act, hearing requests should state the nature of the writer's interest, any facts bearing upon the desirability of a hearing on the matter, 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: Secretary, U.S. Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090. Applicants c/o: David C. Mahaffey, Esq. and Eric D. Simanek, Esq., Sullivan & Worcester LLP, 1666 K Street NW., Washington, DC 20006.

FOR FURTHER INFORMATION CONTACT: Judy T. Lee, Senior Special Counsel, at (202) 551–6259, or Sara Crovitz, Assistant Chief Counsel, at (202) 551–6862 (Division of Investment Management, Chief Counsel's Office).

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 an applicant using the Company name box, at *http://www.sec.gov/search/search.htm* or by calling (202) 551–8090.

Summary of the Application

1. The Adviser will serve as the investment adviser to the Funds pursuant to an investment advisory agreement with the Trust (the ''Advisory Agreement'').[1] The Adviser will provide the Funds with continuous and comprehensive investment management services subject to the supervision of, and policies established by, each Fund's board of trustees (''Board''). The Advisory Agreement permits the Adviser, subject to the approval of the Board, to delegate to one or more sub-advisers (each, a ''Sub-Adviser'' and collectively, the ''Sub-Advisers'') the responsibility to provide the day-to-day portfolio investment management of each Fund, subject to the supervision and direction of the Adviser. The primary responsibility for managing the Funds will remain vested in the Adviser. The Adviser will hire, evaluate, allocate assets to and oversee the Sub-Advisers, including determining whether a Sub-Adviser should be terminated, at all times subject to the authority of the Board.

2. Applicants request an exemption to permit the Adviser, subject to Board approval, to hire certain Sub-Advisers pursuant to Sub-Advisory Agreements and materially amend existing Sub-Advisory Agreements without obtaining the shareholder approval required under section 15(a) of the Act and rule 18f–2 under the Act.[2] Applicants also seek an exemption from the Disclosure Requirements to permit a Fund to disclose (as both a dollar amount and a percentage of the Fund's net assets): (a) The aggregate fees paid to the Adviser and any Affiliated Sub-Adviser; and (b) the aggregate fees paid to Sub-Advisers other than Affiliated Sub-Advisers (collectively, ''Aggregate Fee Disclosure''). For any Fund that employs an Affiliated Sub-Adviser, the Fund will provide separate disclosure of any fees paid to the Affiliated Sub-Adviser.

3. Applicants agree that any order granting the requested relief will be subject to the terms and conditions stated in the Application. Such terms and conditions provide for, among other safeguards, appropriate disclosure to Fund shareholders and notification about sub-advisory changes and enhanced Board oversight to protect the interests of the Funds' shareholders.

4. Section 6(c) 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 provisions of the Act, or any rule thereunder, if such relief is necessary or appropriate in the public interest and consistent with the protection of investors and purposes fairly intended by the policy and provisions of the Act. Applicants believe that the requested relief meets this standard because, as further explained in the Application, the Advisory Agreements will remain subject to shareholder approval, while the role of the Sub-Advisers is substantially similar to that of individual portfolio managers, so that requiring shareholder approval of Sub-Advisory Agreements would impose unnecessary delays and expenses on the Funds. Applicants believe that the requested relief from the Disclosure Requirements meets this standard because it will improve the Adviser's ability to negotiate fees paid to the Sub-Advisers that are more advantageous for the Funds.

For the Commission, by the Division of Investment Management, under delegated authority.

Robert W. Errett,

Deputy Secretary.

[FR Doc. 2016–25239 Filed 10–18–16; 8:45 am]

BILLING CODE 8011–01–P

[1] Applicants request relief with respect to any existing and any future series of the Trust and any other registered open-end management company or series thereof that: (a) Is advised by the Initial Adviser or its successor or by a person controlling, controlled by, or under common control with the Initial Adviser or its successor (each, also an ''Adviser''); (b) uses the manager of managers structure described in the application; and (c) complies with the terms and conditions of the application (any such series, a ''Fund'' and collectively, the ''Funds'' and certain Funds (each, a ''Feeder Fund'') that may invest substantially all of their assets in a Fund). For purposes of the requested order, ''successor'' is limited to an entity that results from a reorganization into another jurisdiction or a change in the type of business organization.

[2] The requested relief will not extend to any Sub-Adviser that is an affiliated person, as defined in section 2(a)(3) of the Act, of a Fund, of any Feeder Fund or the Adviser, other than by reason of serving as a sub-adviser to one or more of the Sub-Advised Funds (''Affiliated Sub-Adviser'').

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–79094; File No. SR–OCC–2016–009]

Self-Regulatory Organizations; The Options Clearing Corporation; Order Approving Proposed Rule Change Concerning the Options Clearing Corporation's Escrow Deposit Program

October 13, 2016.

On August 15, 2016, The Options Clearing Corporation (''OCC'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change SR–OCC–2016–009 pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Exchange Act'') [1] and Rule 19b–4 thereunder.[2] The proposed rule change was published for comment in the **Federal Register** on August 31, 2016.[3] The Commission did not receive any comments on the proposed rule change. This order approves the proposed rule change.

I. Description of the Proposed Rule Change

A. Background

OCC is the sole clearing agency for the U.S. listed options markets and a systemically important financial market utility. In this role, OCC seeks to manage risks that could cause a financial loss or settlement disruption and, therefore, threaten the stability of the U.S. financial system, by collecting collateral to protect against potential losses stemming from the default of a clearing member or its customers through margin from its clearing members or from deposits in lieu of margin of clearing members' customers through OCC's escrow deposit program.

According to OCC, users of its escrow deposit program are customers of clearing members who, through the escrow deposit program, are permitted to collateralize eligible positions directly with OCC (instead of with the relevant clearing member who will, in turn, deposit margin at OCC). When a customer of a clearing member makes a deposit in lieu of margin through OCC's escrow deposit program, the relevant positions are excluded from the clearing member's margin requirement at OCC. OCC states that the escrow deposit program therefore provides users of OCC's services with a means to more efficiently use cash or securities they may have available.

B. The Proposed Rule Change

The proposed rule change seeks to improve the resiliency of OCC's escrow deposit program by effecting the following changes. First, The proposed rule change would increase OCC's visibility into and control over collateral deposits made under the escrow deposit program. As described in the Notice, securities deposits in the escrow deposit program (''specific deposits'') are currently held at either the Depository Trust Company (''DTC'') or custodian banks, and cash deposits in the escrow deposit program (''escrow deposits'') are held at custodian banks. While OCC currently can verify the value of the securities deposited at DTC through DTC's systems, it lacks similar visibility into cash and securities held in custodian bank accounts, relying instead on the custodian banks to verify the value of such collateral. The proposed changes require securities in the escrow deposit program to be held at DTC, providing OCC with increased visibility into the collateral, as OCC will be able to view, validate, and value the collateral in real time and perform the controls currently performed by custodian banks. As stated in the Notice, banks participating in the escrow deposit program (''Tri-Party Custodian Banks'') will also provide OCC with online view access to each customer's cash account designated for the escrow deposit program, allowing visibility into transactional activity and account balances without having to rely upon a third party to value or validate the existence of the collateral.

Second, the proposed changes will provide more specificity concerning the manner in which OCC will take possession of collateral in OCC's escrow deposit program in the event of a clearing member or custodian bank default. As described in the Notice, proposed Rules 610A(b), 610B(f), 610C(q), and 610C(r) will provide that in the event of a clearing member or custodian bank default, OCC will have the right to direct DTC to deliver the securities included in a member specific deposit, third-party specific deposit or escrow deposit to OCC's DTC participant account for the purpose of satisfying the obligations of the clearing member or reimbursing itself for losses incurred as a result of the failure. Similarly, proposed Rules 610C(q) and 610C(r) will give OCC the right in the event of a Tri-Party Custodian Bank default to take possession of cash included within an escrow deposit for the same purposes. Further, Rule 1106(b)(2) will be amended to provide that OCC may close out a short position of a suspended clearing member covered by a member specific, third-party specific or escrow deposit, subject to the ability of the suspended clearing member or its representative to transfer the short position to another clearing member under certain circumstances.

Third, the proposed changes will clarify clearing members' rights to collateral in the escrow deposit program in the event of a customer default to the clearing member. According to the Notice, Proposed Rules 610B(c) and 610C(f) will provide for the grant of a security interest by the customer to the clearing member with respect to any given third-party specific deposit and escrow deposit, as applicable, with the clearing member's right subordinate to OCC's interest. Proposed Rules 610C(d), 610C(o), 610C(p) and 610C(s), relating to escrow deposits, and proposed Rules 610B(d) and 610B(e), relating to third-party specific deposits, will provide that, in the event of a customer default to a clearing member, the clearing member will have the right to request a ''hold'' on a deposit, which will prevent the withdrawal of deposited securities or cash by a custodian bank or the release of a deposit that will otherwise occur in the ordinary course. OCC states that placing the ''hold'' instruction gives a clearing member the right to request that OCC direct delivery of the deposit to the clearing member through DTC's systems, in the case of securities, or an instruction to the Tri-Party Custodian Bank in the case of cash. OCC believes that providing clearing members with transparent instructions regarding how to place a hold instruction on and direct delivery of a deposit in the escrow deposit program will be a significant enhancement to the current escrow deposit program.

Fourth, the proposed changes will improve the readability of the rules governing OCC's escrow deposit program by consolidating all such rules into a single location in OCC's Rulebook. Upon implementation of the proposed changes, all securities collateral in OCC's escrow deposit program will be held at DTC, and custodian banks will only be allowed to hold cash collateral.

Fifth, the proposed rule change will consolidate all of the rules concerning the escrow deposit program, including the provisions of the Escrow Deposit Agreement (''EDA''), which also contains substantive provisions governing the program, into Rules 610, 610A, 610B and 610C. OCC believes that consolidating the many rules governing the escrow deposit program into a single

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Securities Exchange Act Release No. 78675 (August 25, 2016), 81 FR 60099 (August 31, 2016) (SR–OCC–2016–009) (''Notice'').

location will significantly enhance the understandability and transparency of the rules concerning the escrow deposit program for current users of the program as well as any persons that may be interested in using the program in the future. As part of the consolidation efforts, the proposed rule change would also rename certain existing terminologies used in the escrow deposit program.[4]

Finally, OCC will eliminate the EDA and replace it with a streamlined agreement entitled the ''Participating Escrow Bank Agreement.'' The Participating Escrow Bank Agreement will provide that custodian banks are subject to all terms of the rules governing the revised escrow deposit program, as they may be amended from time to time.[5] The Participating Escrow Bank Agreement will contain eligibility requirements for custodian banks, including representations regarding the custodian bank's Tier 1 Capital, and provide OCC with express representations concerning the bank's authority to enter into the Participating Escrow Bank Agreement.

Additionally, Proposed Rule 610C(b) will require customers wishing to deposit cash collateral and custodian banks holding escrow deposits comprised of cash to enter into a tri-party agreement involving OCC, the customer and the applicable custodian bank. While cash collateral pledged in the escrow deposit program will continue to be facilitated through existing interfaces, OCC states that pledges will be required to be made in the customer's account at the Tri-Party Custodian Bank. OCC states that the Tri-Party Agreement will govern the customer's use of cash in the program, confirm the grant of a security interest in the customer's account to OCC and the relevant clearing member (as set forth in proposed Rule 610C(f)), and cause customers of clearing members to be subject to all terms of the Rules governing the revised escrow deposit program. Each custodian bank entering into the Tri-Party Agreement will also agree to follow the directions of OCC with respect to cash escrow deposits without further consent by the customer.

[4] *See* Notice, *supra* note 3, 81 FR at 60100.

[5] Under the Participating Escrow Bank Agreement, however, OCC will agree to provide custodian banks with advance notice of material amendments to the rules relating to deposits in lieu of margin and custodian banks will have the opportunity to withdraw from the escrow deposit program if they object to the amendments. OCC states that, as a general matter, the Participating Escrow Bank Agreement will not be negotiable, although OCC may determine to vary certain non-material terms in limited circumstances.

II. Discussion and Commission Findings

Exchange Act Section 19(b)(2)(C)[6] directs the Commission to approve a proposed rule change of a self-regulatory organization if it finds that the rule change, as proposed, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to such organization.

The Commission finds that the proposed rule change is consistent with Section 17A(b)(3)(F) of the Exchange Act, which requires, among other things, that the rules of a clearing agency assure the safeguarding of securities and funds that are in the custody or control of the clearing agency or for which it is responsible.[7] As described above, the proposed rule change will enhance OCC's ability to validate and value escrow deposit program deposits in real time and enhance its ability to expeditiously take possession of such deposits in the event of a default. These enhancements will enable OCC to better ensure that it monitors and maintains adequate financial resources in the event of a clearing member default and thereby assure the safeguarding of securities and funds in OCC's custody or control or for which it is responsible.

Additionally, the Commission finds that the proposed rule change is consistent with Exchange Act Rules 17Ad–22(d)(1), (3), and (11). Exchange Act Rule 17Ad–22(d)(1) requires clearing agencies to establish, implement, maintain and enforce written policies and procedures reasonably designed to provide a well-founded, transparent, and enforceable legal framework for each aspect of its activities in all relevant jurisdictions.[8] Through the proposed change, OCC will provide clarity to clearing members, their customers, and potential users of OCC's escrow deposit program regarding the operations of the escrow deposit program and the rights of OCC, clearing members and customers upon a clearing member or customer default. For example, the proposed change will better codify OCC's and clearing members' rights to collateral in the escrow deposit program the event of a clearing member or customer default and provide greater transparency regarding the operational steps involved in taking possession of such collateral. Moreover, consolidating the rules governing the escrow deposit program and terms previously located in the EDA into a single location will enhance the transparency of the applicable rules. As such, the Commission believes the proposed change is consistent with Exchange Act Rule 17Ad–22(d)(1).[9]

In addition, the Commission believes that the proposed change is consistent with Exchange Act Rule 17Ad–22(d)(3), which requires clearing agencies to, among other things, establish, implement, maintain and enforce written policies and procedures reasonably designed to hold assets in a manner that minimizes risk of loss or delay in its access to them.[10] As described above, all non-cash collateral in the escrow deposit program will be held at DTC, allowing OCC to validate and value collateral in real time and quickly obtain possession of deposited securities in an event of default without involving custodian banks by issuing a transfer instruction through DTC's systems. The proposed change will also codify OCC's right to take possession of cash collateral within an escrow account upon a clearing member or custodian bank default and provide OCC with online view access to each customer's cash account at the custodian bank. Together, these changes will allow OCC to monitor the adequacy of collateral in the escrow deposit program and be able to more quickly take possession of such collateral in the event of a clearing member default, which will, thereby, reduce potential losses to OCC, other clearing members and market participants.

Finally, the Commission believes that the proposed change is consistent with Exchange Act Rule 17Ad–22(d)(11), which requires clearing agencies to, among other things, establish, implement, maintain and enforce written policies and procedures reasonably designed to make key aspects of their default procedures publicly available.[11] The Commission believes that the proposed change is consistent with Rule 17Ad–22(d)(11) because it will incorporate the substantive terms of the escrow deposit program, and specifically the rules concerning default management, into OCC's Rules, which are publicly available on OCC's Web site, rather than in private agreements.

III. Conclusion

On the basis of the foregoing, the Commission finds that the proposal is consistent with the requirements of the Act, and in particular, with the requirements of Section 17A of the

[6] 15 U.S.C. 78s(b)(2)(C).

[7] 15 U.S.C. 78q–1(b)(3)(F).

[8] 17 CFR 240.17Ad–22(d)(1).

[9] *Id.*

[10] 17 CFR 240.17Ad–22(d)(3).

[11] 17 CFR 240.17Ad–22(d)(11).

Act [12] and the rules and regulations thereunder.

It is therefore ordered, pursuant to Section 19(b)(2) of the Exchange Act,[13] that the proposed rule change (SR–OCC–2016–009) be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[14]

Robert W. Errett,

Deputy Secretary.

[FR Doc. 2016–25234 Filed 10–18–16; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–79091; File No. SR–BatsEDGX–2016–57]

Self-Regulatory Organizations; Bats EDGX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Fees for Use of Bats EDGX Exchange, Inc. Options Platform

October 13, 2016.

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 October 6, 2016, Bats EDGX Exchange, Inc. (the ''Exchange'' or ''EDGX'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change

The Exchange filed a proposal to amend the fee schedule applicable to Members [3] and non-Members of the Exchange pursuant to EDGX Rules 15.1(a) and (c).

The text of the proposed rule change is available at the Exchange's Web site at *www.batstrading.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its fee schedule for its equity options platform (''EDGX Options'') to: (i) Add definition of OCC Customer Volume or OCV, to the Definitions section of the fee schedule; and (ii) modify the criteria for the Customer Volume, Market Maker Volume, and Firm Penny Pilot Cross-Asset Tiers to reflect the new definition of OCV; and (iii) to make a non-substantive change.

OCC Customer Volume Definition

The Exchange proposes to add the definition of ''OCC Customer Volume'' or ''OCV'' to the definition section of its fee schedule. OCC Customer Volume or OCV will be defined as the total equity and Exchange Traded Fund (''ETF'') options volume that clears in the Customer [4] range at the Options Clearing Corporation (''OCC'') for the month for which the fees apply, excluding volume on any day that the Exchange experiences an Exchange System Disruption [5] and on any day with a scheduled early market close.

Tier Qualifications Change

The Exchange proposes to replace current tier qualifications which refer to Total Consolidated Volume (''TCV'') [6] with a reference to OCV in the Customer Volume Tier, Market Maker Volume Tier and Firm Penny Pilot Cross-Asset Tier, in Footnotes 1, 2 and 4, respectively. Because OCV generally makes up a smaller range than the prior TCV, the Exchange also proposes to amend the percentage of OCV necessary to achieve the tier so that it is substantially identical to the previously required percentage of TCV. Doing so will keep each tier's criteria relatively unchanged from its current requirements. The rates for each tier are unchanged. Changes to each tier are described below.

Customer Volume Tiers

Customer orders that yield fee codes NC [7] or PC [8] and are given a standard rebate of $0.05 per contract. Footnote 1 of the fee schedule sets forth five tiers, each providing enhanced rebates, ranging from $0.10 to $0.25 per contract, to a Member's order that yield fee codes NC or PC upon satisfying monthly volume criteria based on an ADV [9] in Customer orders equal to or greater than a percentage of average TCV.

- Tier 1 currently requires that a Member have an ADV in Customer orders equal to or greater than 0.15% of average TCV. As amended, a Member must have an ADV in Customer orders equal to or greater than 0.20% of average OCV.
- Tier 2 currently requires that a Member have an ADV in Customer orders equal to or greater than 0.30% of average TCV. As amended, a Member must have an ADV in Customer orders equal to or greater than 0.40% of average OCV.
- Tier 3 currently requires that a Member have an ADV in Customer orders equal to or greater than 0.50% of average TCV. As amended, a Member must have an ADV in Customer orders equal to or greater than 0.65% of average OCV.
- Tier 4 currently requires that a Member has an ADV in Customer orders equal to or greater than 0.80% of average TCV. As amended, a Member must have an ADV in Customer orders equal to or greater than 1.05% of average OCV.
- Tier 5 currently requires that a Member have an ADV in Customer orders equal to or greater than 0.05% of average TCV, and an ADV in Customer or Market Maker [10] orders equal to or greater than 0.25% of average TCV. As amended, a Member must have an ADV in Customer orders equal to or greater than 0.05% of average OCV, and an

[12] In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[13] 15 U.S.C. 78s(b)(2).

[14] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The term ''Member'' is defined as ''any registered broker or dealer that has been admitted to membership in the Exchange.'' *See* Exchange Rule 1.5(n).

[4] As defined in the Exchange's fee schedule available at *http://www.batsoptions.com/support/fee_schedule/edgx/.*

[5] An ''Exchange System Disruption'' means ''any day that the Exchange's system experiences a disruption that lasts for more than 60 minutes during Regular Trading Hours.'' *Id.*

[6] *Id.*

[7] Fee code NC is appended to a Member's order which removes liquidity (Customer), Non-Penny. *Id.*

[8] Fee code PC is appended to a Member's order which removes liquidity (Customer) Penny Pilot. *Id.*

[9] As defined in the Exchange's fee schedule available at *http://www.batsoptions.com/support/fee_schedule/edgx/.*

[10] *Id.*

ADV in Customer or Market Maker orders equal to or greater than 0.35% of average OCV.

Market Marker Volume Tier

Market Maker orders yield fee codes PM [11] or NM [12] and are charged a standard fee of $0.19 per contract. Footnote 2 of the fee schedule sets forth seven tiers, each providing a reduced fee ranging from $0.01 to $0.16 per contract to a Member's order that yield fee code PM or NM upon satisfying monthly volume criteria based on a Member having an ADV in Market Maker orders equal to or greater than a percentage of average TCV.

• Tier 1 currently requires that a Member have an ADV in Market Maker orders equal to or greater than 0.05% of average TCV. As amended, a Member must have an ADV in Market Maker orders equal to or greater than 0.05% of average OCV.[13]

• Tier 2 currently requires that a Member have an ADV in Market Maker orders equal to or greater than 0.10% of average TCV. The equivalent proposed calculation would require that a Member has an ADV in Market Maker orders equal to or greater than 0.15% of average OCV.

• Tier 3 Currently requires that a Member have an ADV in Market Maker orders equal to or greater than 0.20% of average TCV. As amended, a Member must have an ADV in Market Maker orders equal to or greater than 0.25% of average OCV.

• Tier 4 currently requires that a Member have an ADV in Market Maker orders equal to or greater than 0.30% of average TCV. As amended, a Member must have an ADV in Market Maker orders equal to or greater than 0.40% of average OCV.

• Tier 5 currently requires that a Member have an ADV in Market Maker orders equal to or greater than 0.70% of average TCV. As amended, a Member must have an ADV in Market Maker orders equal to or greater than 0.95% of average OCV.

• Tier 6 currently requires that a Member have an ADV in Market Maker orders equal to or greater than 1.10% of average TCV. As amended, a Member must have an ADV in Market Maker orders equal to or greater than 1.45% of average OCV.

• Tier 7 currently requires that a Member have an ADV in Customer orders equal to or greater than 0.05% of average TCV, and an ADV in Customer or Market Maker orders equal to or greater than 0.25% of average TCV. As amended, a Member must have an ADV in Customer orders equal to or greater than 0.05% of average OCV, and an ADV in Customer or Market Maker orders equal to or greater than 0.35% of average OCV.

Firm Penny Pilot Cross-Asset Tier

Firm [14] Penny Pilot [15] orders yield fee code PF [16] and are charged a standard fee of $0.45 per contract. Footnote 4 of the fee schedule sets forth a Cross-Asset Tier, providing a reduced fee of $0.32 per contract for Member's order that yield fee code PF where that Member has an ADV in Firm orders equal to or greater than 0.10% of average TCV and an ADAV [17] on the Exchange's equity platform (''EDGX Equities'') equal to or greater than 0.12% of average TCV. As amended, a Member must have an ADV in Firm orders equal to or greater than 0.15% of average OCV, and on EDGX Equities an ADAV equal to or greater than 0.12% of average TCV.

Non-Substantive Change

The header of each tier described on the Fee Schedule denotes three columns, the first of which is labeled as ''Tier'' in Footnotes 1 and 2, and labeled as ''Description'' in Footnote 3 and footnote 4. To harmonize the labeling of the tiers and promote clarity throughout the fee schedule the Exchange proposes to label the first columns of Footnotes 3 and 4, ''Tier.''

Implementation Date

The Exchange proposes to implement the amendments to its fee schedule immediately.[18]

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the objectives of Section 6 of the Act,[19] in general, and furthers the objectives of Section 6(b)(4),[20] in particular, as it is designed to provide for the equitable allocation of reasonable dues, fees and other charges among its Members and other persons using its facilities. The Exchange also notes that it operates in a highly-competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive. The Exchange believes that the proposed rates are equitable and non-discriminatory in that they apply uniformly to all Members.

The proposed fee structure remains intended to attract order flow to the Exchange by offering market participants a competitive pricing structure. The Exchange believes it is reasonable to offer and incrementally modify incentives intended to help to contribute to the growth of the Exchange. Volume-based rebates such as that described herein have been widely adopted by exchanges, including the Exchange, and are equitable because they are open to all Members on an equal basis and provide additional benefits or discounts that are reasonably related to: (i) The value to an exchange's market quality; (ii) associated higher levels of market activity, such as higher levels of liquidity provisions and/or growth patterns; and (iii) introduction of higher volumes of orders into the price and volume discovery processes.

The Exchange believes adopting a definition of OCV and utilizing OCV in lieu of TCV is reasonable, fair and equitable, and non-discriminatory because the Exchange also proposed to modify the tier's related criteria in order to maintain substantially identical requirements to qualify for the tier without changing the rate provided for by the tiers. In addition, the amount of OCV historically tends to remain reasonably consistent from month to month, as opposed to TCV which is less consistent. OCV is also more consistent than options volume that clears in the Market Maker or Firm range at the OCC, as Market Maker and Firm volume may vary drastically from month to month based on market events, as opposed to Customer options volume which remains relatively consistent. Therefore, the Exchange believes utilizing OCV would result in consistent tier criteria as OCV is a relatively static monthly number which would enable market participants to better predict whether they may achieve a tier criteria each month and qualify for that tier's preferred pricing.

The Exchange also believes that the use OCV provides a calculation that is reasonably identical to and is not a significant departure from previous tier qualifications conventions offered by

[11] Fee code PM is appended to a Members order which adds liquidity (MM), Penny Pilot. *Id.*

[12] Fee code NM is appended to a Members order which adds liquidity (MM), Non-Penny. *Id.*

[13] The Exchange proposes to retain the 0.05% requirement as adjusting that number to reflect replacing TCV with OCV will result in a de minimmis change in the percentage.

[14] As defined in the Exchange's fee schedule available at *http://www.batsoptions.com/support/fee_schedule/edgx/.*

[15] *Id.*

[16] Fee code PF is appended to a Members order which adds liquidity (Firm/BD/JBO), Penny Pilot.

[17] As defined in the Exchange's fee schedule available at *http://www.batsoptions.com/support/fee_schedule/edgx/.*

[18] The Exchange initially filed the proposed amendments to its fee schedule on September 30, 1016 (SR–BatsEDGX–2016–56). On October 6, 2016, the Exchange withdrew SR–BatsEDGX–2016–56 and submitted this filing.

[19] 15 U.S.C. 78f.

[20] 15 U.S.C. 78f(b)(4).

other exchanges[21] The Exchange believes that the proposed definitions of OCV is reasonable, fair and equitable, and non-discriminatory, and will provide additional transparency to Members regarding the calculations used to determine volume levels for purposes of the proposed tiered pricing model.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe its proposed amendment to its fee schedule would impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange does not believe that the proposed changes represents a significant departure from previous pricing offered by the Exchange or pricing offered by the Exchange's competitors. The Exchange believes that its proposal to amend the qualification criteria and to incorporate OCV as proposed would not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act because the Exchange also proposed to modify the tier's related criteria in order to maintain substantially identical requirements to qualify for each tier. Additionally, Members may opt to disfavor the Exchange's pricing if they believe that alternatives offer them better value. Accordingly, the Exchange does not believe that the proposed changes will impair the ability of Members or competing venues to maintain their competitive standing in the financial markets. The Exchange believes that its proposal would not burden intramarket competition because the proposed rates would continue to apply uniformly to all Members. As stated above, the Exchange notes that it operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee structures to be unreasonable or excessive. The Exchange does not believe the proposed tiers and standard rates would burden intramarket competition as they would apply to all Members uniformly.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any written comments from members or other interested parties.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act[22] and paragraph (f) of Rule 19b–4 thereunder.[23] 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–BatsEDGX–2016–57 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–BatsEDGX–2016–57. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–BatsEDGX–2016–57, and should be submitted on or before November 9, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[24]

Robert W. Errett,

Deputy Secretary.

[FR Doc. 2016–25236 Filed 10–18–16; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–79089; File No. SR–NYSEMKT–2016–91]

Self-Regulatory Organizations; NYSE MKT LLC; Notice of Filing and Immediate Effectiveness of Proposed Change To Modify the NYSE Amex Options Fee Schedule

October 13, 2016.

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 October 3, 2016, NYSE MKT LLC (the

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[21] *See* the NYSE MKT LLC ("NYSE MKT") fee schedule *available at https://www.nyse.com/publicdocs/nyse/markets/amex-options/NYSE_Amex_Options_Fee_Schedule.pdf* (setting forth tiers that provide preferred pricing to options market makers who meet certain criteria, including achieving a specific "Monthly Volume as a % of Industry Customer Equity and Exchange Traded Fund ("ETF") Option Volume"); NYSE Arca, Inc. ("NYSE ARCA") options fee schedule *available at https://www.nyse.com/publicdocs/nyse/markets/arca-options/NYSE_Arca_Options_Fee_Schedule.pdf* (setting forth a Market Maker Incentive tier that provides preferred pricing to market makers who meet certain criteria, including achieving a specific percentage of "Total Industry Customer equity and ETF option ADV"); Nasdaq Stock Market LLC ("Nasdaq") options fee schedule *available at http://www.nasdaqtrader.com/Micro.aspx?id=optionsPricing* (setting forth tiers that provide preferred pricing to market makers who meet certain criteria, including achieving a specific percentage of "total industry customer equity and ETF option ADV contracts per month"); *and* Nasdaq BX LLC ("BX") options fee schedule *available at http://www.nasdaqtrader.com/Micro.aspx?id=BXOptionsPricing* (setting forth tiers that provide preferred pricing to market makers who meet certain criteria, including achieving a specific percentage of "total industry customer equity and ETF option ADV contracts per month").

[22] 15 U.S.C. 78s(b)(3)(A).

[23] 17 CFR 240.19b–4(f).

[24] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

''Exchange'' or ''NYSE MKT'') 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 modify the NYSE Amex Options Fee Schedule. The proposed 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.

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 purpose of this filing is to amend Section I.F. of the Fee Schedule to treat Professional Customer Qualified Contingent Cross (''QCC'') transactions the same as Customer QCC transactions.[4] The Exchange proposes to implement these changes effective on October 3, 2016.

Section I.F. of the Fee Schedule describes QCC Fees and Credits. Currently, the Exchange imposes the following fees for QCC transactions in Standard Options:

Participant	Standard options per contract fee or credit
Customer	$0.00
Non-Customer excluding Specialists and e-Specialists	0.20
Specialists and e-Specialists	0.13

Currently, Professional Customer QCC trades are charged as ''Non-Customer excluding Specialists and e-Specialists.'' [5] The Exchange also offers a Floor Broker rebate which varies based on the volume of executed QCC orders, provided there are not Customers on both sides of the transaction (''Floor Broker Rebate'').[6]

The Exchange proposes to treat Professional Customers the same as Customers for purposes of fees for QCC transactions. In other words, Professional Customers would be charged $0.00 for QCC trades. Thus, the Exchange proposes to modify Section I.F. to add reference to Professional Customers (along with the existing reference to Customers) to reflect this proposed change.

Currently, the Floor Broker Rebate is not available for QCC trades where neither side of the QCC is billable (*i.e.,* Customer-to-Customer QCC transactions). Thus, by extension, the Exchange proposes that the Floor Broker Rebate would likewise be unavailable for QCC trades where there is a Professional Customer or Customer, or both, on both sides of the QCC transaction, as such transactions are all non-billable. For example, a Floor Broker executing as a QCC trade an order from a Customer buying 1,000 ABC Dec 40 Calls and an order from a Professional Customer selling 1,000 ABC Dec 40 Calls at $2.00 would not be eligible for the Floor Broker credits. This example would also apply to QCC trades with a Professional Customer (or Customer) on both sides of the QCC transaction.

The proposal is designed to attract more QCC volume to the Exchange, because there would be no fee for Professional Customer orders, and to enhance the Exchange's competitiveness with other options exchanges that likewise do not charge QCC fees on Professional Customer orders.[7]

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[8] in general, and furthers the objectives of Sections 6(b)(4) and (5) of the Act,[9] in particular, because it provides for the equitable allocation of reasonable dues, fees, and other charges among its members, issuers and other persons using its facilities and does not unfairly discriminate between customers, issuers, brokers or dealers.

The Exchange believes the proposal is reasonable, equitable and not unfairly discriminatory as it is consistent with other options markets that treat Professional Customers similar to Customers for purposes of QCC transaction fees.[10]

The Exchange also believes that the proposed changes are reasonable, equitable and not unfairly discriminatory because permitting Professional Customer orders to be treated similar to Customer orders (*i.e.,* not be subject to a fee) should attract more QCC transactions to the Exchange, which would continue to make the Exchange a more competitive venue for, among other things, order execution.

For these reasons, the Exchange believes that the proposal is consistent with the Act.

B. Self-Regulatory Organization's Statement on Burden on Competition

In accordance with Section 6(b)(8) of the Act,[11] 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. Instead, the Exchange believes that the proposed change would continue to encourage competition, including by attracting additional QCC Transactions to the Exchange, which would continue to make the Exchange a more competitive venue for, among other things, order execution. The Exchange's proposal does not place on undue burden on inter-market competition because other exchanges likewise do not

[4] *See* Fee Schedule, Section I.F. (Qualified Contingent Cross (''QCC'') Fees & Credits for Standard Options & Mini Options), *available here, https://www.nyse.com/publicdocs/nyse/markets/amex-options/NYSE_Amex_Options_Fee_Schedule.pdf.*

[5] *See id.,* note 1 (providing a per contract rebate of either $0.07 or $0.10 to Floor Brokers executing qualifying QCC volume, depending on whether the Floor Broker executes 300,000 or fewer contracts ($0.07 per contract) or more than 300,000 contracts ($0.10 per contract)).

[6] *See, e.g.,* Securities Exchange Act Release No. 68139 (November 2, 2012), 77 FR 66902, 66902, n. 5 (November 7, 2012) (SR–NYSEMKT–2012–56) (noting that Professional Customers are treated as Non-Customers in filing to modify QCC fees for Specialists and e-Specialists).

[7] *See, e.g.,* NYSE Arca Options Fee Schedule, *available here, https://www.nyse.com/publicdocs/nyse/markets/arca-options/NYSE_Arca_Options_Fee_Schedule.pdf;* NASDAQ OMX PHLX LLC (''PHLX'') pricing schedule (Section II), *available here, http://www.nasdaqtrader.com/Micro.aspx?id=PHLXPricing.*

[8] 15 U.S.C. 78f(b).

[9] 15 U.S.C. 78f(b)(4) and (5).

[10] *See supra* note 7.

[11] 15 U.S.C. 78f(b)(8).

charge Professional Customers for QCC transactions.[12]

The Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues. In such an environment, the Exchange must continually review, and consider adjusting, its fees and credits to remain competitive with other exchanges. Because competitors are free to modify their own fees in response, and because market participants may readily adjust their order routing practices, the degree to which fee changes in this market may impose any burden on competition is extremely limited. For the reasons described above, the Exchange believes that the proposed rule change reflects this competitive environment.

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 foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A)[13] of the Act and subparagraph (f)(2) of Rule 19b–4[14] thereunder, because it establishes a due, fee, or other charge imposed by the Exchange.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B)[15] of the Act to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

[12] *See supra* note 7.

[13] 15 U.S.C. 78s(b)(3)(A).

[14] 17 CFR 240.19b–4(f)(2).

[15] 15 U.S.C. 78s(b)(2)(B).

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–NYSEMKT–2016–91 on the subject line.

Paper Comments

• Send paper comments in triplicate to Brent J. Fields, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEMKT–2016–91. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEMKT–2016–91, and should be submitted on or before November 9, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[16]

Robert W. Errett,

Deputy Secretary.

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[16] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–79090; File No. SR–BatsEDGX–2016–55]

Self-Regulatory Organizations; Bats EDGX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Fees for Use of Bats EDGX Exchange, Inc.

October 13, 2016.

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 30, 2016, Bats EDGX Exchange, Inc. (the ''Exchange'' or ''EDGX'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II and III below, which Items have been prepared by the Exchange. The Exchange has designated the proposed rule change as one establishing or changing a member due, fee, or other charge imposed by the Exchange under Section 19(b)(3)(A)(ii) of the Act[3] and Rule 19b–4(f)(2) thereunder,[4] which renders the proposed rule change effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange filed a proposal to amend the fee schedule applicable to Members[5] and non-members of the Exchange pursuant to EDGX Rules 15.1(a) and (c).

The text of the proposed rule change is available at the Exchange's Web site at *www.batstrading.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(ii).

[4] 17 CFR 240.19b–4(f)(2).

[5] The term ''Member'' is defined as ''any registered broker or dealer that has been admitted to membership in the Exchange.'' *See* Exchange Rule 1.5(n).

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 modify its fee schedule in order to: (i) Add the definition of OCC Customer Volume or OCV, to the Definitions section of the fee schedule; and (ii) amend Footnote 1 to: (A) Modify the criteria for the Cross-Asset Add Volume Tier to reflect the new definition of OCV; and (B) establish a Single MPID Cross-Asset Tier.

OCC Customer Volume Definition

The Exchange proposes to add the definition of ''OCC Customer Volume'' or ''OCV'' to the definition section of its fee schedule. OCC Customer Volume or OCV will be defined as the total equity and Exchange Traded Fund (''ETF'') options volume that clears in the Customer [6] range at the Options Clearing Corporation (''OCC'') for the month for which the fees apply, excluding volume on any day that the Exchange experiences an Exchange System Disruption [7] and on any day with a scheduled early market close, using the definition of Customer as provided under the Exchange's fee schedule for EDGX Options.

Footnote One

The Exchange determines the liquidity adding rebate that it will provide to Members using the Exchange's tiered pricing structure. Currently, the Exchange provides various rebates under Footnote 1 of the fee schedule for a Member dependent on the Member's ADV [8] as a percentage of the TCV [9] for orders that yield fee codes B, V, Y, 3, 4 and ZA. The Exchange currently has none Add Volume Tiers. Under such pricing structure, a Member will receive a rebate of anywhere between $0.0025 and $0.0033 per share executed, depending on the volume tier for which such Member qualifies.

Cross-Asset Tier Amendments. Footnote 1 of the fee schedule includes a Cross-Asset Tier under which Members may receive an enhanced rebate of $0.0028 where they have on EDGX Options an ADV in Firm [10] orders equal to or greater than 0.10% of average TCV and an ADAV [11] equal to or greater than 0.12% of average TCV. The Exchange proposes to replace the term TCV with the new defined term OCV (discussed above). As amended, Members must have on EDGX Options an ADV in Firm orders equal to or greater than 0.15% of average OCV. Because, OCV is a by definition, a smaller amount than TCV, the Exchange proposes to slightly increase the volume percentage required to attain the first prong of the tier from 0.10% to 0.15%. Doing so will keep tier's criteria relatively unchanged from its current requirements. Lastly, the Exchange will continue to require Members to also have an ADAV equal to or greater than 0.12% of average TCV on the Exchange.

Single MPID Cross-Asset Investor Tier. The Exchange proposes to add new tier to Footnote 1 to be called the Single MPID Cross-Asset Tier. Under the proposed tier, a Member may would receive an enhanced rebate of $0.0030 per share where that Member's: (i) Market Participant Identifier (''MPID'') has on EDGX Options an ADAV in Market Maker [12] orders equal to or greater than 0.12% of average OCV; and (ii) an ADAV equal to or greater than 0.12% of average TCV.

Implementation Date

The Exchange proposes to implement the amendments to its fee schedule on October 3, 2016.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the objectives of Section 6 of the Act,[13] in general, and furthers the objectives of Section 6(b)(4),[14] in particular, as it is designed to provide for the equitable allocation of reasonable dues, fees and other charges among its Members and other persons using its facilities. The Exchange also notes that it operates in a highly-competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive. The Exchange believes that the proposed rates are equitable and non-discriminatory in that they apply uniformly to all Members.

The Exchange believes that the proposed modifications to the tiered pricing structure are reasonable, fair and equitable, and non-discriminatory. The proposed fee structure remains intended to attract order flow to the Exchange by offering market participants a competitive pricing structure. The Exchange believes it is reasonable to offer and incrementally modify incentives intended to help to contribute to the growth of the Exchange. Volume-based rebates such as that proposed herein have been widely adopted by exchanges, including the Exchange, and are equitable because they are open to all Members on an equal basis and provide additional benefits or discounts that are reasonably related to: (i) The value to an exchange's market quality; (ii) associated higher levels of market activity, such as higher levels of liquidity provisions and/or growth patterns; and (iii) introduction of higher volumes of orders into the price and volume discovery processes.

The Exchange believes adopting a definition of OCV and utilizing OCV in lieu of TCV for its Cross-Asset Tier is reasonable, fair and equitable, and non-discriminatory because the Exchange also proposed to modify the tier's related criteria in order to maintain substantially identical requirements to qualify for the tier. Competitors of the Exchange also use similar calculations and the proposed qualifications do not represent a significant departure from such pricing structures.[15] The Exchange believes that the proposed qualifications are reasonable, fair and equitable, and non-discriminatory, and will provide additional transparency to Members regarding the calculations used to determine volume levels for purposes of the proposed tiered pricing model.

The Exchange believes that the proposed Single MIPID Cross-Asset Tier is reasonable, fair and equitable, and non-discriminatory. The increased liquidity from this proposed tier also

[6] As defined in the fee schedule for the Exchange's equity options platform (''EDGX Options'') available at *http://www.batsoptions.com/support/fee_schedule/edgx/.*

[7] An ''Exchange System Disruption'' means ''any day that the Exchange's system experiences a disruption that lasts for more than 60 minutes during Regular Trading Hours.'' *See* the Exchange's fee schedule available at *http://batstrading.com/support/fee_schedule/edgx/.*

[8] As defined in the Exchange's fee schedule available at *http://batstrading.com/support/fee_schedule/edgx/.*

[9] *Id.*

[10] As defined in EDGX Option's fee schedule available at *http://www.batsoptions.com/support/fee_schedule/edgx/.*

[11] Exchange's fee schedule available at *http://batstrading.com/support/fee_schedule/edgx/.*

[12] As defined in EDGX Option's fee schedule available at *http://www.batsoptions.com/support/fee_schedule/edgx/.*

[13] 15 U.S.C. 78f.

[14] 15 U.S.C. 78f(b)(4).

[15] NYSE Amex Options Customer volume tiers require a specific ''Customer Electronic ADV as a % of Industry Customer Equity and ETF Options ADV''. *https://www.nyse.com/publicdocs/nyse/markets/amex-options/NYSE_Amex_Options_Fee_Schedule.pdf.* Nasdaq NOM Options Customer volume tiers require a specific percentage of ''total industry customer equity and ETF option average daily volume (''ADV'') contracts per day in a month.'' *http://www.nasdaqtrader.com/Micro.aspx?id=optionsPricing.*

benefits all investors by deepening the EDGX Options and the Exchange's liquidity pools, offering additional flexibility for all investors to enjoy cost savings, supporting the quality of price discovery, promoting market transparency and improving investor protection. Such pricing programs thereby reward a Member's growth pattern on the Exchange and such increased volume increases potential revenue to the Exchange, and will allow the Exchange to continue to provide and potentially expand the incentive programs operated by the Exchange. To the extent a Member participates on EDGX Options and not EDGX Equities, the Exchange believes that the proposal is still reasonable, equitably allocated and non-discriminatory with respect to such Member based on the overall benefit to the Exchange resulting from the success of EDGX Options. As noted above, such success allows the Exchange to continue to provide and potentially expand its existing incentive programs to the benefit of all participants on the Exchange, whether they participate on EDGX Options or not. The proposed tier is also fair and equitable in that membership in EDGX Options is available to all market participants which would provide them with access to the benefits on EDGX Equities provided by the proposed changes, as described above, even where a member of EDGX Equities is not necessarily eligible for the proposed increased rebates on the Exchange. Further, the proposed changes will result in Members receiving either the same or an increased rebate than they would currently receive.

The Exchange further believes that the proposed addition of the Single MPID Cross Asset Tier represents an equitable allocation of reasonable dues, fees, and other charges among Members and other persons using its facilities because it rewards Members with order flow characteristics that contribute meaningfully to price discovery on the Exchange. In other words, Members that post a substantial amount of liquidity and primarily post liquidity are valuable Members to the EDGX Options and EDGX Equities Exchanges and the marketplace in terms of liquidity provision. By applying the tier on a single MPID rather than across a Member's entire trading activity, the Exchange is also allowing more Members to potentially receive the enhanced rebates for their trading activity related to liquidity provision. The Single MPID Cross Asset Tier also encourages Members to primarily add liquidity in order to satisfy the ADAV as a percentage of OCV. Such increased volume increases potential revenue to the Exchange, and would allow the Exchange to spread its administrative and infrastructure costs over a greater number of shares, leading to lower per share costs. These lower per share costs would allow the Exchange to pass on the savings to Members in the form of higher rebates. The increased liquidity also benefits all investors by deepening the Exchange's liquidity pool, offering additional flexibility for all investors to enjoy cost savings, supporting the quality of price discovery, promoting market transparency and improving investor protection. Volume-based rebates such as the ones proposed herein have been widely adopted in the cash equities markets, and are equitable because they are open to all Members on an equal basis and provide discounts that are reasonably related to the value to an exchange's market quality associated with higher levels of market activity, such as higher levels of liquidity provision and introduction of higher volumes of orders into the price and volume discovery processes.

In addition, the rebate is also reasonable in that other exchanges likewise employ similar pricing mechanisms based on a Member's MPID.[16] Finally, the Exchange also believes that the proposed Single MPID Investor Tier is non-discriminatory in that it would apply equally to all Members.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe its proposed amendment to its fee schedule would impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange does not believe that the proposed changes represents a significant departure from previous pricing offered by the Exchange or pricing offered by the Exchange's competitors. Additionally, Members may opt to disfavor the Exchange's pricing if they believe that alternatives offer them better value. The Exchange believes that its proposal would not burden intramarket competition because the proposed rate would apply uniformly to all Members. The Exchange does not believe that the proposed new tiers and standard removal rates would burden competition, but instead, enhances competition, as they are intended to increase the competitiveness of and draw additional volume to the Exchange. As stated above, the Exchange notes that it operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee structures to be unreasonable or excessive. The proposed changes are generally intended to draw additional liquidity to the Exchange. The Exchange does not believe the proposed tiers and standard rates would burden intramarket competition as they would apply to all Members uniformly.

The Exchange does not believe that the proposed new Single MPID Cross-Asset Add Tier would burden competition, but instead, enhances competition, as it is intended to increase the competitiveness of and draw additional volume to the Exchange and EDGX Options. The Exchange does not believe that its proposal would burden intramarket competition because the proposed rebate would apply uniformly to all Members that achieve the objective criteria of the Single MPID Investor Tier.

Lastly, the Exchange believes that its proposal to amend the qualification criteria for the Cross-Asset Tier to incorporate OCV would not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act because the Exchange also proposed to modify the tier's related criteria in order to maintain substantially identical requirements to qualify for the tier.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any written comments from members or other interested parties.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act[17] and paragraph (f) of Rule 19b–4 thereunder.[18] 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

[16] *See* Bats BZX Exchange, Inc. fee schedule *available at http://batstrading.com/support/fee_schedule/bzx/* (offering a Single MPID Investor Tier with volume requirements based on MPID).

[17] 15 U.S.C. 78s(b)(3)(A).

[18] 17 CFR 240.19b–4(f).

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–BatsEDGX–2016–55 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–BatsEDGX–2016–55. 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–BatsEDGX–2016–55, and should be submitted on or before November 9, 2016.

[19] 17 CFR 200.30–3(a)(12).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[19]

Robert W. Errett,

Deputy Secretary.

[FR Doc. 2016–25237 Filed 10–18–16; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–79096; File No. SR–OCC–2016–802]

Self-Regulatory Organizations; The Options Clearing Corporation; Notice of No Objection to Advance Notice Filing Concerning The Options Clearing Corporation's Escrow Deposit Program

October 13, 2016.

The Options Clearing Corporation (''OCC'') filed on August 15, 2016 with the Securities and Exchange Commission (''Commission'') advance notice SR–OCC–2016–802 (''Advance Notice'') pursuant to Section 806(e)(1) of the Payment, Clearing, and Settlement Supervision Act of 2010 (''Payment, Clearing and Settlement Supervision Act'') [1] and Rule 19b–4(n)(1)(i) [2] under the Securities Exchange Act of 1934 (''Exchange Act'') to implement changes to its escrow deposit program. The Advance Notice was published for comment in the **Federal Register** on September 20, 2016.[3] The Commission did not receive any comments on the Advance Notice. This publication serves as notice of no objection to the Advance Notice.

I. Description of the Advance Notice

OCC is the sole clearing agency for the U.S. listed options markets and a systemically important financial market utility. OCC seeks to manage risks that could cause a financial loss or settlement disruption and, therefore, threaten the stability of the U.S. financial system. One way OCC manages such risks is by collecting collateral to protect against potential losses stemming from the default of a clearing member or its customers. OCC obtains this collateral by collecting margin from its clearing members, or from deposits in lieu of margin of clearing members' customers through OCC's escrow deposit program. OCC states that the users of its escrow deposit program are customers of clearing members who, through the escrow deposit program, are permitted to collateralize eligible positions directly with OCC (instead of with the relevant clearing member who would, in turn, deposit margin at OCC). OCC states that when a customer of a clearing member makes a deposit in lieu of margin through OCC's escrow deposit program, the relevant positions are excluded from the clearing member's margin requirement at OCC. OCC believes that the escrow deposit program therefore provides users of OCC's services with a means to more efficiently use cash or securities they may have available.

As described by OCC in the Advance Notice, the purpose of the proposed change is to improve the resiliency of OCC's escrow deposit program (''EDP''). First, OCC states that the changes would increase OCC's visibility into and control over collateral deposits made under the escrow deposit program. As described in the Advance Notice, currently, securities deposits in the EDP (''specific deposits'') are held at either the Depository Trust Company (''DTC'') or custodian banks, and cash deposits in the EDP (''escrow deposits'') are held at custodian banks. While OCC currently can verify the value of the securities deposited at DTC through DTC's systems, it lacks similar visibility into cash and securities held in custodian bank accounts, relying instead on the custodian banks to verify the value of such collateral. The proposed changes would require securities in the EDP to be held at DTC, providing OCC with increased visibility into the collateral, as OCC will be able to view, validate, and value the collateral in real time and perform the controls currently performed by custodian banks. As stated in the Advance Notice, a bank participating in the escrow deposit program (''Tri-Party Custodian Bank'') would also provide OCC with online view access to each customer's cash account designated for the escrow deposit program, allowing visibility into

[1] 12 U.S.C. 5465(e)(1). The Financial Stability Oversight Council designated OCC a systemically important financial market utility on July 18, 2012. *See* Financial Stability Oversight Council 2012 Annual Report, Appendix A, *http://www.treasury.gov/initiatives/fsoc/Documents/2012%20Annual%20Report.pdf.* Therefore, OCC is required to comply with the Payment, Clearing and Settlement Supervision Act and file advance notices with the Commission. *See* 12 U.S.C. 5465(e).

[2] 17 CFR 240.19b–4(n)(1)(i).

[3] *See* Securities Exchange Act Release No. 78834 (September 14, 2016), 81 FR 64536 (September 20, 2016) (File No. SR–OCC–2016–802). OCC also filed a proposed rule change with the Commission pursuant to Section 19(b)(1) of the Exchange Act and Rule 19b–4 thereunder, seeking approval of changes to its Rules necessary to implement the Advance Notice. 15 U.S.C. 78s(b)(1) and 17 CFR 240.19b–4, respectively. This proposed rule change was published in the **Federal Register** on August 31, 2016. Securities Exchange Act Release No. 78675 (August 25, 2016), 81 FR 60108 (August 31, 2016) (SR–OCC–2016–009).

transactional activity and account balances without having to rely upon a third party to value or warrant the existence of the collateral.

Second, OCC states that the proposed changes provide more specificity concerning the manner in which OCC would take possession of collateral in OCC's escrow deposit program in the event of a clearing member or custodian bank default. As described in the Advance Notice, proposed Rules 610A(b), 610B(f), 610C(q), and 610C(r) would provide that in the event of a clearing member or custodian bank default, OCC would have the right to direct DTC to deliver the securities included in a member specific deposit, third-party specific deposit or escrow deposit to OCC's DTC participant account for the purpose of satisfying the obligations of the clearing member or reimbursing itself for losses incurred as a result of the failure. Similarly, pursuant to proposed Rules 610C(q) and 610C(r), OCC would have the right in the event of a Tri-Party Custodian Bank default to take possession of cash included within an escrow deposit for the same purposes. Further, Rule 1106(b)(2) would be amended to provide that OCC may close out a short position of a suspended clearing member covered by a member specific, third-party specific or escrow deposit, subject to the ability of the suspended clearing member or its representative to transfer the short position to another clearing member under certain circumstances.

Third, OCC states the proposed changes would clarify clearing members' rights to collateral in the EDP in the event of a customer default to the clearing member. According to the Advance Notice, Proposed Rules 610B(c) and 610C(f) would provide for the grant of a security interest by the customer to the clearing member with respect to any given third-party specific deposit and escrow deposit, as applicable, with the clearing member's right subordinate to OCC's interest. Proposed Rules 610C(d), 610C(o), 610C(p) and 610C(s), relating to escrow deposits, and proposed Rules 610B(d) and 610B(e), relating to third-party specific deposits, would provide that, in the event of a customer default to a clearing member, the clearing member would have the right to request a ''hold'' on a deposit, which would prevent the withdrawal of deposited securities or cash by a custodian bank or the release of a deposit that would otherwise occur in the ordinary course. OCC states that placing the ''hold'' instruction gives a clearing member the right to request that OCC direct delivery of the deposit to the clearing member through DTC's systems, in the case of securities, or an instruction to the Tri-Party Custodian Bank in the case of cash. OCC believes that providing clearing members with transparent instructions regarding how to place a hold instruction on and direct delivery of a deposit in the escrow deposit program would be a significant enhancement to the current escrow deposit program.

Fourth, OCC states the changes would improve the readability of the rules governing OCC's escrow deposit program by consolidating all such rules into a single location in OCC's Rulebook. Upon implementation of the proposed change, all securities collateral in OCC's escrow deposit program would be held at DTC, and custodian banks would only be allowed to hold cash collateral.

Rule Consolidation and Terminology Changes

OCC's current rules concerning its escrow deposit program are located in OCC Rules 503, 610, 613 and 1801. Additionally, OCC and custodian banks participating in OCC's escrow deposit program enter into an Escrow Deposit Agreement (''EDA''), which also contains substantive provisions governing the program. OCC proposes to consolidate all of the rules concerning the escrow deposit program, including the provisions of the EDA relevant to the revised escrow deposit program, into proposed Rules 610, 610A, 610B and 610C. OCC states that consolidating the many rules governing the escrow deposit program into a single location would significantly enhance the understandability and transparency of the rules concerning the escrow deposit program for current users of the program as well as any persons that may be interested in using the program in the future.

OCC proposes to rename the types of escrow deposits available within the escrow deposit program, as well as rename the term ''approved depository'' to ''approved custodian.'' Specific deposits, which are equity securities deposited by clearing members at DTC at the direction of their customers, would now be called ''member specific deposits''; third-party escrow deposits, which are equity securities deposited by custodian banks at DTC at the direction of their customers, would now be called ''third-party specific deposits''; and escrow program deposits, which are either cash deposits held at a custodian bank for the benefit of OCC, or Government securities deposited at DTC by custodian banks at the direction of their customers, would now be called ''escrow deposits''. The term ''approved depository'' would also be changed to ''approved custodian'' to eliminate any potential confusion with the term ''Depository,'' which is defined in the Rules to mean DTC.

New Rule Organization

With respect to the rules governing the escrow deposit program, OCC states that proposed Rule 610 would set forth general terms and conditions common to all types of deposits permitted under the escrow deposit program. Specifically, proposed Rule 610: (1) Sets forth the different types of eligible positions for which a deposit in lieu of margin may be used, (2) sets forth operational aspects of the escrow deposit program such as the days and the times during which a deposit in lieu of margin may be made and where the different types of deposits in lieu of margin must be maintained (either DTC or a custodian bank), (3) provides the conditions under which OCC may take possession of a deposit in lieu of margin (from DTC or a custodian bank), and (4) describes OCC's security interest in deposits in lieu of margin.[4] Proposed Rule 610 is supplemented by: (1) Proposed Rule 610A for member specific deposits, (2) proposed Rule 610B for third-party specific deposits, and (3) proposed Rule 610C for escrow deposits.

Agreements Concerning the Escrow Deposit Program

In addition to the above-described Rule changes, many provisions of the EDA would be moved in to the Rules. OCC proposes to eliminate the EDA and replace it with a streamlined agreement entitled the ''Participating Escrow Bank Agreement.'' OCC states that the Participating Escrow Bank Agreement would provide that custodian banks are subject to all terms of the Rules governing the revised escrow deposit program, as they may be amended from time to time.[5] OCC states that the

[4] OCC would continue to maintain a perfected security interest in deposits in the escrow deposit program under the proposed Rules notwithstanding changes to the location of the rules that perfect such security interest. OCC's security interest in securities deposits in the escrow deposit program, which are held at DTC, is perfected by operation of DTC's rules. OCC's security interest in cash deposits in the escrow deposit program is perfected under proposed Rules 610C(i), 610C(j) and 610C(k), which replace Sections 3.3, 3.4, 4.3, 4.4, 5.3, 5.4 and 21 of the EDA. Proposed Rule 610(g) also concerns OCC's security interest in deposits in escrow deposit program.

[5] Under the Participating Escrow Bank Agreement, however, OCC will agree to provide custodian banks with advance notice of material amendments to the Rules relating to deposits in lieu

Continued

Participating Escrow Bank Agreement would contain eligibility requirements for custodian banks, including representations regarding the custodian bank's Tier 1 Capital, and provide OCC with express representations concerning the bank's authority to enter into the Participating Escrow Bank Agreement.

OCC is also proposing, under Proposed Rule 610C(b), to require customers wishing to deposit cash collateral and custodian banks holding escrow deposits comprised of cash to enter into a tri-party agreement involving OCC, the customer and the applicable custodian bank. While cash collateral pledged in the escrow deposit program will continue to be facilitated through existing interfaces, OCC states that pledges would be required to be made in the customer's account at the Tri-Party Custodian Bank. OCC states that the Tri-Party Agreement would govern the customer's use of cash in the program, confirm the grant of a security interest in the customer's account to OCC and the relevant clearing member (as set forth in proposed Rule 610C(f)), and cause customers of clearing members to be subject to all terms of the Rules governing the revised escrow deposit program. Each custodian bank entering into the Tri-Party Agreement would also agree to follow the directions of OCC with respect to cash escrow deposits without further consent by the customer.

II. Discussion and Commission Findings

Although the Payment, Clearing and Settlement Supervision Act does not specify a standard of review for an advance notice, the Commission believes that the stated purpose of the Payment, Clearing and Settlement Supervision Act is instructive.[6] The stated purpose of the Payment, Clearing and Settlement Supervision Act is to mitigate systemic risk in the financial system and promote financial stability by, among other things, promoting uniform risk management standards for systemically important financial market utilities and strengthening the liquidity of systemically important financial market utilities.[7]

Section 805(a)(2) of the Payment, Clearing and Settlement Supervision Act[8] authorizes the Commission to prescribe risk management standards for the payment, clearing, and settlement activities of designated clearing entities and financial institutions engaged in designated activities for which it is the supervisory agency or the appropriate financial regulator. Section 805(b) of the Payment, Clearing and Settlement Supervision Act[9] states that the objectives and principles for the risk management standards prescribed under Section 805(a) shall be to:

- promote robust risk management;
- promote safety and soundness;
- reduce systemic risks; and
- support the stability of the broader financial system.

The Commission has adopted risk management standards under Section 805(a)(2) of the Payment, Clearing and Settlement Supervision Act (''Clearing Agency Standards'') and the Exchange Act.[10] The Clearing Agency Standards became effective on January 2, 2013, and require registered clearing agencies to establish, implement, maintain, and enforce written policies and procedures that are reasonably designed to meet certain minimum requirements for their operations and risk management practices on an ongoing basis. As such, it is appropriate for the Commission to review advance notices against these Clearing Agency Standards, and the objectives and principles of these risk management standards as described in Section 805(b) of the Payment, Clearing and Settlement Supervision Act.[11]

The Commission believes the proposed change is consistent with the objectives and principles described in Section 805(b) of the Payment, Clearing and Settlement Supervision Act,[12] and the Clearing Agency Standards, in particular, Rule 17Ad–22(d)(1),[13] Rule 17Ad–22(d)(3),[14] and Rule 17Ad–22(d)(11)[15] under the Exchange Act, as described in detail below.

A. Consistency With Section 805(b)(1) of the Act

The objectives and principles of Section 805(b) of the Payment, Clearing and Settlement Supervision Act are to promote robust risk management, promote safety and soundness, reduce systemic risks, and support the stability of the broader financial system.[16] The proposed change is consistent with the objectives and principles described in Section 805(b)(1) of the Act, including consistency with promoting robust risk management.[17] OCC collects margin and deposits in lieu of margin to protect OCC and market participants from risks resulting from the default of a clearing member. The proposed change will enhance OCC's ability to validate and value EDP deposits in real time and enhance its ability to expeditiously take possession of such deposits in the event of a default. These enhancements will enable OCC to better ensure that it monitors and maintains adequate financial resources in the event of a clearing member default and thereby promote robust risk management. As such, the Commission believes that the proposed change is consistent with the promotion of robust risk management.

B. Consistency With Exchange Act Rule 17Ad–22(d)

Rule 17Ad–22(d)(1) under the Exchange Act requires OCC to establish, implement, maintain and enforce written policies and procedures reasonably designed to provide a well-founded, transparent, and enforceable legal framework for each aspect of its activities in all relevant jurisdictions.[18] Through the proposed change, OCC will provide clarity to clearing members, their customers, and potential users of OCC's escrow deposit program regarding the operations of the escrow deposit program and the manner in which OCC would risk manage a clearing member or customer default using the escrow deposit program. For example, the proposed change would better codify OCC's and clearing members' rights to EDP collateral in the event of a clearing member or customer default and provide greater transparency regarding the operational steps involved in taking possession of such collateral. Moreover, consolidating the rules governing the EDP and terms previously located in the EDA into a single location will enhance the transparency of the applicable EDP rules. As such, the Commission believes the proposed change is consistent with Exchange Act Rule 17Ad–22(d)(1).[19]

In addition, the Commission believes that the proposed change is consistent with Exchange Act Rule 17Ad–22(d)(3).[20] Rule 17Ad–22(d)(3) requires OCC to, among other things, establish,

of margin and custodian banks will have the opportunity to withdraw from the escrow deposit program if they object to the amendments. As a general matter, the Participating Escrow Bank Agreement will not be negotiable, although OCC may determine to vary certain non-material terms in limited circumstances.

[6] *See* 12 U.S.C. 5461(b).

[7] *Id.*

[8] 12 U.S.C. 5464(a)(2).

[9] 12 U.S.C. 5464(b).

[10] 17 CFR 240.17Ad–22. *See* Securities Exchange Act Release No. 68080 (October 22, 2012), 77 FR 66220 (November 2, 2012) (S7–08–11).

[11] 12 U.S.C. 5464(b).

[12] *Id.*

[13] 17 CFR 240.17Ad–22(d)(1).

[14] 17 CFR 240.17Ad–22(d)(3).

[15] 17 CFR 240.17Ad–22(d)(11).

[16] 12 U.S.C. 5464(b).

[17] 12 U.S.C. 5464(b)(1).

[18] 17 CFR 240.17Ad–22(d)(1).

[19] *Id.*

[20] 17 CFR 240.17Ad–22(d)(3).

implement, maintain and enforce written policies and procedures reasonably designed to hold assets in a manner that minimizes risk of loss or delay or in its access to them.[21] Under the proposed change, all non-cash collateral in the EDP would be held at DTC, which will allow OCC to validate and value collateral in real time and quickly obtain possession of deposited securities in an event of default without involving custodian banks by issuing a transfer instruction through DTC's systems. With respect to cash collateral, the proposed change would codify OCC's right to take possession of cash within an escrow account upon a clearing member or custodian bank default and provide OCC with online view access to each customer's cash account at the custodian bank. Together, these changes would allow OCC monitor the adequacy of collateral in the EDP and be able to more quickly take possession of collateral in the EDP in the event of a clearing member default, which would, thereby, reduce potential losses to OCC, other clearing members and market participants.

Finally, the Commission believes that the proposed change is consistent with Exchange Act Rule 17Ad–22(d)(11), which requires OCC to, among other things, establish, implement, maintain and enforce written policies and procedures reasonably designed to make key aspects of their default procedures publicly available.[22] The Commission believes that the proposed change is consistent with Rule 17Ad–22(d)(11) because it would incorporate the substantive terms of the EDP, and specifically the rules concerning default management, into OCC's Rules, which are publicly available on OCC's Web site, rather than in private agreements.

III. Conclusion

It is therefore noticed, pursuant to Section 806(e)(1)(I) of the Payment, Clearing and Settlement Supervision Act,[23] that the Commission *does not object* to Advance Notice (SR–OCC–2016–802) and that OCC is *authorized* to implement the proposed change.

By the Commission.

Robert W. Errett,

Deputy Secretary.

[FR Doc. 2016–25233 Filed 10–18–16; 8:45 am]

BILLING CODE 8011–01–P

[21] *Id.*

[22] 17 CFR 240.17Ad–22(d)(11).

[23] 12 U.S.C. 5465(e)(1)(I).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–79092; File No. SR–BATSBZX–2016–48]

Self-Regulatory Organizations; Bats BZX Exchange, Inc.; Notice of Designation of a Longer Period for Commission Action on Proposed Rule Change, as Modified by Amendment No. 1 Thereto, to List and Trade Shares of the iShares iBonds Dec 2023 Term Muni Bond ETF and iShares iBonds Dec 2024 Term Muni Bond ETF of the iShares U.S. ETF Trust

October 13, 2016.

On August 9, 2016, Bats BZX Exchange, Inc. (''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 list and trade Shares of the iShares iBonds Dec 2023 Term Muni Bond ETF and iShares iBonds Dec 2024 Term Muni Bond ETF (collectively, ''Funds'') pursuant to Exchange Rule 14.11(c)(4). The proposed rule change was published for comment in the **Federal Register** on August 30, 2016.[3] On October 6, 2016, the Exchange filed Amendment No. 1 to the proposed rule change, which amended and replaced in its entirety the proposal as originally submitted.[4] The Commission has not received any comments on the proposal.

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 after publication of the notice for this proposed rule change is October 14, 2016. 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, as modified by Amendment No. 1. Accordingly, the Commission, pursuant to Section 19(b)(2) of the Act,[6] designates November 28, 2016, as the date by which the Commission shall either approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change (File No. SR–BATSBZX–2016–48) as modified by Amendment No. 1.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[7]

Robert W. Errett,

Deputy Secretary.

[FR Doc. 2016–25235 Filed 10–18–16; 8:45 am]

BILLING CODE 8011–01–P

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 78666 (Aug. 24, 2016), 81 FR 59700.

[4] In Amendment No. 1, the Exchange: (1) Clarified the amounts of certain municipal securities that the Funds would hold; (2) represented that at least 90% of the Funds' net assets that are invested in listed derivatives would be invested in instruments that trade in markets that are members or affiliates of members of the Intermarket Surveillance Group or are parties to a comprehensive surveillance sharing agreement with the Exchange; (3) provided greater detail regarding the types of short-term instruments in which the Funds may invest; and (4) supplemented the information provided regarding the availability of price information for the Funds' permitted investments.

[5] 15 U.S.C. 78s(b)(2).

[6] *Id.*

[7] 17 CFR 200.30–3(a)(31).

DEPARTMENT OF STATE

[Public Notice: 9764]

Overseas Security Advisory Council (OSAC) Renewal

The Department of State has renewed the Charter of the Overseas Security Advisory Council. This federal advisory committee will continue to interact on overseas security matters of mutual interest between the U.S. Government and the American private sector. The Council's initiatives and security publications provide a unique contribution to protecting American private sector interests abroad. The Under Secretary for Management determined that renewal of the Charter is necessary and in the public interest.

The Council consists of representatives from three (3) U.S. Government agencies and thirty-one (31) American private sector companies and organizations. The Council follows the procedures prescribed by the Federal Advisory Committee Act (FACA) (Pub. L. 92–463). Meetings will be open to the public unless a determination is made in accordance with Section 10(d) of the FACA and 5 U.S.C. 552b(c)(4), that a meeting or a portion of the meeting should be closed to the public. Notice of each meeting will be provided in the **Federal Register** at least 15 days prior to the meeting.

FOR FURTHER INFORMATION CONTACT: For more information contact Marsha Thurman, Overseas Security Advisory Council, Bureau of Diplomatic Security, U.S. Department of State, Washington, DC 20522–2008, phone: 571–345–2214.

Dated: September 14, 2016.

Bill A. Miller,

Director of the Diplomatic, Security Service.

[FR Doc. 2016–25304 Filed 10–18–16; 8:45 am]

BILLING CODE 4710–43–P

DEPARTMENT OF STATE

[Public Notice: 9763]

Defense Trade Advisory Group; Notice of Open Meeting

SUMMARY: The Defense Trade Advisory Group (DTAG) will meet in open session from 1:00 p.m. until 5:00 p.m. on Tuesday, November 15, 2016 at 1777 F Street NW., Washington, DC 20006. Entry and registration will begin at 12:30 p.m. The membership of this advisory committee consists of private sector defense trade representatives, appointed by the Assistant Secretary of State for Political-Military Affairs, who advise the Department on policies, regulations, and technical issues affecting defense trade. The purpose of the meeting will be to discuss current defense trade issues and topics for further study.

FOR FURTHER INFORMATION CONTACT: For additional information, contact Ms. Glennis Gross-Peyton, PM/DDTC, SA–1, 12th Floor, Directorate of Defense Trade Controls, Bureau of Political-Military Affairs, U.S. Department of State, Washington, DC 20522–0112; telephone (202) 663–2862; FAX (202) 261–8199; or email *DTAG@state.gov.*

SUPPLEMENTARY INFORMATION: The following agenda topics will be discussed: (1) Review past DTAG reports on issues previously examined and identify those issues/reports that remain relevant, warrant further DTAG review/update, and should be considered by DDTC for implementation; (2) Identify and recommend to DDTC new issues for DTAG to review; (3) Organize all (past and new) issues into a list of priorities for DTAG action and DDTC consideration.

Members of the public may attend this open session and will be permitted to participate in the discussion in accordance with the Chair's instructions. Members of the public may, if they wish, submit a brief statement to the committee in writing.

As seating is limited to 125 persons, those wishing to attend the meeting must notify the DTAG Alternate Designated Federal Officer (DFO) by COB Friday, November 4, 2016. Members of the public requesting reasonable accommodation must also notify the DTAG Alternate DFO by that date. If notified after this date, the Department will be unable to accommodate requests due to requirements at the meeting location. Each non-member observer or DTAG member that wishes to attend this plenary session should provide: His/her name and identifying data such as driver's license number, U.S. Government ID, or U.S. Military ID, to the DTAG Alternate DFO, Lisa Aguirre, via email at *DTAG@state.gov.* One of the following forms of valid photo identification will be required for admission to the meeting: U.S. driver's license, passport, U.S. Government ID or other valid photo ID.

Dated: October 5, 2016.

Lisa V. Aguirre,

Alternate Designated Federal Officer, Defense Trade Advisory Group, Department of State.

[FR Doc. 2016–25305 Filed 10–18–16; 8:45 am]

BILLING CODE 4710–25–P

SURFACE TRANSPORTATION BOARD

[Docket No. AB 55 (Sub-No. 765X)]

CSX Transportation, Inc.—Discontinuance of Service Exemption—in Dickenson and Buchanan Counties, VA

CSX Transportation, Inc. (CSXT), filed a verified notice of exemption under 49 CFR part 1152, subpart F—*Exempt Abandonments and Discontinuances of Service* to discontinue service over an approximately 5.6-mile rail line on its Southern Region, Florence Division and Kingsport Subdivision, between milepost ZH 0.0 in Haysi and milepost 5.6 in Dickenson and Buchanan Counties, Va. (the Line). The Line traverse U.S. Postal Service Zip Codes 24256, 24627, and 24656, and includes the stations of: (1) Haysi at milepost ZH 0.0 (FSAC 50011/OPSL 24520); (2) Pittco at milepost ZH 0.2 (FSAC 50350/OPSL 24535); (3) Berta at milepost ZH 0.3 (FSAC 50012/OPSL 24525); (4) CC at milepost ZH 0.4 (FSAC 50014/OPSL 24530); and (5) Crooked Branch at milepost ZH 3.2 (FSAC 50015/OPSL 24532). CSXT states that all stations on the Line but Haysi can be closed.

CSXT has certified that: (1) No local freight traffic has moved over the Line for at least two years; (2) there is no overhead traffic on the Line; (3) no formal complaint filed by a user of rail service on the Line (or by a state or local government entity acting on behalf of such user) regarding cessation of service over the Line is pending either with the Surface Transportation Board or any U.S. District Court or has been decided in favor of a complainant within the two-year period; and (4) the requirements at 49 CFR 1105.12 (newspaper publication) and 49 CFR 1152.50(d)(1) (notice to governmental agencies) have been met.

As a condition to this exemption, any employee adversely affected by the discontinuance of service shall be protected under *Oregon Short Line Railroad—Abandonment Portion Goshen Branch Between Firth & Ammon, in Bingham & Bonneville Counties, Idaho,* 360 I.C.C. 91 (1979). To address whether this condition adequately protects affected employees, a petition for partial revocation under 49 U.S.C. 10502(d) must be filed.

Provided no formal expression of intent to file an offer of financial assistance (OFA) to subsidize continued rail service has been received, this exemption will become effective on November 18, 2016, unless stayed pending reconsideration. Petitions to stay that do not involve environmental issues and formal expressions of intent to file an OFA to subsidize continued rail service under 49 CFR 1152.27(c)(2) [1] must be filed by October 28, 2016.[2] Petitions to reopen must be filed by November 8, 2016, with the Surface Transportation Board, 395 E Street SW., Washington, DC 20423–0001.

A copy of any petition filed with the Board should be sent to CSXT's representative: Louis E. Gitomer, Law Offices of Louis E. Gitomer, LLC, 600 Baltimore Avenue, Suite 301, Towson, MD 21204.

If the verified notice contains false or misleading information, the exemption is void ab initio.

Board decisions and notices are available on our Web site at *WWW.STB.GOV.*

Decided: October 14, 2016.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

Kenyatta Clay,

Clearance Clerk.

[FR Doc. 2016–25353 Filed 10–18–16; 8:45 am]

BILLING CODE 4915–01–P

[1] Each OFA must be accompanied by the filing fee, which is currently set at $1,600. *See* 49 CFR 1002.2(f)(25).

[2] Because this is a discontinuance proceeding and not an abandonment, interim trail use/rail banking and public use conditions are not appropriate. Because there will be an environmental review during abandonment, this discontinuance does not require an environmental review.

SUSQUEHANNA RIVER BASIN COMMISSION

Projects Approved for Consumptive Uses of Water

AGENCY: Susquehanna River Basin Commission.

ACTION: Notice.

SUMMARY: This notice lists the projects approved by rule by the Susquehanna River Basin Commission during the period set forth in **DATES**.

DATES: September 1–30, 2016.

ADDRESSES: Susquehanna River Basin Commission, 4423 North Front Street, Harrisburg, PA 17110–1788.

FOR FURTHER INFORMATION CONTACT: Jason E. Oyler, General Counsel, telephone: (717) 238–0423, ext. 1312; fax: (717) 238–2436; email: *joyler@srbc.net.* Regular mail inquiries may be sent to the above address.

SUPPLEMENTARY INFORMATION: This notice lists the projects, described below, receiving approval for the consumptive use of water pursuant to the Commission's approval by rule process set forth in 18 CFR 806.22(f) for the time period specified above:

Approvals by Rule Issued Under 18 CFR 806.22(f)

1. Atlas Resources, LLC, Pad ID: Rhodes Well Pad, ABR–201201018.R1, Gamble Township, Lycoming County, Pa.; Consumptive Use of Up to 3.6000 mgd; Approval Date: September 2, 2016.
2. Chesapeake Appalachia, LLC, Pad ID: Krise, ABR–201111022.R1, Leroy Township, Bradford County, Pa.; Consumptive Use of Up to 7.5000 mgd; Approval Date: September 2, 2016.
3. Chesapeake Appalachia, LLC, Pad ID: Schlapfer, ABR–201202006.R1, Albany Township, Bradford County, Pa.; Consumptive Use of Up to 7.5000 mgd; Approval Date: September 2, 2016.
4. Chesapeake Appalachia, LLC, Pad ID: Moyer, ABR–201202019.R1, Overton Township, Bradford County, Pa.; Consumptive Use of Up to 7.5000 mgd; Approval Date: September 2, 2016.
5. Chief Oil & Gas LLC, Pad ID: L & L Construction A Drilling Pad #1, ABR–201202014.R1, Wilmot Township, Bradford County, Pa.; Consumptive Use of Up to 2.0000 mgd; Approval Date: September 6, 2016.
6. SWN Production Company LLC, Pad ID: Shively Pad, ABR–201108011.R1, Lenox Township, Susquehanna County, Pa.; Consumptive Use of Up to 4.9900 mgd; Approval Date: September 6, 2016.
7. Range Resources—Appalachia, LLC, Pad ID: Gulf USA 40H–42H, ABR–201609001, Snow Shoe Township, Centre County, Pa.; Consumptive Use of Up to 1.0000 mgd; Approval Date: September 15, 2016.
8. Chief Oil & Gas, LLC, Pad ID: Stasiak Drilling Pad #1, ABR–201203025.R1, Pike Township, Bradford County, Pa.; Consumptive Use of Up to 2.0000 mgd; Approval Date: September 19, 2016.
9. SWN Production Company LLC, Pad ID: SKELLY, ABR–201112005.R1, New Milford Township, Susquehanna County, Pa.; Consumptive Use of Up to 4.9990 mgd; Approval Date: September 19, 2016.
10. SWN Production Company LLC, Pad ID: TNT 1 LIMITED PARTNERSHIP, ABR–201112006.R1, New Milford Township, Susquehanna County, Pa.; Consumptive Use of Up to 4.9990 mgd; Approval Date: September 19, 2016.
11. SWN Production Company LLC, Pad ID: INNES, ABR–201111032.R1, New Milford Borough, Susquehanna County, Pa.; Consumptive Use of Up to 4.9990 mgd; Approval Date: September 19, 2016.
12. Chief Oil & Gas, LLC, Pad ID: Muzzy Drilling Pad #1, ABR–201202027.R1, Ulster Township, Bradford County, Pa.; Consumptive Use of Up to 2.0000 mgd; Approval Date: September 21, 2016.
13. Chief Oil & Gas, LLC, Pad ID: Ober Drilling Pad #1, ABR–201203026.R1, Asylum Township, Bradford County, Pa.; Consumptive Use of Up to 2.0000 mgd; Approval Date: September 21, 2016.
14. Cabot Oil & Gas Corporation, Pad ID: EllsworthA P1, ABR–201110015.R1, Bridgewater Township, Susquehanna County, Pa.; Consumptive Use of Up to 3.5750 mgd; Approval Date: September 22, 2016.
15. Cabot Oil & Gas Corporation, Pad ID: LippincoffF P1, ABR–201110014.R1, Brooklyn Township, Susquehanna County, Pa.; Consumptive Use of Up to 3.5750 mgd; Approval Date: September 22, 2016.
16. Cabot Oil & Gas Corporation, Pad ID: WellsP P1, ABR–201111023.R1, Bridgewater Township, Susquehanna County, Pa.; Consumptive Use of Up to 3.5750 mgd; Approval Date: September 22, 2016.
17. Cabot Oil & Gas Corporation, Pad ID: HessR P1, ABR–201111034.R1, Dimock Township, Susquehanna County, Pa.; Consumptive Use of Up to 3.5750 mgd; Approval Date: September 22, 2016.

Authority: Pub. L. 91–575, 84 Stat. 1509 *et seq.*, 18 CFR parts 806, 807, and 808.

Dated: October 14, 2016.

Stephanie L. Richardson,

Secretary to the Commission.

[FR Doc. 2016–25280 Filed 10–18–16; 8:45 am]

BILLING CODE 7040–01–P

SUSQUEHANNA RIVER BASIN COMMISSION

Projects Rescinded for Consumptive Uses of Water

AGENCY: Susquehanna River Basin Commission.

ACTION: Notice.

SUMMARY: This notice lists the approved by rule projects rescinded by the Susquehanna River Basin Commission during the period set forth in **DATES**.

DATES: September 1–30, 2016.

ADDRESSES: Susquehanna River Basin Commission, 4423 North Front Street, Harrisburg, PA 17110–1788.

FOR FURTHER INFORMATION CONTACT: Jason E. Oyler, General Counsel, telephone: (717) 238–0423, ext. 1312; fax: (717) 238–2436; email: *joyler@srbc.net.* Regular mail inquiries may be sent to the above address.

SUPPLEMENTARY INFORMATION: This notice lists the projects, described below, being rescinded for the consumptive use of water pursuant to the Commission's approval by rule process set forth in 18 CFR 806.22(e) and § 806.22(f) for the time period specified above:

Rescinded ABRs Issued

1. Seneca Resources Corporation, Pad ID: DCNR 007 Pad H, ABR–201110012, Delmar Township, Tioga County, Pa.; Rescind Date: September 7, 2016.
2. Seneca Resources Corporation, Pad ID: DCNR 595 Pad A, ABR–201405001, Covington Township, Tioga County, Pa.; Rescind Date: September 7, 2016.

Authority: Pub. L. 91–575, 84 Stat. 1509 *et seq.,* 18 CFR parts 806, 807, and 808.

Dated: October 14, 2016.

Stephanie L. Richardson,

Secretary to the Commission.

[FR Doc. 2016–25281 Filed 10–18–16; 8:45 am]

BILLING CODE 7040–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Aviation Rulemaking Advisory Committee Meeting on Transport Airplane and Engine Issues

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of public meeting.

SUMMARY: This notice announces a public meeting of the FAA's Aviation Rulemaking Advisory Committee (ARAC) Transport Airplane and Engine (TAE) Subcommittee to discuss TAE issues.

DATES: The meeting is scheduled for Tuesday, November 8, 2016, starting at 9:00 a.m. Pacific Standard Time. Arrange for oral presentations by November 1, 2016.

ADDRESSES: 1601 Lind Ave SW., Renton, WA 98057.

FOR FURTHER INFORMATION CONTACT: Ralen Gao, Office of Rulemaking, ARM–209, FAA, 800 Independence Avenue SW., Washington, DC 20591, Telephone (202) 267–3168, Fax (202) 267–5075, or email at *ralen.gao@faa.gov.*

SUPPLEMENTARY INFORMATION: Pursuant to Section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463; 5 U.S.C. app. III), notice is given of an ARAC meeting to be held on November 8, 2016.

The agenda for the meeting is as follows:

- Opening Remarks, Review Agenda and Minutes
- FAA Report
- ARAC Report
- Transport Canada Report
- EASA Report
- Engine Harmonization Working Group Report
- Flight Test Harmonization Working Group Report
- Airworthiness Assurance Working Group Report
- Metallic and Composite Structures Working Group Report
- Crashworthiness and Ditching Working Group Report
- Any Other Business
- Action Item Review

Participation is open to the public, but will be limited to the availability of teleconference lines.

To participate, please contact the person listed in **FOR FURTHER INFORMATION** by email or phone for the teleconference call-in number and passcode. Please provide the following information: Full legal name, country of citizenship, and name of your industry association, or applicable affiliation. If you are participating as a public citizen, please indicate so. Participants are responsible for any telephone, data usage or other similar expenses related to this meeting.

The public must make arrangements by November 1, 2016, to present oral or written statements at the meeting. Written statements may be presented to the Subcommittee by providing a copy to the person listed in the **FOR FURTHER INFORMATION CONTACT** section. Copies of the documents to be presented to the Subcommittee may be made available by contacting the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

If you need assistance or require a reasonable accommodation for the meeting or meeting documents, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

Issued in Washington, DC, on October 13, 2016.

Kelvin L. Solco,

Acting Designated Federal Officer, Aviation Rulemaking Advisory Committee.

[FR Doc. 2016–25287 Filed 10–18–16; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Twelfth RTCA SC–228 Minimum Performance Standards (MPS) for UAS Focused-Topic Plenary

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

ACTION: Twelfth RTCA SC–228 Minimum Performance Standards (MPS) for UAS Focused-Topic Plenary.

SUMMARY: The FAA is issuing this notice to advise the public of a meeting of Twelfth RTCA SC–228 Minimum Performance Standards (MPS) for UAS Focused-Topic Plenary.

DATES: The meeting will be held virtually November 14, 2016, 12:30 p.m.–01:30 p.m.

ADDRESSES: The meeting will be held at: Virtual meeting ONLY. Join at the following link: *https://rtca.webex.com/rtca/j.php?MTID=m0be5cd6a8d8d86fc024338aca4569302.*

FOR FURTHER INFORMATION CONTACT: Al Secen at *asecen@rtca.org* or 202–330–0647, or The RTCA Secretariat, 1150 18th Street NW., Suite 910, Washington, DC 20036, or by telephone at (202) 833–9339, fax at (202) 833–9434, or Web site at *http://www.rtca.org.*

SUPPLEMENTARY INFORMATION: Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463, 5 U.S.C., App.), notice is hereby given for a meeting of the Twelfth RTCA SC–228 Minimum Performance Standards (MPS) for UAS Focused-Topic Plenary. The agenda will include the following:

Monday, November 14, 2016, 12:30 p.m. to 1:30 p.m.

1. Welcome/Introductions/Administrative Remarks/SC–228 Participation Guidelines
   a. Reading of the Public Announcement by the DFO
   b. Reading of the RTCA Proprietary References Policy
2. Agenda Overview
3. Determine approval of WG–1 DAA MOPS
   a. DAA MOPS Document Approval
   b. Air-to-Air Radar MOPS Document Approval
4. Adjourn

Attendance is open to the interested public. With the approval of the chairman, members of the public may present oral statements at the meeting. Persons wishing to present statements or obtain information should contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section. Members of the public may present a written statement to the committee at any time.

Issued in Washington, DC, on October 13, 2016.

Mohannad Dawoud,

Management & Program Analyst, Partnership Contracts Branch, ANG–A17, NextGen, Procurement Services Division, Federal Aviation Administration.

[FR Doc. 2016–25187 Filed 10–18–16; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Fifth RTCA SC–235 Non Rechargeable Lithium Batteries Plenary Session

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

ACTION: Fifth RTCA SC–235 Non Rechargeable Lithium Batteries Plenary Session.

SUMMARY: The FAA is issuing this notice to advise the public of a meeting of Fifth RTCA SC–235 Non Rechargeable Lithium Batteries Plenary Session.

DATES: The meeting will be held November 15–16, 2016 09:00 a.m.–05:00 p.m.

ADDRESSES: The meeting will be held at: RTCA Headquarters, 1150 18th Street NW., Suite 910, Washington, DC 20036.

FOR FURTHER INFORMATION CONTACT: Karan Hofmann at *khofmann@rtca.org* or 202–330–0680, or The RTCA Secretariat, 1150 18th Street NW., Suite 910, Washington, DC 20036, or by telephone at (202) 833–9339, fax at (202) 833–9434, or Web site at *http://www.rtca.org.*

SUPPLEMENTARY INFORMATION: Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463, 5 U.S.C., App.), notice is hereby given for a meeting of the Fifth RTCA SC–235 Non Rechargeable Lithium Batteries Plenary Session. The agenda will include the following:

Tuesday, November 15, 2016—9:00 a.m.–5:00 p.m.

1. Welcome and Administrative Remarks
2. Introductions
3. Agenda Review
4. Meeting-Minutes Review
5. FAA Tech Center Testing Update
6. Status Discussion of Internal Comment Review
7. Review of program schedule
8. Action Item Review
9. Any other Business
10. Date and Place of Next Meeting
11. Adjourn

Wednesday, November 16, 2016—9:00 a.m.–4:00 p.m.

Continuation of Plenary or Working Group Session

Attendance is open to the interested public but limited to space availability. With the approval of the chairman, members of the public may present oral statements at the meeting. Persons wishing to present statements or obtain information should contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section. Members of the public may present a written statement to the committee at any time.

Issued in Washington, DC, on October 13, 2016.

Mohannad Dawoud,

Management & Program Analyst, Partnership Contracts Branch, ANG–A17, NextGen, Procurement Services Division, Federal Aviation Administration.

[FR Doc. 2016–25186 Filed 10–18–16; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Docket No. FAA–2016–9284]

Applicability of National Environmental Policy Act (NEPA) to Federal Aviation Administration (FAA) Review of Airport Wildlife Hazard Management Plans

AGENCY: Federal Aviation Administration (FAA), DOT

ACTION: Notice and request for comments.

SUMMARY: The Federal Aviation Administration (FAA) Office of Airports is clarifying a program guidance letter issued in 2006 concerning how federal environmental laws apply to FAA approval of a new or updated airport Wildlife Hazard Management Plan (WHMP). Recent issues and questions have arisen that make it necessary to update and clarify the guidance. The clarified policy includes circumstances where the FAA would approve WHMPs, and delineate which individual measures in a plan the airport may implement based upon a categorical exclusion without further environmental review or coordination. In contrast, other measures might be subject to a higher level of review and interagency coordination prior to approval. The FAA is publishing this for notice and comment prior to implementation.

DATES: Written comments must be received on or before November 18, 2016.

ADDRESSES: Send comments identified by docket number FAA–2016–9284 using any of the following methods:

• *Federal eRulemaking 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 9 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: Mr. Elliott Black, Director, Office of Airport Planning and Programming. Mailing address: Federal Aviation Administration, 800 Independence Ave. SW., Washington, DC 20591. Telephone: (202) 267–8775. Email address: *Elliott.Black@faa.gov.*

SUPPLEMENTARY INFORMATION:

Authority. 49 United States Code (U.S.C.) § 44706 (''Airport operating certificates) and 14 CFR part 139.337 (''Wildlife Hazard Management''); and 42 United States Code [U.S.C.] §§ 4321–4335 National Environmental Policy Act (NEPA).

Title 14 CFR part 139 § 139.337 (''Wildlife hazard management'') requires in part that when the FAA determines that a wildlife hazard management plan is needed, the certificate holder must formulate and implement a plan using the wildlife hazard assessment as a basis. The plan must provide measures to reduce or eliminate wildlife hazards to air carrier operations, and be submitted to (and approved by) the FAA prior to implementation.

In 2006, the FAA's Office of Airports issued Program and Policy Guidance Letter 92 (''Policy 92'') to address questions about the applicability of the National Environmental Policy Act (NEPA) to FAA approval of WHMPs, and the certificate holder's implementation of those plans.[1] That policy referred in part to Section 209 of FAA Order 5050.4B, ''National Environmental Policy Act (NEPA) Implementing Instructions for Airport Actions'' (April 28, 2006), which addressed the applicability of NEPA to

[1] Available online at *http://www.faa.gov/airports/airport_safety/wildlife/.*

an approval of a WHMP required under 14 CFR part 139.

Recent litigation concerning the snowy owl at an airport in New York and coordination with federal resource agencies on plan updates has led to closer scrutiny of some of the language contained in Section 209 of FAA Order 5050.4B. The language may have created some confusion, because it may appear to some readers to focus on NEPA requirements primarily in the context of Airport Improvement Program (AIP) grants or Airport Layout Plan (ALP) approvals. The FAA will similarly explain in an upcoming revision of Order 5050.4B that NEPA applies to the federal action of approving the WHMP and that this environmental review is typically sufficient for any related AIP grant or ALP approvals. The approval of the WHMPs is considered to involve sufficient discretion that NEPA (and other federal environmental laws) apply.

In the meantime, the FAA is proposing to revise the 2006 ''Policy 92'' document (''Applicability of National Environmental Policy Act to Federal Aviation Administration Mandated Wildlife Hazard Management Plans'') to clarify the process and procedures. The revised policy would read as follows:

Proposed Text of Revised Policy 92. When the FAA requires the holder of an Airport Operating Certificate to prepare a new or updated [2] Wildlife Hazard Management Plan (WHMP), the Certificate Holder must submit the plan to the FAA for approval before implementation [§ 139.337(e)].

The FAA's approval of a WHMP is a federal action subject to the National Environmental Policy Act (NEPA). In addition, WHMPs may include measures that are subject to related federal actions of airport layout plan approval and/or federal funding. Section 209 of FAA Order 5050.4B, ''National Environmental Policy Act (NEPA) Implementing Instructions for Airport Actions'' (April 28, 2006), addressed the applicability of NEPA to a WHMP required under Part 139. However, insofar as that section may have been read by some to focus primarily on airport actions implementing WHMPs that involved AIP grant funding and/or airport layout plan approval, and to suggest that these actions were handled distinctly from plan approval for purposes of NEPA, it may have led to some misunderstanding. NEPA applies to the federal action of approving WHMPs. This environmental review is typically sufficient for any related AIP grant or ALP approvals. As a matter of federal or state law, the certificate holder may also be subject to permitting or licensing requirements for its actions in implementing discrete WHMP measures. FAA considers whether there is a reasonable assurance of obtaining these permits and licenses in reviewing approval of the plan under NEPA.

The FAA must consider the existence of extraordinary circumstances when determining whether to categorically exclude approval of any or all WHMP measures. In our experience, airport certificate holders will often be able to implement many, if not all, measures under a WHMP based upon a categorical exclusion. The measures in most plans qualify for a categorical exclusion because they are not reasonably expected to significantly change land use management or cause environmental impacts. Most of the measures in a WHMP also have independent utility from other measures because they address different safety concerns. However, under certain circumstances, an EA or EIS may be required prior to FAA approval of a WHMP, and/or prior to the certificate holder's implementation of certain measures within an approved WHMP.

The effect of this clarification will be to set forth in more detail how and why the FAA and airport sponsor, consistent with independent utility and requirements to consider extraordinary circumstances, may delineate certain measures in the Plan for approval based upon categorical exclusion while identifying others that trigger special purpose environmental laws like ESA Section 7 for further environmental review prior to approval. In other words, the measures in the plan that do not trigger special purpose laws may be approved by the FAA, provided they have independent utility and otherwise qualify for categorical exclusion. The FAA may then conditionally approve the plan as to the remaining measures pending any further required environmental review.

Responsibilities and Procedures

• *Certificate Holders.* The Certificate Holder is responsible for monitoring wildlife hazards and initiating required coordination with the FAA early enough to mitigate risks while complying with all applicable environmental laws and regulations. The Certificate Holder is responsible for identifying any protected environmental resources (*e.g.,* threatened and endangered species, wetlands, archeological sites) on or near the airport. It is the Certificate Holder's responsibility to contact the appropriate FAA Airports Regional Office or Airports District Office to provide any information required in support of the environmental review process for all measures within the WHMP. The Certificate Holder is responsible for implementing measures of the WHMP only after they have received the required environmental approvals, unless an emergency condition compels the Certificate Holder to take immediate steps in order to protect the safety of air transportation. In such circumstances, the Certificate Holder must immediately alert the FAA of the emergency circumstances so that FAA may follow emergency provisions in applicable environmental laws such as NEPA and the ESA.[3] The Certificate Holder is responsible for compliance with 14 CFR part 139.337 (''Wildlife Hazard Management'') as well as all applicable Federal, state and local environmental laws and regulations. For plan components/measures not covered by categorical exclusions, certain findings and determinations required under special purpose laws, requirements, regulations, or orders may need to be completed before FAA can approve them.[4]

• *Safety Inspectors.* The FAA's designated Airport Certification Safety Inspector (ACSI) must review all WHMPs that are required for compliance with § 139.337(f). The ACSI must coordinate approval of the WHMP with the FAA Environmental Protection Specialist (EPS), and should involve the EPS as early as possible in the process in order to help identify and address potential environmental issues as expeditiously as possible. The FAA's approval of new WHMPs and updates to WHMPs is normally categorically excluded under FAA Order 1050.1F,[5] paragraph 5–6.2(e),[6] provided there are no extraordinary circumstances. If there is evidence of protected environmental resources (*e.g.,* threatened and endangered species, wetlands, archeological sites) on or near the airport, an environmental review associated with the WHMP must address how the implementation of wildlife control measures might impact these resources, and clearly identify any

[2] For purposes of this FRN, every reference to ''WHMP'' should be read as ''new or updated WHMP,'' because the same provisions apply to either circumstance.

[3] FAA's emergency procedures are outlined in section 807 of FAA Order 1050.1F.

[4] FAA Order 1050.1F Desk Reference describes laws, regulations, and orders in addition to NEPA that must be complied with before approving a proposed Federal action.

[5] ''Environmental Impacts: Policies and Procedures'' (dated July 16, 2015).

[6] Previously paragraph 308e in FAA Order 1050.1E.

required mitigation measures and associated regulatory/permit requirements.

The ACSI will coordinate with the FAA's EPS to determine whether any measures of the WHMP may require NEPA review beyond a categorical exclusion, and to ensure compliance with any other applicable environmental law. Approval letters will indicate which measures are not yet approved for implementation due to a need for additional FAA NEPA or special purpose law compliance, which measures are approved with conditions that the Certificate Holder must satisfy prior to implementation of the measure, and which measures are approved outright and ready for implementation.

- *Environmental Protection Specialists (EPS's).* The EPS will coordinate with the ACSI to review all available information to determine whether FAA may categorically exclude the approval of any or all of the WHMP measures comprising the WHMP in accordance with paragraph 5–6.2(e) of FAA Order 1050.1F, or whether any may require preparation of an Environmental Assessment (EA) or Environmental Impact Statement (EIS). To avoid segmentation, the FAA's EPS will, as part of the review of extraordinary circumstances, consider whether any measures considered for approval under a categorical exclusion are connected to other measures that may require further environmental review or interagency coordination. The EPS will provide the ACSI with language (for inclusion in the letter to the Certificate Holder) explaining which measures and aspects of the Plan are approved, approved with conditions (like obtaining a 404 permit) but without requiring further FAA action, or disapproved or requiring further environmental analysis or consultation by FAA. The EPS will also advise the Certificate Holder regarding which agency is responsible for coordination with the applicable resource agencies.[7] If there are additional environmental reviews needed before the Certificate Holder can implement a specific action, the EPS will help draft conditions requiring such coordination and completion of the environmental review before implementation of the action is undertaken by the Certificate Holder.

Certification Status: Certificate Holders should note that, pursuant to Section 139.337(e), FAA's approval of a WHMP satisfies their requirements as long as the Certificate Holder implements the approved provisions and works to obtain approval of the remaining measures. To the extent there are measures that require additional NEPA review and/or other interagency coordination, the Certificate Holder may not implement those measures unless and until the FAA and/or the appropriate resource agency have reached a favorable environmental determination. The Certificate Holder must then carry out the approved measures to remain in compliance with Part 139 certification requirements. This does not relieve the Certificate Holder of their responsibility to continue to monitor wildlife hazards and take relevant and appropriate measures to minimize the risks, to the extent permissible under the WHMP and all applicable environmental laws and regulations.

If the WHMP has no measures that can be implemented immediately, the Certificate Holder must consider and document interim mitigation measures, in consultation with the FAA's ACSI and EPS. For example, if the WHMP calls for certain depredation measures which require approval by the U.S. Fish & Wildlife Service, then the Certificate Holder may commit to monitoring wildlife numbers and activities, and seek under any available emergency provisions to conduct the least invasive measure in the interim. In extraordinarily rare circumstances, it may be possible for a Certificate Holder to demonstrate that wildlife hazards represent such an immediate threat to the safety of the traveling public that the emergency provisions of NEPA and the Endangered Species Act offer some latitude for interim action. This would be rare, however, because the FAA expects Certificate Holders to monitor wildlife hazards and initiate required coordination early enough to mitigate risks while complying with all applicable environmental laws and regulations.

Applicability to non-139 airports: The FAA encourages all airport operators to actively monitor and manage wildlife hazards on and near the airport environs. Other airports (such as those that are certificated under 14 CFR part 139 but that have not had a triggering event that would mandate a WHMP, or for airports not certificated under Part 139) are still encouraged to undertake Wildlife Hazard Assessments or Wildlife Hazard Site Visits, and to establish and implement WHMPs when justified.[8] However, the FAA would not approve such plans, so unless implementation of the WHMP required a change to the ALP, or involved federal funding, there would most likely be no Federal action from the FAA's perspective. Airport owners and operators would have to comply with all applicable Federal environmental laws and regulations related to any measures contained within such WHMPs if they have the potential to impact threatened and endangered species, wetlands, archeological sites or other protected environmental resources. The FAA would make its expert wildlife and environmental resources available to the airport in such circumstances, and may support interagency coordination if necessary depending upon the proposed measures.

Effective date: Once the FAA has received and reviewed any comments submitted in response to this **Federal Register** notice, the FAA will publish a final revision of Policy 92, which will be effective as of the date of its publication for any new or updated WHMP that has not yet been submitted to the FAA for review and approval as of that date. However, this does not relieve airport Certificate Holders of their responsibilities for additional permitting and interagency coordination that may already be required under applicable federal environmental laws for implementation of certain measures, even if those measures were submitted as part of a WHMP that was previously approved by the FAA but not yet implemented.

Issued in Washington, DC, on October 14, 2016.

Elliott Black,

Director, Office of Airport Planning and Programming.

[FR Doc. 2016–25285 Filed 10–18–16; 8:45 am]

BILLING CODE 4910–13–P

[7] The FAA is also reviewing its Policy and Guidance Letter 78 (dated June 21, 2004), which addresses Section 7 consultation with the U.S. Fish & Wildlife Service (USFWS) under the Endangered Species Act (ESA). The FAA will either update, revise or rescind that policy as appropriate after coordination with the USFWS.

[8] The FAA previously issued a **Federal Register** notice for public comment on December 10, 2012 (77 FR 73511). The FRN presented a clarification of Grant Assurance #19 (Operation and Maintenance), which would have clarified the expectation for all federally-obligated airports to conduct Wildlife Hazard Site Visits (WHSVs) or Wildlife Hazard Assessments (WHAs). Based in part on comments received in response to that **Federal Register** notice, the FAA has decided not to proceed with this clarification at this time.

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Notice of Request To Release Airport Property

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of Intent To Rule on Request To Release Airport Property at Waterloo Regional Airport, Waterloo, Iowa. (ALO)

SUMMARY: The FAA proposes to rule and invites public comment on the release of land at Waterloo Regional Airport, Waterloo, Iowa, under the provisions of 49 U.S.C. 47107(h)(2).

DATES: Comments must be received on or before November 18, 2016.

ADDRESSES: Comments on this application may be mailed or delivered to the FAA at the following address: Lynn D. Martin, Airports Compliance Specialist, Federal Aviation Administration, Airports Division, ACE–610C, 901 Locust Room 364, Kansas City, MO 64106.

In addition, one copy of any comments submitted to the FAA must be mailed or delivered to: Keith Kaspari, Director of Aviation, 2790 Livingston Ln., Waterloo, IA 50703, (319) 291–4483

FOR FURTHER INFORMATION CONTACT: Lynn D. Martin, Airports Compliance Specialist, Federal Aviation Administration, Airports Division, ACE–610C, 901 Locust Room 364, Kansas City, MO 64106, (816) 329–2644, *lynn.martin@faa.gov.* The request to release property may be reviewed, by appointment, in person at this same location.

SUPPLEMENTARY INFORMATION: The FAA invites public comment on the request to release approximately 12.33+ acres of airport property at Waterloo Regional Airport (ALO) under the provisions of 49 U.S.C. 47107(h)(2). On March 29, 2016, the Director of Aviation at Waterloo Regional Airport requested from the FAA that approximately 12.33+ acres of property be released for sale to Dahlstrom Development for industrial/business development consistent with the zoning ordinances of the City. On October 6, 2016, the FAA determined that the request to release property at Waterloo Regional Airport (ALO) submitted by the Sponsor meets the procedural requirements of the Federal Aviation Administration and the release of the property does not and will not impact future aviation needs at the airport. The FAA may approve the request, in whole or in part, no sooner than thirty days after the publication of this notice.

The following is a brief overview of the request:

The Waterloo Regional Airport (ALO) is proposing the release of airport property totaling 12.33 acres, more or less. This land is to be used for industrial/business development to Dahlstrom Development. The release of land is necessary to comply with Federal Aviation Administration Grant Assurances that do not allow federally acquired airport property to be used for non-aviation purposes. The sale of the subject property will result in the land at Waterloo Regional Airport (ALO) being changed from aeronautical to non-aeronautical use and release the lands from the conditions of the Airport Improvement Program Grant Agreement Grant Assurances. In accordance with 49 U.S.C. 47107(c)(2)(B)(i) and (iii), the airport will receive fair market value for the property, which will be subsequently reinvested in another eligible airport improvement project for general aviation facilities at Waterloo Regional Airport.

Any person may inspect, by appointment, the request in person at the FAA office listed above under **FOR FURTHER INFORMATION CONTACT**. In addition, any person may, upon appointment and request, inspect the application, notice and other documents determined by the FAA to be related to the application in person at Waterloo Regional Airport.

Issued in Kansas City, MO on October 13, 2016.

Jim A. Johnson,

Manager, Airports Division.

[FR Doc. 2016–25286 Filed 10–18–16; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Environmental Impact Statement: Los Angeles County, California

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Amended notice of intent.

SUMMARY: The FHWA, on behalf of the California Department of Transportation (Caltrans), is issuing this amended notice to advise the public that a Draft Environmental Impact Statement (EIS) will be prepared for proposed highway improvements on Interstate 605 (I–605). The I–605 Corridor Improvement Project (Project) will consist of improvements on the I–605 corridor from the Interstate 10 (I–10) Interchange to the Interstate 105 (I–105) Interchange. The proposed Project also includes improvements along State Route 60 (SR–60) from Santa Anita Avenue to east of Turnbull Canyon Road, and on Interstate 5 (I–5) from Florence Avenue to Paramount Boulevard in the cities of Baldwin Park, El Monte, City of Industry, Pico Rivera, South El Monte, Whittier, Downey, Norwalk, Santa Fe Springs, and unincorporated Los Angeles County. The Project limits include the I–605/I–5 and I–605/SR–60 corridors. These corridors were previously analyzed as separate projects; however, the Project limits along these corridors are being combined to connect logical termini. A Project Study Report-Project Development Support Study (PSR–PDS) for the I–605/I–5 corridor was approved in July 2014, and a PSR–PDS for the I-605/SR–60 corridor was approved in December 2015 (not attached).

FOR FURTHER INFORMATION CONTACT: Ronald Kosinski, Deputy District Director, Division of Environmental Planning, District 7, 100 South Main Street, Suite 100, Los Angeles, CA 90012, (213) 897–0703.

SUPPLEMENTARY INFORMATION: Effective July 1, 2007, the FHWA assigned, and Caltrans assumed, environmental responsibilities for this Project pursuant to 23 United States Code (U.S.C.) 327. Caltrans will prepare an Environmental Impact Statement (EIS) for the proposed Project. The purpose of the Project is to reduce congestion, improve freeway operations, improve and enhance safety, and improve local and system interchange operations.

Project Description

The Project proposes widening along the southbound and northbound I–605 corridor from the I–10 Interchange to the I–105 Interchange. The proposed Project includes improvements along SR–60 from Santa Anita Avenue to east of Turnbull Canyon Road, and on I–5 from Florence Avenue to Paramount Boulevard. The study area includes the cities of Baldwin Park, El Monte, City of Industry, Pico Rivera, South El Monte, Whittier, Downey, Norwalk, Santa Fe Springs, and unincorporated Los Angeles County. Improvements to local streets and interchanges may be required as part of the Project including the following interchanges that would be affected: I–605/Imperial Highway, I–605/Firestone Boulevard, I–605/Telegraph Road, I–605/Slauson Avenue, I–605/Florence Ave., I–605/Washington Boulevard, I–605/Whittier Boulevard, I–605/Beverly Boulevard, I–605/Rose Hills Road, I–605/Peck Road, I–605/SR–60, I–605/Valley Boulevard, SR–60/Peck Road, SR–60/7th Ave., I–5/Florence Ave., I–5/Lakewood Boulevard, I–5/Paramount Blvd., and I–605/I–5 Interchanges.

The following Project alternatives are under consideration.

Alternative 1: No Build Alternative

In this alternative, there would be no reconstruction or improvements to the

I–605 corridor. Within the Project limits, I–605 would continue to have four mixed flow lanes that are 11-feet wide, with 2-foot-wide median shoulders, plus one high-occupancy vehicle (HOV) lane and a 1-foot-wide HOV buffer.

Alternative 2: Standard Alternative (Lane/Shoulder Widths)

This alternative includes adding mixed flow or HOV lanes as well as auxiliary lanes where additional capacity is required on southbound and northbound I–605 from I–10 to I–105, and along SR–60 from Santa Anita Avenue to east of Turnbull Canyon Road. This Project will also be adding one HOV lane in each direction along I–5 from Florence Avenue to Paramount Boulevard and auxiliary lanes where necessary. These improvements would implement standard lane widths and shoulders, consistent with the Caltrans Highway Design Manual for the mainline freeway, connectors, and ramps. Right-of-way (ROW) acquisitions would be necessary to accommodate these improvements.

This alternative will have additional design variations, which would provide optional lane use (general purpose, HOV, on and off ramp modifications, and other operational improvements.

Alternative 3: Reduced Standard Alternative (Lane/Shoulder Widths)

Alternative 3 includes many of the design elements identified in Alternative 2 on I–605, SR–60, and I–5 with design variations, which would provide optimal lane use to reduced ROW impacts. This alternative includes adding mixed flow or HOV lanes as well as auxiliary lanes, where additional capacity is required, on southbound and northbound I–605 from I–10 to I–105. The Project also includes adding mixed flow and auxiliary lanes, where additional capacity is required, along SR–60 from Santa Anita Avenue to east of Turnbull Canyon Road and adding one HOV lane in each direction on I–5 from Florence Avenue to Paramount Boulevard.

This alternative will have additional design variations, which provide optional lane use such as general purpose, HOV, optional on and off ramp modifications, and other operational improvements. These alternatives may be refined or be removed from further consideration, as engineering and environmental analysis is conducted for the Project.

Alternative 4: Transportation Systems Management/Transportation Demand Management (TSM/TDM)

The TSM/TDM Alternative would add transportation system and demand management techniques to existing features within the Project limits. Improvements that may be included as part of this alternative are additional ramp metering, improved signal timing, increased transit service, improved signage, development of rideshare/carpool programs, and installation of intelligent transportation systems.

Analysis supporting the Environmental Impact Statement (EIS) will determine the improvements necessary to meet the existing and future transportation needs in the corridor.

The following permits/approvals may be required to construct the Project:

- 33 U.S.C. 408 Section 408 Permit (United States (U.S.) Army Corps of Engineers)
- Clean Water Act (CWA) Section 404 Permit (U.S. Army Corps of Engineers)
- Section 1602 Agreement (California Department of Fish and Wildlife)
- National Pollutant Discharge Elimination System (NPDES) Permit
- Caltrans Statewide Permit and Construction General Permit
- CWA Section 401 Water Quality Certification and/or Waste Discharge Requirement (WDR) (Regional Water Quality Control Board)
- South Coast Air Quality Management District (SCAQMD) Rules 403, 1403, and 1166
- Clean Air Act, Transportation Conformity Determination (FHWA; Caltrans)
- Section 106 Compliance with National Historic Preservation Act
- Section 7 Consultation with U.S. Fish and Wildlife Service in the event that Federally-listed species are affected
- Union Pacific Railroad (UPRR) Memorandum of Agreement
- Various City Encroachment Permits

Caltrans will be holding public scoping meetings to provide an overview of the Project, summarize the environmental process, and receive input regarding the environmental issues and the suggested scope and content of the EIS. These meetings will include separate agency and public scoping. Please refer to the table below for meeting dates and locations:

SCOPING AND AGENCY MEETINGS

City	Date	Time	Location
Downey	Monday, Oct. 24, 2016	6:30 p.m.–8:30 p.m.	Public Scoping Meeting, Embassy Suites Los Angeles-Downey, Diplomat/Consulate Room, 8425 Firestone Blvd., Downey, CA 90241.
Santa Fe Springs	Wednesday, Oct. 26, 2016	3:00 p.m.–4:30 p.m.	Agency Scoping Meeting, Gus Velasco Neighborhood Center, 9255 South Pioneer Blvd., Santa Fe Springs, CA 90670.
Santa Fe Springs	Wednesday, Oct. 26, 2016	6:30 p.m.–8:30 p.m.	Public Scoping Meeting, Gus Velasco Neighborhood Center, 9255 South Pioneer Blvd., Santa Fe Springs, CA 90670.
Norwalk	Thursday, Oct. 27, 2016	6:30 p.m.–8:30 p.m.	Public Scoping Meeting, Norwalk Assembly of God Church, 11129 Pioneer Blvd., Norwalk, CA 90650.
City of Industry	Tuesday, Nov. 1, 2016	6:30 p.m.–8:30 p.m.	Public Scoping Meeting, Industry Hills Expo Center, 16200 Temple Avenue, City of Industry, CA 91744.
South El Monte	Wednesday, Nov. 2, 2016	6:30 p.m.–8:30 p.m.	Public Scoping Meeting, South El Monte Senior Center, 1556 Central Ave., South El Monte, CA 91733.
Whittier	Thursday, Nov. 3, 2016	6:30 p.m.–8:30 p.m.	Public Scoping Meeting, Palm Park, Palm A–B Room, 5703 Palm Ave., Whittier, CA 90601.
Whittier	Thursday, Nov. 3, 2016	3:00 p.m.–4:30 p.m.	Agency Scoping Meeting, Palm Park, Palm A–B Room, 5703 Palm Ave., Whittier, CA 90601.

Letters describing the proposed action and soliciting comments will be sent to appropriate Federal, State, and Participating Agencies; tribal governments and local agencies and private organizations and citizens who have previously expressed or are known to have interest in this proposal. The Draft EIS is anticipated to be available for public and agency review and comment in mid-2019. Public meetings will be held in study area communities during the public and agency review and comment period. In addition, public hearings will be held for the Project. Public notice will be given for the time and place of the public meetings and hearings. The Draft EIS will be available for public and agency review and comment prior to the public hearings.

To ensure that the full range of issues related to this proposed action is addressed and all significant concerns are identified, comments and suggestions are invited from all interested parties. Comments or questions about this proposed action and the EIS should be directed to Caltrans at the address provided above.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.)

Issued on: October 11, 2016.

Josué M. Yambó,

Senior Transportation Engineer, Project Delivery Division, Federal Highway Administration, Sacramento, California.

[FR Doc. 2016–25216 Filed 10–18–16; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Notice of Final Federal Agency Actions on Proposed Haines Highway Reconstruction Milepost 3.9 to Milepost 25.0 in Alaska

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of limitation of claims for judicial review of actions by FHWA and other Federal agencies.

SUMMARY: This notice announces actions taken by FWHA that are final within the meaning of 23 U.S.C. 139(l)(1). The actions relate to the proposed Haines Highway Reconstruction in the Haines Borough in the State of Alaska. Those actions grant approvals for the project.

DATES: By this notice, FHWA is advising the public of final agency actions subject to 23 U.S.C. 139(l)(1). A claim seeking judicial review of FHWA actions on the highway project will be barred unless the claim is filed on or before March 20, 2017. If the Federal law that authorizes judicial review of a claim provides a time period of less than 150 days for filing such claim, then that shorter time period still applies.

FOR FURTHER INFORMATION CONTACT: Al Fletcher, Field Operations Engineer, Federal Highway Administration, Alaska Division, 709 West 9th Street, Room 851, Juneau, AK 99802, telephone (907) 586–7245; email: *Al.Fletcher@dot.gov.* The FHWA Alaska Division Office's normal business hours are 8:00 a.m. to 5:00 p.m. (Alaska Standard Time), Monday through Friday, except Federal holidays. You may also contact Greg Lockwood P.E., Project Manager, Alaska Department of Transportation, Southcoast Region, P.O. Box 112506, Juneau, AK 99811–2506, telephone (907) 465–2393; email: *greg.lockwood@alaska.gov.* The DOT&PF Southcoast Regions' normal business hours are 8:00 a.m. to 4:30 p.m. (Alaska Standard Time), Monday through Friday, except State and Federal holidays.

SUPPLEMENTARY INFORMATION: Notice is hereby given that FHWA has taken final agency action subject to 23 U.S.C. 139(l)(1) by issuing licenses, permits, and approvals for the Haines Highway Reconstruction Milepost 3.9 to Milepost 25.0 Project in the State of Alaska. The Haines Highway Reconstruction Milepost 3.9 to Milepost 25.0 Project proposes to upgrade the Haines Highway to current standards from Milepost (MP) 3.5 to 25.3 in Haines, Alaska.

The project includes the following components:

1. Improvements to Haines Highway. Specifically, realignment of sections of the highway and straightening some curves to meet 55 mile-per-hour design standards, with the exception of two curves. Widening the roadway shoulders to a continuous 6-foot width and providing minimum sight distance to meet design standards. Constructing drainage ditches and upgrading, replacing, and/or adding new culverts where appropriate. Repaving and restriping the roadway and adding new signage. Rehabilitating or relocating of driveways, turnout access points, and road intersections (including Chilkat Avenue, Klukwan) to meet design standards. Installing or upgrading of guardrails and other safety features along the highway, where needed. Modifying the Haines-Fairbanks Pipeline Gate Valve 4's surrounding concrete vault, to protect the gate valve and provide a safe road embankment. Relocating utilities, where required. Maintaining access to utilities not relocated.

2. Replacement of Chilkat River Bridge. Installation of a temporary bridge downstream to be used as a construction staging platform. Construction of a new bridge directly adjacent to, and downstream of, the existing bridge, with the same lane and shoulder widths as the revised proposed road. The new bridge would be constructed to meet the following criteria: A 55 mile-per-hour design speed, current seismic standards, and accommodation of freight vehicles carrying heavier loads than currently accommodated by the bridge, and consistency with the bridges constructed in the Haines Highway Milepost 24 to the border project. Removing existing bridge deck and rail; cutting and removing foundation structures, including remnant pilings from previous bridge structures.

3. Improvements for Highway Protection at Debris and Water Flood Flow Areas. Raising the grade of the highway 15 to 18 feet from its current elevation at Milepost 19 and Milepost 23. Installing of four to six larger-diameter culverts under the elevated highway, at each debris flow area (Milepost 19, Milepost 23).

4. Improvements for Recreational Access. Widening roadway shoulders from 2 feet to 6 feet, to improve safety for non-motorized users. Constructing parking area for access to the Mount Ripinski Trailhead. Improving surfacing and grading of turnouts within the right-of-way. Improving vehicle access to the Chilkat River recreational areas.

The actions by FHWA and the laws under which such actions were taken are described in the Haines Highway Reconstruction Milepost 3.9 to Milepost 25.0 Final Revised Environment Assessment (FREA), Finding of No Significant Impact (FONSI), and the Section 4(f) evaluations, issued on August 15, 2016, and in other documents in the project records. The FREA, FONSI, and Section 4(f) Evaluations, and other project records are available by contacting FHWA at the address provided above. The EA and Section 4(f) Evaluation and FONSI can be viewed and downloaded from the project Web site at *http://dot.alaska.gov/sereg/projects/haines_hwy/documents.shtml* or by contacting FHWA at the address provided above.

This notice applies to all FHWA decisions as of the issuance date of this notice and all laws under which such actions were taken. Laws generally applicable to such actions include but are not limited to:

- *General:* National Environmental Policy Act (NEPA) [42 U.S.C. 4321–4351; Federal-Aid Highway Act [23 U.S.C. 109].
- *Wildlife:* Fish and Wildlife Coordination Act [16 U.S.C. 661–667(d); Migratory Bird Treaty Act [16 U.S.C. 703–712], Magnuson-Stevens Fisheries Conservation and Management Act of 1976 [16 U.S.C. 1801, Bald and Golden Eagle Protection Act [16 U.S.C. 668–668c).
- *Waters of the U.S.:* Section 404 of the Clean Water Act [33 U.S.C. 1344].
- *Cultural Resources:* Section 106 of the National Historic Preservation Act of 1966, as amended [16 U.S.C. 470(f) *et seq.*]; Archaeological and Historic Preservation Act [16 U.S.C. 469–469(c)]; Archaeological Resources Protection Act of 1977 [16 U.S.C. 470(aa)–11].
- Section 4(f) of the USDOT Act [49 U.S.C. 1653(f)].
- *Executive Orders:* Executive Order 12898, Environmental Justice; Executive Order 11988, Floodplain Management; Executive Order 11990, Protection of Wetlands; Executive Order 13112, Invasive Species; Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks; Executive Order 13007, Indian Sacred Sites; Executive Order 11593, Protection and Enhancement of the Cultural Environment; and Executive Order 13175, Consultation and Coordination with Indian Tribal Governments.

Authority: 23 U.S.C. 139(l)(1).

Issued on: October 12, 2016.

Sandra A. Garcia-Aline,

Division Administrator, Juneau, Alaska.

[FR Doc. 2016–25284 Filed 10–18–16; 8:45 am]

BILLING CODE 4910–RY–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Notice To Rescind a Notice of Intent To Prepare an Environmental Impact Statement: Los Angeles County, California

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Rescind Notice of Intent to prepare an Environmental Impact Statement.

SUMMARY: The FHWA, on behalf of the California Department of Transportation (Caltrans) is issuing this notice to advise the public that the Notice of Intent (NOI) published on October 11, 2016 (Page: 70247–70248 (2 pages), Document Number: 2016–24480) to prepare an Environmental Impact Statement (EIS) for a proposed highway project on Interstate 605 in Los Angeles County is being rescinded.

FOR FURTHER INFORMATION CONTACT: Ronald Kosinski, Deputy District Director, Division of Environmental Planning, District 7, 100 South Main Street, Suite 100, Los Angeles, CA 90012, (213) 897–0703.

SUPPLEMENTARY INFORMATION: Effective July 1, 2007, the Federal Highway Administration (FHWA) assigned, and the California Department of Transportation (Caltrans) assumed, environmental responsibilities for this project pursuant to 23 U.S.C. 327. Caltrans, as the delegated National Environmental Policy Act (NEPA) agency, is rescinding the NOI to prepare an EIS for the I–605/SR–60 Improvement Project in Los Angeles County, California.

The Project proposes widening along southbound and northbound I–605 and the addition of one mixed flow lane (a standard freeway lane where vehicles with any number of occupants can drive anytime) along westbound SR–60 within the Project limits. The Project will also include the addition of auxiliary lanes, where necessary (lanes used to separate entering, exiting, or weaving traffic from through traffic). Improvements to local streets and interchanges would be required as part of the Project. Interchanges that would be affected include the I–605/Slauson Avenue Interchange, I–605/Washington Boulevard Interchange, I–605/Whittier Boulevard Interchange, I–605/Beverly Boulevard Interchange, I–605/Rose Hills Road Interchange, I–605/Peck Road Interchange, I–605/SR 60 Interchange, I–605/Valley Boulevard Interchange, and SR 60/Peck Road Interchange. The NOI is being rescinded due to the extension of project limits. Comments or questions concerning this proposed action should be directed to Caltrans at the address provided above.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.)

Issued on: October 12, 2016.

Josué M. Yambó,

Senior Transportation Engineer, Federal Highway Administration, Los Angeles, California.

[FR Doc. 2016–25218 Filed 10–18–16; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2016–0194]

Agency Information Collection Activities; Renewal of a Currently-Approved Information Collection: Licensing Applications for Motor Carrier Operating Authority

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 review and approval. The FMCSA requests approval to renew an ICR titled, ''Licensing Applications for Motor Carrier Operating Authority,'' that is used by for-hire motor carriers of regulated commodities, motor passenger carriers, freight forwarders, property brokers, and certain Mexico-domiciled motor carriers to register their operations with the FMCSA.

DATES: We must receive your comments on or before November 18, 2016. 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–2016–0194. 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: Mr. Jeffrey Secrist, Office of Registration and Safety Information, Department of Transportation, Federal Motor Carrier Safety Administration, 1200 New Jersey Avenue SE., Washington, DC 20590–0001. Telephone Number: (202) 385–2367; Email Address: *jeff.secrist@dot.gov.* Office hours are from 8:00 a.m. to 5:00 p.m., E.T., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Title: Licensing Applications for Motor Carrier Operating Authority.

OMB Control Number: 2126–0016.

Type of Request: Renewal of a currently approved collection.

Respondents: Motor carriers, motor passenger carriers, freight forwarders, brokers, and certain Mexico-domiciled motor carriers.

Estimated Number of Respondents and Responses: 37,240 respondents [(37,216 respondents and responses for Year 1) + (12 respondents and responses for Year 2) + (12 respondents and responses for Year 3)].

Estimated Time per Response: 2 hours for forms OP–1, OP–1(P), OP–1(FF) and 4 hours for forms OP–1(MX), OP–1(NNA).

Expiration Date: October 31, 2016.

Frequency of Response: Other (as needed).

Estimated Total Annual Burden: 24,853 hours [74,464 hours for Year 1 + 48 hours for Year 2 + 48 hours for Year 3 = 74,560 hours/3 year approval for ICR = 24,853 estimated average number of annual burden hours].

Background: The FMCSA registers for-hire motor carriers of regulated commodities, motor passenger carriers, freight forwarders, property brokers, and certain for-hire Mexico-domiciled motor carriers under 49 U.S.C. 13902(c). These motor carriers may conduct transportation services in the United States only if they are registered with the FMCSA. Each registration is effective from the date specified and remains in effect for such period as the Secretary of Transportation (Secretary) determines by regulations. The ICC Termination Act of 1995 (ICCTA), Public Law 104–88, 109 Stat. 803 (December 29, 1995), transferred this registration authority from the former Interstate Commerce Commission (ICC) to the Secretary who subsequently delegated the registration function to the Federal Highway Administration (FHWA) (FMCSA's predecessor agency), then to the FMCSA at the time that agency was created.

On March 19, 2002, the FMCSA published an interim final rule (IFR) at 67 FR 12702 which proposed to amend 49 CFR part 365 and revise Form OP–1(MX). Under the amended regulations, Mexico-domiciled long-haul motor carriers seeking to operate within the United States beyond the commercial border zones, including carriers that previously filed pending Form OP–1(MX) applications, would be required to submit the revised Form OP–1(MX). Under the revised Form OP–1(MX), the FMCSA would collect more detailed information on an applicant motor carrier's size, operations and history than could be collected previously by using the existing form.

The Final Rule titled, ''Unified Registration System,'' (78 FR 52608) dated August 23, 2013, implemented statutory provisions for an on-line registration system required by ICCTA and the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, 2005 (SAFETEA–LU). The URS streamlines the registration process and serves as a clearinghouse and repository of information on, and identification of, motor carriers, brokers, freight forwarders, intermodal equipment providers (IEPs), hazardous materials safety permit (HMSP) applicants, and cargo tank facilities required to register with FMCSA. This ICR previously covered registration requirements for non-exempt for-hire carriers, freight forwarders, and property brokers. Under the URS, all forms in this ICR, except the OP–1 (MX), were folded into the Form MCSA–1 under the OMB Control Number 2126–0051 titled, ''FMCSA Registration/Updates,'' ICR on October 23, 2015. The Form OP–1(MX) would be retained for the small number of Mexico-domiciled carriers that seek authority to operate beyond the United States municipalities on the United States-Mexico border and their commercial zones because they are not included within the scope of the URS rule.

The Final Rule titled, ''Unified Registration System,'' (80 FR 63695) dated October 21, 2015, changed the effective and compliance dates of the 2013 URS Final Rule from October 23, 2015, to September 30, 2016, in order to allow FMCSA additional time to complete the information technology (IT) systems work required to fully implement that rule. An additional delay was published on July 28, 2016 (81 FR 49553), stating the URS Final Rule will come into effect on January 14, 2017, however the full compliance date is April 14, 2017. This ICR revision will restore the Forms OP–1, OP–1(P), OP–1(FF), and OP–1(NNA) under control number 2126–0016, until the scheduled URS full compliance date of April 14, 2017, because these forms are still needed to support registration processes for entities subject to FMCSA's regulations that enforce these motor carriers to update their registration for operating authority, or add additional authorities with FMCSA, in order to conduct for-hire interstate transportation services of passengers, or regulated commodities, in the United States. After April 14, 2017, all forms in this ICR, except the OP–1(MX), will be folded into the online Form MCSA–1 under the OMB Control Number 2126–0051 titled, ''FMCSA Registration/Updates.''

Public Comments Invited: No comments were received from the public in response to the 60-day **Federal Register** (81 FR 53539), issued on August 12, 2016. You are asked to comment on any aspect of this information collection, including: (1) Whether the proposed collection is necessary for the performance of FMCSA's 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 under the authority delegated in 49 CFR 1.87 on: October 13, 2016.

G. Kelly Regal.

Associate Administrator for Office of Research and Information Technology.

[FR Doc. 2016–25230 Filed 10–18–16; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2016–0101]

Requested Administrative Waiver of the Coastwise Trade Laws: Vessel Kipu One; Invitation for Public Comments

AGENCY: Maritime Administration, Department of Transportation.

ACTION: Notice.

SUMMARY: As authorized by 46 U.S.C. 12121, the Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to grant waivers of the U.S.-build requirement of the coastwise laws under certain circumstances. A request for such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below.

DATES: Submit comments on or before November 18, 2016.

ADDRESSES: Comments should refer to docket number MARAD–2016–0101. Written comments may be submitted by hand or by mail to the Docket Clerk, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590. You may also send comments electronically via the Internet at *http://www.regulations.gov.* All comments will become part of this docket and will be available for inspection and copying at the above address between 10 a.m. and 5 p.m., E.T., Monday through Friday, except federal holidays. An electronic version of this document and all documents entered into this docket is available on the World Wide Web at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Bianca Carr, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue SE., Room W23–453, Washington, DC 20590. Telephone 202–366–9309, Email *Bianca.carr@dot.gov.*

SUPPLEMENTARY INFORMATION: As described by the applicant the intended service of the vessel *Kipu One* is:

Intended Commercial Use of Vessel: ''Tour boat 6 passenger''.

Geographic Region: ''Hawaii''.

The complete application is given in DOT docket MARAD–2016–0101 at *http://www.regulations.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR part 388, that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the docket number of this notice and the vessel name in order for MARAD to properly consider the comments. Comments should also state the commenter's interest in the waiver application, and address the waiver criteria given in § 388.4 of MARAD's regulations at 46 CFR part 388.

Privacy Act

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78).

By Order of the Maritime Administrator.

Dated: October 4, 2016.

T. Mitchell Hudson, Jr.,

Secretary, Maritime Administration.

[FR Doc. 2016–25198 Filed 10–18–16; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2016–0098]

Requested Administrative Waiver of the Coastwise Trade Laws: Vessel BLACK 1; Invitation for Public Comments

AGENCY: Maritime Administration, Department of Transportation.

ACTION: Notice.

SUMMARY: As authorized by 46 U.S.C. 12121, the Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to grant waivers of the U.S.-build requirement of the coastwise laws under certain circumstances. A request for such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below.

DATES: Submit comments on or before November 18, 2016.

ADDRESSES: Comments should refer to docket number MARAD–2016–0098. Written comments may be submitted by hand or by mail to the Docket Clerk, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590. You may also send comments electronically via the Internet at *http://www.regulations.gov.* All comments will become part of this docket and will be available for inspection and copying at the above address between 10 a.m. and 5 p.m., E.T., Monday through Friday, except Federal holidays. An electronic version of this document and all documents entered into this docket is available on the World Wide Web at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Bianca Carr, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue SE., Room W23–453, Washington, DC 20590. Telephone 202–366–9309, Email *Bianca.carr@dot.gov.*

SUPPLEMENTARY INFORMATION: As described by the applicant the intended service of the vessel BLACK 1 is: INTENDED COMMERCIAL USE OF VESSEL: ''PASSENGER TRANSPORT FOR WHALE WATCHING AND COASTAL SIGHT SEEING'' GEOGRAPHIC REGION: ''Hawaii'' The complete application is given in DOT docket MARAD–2016–0098 at *http://www.regulations.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR part 388, that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the docket number of this notice and the vessel name in order for MARAD to properly consider the comments. Comments should also state the commenter's interest in the waiver application, and address the waiver criteria given in § 388.4 of MARAD's regulations at 46 CFR part 388.

Privacy Act

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78).

By Order of the Maritime Administrator.

Date: October 4, 2016.

T. Mitchell Hudson, Jr.,

Secretary, Maritime Administration.

[FR Doc. 2016–25193 Filed 10–18–16; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2016–0103]

Requested Administrative Waiver of the Coastwise Trade Laws: Vessel ADVENTURESS II; Invitation for Public Comments

AGENCY: Maritime Administration, Department of Transportation.

ACTION: Notice.

SUMMARY: As authorized by 46 U.S.C. 12121, the Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to grant waivers of the U.S.-build requirement of the coastwise laws under certain circumstances. A request for such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below.

DATES: Submit comments on or before November 18, 2016.

ADDRESSES: Comments should refer to docket number MARAD–2016–0103. Written comments may be submitted by hand or by mail to the Docket Clerk, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590. You may also send comments electronically via the Internet at *http://www.regulations.gov.* All comments will become part of this docket and will be available for inspection and copying at the above address between 10 a.m. and 5 p.m., E.T., Monday through Friday, except Federal holidays. An electronic version of this document and all documents entered into this docket is available on the World Wide Web at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Bianca Carr, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue SE., Room W23–453, Washington, DC 20590. Telephone 202–366–9309, Email *Bianca.carr@dot.gov.*

SUPPLEMENTARY INFORMATION: As described by the applicant the intended service of the vessel ADVENTURESS II is: INTENDED COMMERCIAL USE OF VESSEL: ''passenger charter, fishing charter'' GEOGRAPHIC REGION: ''Florida'' The complete application is given in DOT docket MARAD–2016–0103 at *http://www.regulations.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR part 388, that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the docket number of this notice and the vessel name in order for MARAD to properly consider the comments. Comments should also state the commenter's interest in the waiver application, and address the waiver criteria given in § 388.4 of MARAD's regulations at 46 CFR part 388.

Privacy Act

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78).

By Order of the Maritime Administrator.

Dated: October 11, 2016.

T. Mitchell Hudson, Jr.,

Secretary, Maritime Administration.

[FR Doc. 2016–25227 Filed 10–18–16; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2016–0097]

Requested Administrative Waiver of the Coastwise Trade Laws: Vessel BLUE MOON 3; Invitation for Public Comments

AGENCY: Maritime Administration, Department of Transportation.

ACTION: Notice.

SUMMARY: As authorized by 46 U.S.C. 12121, the Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to grant waivers of the U.S.-build requirement of the coastwise laws under certain circumstances. A request for such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below.

DATES: Submit comments on or before November 18, 2016.

ADDRESSES: Comments should refer to docket number MARAD–2016–0097. Written comments may be submitted by hand or by mail to the Docket Clerk, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590. You may also send comments electronically via the Internet at *http://www.regulations.gov.* All comments will become part of this docket and will be available for inspection and copying at the above address between 10 a.m. and 5 p.m., E.T., Monday through Friday, except federal holidays. An electronic version of this document and all documents entered into this docket is available on the World Wide Web at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Bianca Carr, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue SE., Room W23–453, Washington, DC 20590. Telephone 202–366–9309, Email *Bianca.carr@dot.gov.*

SUPPLEMENTARY INFORMATION:

As described by the applicant the intended service of the vessel BLUE MOON 3 is:

Intended Commercial Use of Vessel: ''Sportfishing and cruising charter''.

Geographic Region: ''Texas, Louisiana, Mississippi, Alabama, Florida''.

The complete application is given in DOT docket MARAD–2016–0097 at *http://www.regulations.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR part 388, that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the docket number of this notice and the vessel name in order for MARAD to properly consider the comments. Comments should also state the commenter's interest in the waiver application, and address the waiver criteria given in § 388.4 of MARAD's regulations at 46 CFR part 388.

Privacy Act

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78).

By Order of the Maritime Administrator.

Date: October 4, 2016.

T. Mitchell Hudson, Jr.,

Secretary, Maritime Administration.

[FR Doc. 2016–25200 Filed 10–18–16; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2016–0104]

Requested Administrative Waiver of the Coastwise Trade Laws: Vessel Shalimar; Invitation for Public Comments

AGENCY: Maritime Administration, Department of Transportation.

ACTION: Notice.

SUMMARY: As authorized by 46 U.S.C. 12121, the Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to grant waivers of the U.S.-build requirement of the coastwise laws under certain circumstances. A request for such a waiver has been received by

MARAD. The vessel, and a brief description of the proposed service, is listed below.

DATES: Submit comments on or before November 18, 2016.

ADDRESSES: Comments should refer to docket number MARAD–2016–0104. Written comments may be submitted by hand or by mail to the Docket Clerk, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590. You may also send comments electronically via the Internet at *http://www.regulations.gov.* All comments will become part of this docket and will be available for inspection and copying at the above address between 10 a.m. and 5 p.m., E.T., Monday through Friday, except federal holidays. An electronic version of this document and all documents entered into this docket is available on the World Wide Web at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Bianca Carr, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue SE., Room W23–453, Washington, DC 20590. Telephone 202–366–9309, Email *Bianca.carr@dot.gov.*

SUPPLEMENTARY INFORMATION:

As described by the applicant the intended service of the vessel Shalimar is:

Intended Commercial Use of Vessel: An exclusive private charter sailing vessel. Exclusive private Ecology tours, whale watching, dolphin watching, sunset sails, day sailing and live-aboard inter-island sailing charters.

Geographic Region: ''Hawaii''.

The complete application is given in DOT docket MARAD–2016–0104 at *http://www.regulations.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR part 388, that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the docket number of this notice and the vessel name in order for MARAD to properly consider the comments. Comments should also state the commenter's interest in the waiver application, and address the waiver criteria given in § 388.4 of MARAD's regulations at 46 CFR part 388.

Privacy Act

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78).

By Order of the Maritime Administrator.

Dated: October 11, 2016.

T. Mitchell Hudson, Jr.,

Secretary, Maritime Administration.

[FR Doc. 2016–25199 Filed 10–18–16; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2016–0100]

Requested Administrative Waiver of the Coastwise Trade Laws: Vessel KATLO; Invitation for Public Comments

AGENCY: Maritime Administration, Department of Transportation.

ACTION: Notice.

SUMMARY: As authorized by 46 U.S.C. 12121, the Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to grant waivers of the U.S.-build requirement of the coastwise laws under certain circumstances. A request for such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below.

DATES: Submit comments on or before November 18, 2016.

ADDRESSES: Comments should refer to docket number MARAD–2016–0100. Written comments may be submitted by hand or by mail to the Docket Clerk, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590. You may also send comments electronically via the Internet at *http://www.regulations.gov.* All comments will become part of this docket and will be available for inspection and copying at the above address between 10 a.m. and 5 p.m., E.T., Monday through Friday, except federal holidays. An electronic version of this document and all documents entered into this docket is available on the World Wide Web at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Bianca Carr, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue SE., Room W23–453, Washington, DC 20590. Telephone 202–366–9309, Email *Bianca.carr@dot.gov.*

SUPPLEMENTARY INFORMATION:

As described by the applicant the intended service of the vessel KATLO is:

Intended Commercial Use of Vessel: ''Sailing catamaran intending to take 6 passengers on multi-day overnight vacation excursions.''

Geographic Region: ''Maine, Massachusetts, New Hampshire, Rhode Island, Puerto Rico.''

The complete application is given in DOT docket MARAD–2016–0100 at *http://www.regulations.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR part 388, that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the docket number of this notice and the vessel name in order for MARAD to properly consider the comments. Comments should also state the commenter's interest in the waiver application, and address the waiver criteria given in § 388.4 of MARAD's regulations at 46 CFR part 388.

Privacy Act

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78).

By Order of the Maritime Administrator.

Date: October 4, 2016.

T. Mitchell Hudson, Jr.,

Secretary, Maritime Administration.

[FR Doc. 2016–25194 Filed 10–18–16; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2016–0105]

Requested Administrative Waiver of the Coastwise Trade Laws: Vessel MY SUNSHINE; Invitation for Public Comments

AGENCY: Maritime Administration, Department of Transportation.

ACTION: Notice.

SUMMARY: As authorized by 46 U.S.C. 12121, the Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to grant waivers of the U.S.-build requirement of the coastwise laws under certain circumstances. A request for such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below.

DATES: Submit comments on or before November 18, 2016.

ADDRESSES: Comments should refer to docket number MARAD–2016–0105. Written comments may be submitted by hand or by mail to the Docket Clerk, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590. You may also send comments electronically via the Internet at *http://www.regulations.gov.* All comments will become part of this docket and will be available for inspection and copying at the above address between 10 a.m. and 5 p.m., E.T., Monday through Friday, except federal holidays. An electronic version of this document and all documents entered into this docket is available on the World Wide Web at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Bianca Carr, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue SE., Room W23–453, Washington, DC 20590. Telephone 202–366–9309, Email *Bianca.carr@dot.gov.*

SUPPLEMENTARY INFORMATION: As described by the applicant the intended service of the vessel MY SUNSHINE is:

Intended Commercial Use of Vessel: ''Day Charters & Overnight Charters throughout Hawaiian Islands.''

Geographic Region: ''Hawaii.''

The complete application is given in DOT docket MARAD–2016–0105 at *http://www.regulations.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR part 388, that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the docket number of this notice and the vessel name in order for MARAD to properly consider the comments. Comments should also state the commenter's interest in the waiver application, and address the waiver criteria given in § 388.4 of MARAD's regulations at 46 CFR part 388.

Privacy Act

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78).

By Order of the Maritime Administrator.

Dated: October 11, 2016.

T. Mitchell Hudson, Jr.,

Secretary, Maritime Administration.

[FR Doc. 2016–25225 Filed 10–18–16; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2016–0102]

Requested Administrative Waiver of the Coastwise Trade Laws: Vessel T–ZERO; Invitation for Public Comments

AGENCY: Maritime Administration, Department of Transportation.

ACTION: Notice.

SUMMARY: As authorized by 46 U.S.C. 12121, the Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to grant waivers of the U.S.-build requirement of the coastwise laws under certain circumstances. A request for such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below.

DATES: Submit comments on or before November 18, 2016.

ADDRESSES: Comments should refer to docket number MARAD–2016–0102. Written comments may be submitted by hand or by mail to the Docket Clerk, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590. You may also send comments electronically via the Internet at *http://www.regulations.gov.* All comments will become part of this docket and will be available for inspection and copying at the above address between 10 a.m. and 5 p.m., E.T., Monday through Friday, except federal holidays. An electronic version of this document and all documents entered into this docket is available on the World Wide Web at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Bianca Carr, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue SE., Room W23–453, Washington, DC 20590. Telephone 202–366–9309, Email *Bianca.carr@dot.gov.*

SUPPLEMENTARY INFORMATION: As described by the applicant the intended service of the vessel T–ZERO is:

Intended Commercial Use of Vessel: ''Overnight luxury pleasure time charters for weeklong or greater charter periods.''

Geographic Region: Florida, Georgia, South Carolina, North Carolina, Maryland, Virginia, Delaware, New Jersey, New York, Connecticut, Rhode Island, Massachusetts, New Hampshire, Maine

The complete application is given in DOT docket MARAD–2016–0102 at *http://www.regulations.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR part 388, that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the docket number of this notice and the vessel name in order for MARAD to properly consider the comments. Comments should also state the commenter's interest in the waiver application, and address the waiver criteria given in § 388.4 of MARAD's regulations at 46 CFR part 388.

Privacy Act

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act

Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78).

By Order of the Maritime Administrator.

Date: October 11, 2016.

T. Mitchell Hudson, Jr.,

Secretary, Maritime Administration.

[FR Doc. 2016–25201 Filed 10–18–16; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF THE TREASURY

Senior Executive Service; Departmental Offices Performance Review Board

AGENCY: Treasury Department.

ACTION: Notice of members of the Departmental Offices Performances Review Board.

SUMMARY: Pursuant to 5 U.S.C. 4314(c)(4), this notice announces the appointment of members of the Departmental Offices Performance Review Board (PRB). The purpose of this Board is to review and make recommendations concerning proposed performance appraisals, ratings, bonuses and other appropriate personnel actions for incumbents of SES positions in the Departmental Offices, excluding the Legal Division. The Board will perform PRB functions for other bureau positions if requested.

DATES: Membership is effective on the date of this notice.

FOR FURTHER INFORMATION CONTACT: Julia Markham and Sherri Coleman, Office of Executive Resources, 1500 Pennsylvania Avenue NW., ATTN: 1722 Eye Street, 9th Floor, Washington, DC 20220, Telephone: 202–622–1043.

SUPPLEMENTARY INFORMATION:

Composition of Departmental Offices PRB: The Board shall consist of at least three members. In the case of an appraisal of a career appointee, more than half the members shall consist of career appointees. The names and titles of the Board members are as follows:

Names for Federal Register Publication

- Jordan, Everett, Deputy Assistant Secretary, Intelligence Community Integration
- Monroe, David, Director, Office of Fiscal Projections
- Banks, Carole, Director, Office of Accounting and Internal Controls
- Norris, Trevor, Associate Chief Human Capital Officer for Executive and Human Capital Services (Alternate Member)
- Rasetti, Lorenzo, Chief Financial Officer for Office of Financial Stability (Alternate Member)
- Kaplan, Michael, Deputy Assistant Secretary, Western Hemisphere and South Asia (Alternate Member)

Julia Markham,

Director, Office of Executive Resources.

[FR Doc. 2016–25271 Filed 10–18–16; 8:45 am]

BILLING CODE 4810–25–P

DEPARTMENT OF THE TREASURY

Senior Executive Service; Departmental Performance Review Board

AGENCY: Treasury Department.

ACTION: Notice of members of the Departmental Performance Review Board (PRB).

SUMMARY: Pursuant to 5 U.S.C. 4314(c)(4), this notice announces the appointment of members of the Departmental PRB. The purpose of this PRB is to review and make recommendations concerning proposed performance appraisals, ratings, bonuses and other appropriate personnel actions for incumbents of SES positions for which the Secretary or Deputy Secretary is the appointing authority. These positions include SES bureau heads, deputy bureau heads and certain other positions. The Board will perform PRB functions for other key bureau positions if requested.

Composition of Departmental PRB: The Board shall consist of at least three members. In the case of an appraisal of a career appointee, more than half the members shall consist of career appointees. The names and titles of the PRB members are as follows:

- Kody Kinsley, Assistant Secretary for Management
- Trevor Norris, Associate Chief Human Capital Officer for Executive and Human Capital Services
- Daniel L. Glaser, Assistant Secretary for Terrorist Financing
- Mark Mazur, Assistant Secretary for Tax Policy
- David A. Lebryk, Fiscal Assistant Secretary
- Anita K. Blair, Deputy Assistant Secretary for Human Resources and Chief Human Capital Officer
- John J. Manfreda, Administrator, Alcohol and Tobacco Tax and Trade Bureau
- Mary G. Ryan, Deputy Administrator, Alcohol and Tobacco Tax and Trade Bureau
- Jamal El-Hindi, Deputy Director, Financial Crimes Enforcement Network
- Sheryl Morrow, Commissioner, Bureau of Fiscal Service
- Wanda J. Rogers, Deputy Commissioner, Financial Services and Operations, Bureau of Fiscal Service
- Kimberly McCoy, Deputy Commissioner, Fiscal Accounting and Shared Services, Bureau of Fiscal Services
- Leonard Olijar, Director, Bureau of Engraving and Printing
- Matthew Rhett Jeppson, Principal Deputy Director of the Mint
- Jeffrey Tribiano, Deputy Commissioner, Operations Support, Internal Revenue Service

DATES: Membership is effective on the date of this notice.

FOR FURTHER INFORMATION CONTACT: Julia J. Markham, Director, Office of Executive Resources, 1500 Pennsylvania Avenue NW., ATTN: 1722 Eye Street, 9th Floor, Washington, DC 20220, Telephone: (202) 927–4370.

Julia Markham,

Director, Office of Executive Resources.

[FR Doc. 2016–25272 Filed 10–18–16; 8:45 am]

BILLING CODE 4810–25–P

DEPARTMENT OF VETERANS AFFAIRS

Advisory Committee on Disability Compensation, Notice of Meeting

The Department of Veterans Affairs (VA) gives notice under the Federal Advisory Committee Act, 5 U.S.C. App. 2, that the Advisory Committee on Disability Compensation (Committee) will meet on December 6–7, 2016 at 1800 G Street NW., Washington, DC 20001. On December 6, 2016, the meeting is scheduled to meet on the Fifth Floor in Conference Room 542; and on December 7, 2016, the meeting will take place on the Eight Floor in Conference Room 870. The sessions will begin at 8:30 a.m. and end at 4:30 p.m. EST each day. The meeting is open to the public.

The purpose of the Committee is to advise the Secretary of Veterans Affairs on the maintenance and periodic readjustment of the VA Schedule for Rating Disabilities. The Committee is to assemble and review relevant information relating to the nature and character of disabilities arising during service in the Armed Forces, provide an ongoing assessment of the effectiveness of the rating schedule, and give advice on the most appropriate means of responding to the needs of Veterans relating to disability compensation.

The Committee will receive briefings on issues related to compensation for Veterans with service-connected disabilities and on other VA benefits programs. Time will be allocated for receiving public comments. Public comments will be limited to three minutes each. Individuals wishing to make oral statements before the Committee will be accommodated on a first-come, first-served basis. Individuals who speak are invited to submit 1–2 page summaries of their comments at the time of the meeting for inclusion in the official meeting record.

The public may submit written statements for the Committee's review to Dr. Ioulia Vvedenskaya, Department of Veterans Affairs, Veterans Benefits Administration, Compensation Service, Policy Staff (211C), 810 Vermont Avenue NW., Washington, DC 20420 or email at *Ioulia.Vvedenskaya@va.gov.* Because the meeting is being held in a government building, a photo I.D. must be presented at the Guard's Desk as a part of the screening process. Due to an increase in security protocols, you should allow an additional 30 minutes before the meeting begins. Routine escort will be provided until 9:00 a.m. each day. Any member of the public wishing to attend the meeting or seeking additional information should email Dr. Vvedenskaya or call her at (202) 461–9882.

Dated: October 13, 2016.

Jelessa Burney,

Federal Advisory Committee Management Officer.

[FR Doc. 2016–25204 Filed 10–18–16; 8:45 am]

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NATIONAL ARCHIVES AND RECORDS ADMINISTRATION
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FEDERAL REGISTER

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No. 202 October 19, 2016

Part II

Bureau of Consumer Financial Protection

12 CFR Parts 1024 and 1026

Amendments to the 2013 Mortgage Rules Under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z); Final Rule

BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Parts 1024 and 1026

[Docket No. CFPB–2014–0033]

RIN 3170–AA49

Amendments to the 2013 Mortgage Rules Under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z)

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Final rule.

SUMMARY: The Bureau of Consumer Financial Protection (Bureau) is amending certain mortgage servicing rules issued by the Bureau in 2013. This final rule clarifies, revises, or amends provisions regarding force-placed insurance notices, policies and procedures, early intervention, and loss mitigation requirements under Regulation X's servicing provisions; and prompt crediting and periodic statement requirements under Regulation Z's servicing provisions. The final rule also addresses proper compliance regarding certain servicing requirements when a person is a potential or confirmed successor in interest, is a debtor in bankruptcy, or sends a cease communication request under the Fair Debt Collection Practices Act. The final rule also makes technical corrections to several provisions of Regulations X and Z. The Bureau is issuing concurrently with this final rule an interpretive rule under the Fair Debt Collection Practices Act relating to servicers' compliance with certain mortgage servicing rules.

DATES: This final rule is effective on October 19, 2017, except that the following amendments are effective on April 19, 2018: Amendatory instructions 5, 6.b, 7, 8, 9, 11.b, 17.a.ii, 17.b.ii, 17.c, 17.d.ii, 17.f.i, 17.i.i, 17.k, 19, 20, 22, 23.c, 25.a, 25.b, 25.c.ii, and 25.d.ii. For additional discussion regarding the effective date of the rule, see part VI of the **SUPPLEMENTARY INFORMATION** below.

FOR FURTHER INFORMATION CONTACT: Dania L. Ayoubi, David H. Hixson, Alexandra W. Reimelt, or Joel L. Singerman, Counsels; or William R. Corbett, Laura A. Johnson, or Amanda E. Quester, Senior Counsels; Office of Regulations, at (202) 435–7700.

SUPPLEMENTARY INFORMATION:

I. Summary of the Final Rule

In January 2013, the Bureau issued several final rules concerning mortgage markets in the United States (2013 Title XIV Final Rules), pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), Public Law 111–203, 124 Stat. 1376 (2010).[1] Two of these rules were (1) the Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X) (2013 RESPA Servicing Final Rule);[2] and (2) the Mortgage Servicing Rules Under the Truth in Lending Act (Regulation Z) (2013 TILA Servicing Final Rule).[3]

The Bureau clarified and revised those rules through notice and comment rulemaking during the summer and fall of 2013 in the (1) Amendments to the 2013 Mortgage Rules under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z) (July 2013 Mortgage Final Rule)[4] and (2) Amendments to the 2013 Mortgage Rules under the Equal Credit Opportunity Act (Regulation B), Real Estate Settlement Procedures Act (Regulation X), and the Truth in Lending Act (Regulation Z) (September 2013 Mortgage Final Rule).[5] In October 2013, the Bureau clarified compliance requirements in relation to successors in interest, early intervention requirements, bankruptcy law, and the Fair Debt Collection Practices Act (FDCPA),[6] through an Interim Final Rule (October 2013 IFR or IFR)[7] and a contemporaneous compliance bulletin (October 2013 Servicing Bulletin).[8] In addition, in October 2014, the Bureau added an alternative definition of small servicer in the Amendments to the 2013 Mortgage Rules under the Truth in Lending Act (Regulation Z).[9] The purpose of each of these updates was to address important questions raised by industry, consumer advocacy groups, and other stakeholders. The 2013 RESPA Servicing Final Rule and the 2013 TILA Servicing Final Rule, as amended in 2013 and 2014, are collectively referred to herein as the 2013 Mortgage Servicing Final Rules.

On November 20, 2014, the Bureau issued a proposed rule that would have further amended the 2013 Mortgage Servicing Final Rules.[10] The proposal covered nine major topics, and focused primarily on clarifying, revising, or amending provisions regarding force-placed insurance notices, policies and procedures, early intervention, and loss mitigation requirements under Regulation X's servicing provisions; and prompt crediting and periodic statement requirements under Regulation Z's servicing provisions. The proposal also addressed proper compliance regarding certain servicing requirements when a person is a potential or confirmed successor in interest, is a debtor in bankruptcy, or sends a cease communication request under the Fair Debt Collection Practices Act.

The Bureau is now finalizing the proposed amendments, with additional clarifications and revisions, to revise regulatory provisions and official interpretations relating to the Regulation X and Z mortgage servicing rules.[11] The final rule also covers nine major topics, summarized below, generally in the order they appear in the final rule. More details can be found in the section-by-section analysis below.

1. Successors in interest. The Bureau is finalizing three sets of rule changes relating to successors in interest. First, the Bureau is adopting definitions of successor in interest for purposes of Regulation X's subpart C and Regulation Z that are modeled on the categories of transfers protected under section 341(d) of the Garn-St Germain Act. Second, the Bureau is finalizing rules relating to

[1] Specifically, on January 10, 2013, the Bureau issued Escrow Requirements Under the Truth in Lending Act (Regulation Z), 78 FR 4725 (Jan. 22, 2013) (2013 Escrows Final Rule), High-Cost Mortgage and Homeownership Counseling Amendments to the Truth in Lending Act (Regulation Z) and Homeownership Counseling Amendments to the Real Estate Settlement Procedures Act (Regulation X), 78 FR 6855 (Jan. 31, 2013) (2013 HOEPA Final Rule), and Ability to Repay and Qualified Mortgage Standards Under the Truth in Lending Act (Regulation Z), 78 FR 6407 (Jan. 30, 2013) (January 2013 ATR Final Rule). The Bureau concurrently issued a proposal to amend the January 2013 ATR Final Rule, which was finalized on May 29, 2013. *See* 78 FR 6621 (Jan. 30, 2013) (January 2013 ATR Proposal) and 78 FR 35429 (June 12, 2013) (May 2013 ATR Final Rule). On January 17, 2013, the Bureau issued the Real Estate Settlement Procedures Act (Regulation X) and Truth in Lending Act (Regulation Z) Mortgage Servicing Final Rules, 78 FR 10901 (Feb. 14, 2013) (Regulation Z) and 78 FR 10695 (Feb. 14, 2013) (Regulation X) (2013 Mortgage Servicing Final Rules). On January 18, 2013, the Bureau issued the Disclosure and Delivery Requirements for Copies of Appraisals and Other Written Valuations Under the Equal Credit Opportunity Act (Regulation B), 78 FR 7215 (Jan. 31, 2013) (2013 ECOA Valuations Final Rule) and, jointly with other agencies, issued Appraisals for Higher-Priced Mortgage Loans (Regulation Z), 78 FR 10367 (Feb. 13, 2013) (2013 Interagency Appraisals Final Rule). On January 20, 2013, the Bureau issued the Loan Originator Compensation Requirements under the Truth in Lending Act (Regulation Z), 78 FR 11279 (Feb. 15, 2013) (2013 Loan Originator Final Rule).

[2] 78 FR 10695 (Feb. 14, 2013).

[3] 78 FR 10901 (Feb. 14, 2013).

[4] 78 FR 44685 (July 24, 2013).

[5] 78 FR 60381 (Oct. 1, 2013).

[6] 15 U.S.C. 1692 *et seq.*

[7] 78 FR 62993 (Oct. 23, 2013).

[8] Bureau of Consumer Fin. Prot., CFPB Bulletin 2013–12, *Implementation Guidance for Certain Mortgage Servicing Rules* (Oct. 15, 2013), *available at http://files.consumerfinance.gov/f/201310_cfpb_mortgage-servicing_bulletin.pdf.*

[9] 79 FR 65300, 65304 (Nov. 3, 2014).

[10] 79 FR 74175 (Dec. 15, 2014).

[11] Note that RESPA and TILA differ in their terminology. Whereas Regulation X generally refers to "borrowers," Regulation Z generally refers to "consumers."

how a mortgage servicer confirms a successor in interest's identity and ownership interest.[12] Third, the Bureau is applying the Regulation X and Z mortgage servicing rules to successors in interest once a servicer confirms the successor in interest's status.

2. Definition of delinquency. The Bureau is finalizing a general definition of delinquency that applies to all of the servicing provisions of Regulation X and the provisions regarding periodic statements for mortgage loans in Regulation Z. Delinquency means a period of time during which a borrower and a borrower's mortgage loan obligation are delinquent. A borrower and a borrower's mortgage loan obligation are delinquent beginning on the date a periodic payment sufficient to cover principal, interest, and, if applicable, escrow, becomes due and unpaid, until such time as no periodic payment is due and unpaid.

3. Requests for information. The Bureau is finalizing amendments that change how a servicer must respond to requests for information asking for ownership information for loans in trust for which the Federal National Mortgage Association (Fannie Mae) or Federal Home Loan Mortgage Corporation (Freddie Mac) is the owner of the loan or the trustee of the securitization trust in which the loan is held.

4. Force-placed insurance. The Bureau is finalizing amendments to the force-placed insurance disclosures and model forms to account for when a servicer wishes to force-place insurance when the borrower has insufficient, rather than expiring or expired, hazard insurance coverage on the property. Additionally, servicers now will have the option to include a borrower's mortgage loan account number on the notices required under § 1024.37. The Bureau also is finalizing several technical edits to correct discrepancies between the model forms and the text of § 1024.37.

5. Early intervention. The Bureau is clarifying the early intervention live contact obligations for servicers to establish or make good faith efforts to establish live contact so long as the borrower remains delinquent. The Bureau is also clarifying requirements regarding the frequency of the written early intervention notices, including when there is a servicing transfer. In addition, regarding certain borrowers who are in bankruptcy or who have invoked their cease communication rights under the FDCPA, the Bureau is finalizing exemptions for servicers from complying with the live contact obligations but requiring servicers to provide written early intervention notices under certain circumstances.

6. Loss mitigation. The Bureau is finalizing several amendments relating to the loss mitigation requirements. The final rule: (1) Requires servicers to meet the loss mitigation requirements more than once in the life of a loan for borrowers who become current on payments at any time between the borrower's prior complete loss mitigation application and a subsequent loss mitigation application; (2) modifies an existing exception to the 120-day prohibition on foreclosure filing to allow a servicer to join the foreclosure action of a superior or subordinate lienholder; (3) clarifies how servicers select the reasonable date by which a borrower should return documents and information to complete an application; (4) clarifies that, if the servicer has already made the first notice or filing, and a borrower timely submits a complete loss mitigation application: (i) The servicer must not move for foreclosure judgment or order of sale, or conduct a foreclosure sale, even where the sale proceedings are conducted by a third party, unless one of the specified circumstances is met (*i.e.,* the borrower's loss mitigation application is properly denied, withdrawn, or the borrower fails to perform on a loss mitigation agreement); (ii) that absent one of the specified circumstances, conduct of the sale violates the rule; (iii) that the servicer must instruct foreclosure counsel promptly not to make any further dispositive motion, to avoid a ruling or order on a pending dispositive motion, or to prevent conduct of a foreclosure sale, unless one of the specified circumstances is met; and (iv) that the servicer is not relieved from its obligations by counsel's actions or inactions; (5) requires that servicers provide a written notice to a borrower within five days (excluding Saturdays, Sundays, or legal holidays) after they receive a complete loss mitigation application and requires that the notice: (i) Indicate that the servicer has received a complete application; (ii) provide the date of completion, a statement that the servicer expects to complete its evaluation within 30 days from the date it received the complete application, and an explanation that the borrower is entitled to certain specific foreclosure protections and may be entitled to additional protections under State or Federal law; (iii) clarify that the servicer might need additional information later, in which case the evaluation could take longer and the foreclosure protections could end if the servicer does not receive the information as requested; (6) sets forth how servicers must attempt to obtain information not in the borrower's control and evaluate a loss mitigation application while waiting for third party information; requires servicers to exercise reasonable diligence to obtain the information and prohibits servicers from denying borrowers solely because a servicer lacks required information not in the borrower's control, except under certain circumstances; requires servicers in this circumstance to complete all possible steps in the evaluation process within the 30 days, notwithstanding the lack of the required third-party information; requires that servicers promptly provide a written notice to the borrower if the servicer lacks required third party information 30 days after receiving the borrower's complete application and cannot evaluate the application in accordance with applicable requirements established by the owner or assignee of the mortgage loan; and requires servicers to notify borrowers of their determination on the application in writing promptly upon receipt of the third party information it lacked; (7) permits servicers to offer a short-term repayment plan based upon an evaluation of an incomplete loss mitigation application; (8) clarifies that servicers may stop collecting documents and information from a borrower for a particular loss mitigation option after receiving information confirming that, pursuant to any requirements established by the owner or assignee, the borrower is ineligible for that option; and clarifies that servicers may not stop collecting documents and information for any loss mitigation option based solely upon the borrower's stated preference but may stop collecting documents and information for any loss mitigation option based on the borrower's stated preference in conjunction with other information, as prescribed by requirements established by the owner or assignee of the mortgage loan; and (9) addresses and clarifies how loss mitigation procedures and timelines apply when a transferee servicer receives a mortgage loan for which there is a loss mitigation application pending at the time of a servicing transfer.

7. Prompt payment crediting. The Bureau is clarifying how servicers must treat periodic payments made by consumers who are performing under either temporary loss mitigation programs or permanent loan modifications. Periodic payments made

[12] This final rule uses the term ''successor in interest's status'' to refer to the successor in interest's identity and ownership interest in the property.

pursuant to temporary loss mitigation programs must continue to be credited according to the loan contract and could, if appropriate, be credited as partial payments, while periodic payments made pursuant to a permanent loan modification must be credited under the terms of the permanent loan agreement.

8. Periodic statements. The Bureau is finalizing several requirements relating to periodic statements. The final rule: (1) Clarifies certain periodic statement disclosure requirements relating to mortgage loans that have been accelerated, are in temporary loss mitigation programs, or have been permanently modified, to conform generally the disclosure of the amount due with the Bureau's understanding of the legal obligation in each of those circumstances, including that the amount due may only be accurate for a specified period of time when a mortgage loan has been accelerated; (2) requires servicers to send modified periodic statements (or coupon books, where servicers are otherwise permitted to send coupon books instead of periodic statements) to consumers who have filed for bankruptcy, subject to certain exceptions, with content varying depending on whether the consumer is a debtor in a chapter 7 or 11 bankruptcy case, or a chapter 12 or 13 bankruptcy case; and includes proposed sample periodic statement forms that servicers may use for consumers in bankruptcy to ensure compliance with § 1026.41; and (3) exempts servicers from the periodic statement requirement for charged-off mortgage loans if the servicer will not charge any additional fees or interest on the account and provides a periodic statement including additional disclosures related to the effects of charge-off.

9. Small servicer. The Bureau is finalizing certain changes to the small servicer determination. The small servicer exemption generally applies to servicers who service 5,000 or fewer mortgage loans for all of which the servicer is the creditor or assignee. The final rule excludes certain seller-financed transactions and mortgage loans voluntarily serviced for a non-affiliate, even if the non-affiliate is not a creditor or assignee, from being counted toward the 5,000 loan limit, allowing servicers that would otherwise qualify for small servicer status to retain their exemption while servicing those transactions.

In addition to the changes discussed above, the final rule also makes technical corrections and minor clarifications to wording throughout several provisions of Regulations X and Z that generally are not substantive in nature.

II. Background

Title XIV Rules Under the Dodd-Frank Act

In response to an unprecedented cycle of expansion and contraction in the mortgage market that sparked the most severe U.S. recession since the Great Depression, Congress passed the Dodd-Frank Act, which was signed into law on July 21, 2010. In the Dodd-Frank Act, Congress established the Bureau and generally consolidated the rulemaking authority for Federal consumer financial laws, including the Truth in Lending Act (TILA) and the Real Estate Settlement Procedures Act (RESPA), in the Bureau.[13] At the same time, Congress significantly amended the statutory requirements governing mortgages with the intent to restrict the practices that contributed to and exacerbated the crisis.[14] Under the statute, most of these new requirements would have taken effect automatically on January 21, 2013, if the Bureau had not issued implementing regulations by that date.[15] To avoid uncertainty and potential disruption in the national mortgage market at a time of economic vulnerability, the Bureau issued several final rules in January 2013 to implement these new statutory provisions and provide for an orderly transition. These rules included the 2013 RESPA Servicing Final Rule and the 2013 TILA Servicing Final Rule, issued on January 17, 2013. Pursuant to the Dodd-Frank Act, which permitted a maximum of one year for implementation, these rules became effective on January 10, 2014. The Bureau issued additional corrections and clarifications to the 2013 RESPA Servicing Final Rule and the 2013 TILA Servicing Final Rule in the summer and fall of 2013 and in the fall of 2014.

III. Summary of the Rulemaking Process

A. Implementation Plan for New Mortgage Rules

On February 13, 2013, the Bureau announced an initiative to support implementation of the new mortgage rules (Implementation Plan),[16] under which the Bureau would work with the mortgage industry to ensure that the 2013 Title XIV Final Rules could be implemented accurately and expeditiously. The Implementation Plan included: (1) Coordination with other agencies; (2) Publication of plain-language guides to the new rules; (3) Ongoing conversations with stakeholders involved in implementation with respect to questions and concerns they had identified; (4) Publication of additional interpretive guidance and corrections or clarifications of the new rules as needed; (5) Publication of readiness guides for the new rules; and (5) Education of consumers on the new rules.

In the course of the implementation process, the Bureau identified a number of respects in which the 2013 Mortgage Servicing Final Rules posed implementation challenges. As a result, in July 2013 and September 2013, following notice and comment, the Bureau issued two final rules amending discrete aspects of the 2013 Mortgage Servicing Final Rules. Among other things, the July 2013 Mortgage Final Rule clarified, corrected, or amended provisions on the relation to State law to Regulation X's servicing requirements; implementation dates for certain adjustable-rate mortgage servicing notices under Regulation Z; and the small servicer exemption from certain servicing rules. Among other things, the September 2013 Mortgage Final Rule modified provisions of Regulation X related to error resolution, information requests, and loss mitigation procedures. In October 2013, the Bureau issued an IFR, which among other things, provisionally suspended the effectiveness of certain requirements of the 2013 Mortgage Servicing Final Rules with respect to consumers in bankruptcy and consumers who had exercised their rights under the FDCPA to direct that debt collectors cease

[13] *See, e.g.,* sections 1011 and 1021 of the Dodd-Frank Act, 12 U.S.C. 5491 and 5511 (establishing and setting forth the purpose, objectives, and functions of the Bureau); section 1061 of the Dodd-Frank Act, 12 U.S.C. 5581 (consolidating certain rulemaking authority for Federal consumer financial laws in the Bureau); section 1100A of the Dodd-Frank Act (codified in scattered sections of 15 U.S.C.) (similarly consolidating certain rulemaking authority in the Bureau). *But see* Section 1029 of the Dodd-Frank Act, 12 U.S.C. 5519 (subject to certain exceptions, excluding from the Bureau's authority any rulemaking authority over a motor vehicle dealer that is predominantly engaged in the sale and servicing of motor vehicles, the leasing and servicing of motor vehicles, or both).

[14] *See* title XIV of the Dodd-Frank Act, Public Law 111–203, 124 Stat. 1376 (2010) (codified in scattered sections of 12 U.S.C., 15 U.S.C., and 42 U.S.C.).

[15] *See* Dodd-Frank Act section 1400(c), 15 U.S.C. 1601 note.

[16] Press Release, Bureau of Consumer Fin. Prot., CFPB Lays Out Implementation Plan for New Mortgage Rules (Feb. 13, 2013), *available at http://www.consumerfinance.gov/newsroom/consumer-financial-protection-bureau-lays-out-implementation-plan-for-new-mortgage-rules/.*

contacting them with respect to outstanding debts. In the October 2013 Servicing Bulletin, the Bureau also clarified compliance requirements regarding successors in interest, early intervention live contact requirements, and the FDCPA. In addition, in October 2014, the Bureau issued a final rule that, among other things, added an alternative definition of small servicer that applies to certain nonprofit entities that service, for a fee, only loans for which the servicer or an associated nonprofit entity is the creditor.

B. Ongoing Monitoring

After the January 10, 2014 effective date of the rules, the Bureau has continued to engage in ongoing outreach and monitoring with industry, consumer advocacy groups, and other stakeholders. As a result, the Bureau has identified further issues that continue to pose implementation challenges or require clarification. The Bureau has also recognized that there are instances in which the rules are creating unintended consequences or failing to achieve desired objectives.

The Bureau recognizes that industry has incurred costs in the implementation of the 2013 Mortgage Servicing Final Rules. The Bureau believes that the majority of the provisions in this final rule would impose, at most, minimal new compliance burdens, and in many cases would reduce the compliance burden relative to the existing rules. Where the Bureau is adding new requirements to the 2013 Mortgage Servicing Final Rules, the Bureau is doing so after careful weighing of incremental costs and benefits.

This final rule adopts the proposed amendments with some additional clarifications and revisions. The purpose of these updates is to address important questions raised by industry, consumer advocacy groups, and other stakeholders.

C. Testing of Bankruptcy Periodic Statement Sample Forms

In the proposed rule, the Bureau indicated that it would conduct consumer testing of the proposed sample periodic statement forms for consumers who have filed for bankruptcy and would publish and seek comment on a report summarizing the methods and results of such testing prior to finalizing any sample forms. Following publication of the proposed rule, the Bureau engaged Fors Marsh Group (FMG), a research and consulting firm that specializes in designing disclosures and consumer testing, to conduct one-on-one cognitive interviews to test the Bureau's proposed sample periodic statement forms for consumers who have filed for bankruptcy. As described in detail in the report summarizing the testing,[17] between May 2015 and August 2015, the Bureau worked with the firm to conduct three rounds of one-on-one cognitive interviews with a total of 51 consumers in Arlington, Virginia, Fort Lauderdale, Florida, and Chicago, Illinois. Efforts were made to recruit a significant number of participants who had filed for bankruptcy, who had a mortgage (preferably when they filed for bankruptcy), and who had trouble making mortgage payments in the last two years.

During the interviews, participants were shown sample modified periodic statements. In general, participants who had filed for chapter 7 bankruptcy reviewed statements tailored to borrowers who are debtors in a chapter 7 or chapter 11 bankruptcy case, while participants who had filed for chapter 13 bankruptcy reviewed statements tailored to borrowers who are debtors in a chapter 12 or chapter 13 bankruptcy case. Participants were asked specific questions to test their understanding of the information presented in the sample statements and how easily they could find various pieces of information presented in the sample statements, as well as to learn about how they would use the information presented in the sample statements. The Bureau and FMG jointly developed revisions to all of the forms between rounds to address any apparent usability or comprehension issues and in response to public comments the Bureau received on the proposed rule.

The Bureau conducted the consumer testing after the close of the original comment period. The notice seeking public comment specifically on the report summarizing the methods and results of the testing was published in the **Federal Register** on April 26, 2016.[18]

D. Comments on the Proposed Rule and Testing of Bankruptcy Periodic Statement Sample Forms

The Bureau issued the proposed rule on November 20, 2014, and the proposal was published in the **Federal Register** on December 15, 2014.[19] The comment period ended on March 16, 2015. The comment period on the report summarizing the results of the consumer testing of bankruptcy periodic statement sample forms ended on May 26, 2016. The Bureau received more than 160 comments on the proposed rule and approximately 20 comments on the testing report. The comments were received from consumers, consumer advocacy groups, government agencies, servicers, industry trade associations, and others. As discussed in more detail below, the Bureau has considered these comments in adopting this final rule.

The Bureau notes that a number of consumer advocacy group commenters discussed language access and communications with consumers with limited English proficiency (LEP) and indicated that this is an area that needs further action and attention from the Bureau. One commenter urged the Bureau to consider additional rulemaking to require servicers to respond effectively to the needs of LEP borrowers. Another commenter stated that servicers' failure to communicate effectively with LEP homeowners remains a major unresolved issue, and said that servicers fail to provide written communication in the homeowner's preferred non-English language, fail to provide adequate oral translation for LEP homeowners, and refuse to accept official government documents in non-English languages. The commenter suggested that the Bureau should ensure that materials and points of contact are available in homeowners' preferred languages.

The Bureau takes seriously the important considerations of language access. The Bureau believes that LEP consumers should be served fairly, equitably, and in a nondiscriminatory manner. The Bureau recognizes that LEP consumers face particular challenges and obstacles in accessing effective loss mitigation. The Bureau believes that servicers should communicate with borrowers clearly, including in the consumer's preferred language, where possible, and especially when lenders advertise in the consumer's preferred language.

The Bureau has not had the opportunity, however, to test either the new disclosures that the Bureau is adopting in this final rule or the pre-existing RESPA and TILA servicing disclosures in languages other than English. Nor has the Bureau had the opportunity to take comment from all interested parties about the significant operational challenges implicated in addressing language access in the mortgage servicing context. Accordingly, the Bureau is not imposing

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[17] Fors Marsh Group, *Testing of Bankruptcy Periodic Statement Forms for Mortgage Servicing* (Feb. 2016), *available at http://www.consumerfinance.gov/data-research/research-reports/testing-bankruptcy-periodic-statement-forms-mortgage-servicing/* (report on consumer testing submitted to the Bureau of Consumer Fin. Prot.).

[18] 81 FR 24519 (Apr. 26, 2016).

[19] 79 FR 74175 (Dec. 15, 2014).

mandatory language translation requirements or other language access requirements at this time with respect to the mortgage servicing disclosures and other mortgage servicing requirements.

Although the Bureau declines at this time to implement requirements regarding language access, the Bureau reiterates the importance of servicers communicating clearly and in a non-discriminatory manner with all consumers, including those with limited English proficiency. Servicers should ensure they are in compliance with all applicable law. For instance, servicers may have separate responsibilities under State law, which may, in certain circumstances, require that financial institutions provide foreign language services. As the Bureau has previously noted, the Final Servicing Rules do not have the effect of prohibiting State law from affording borrowers broader consumer protections relating to mortgage servicing than those conferred under the mortgage servicing rules.[20] The Bureau will continue to consider language access generally in connection with mortgage servicing, including access to effective loss mitigation. The Bureau continues to explore the obstacles that LEP consumers face when attempting to access credit, as well as the challenges that servicers and creditors face when interacting with those consumers.[21] The Bureau will consider further requirements on servicer communications with LEP consumers in the mortgage servicing context, if appropriate.

IV. Legal Authority

As discussed more fully in the section-by-section analysis, the Bureau is issuing this final rule pursuant to RESPA, TILA, the FDCPA, 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 of Governors of the Federal Reserve System (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.'' Section 1061 of the Dodd-Frank Act also transferred to the Bureau all of the Department of Housing and Urban Development's (HUD's) consumer protection functions relating to RESPA. Title X of the Dodd-Frank Act, including section 1061 of the Dodd-Frank Act, along with RESPA, TILA, the FDCPA, and certain subtitles and provisions of title XIV of the Dodd-Frank Act, are Federal consumer financial laws.[22]

A. RESPA

Section 19(a) of RESPA, 12 U.S.C. 2617(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 include its consumer protection purposes. In addition, section 6(j)(3) of RESPA, 12 U.S.C. 2605(j)(3), authorizes the Bureau to establish any requirements necessary to carry out section 6 of RESPA, and section 6(k)(1)(E) of RESPA, 12 U.S.C. 2605(k)(1)(E), authorizes the Bureau to prescribe regulations that are appropriate to carry out RESPA's consumer protection purposes. As identified in the 2013 RESPA Servicing Final Rule, the consumer protection purposes of RESPA include ensuring that servicers respond to borrower requests and complaints in a timely manner and maintain and provide accurate information, helping borrowers avoid unwarranted or unnecessary costs and fees and facilitating review for foreclosure avoidance options. Each of the amendments or clarifications to Regulation X is intended to achieve some or all these purposes.

Additionally, as explained below, certain of the amendments to Regulation X implement specific provisions of RESPA.

This final rule also includes amendments to the official Bureau commentary in Regulation X. Section 19(a) of RESPA authorizes the Bureau to make such reasonable interpretations of RESPA as may be necessary to achieve the consumer protection purposes of RESPA. Good faith compliance with the interpretations affords servicers protection from liability under section 19(b) of RESPA.

B. TILA

Section 105(a) of TILA, 15 U.S.C. 1604(a), authorizes the Bureau to prescribe regulations to carry out the purposes of TILA. Under section 105(a), such regulations may contain such additional requirements, classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for all or any class of transactions, as in the judgment of the Bureau are necessary or proper to effectuate the purposes of TILA, to prevent circumvention or evasion thereof, or to facilitate compliance therewith. Under section 102(a), 15 U.S.C. 1601(a), the purposes of TILA include assuring the meaningful disclosure of credit terms to enable consumers 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. The Bureau's amendments to Regulation Z carry out TILA's purposes and such additional requirements, adjustments, and exceptions as, in the Bureau's judgment, are necessary and proper to carry out the purposes of TILA, prevent circumvention or evasion thereof, or to facilitate compliance therewith.

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. For the reasons discussed in this notice, the Bureau exempts certain transactions from the requirements of TILA pursuant to its authority under section 105(f) of TILA.

Additionally, as explained below, certain of the amendments to Regulation Z implement specific provisions of TILA.

This final rule also includes amendments to the official Bureau commentary in Regulation Z. Good faith compliance with the interpretations affords protection from liability under section 130(f) of TILA.

[20] 78 FR 10696, 10706 (Feb. 14, 2013).

[21] The Bureau has created a Language Access Task Force, which is an internal cross-divisional working group aimed at developing and executing a Bureau-wide strategy to provide LEP consumers with meaningful access to information produced by the Bureau. The Language Access Task Force coordinated the development of the Bureau's Language Access Plan, which describes the Bureau's policy and how the current language access activities are implemented across all of the Bureau's operations, programs, and services. Bureau of Consumer Fin. Prot. Language Access Plan, *available at https://www.federalregister.gov/articles/2014/10/08/2014-24122/proposed-language-access-plan-for-the-consumer-financial-protection-bureau.*

[22] *See* Dodd-Frank Act section 1002(14), 12 U.S.C. 5481(14) (defining ''Federal consumer financial law'' to include the ''enumerated consumer laws,'' the provisions of title X of the Dodd-Frank Act, and the laws for which authorities are transferred under title X subtitles F and H 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 Act section 1400(b), 12 U.S.C. 5481(12) note (defining ''enumerated consumer laws'' to include certain subtitles and provisions of Dodd-Frank Act title XIV); Dodd-Frank Act section 1061(b)(7), 12 U.S.C. 5581(b)(7) (transferring to the Bureau all of HUD's consumer protection functions relating to RESPA).

C. FDCPA

As explained in the section-by-section analysis, the Bureau also is issuing an FDCPA interpretive rule in a separate notice issued concurrently with this Final Rule.[23] The Bureau exercises its authority to prescribe rules with respect to the collection of debts by debt collectors pursuant to section 814(d) of the FDCPA, 15 U.S.C. 1692l(d), and its power to issue advisory opinions under section 813(e) of the FDCPA, 15 U.S.C. 1692k(e). Under that section, ''[n]o provision of [the FDCPA] imposing any liability shall apply to any act done or omitted in good faith in conformity with any advisory opinion of the Bureau, notwithstanding that after such act or omission has occurred, such opinion is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.'' The Bureau relies on this authority to issue an FDCPA interpretive rule interpreting the exceptions set forth in section 805(c)(2) and (3) of the FDCPA to include the written early intervention notice required by proposed § 1024.39(d)(2)(iii) as well as providing that loss mitigation information or assistance provided in response to a borrower-initiated communication should be considered outside the scope of a borrower's invocation of the cease communication right. The interpretive rule also interprets the term consumer for purposes of FDCPA section 805 to include a confirmed successor in interest, as that term is defined in Regulation X § 1024.31 and Regulation Z § 1026.2(a)(27)(ii).

D. The Dodd-Frank Act

Section 1022(b)(1) of the Dodd-Frank Act, 12 U.S.C. 5512(b)(1), 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.'' RESPA, TILA, the FDCPA, and title X of the Dodd-Frank Act are Federal consumer financial laws.

Section 1032(a) of the Dodd-Frank Act, 12 U.S.C. 5532(a), 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.'' The authority granted to the Bureau in section 1032(a) of the Dodd-Frank Act 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.

Section 1032(c) of the Dodd-Frank Act, 12 U.S.C. 5532(c), provides that, in prescribing rules pursuant to section 1032 of the Dodd-Frank Act, 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.'' Accordingly, in amending provisions authorized under section 1032(a) of the Dodd-Frank Act, 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.

V. Section-by-Section Analysis

A. Overview of Sections Relating to Successors in Interest in Regulations X and Z

Introduction

Several aspects of the final rule affect provisions in both Regulations X and Z. For example, the definition of delinquency in § 1024.31 affects requirements in §§ 1024.39 through 1024.41 of Regulation X, as well as § 1026.41 of Regulation Z. Generally, the Bureau discusses each section of the final rule under the heading designating the applicable regulation below—part V.B. for Regulation X and part V.C. for Regulation Z. However, because the final rule and commentary relating to successors in interest are interspersed throughout Regulations X and Z and many commenters addressed multiple sections of the proposal at once, this combined part V.A. provides an overview of the successor in interest provisions in the final rule and related issues raised by commenters for both Regulations X and Z. The Bureau then discusses each specific section of the final rule relating to successors in interest in more detail under the heading designating the applicable regulation below.

Current § 1024.38(b)(1)(vi) provides that servicers are required to maintain policies and procedures that are reasonably designed to ensure that the servicer can, upon notification of the death of a borrower, promptly identify and facilitate communication with the successor in interest of the deceased borrower with respect to the property securing the deceased borrower's mortgage loan. The Bureau adopted this requirement in the 2013 RESPA Servicing Final Rule because it understood that successors in interest may encounter challenges in communicating with mortgage servicers about a deceased borrower's mortgage loan account.[24]

The Bureau provided guidance about this requirement in the October 2013 Servicing Bulletin. The Bureau noted that it had received reports of servicers either refusing to speak to a successor in interest or demanding documents to prove the successor in interest's claim to the property that either did not exist or were not reasonably available.[25] The Bureau stated that these practices often prevented a successor in interest from pursuing assumption of the mortgage loan and, if applicable, loss mitigation options.[26] The October 2013 Servicing Bulletin provided examples of servicer practices and procedures that would accomplish the objectives set forth in § 1024.38(b)(1)(vi) and alleviate these problems.[27]

Despite the Bureau's guidance regarding the requirements of the existing rule, housing counselors and consumer advocacy groups continue to report, in both published reports and their comments on this rulemaking, that

[23] *See* Bureau of Consumer Fin. Prot., Official Bureau Interpretations: Safe Harbors from Liability under the Fair Debt Collection Practices Act for Certain Actions Taken in Compliance with Mortgage Servicing Rules under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z) (Aug. 4, 2016), *available at http://www.consumerfinance.gov/policy-compliance/rulemaking/final-rules/safe-harbors-liability-under-fair-debt-collection-practices-act-certain-actions-taken-compliance-mortgage-servicing-rules-under-real-estate-settlement-procedures-act-regulation-x-and-truth-lending-act-regulation-z.*

[24] 78 FR 10695, 10781 (Feb. 14, 2013).

[25] October 2013 Servicing Bulletin at 2.

[26] *Id.*

[27] *Id.* On July 17, 2014, the Bureau also issued an interpretive rule clarifying that where a successor in interest who has previously acquired a legal interest in a dwelling agrees to be added as obligor on the mortgage loan, the servicer's express acknowledgment of the successor in interest as obligor does not constitute an ''assumption'' as that term is used in Regulation Z. *See* 79 FR 41631, 41632–33 (July 17, 2014). Accordingly, the Regulation Z Ability-to-Repay Rule does not apply when a creditor expressly accepts a successor in interest as obligor on a loan under these circumstances. *See id.* The interpretive rule also noted that the servicer must comply with any ongoing obligations pertaining to consumer credit, such as the ARM notice requirements (12 CFR 1026.20(c) and (d)) and periodic statement requirement (12 CFR 1026.41), after the successor in interest is added as an obligor on the mortgage note. *Id.*

successors in interest face a variety of challenges, including difficulties in obtaining information about the status of mortgage loans on their homes or the monthly payment amount, getting servicers to accept their payments, and finding out their options to avoid foreclosure.[28] Housing counselors and consumer advocacy groups have also reported that servicers often refuse to speak with successors in interest, tell them they must assume the loan before they can apply for a loss mitigation option, or accept payments for several months before telling a successor in interest that the servicer will no longer accept payments because the successor in interest is not a borrower.

Consumer advocacy groups emphasized in their comments that successors in interest also continue to face problems establishing their successor status. For example, when surveyed by one consumer advocacy organization about their experiences assisting successors in interest, a large number of elder advocates including legal services attorneys and housing counselors reported that they had been asked for probate documents despite having provided the servicer with a right of survivorship deed, had been asked to supply the same documents regarding proof of successor status multiple times, had experienced a servicer refusing to communicate with a successor in interest at all, or had dealt with a servicer that was unclear about what documents were needed to establish successor status. These reports suggest that widespread confusion remains about the rights and options of successors in interest.

Moreover, the protections established in the Bureau's existing rules do not apply to many categories of successors in interest in need of assistance. The office of a State Attorney General commented that it continues to receive complaints on behalf of non-borrowers who obtain property through divorce or other types of family transfers that are not covered under the current rules.

The ability of successors in interest to sell, encumber, or make improvements to their property is limited by the lien securing the mortgage loan. As homeowners of property securing a mortgage loan, successors in interest typically must satisfy the loan's payment obligations to avoid foreclosure, even though a successor in interest will not necessarily have assumed liability for the mortgage debt under State law. A foreclosure or threatened foreclosure imperils a successor in interest's ownership interest and poses significant risk of consumer harm. Successors in interest, like other homeowners, can face serious adverse consequences from foreclosure. These consumer harms may include loss of the home and accumulated equity, displacement, and damage to credit scores.

Successors in interest may also have difficulty, beyond that of other homeowners, in avoiding foreclosure and may be more likely than other homeowners to have experienced recently or to be experiencing an income disruption due to death or divorce. Successors in interest may also have more difficulty than other homeowners obtaining information about the status of the mortgage loan, options for loss mitigation, and payoff information and may be more likely than other homeowners to experience difficulty with the prompt crediting of their payments, resulting in unnecessary foreclosure. For all these reasons, successors in interest are a particularly vulnerable group at risk of substantial harms.

These difficulties present significant problems related to the consumer protection purposes of RESPA and TILA and are similar to many of the problems that prompted the Bureau to adopt the 2013 Mortgage Servicing Rules. As the Bureau noted in its 2013 RESPA Servicing Final Rule, RESPA's consumer protection purposes include ensuring that servicers respond to borrower requests and complaints in a timely manner and maintain and provide accurate information, helping borrowers avoid unwarranted or unnecessary costs and fees, and facilitating review for foreclosure avoidance options. The Dodd-Frank Act provides the Bureau authority to establish prohibitions on servicers of federally related mortgage loans appropriate to carry out the consumer protection purposes of RESPA.[29] As the proposal explained, the Bureau believes that further modifications to Regulation X's mortgage servicing rules relating to successors in interest serve these purposes, in particular with respect to preventing unnecessary foreclosure and other homeowner harms, much as the 2013 RESPA Servicing Final Rule served these consumer protection purposes.

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.[30] The Bureau believes these purposes are served by extending the protections of Regulation Z's mortgage servicing rules to confirmed successors in interest, who, as owners of dwellings securing mortgage loans, have an interest in obtaining timely and accurate account information as to the mortgage secured by their dwelling. The Dodd-Frank Act authorizes the Bureau to modify or create an exemption from the disclosure requirements of TILA regarding residential mortgage loans if the Bureau determines that such exemption or modification is in the interest of consumers and in the public interest.[31]

As explained in more detail in the discussion that follows and in the section-by-section analysis of the final rule sections,[32] the Bureau proposed three sets of rules relating to successors in interest. First, the Bureau proposed rules to define successors in interest for

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[28] *See, e.g.,* Alys Cohen, Nat'l Consumer Law Ctr., *Snapshots of Struggle: Saving the Family Home After a Death or Divorce, Successors Still Face Major Challenges in Obtaining Loan Modifications* (Mar. 2016), *available at https://www.nclc.org/images/pdf/pr-reports/report-snapshot-struggle.pdf*; Nat'l Hous. Res. Ctr., *Servicer Compliance with CFPB Servicing Regulations* (Feb. 2016), *available at http://www.hsgcenter.org/wp-content/uploads/2016/02/NHRC-2016-Servicing-Survey-Report.pdf*; Nat'l Consumer Law Ctr., *NCLC Survey Reveals Ongoing Problems with Mortgage Servicing* (May 2015), *available at http://www.nclc.org/images/pdf/foreclosure_mortgage/mortgage_servicing/ib-servicing-issues-2015.pdf*; Nat'l Council of La Raza & Nat'l Hous. Res. Ctr., *Are Mortgage Servicers Following the New Rules? A Snapshot of Compliance with CFPB Servicing Standards* 3, 7 (Jan. 9, 2015), *available at http://www.nclr.org/Assets/uploads/Publications/mortgageservicesreport_11215.pdf*; Nat'l Consumer Law Ctr., *Examples of Cases Where Successors in Interest and Similar Parties Faced Challenges Seeking Loan Modifications and Communicating with Mortgage Servicers* (July 1, 2014), *available at http://www.nclc.org/images/pdf/foreclosure_mortgage/mortgage_servicing/successor-stories-2014.pdf*; Cal. Reinvestment Coal., *Chasm Between Words and Deeds X: How Ongoing Mortgage Servicing Problems Hurt California Homeowners and Hardest-Hit Communities* (May 2014), *available at http://www.calreinvest.org/publications/california-reinvestment-coalition-research*; Nat'l Hous. Res. Ctr., *National Mortgage Settlement Servicing Standards and Noncompliance: Results of a National Housing Counselor Survey* 8 (June 5, 2013), *available at http://www.hsgcenter.org/wp-content/uploads/2013/06/NMS_Findings.pdf*; Cal. Reinvestment Coal., *Chasm Between Words and Deeds IX: Bank Violations Hurt Hardest Hit Communities* (April 2013), *available at http://www.calreinvest.org/publications/california-reinvestment-coalition-research.* The Bureau's examiners have also observed non-compliance with Regulation X's policy and procedure requirement relating to successors in interest. *See* Bureau of Consumer Fin. Prot., *Supervisory Highlights Mortgage Servicing Special Edition (Issue 11)* at 15–16 (June 2016).

[29] 12 U.S.C. 5512(b)(1).

[30] 15 U.S.C. 1601(a).

[31] Dodd-Frank Act section 1405(b), 15 U.S.C. 1601 note.

[32] *See* section-by-section analyses of §§ 1024.30(d), 1024.31, 1024.36(i), 1024.38(b)(1)(vi), 1024.39(b)(1), 1024.41(b), 1026.2(a)(11), 1026.2(a)(27), and 1026.41(a), *infra.*

purposes of Regulation X's subpart C and Regulation Z as those persons who acquired an ownership interest in the property securing a mortgage loan in a transfer protected by the Garn-St Germain Depository Institutions Act of 1982 (the Garn-St Germain Act).[33] Second, the Bureau proposed rules relating to how a mortgage servicer confirms a successor in interest's identity and ownership interest in the property. Third, the Bureau proposed to apply certain mortgage servicing rules to successors in interest whose identity and ownership interest in the property have been confirmed by the servicer.

The Bureau received more comments on the successor in interest provisions than on any other aspect of the proposal. As noted above, in their comments, consumer advocacy groups reported that successors in interest continue to face challenges with respect to the servicing of mortgage loans secured by their property. These commenters generally expressed support for the Bureau's proposal and, in many instances, urged the Bureau to adopt additional or broader protections for successors in interest. Servicers, trade associations, and other industry commenters, however, raised a variety of concerns about the Bureau's proposal, including operational challenges, privacy concerns, and questions about the Bureau's legal authority and the proposal's interaction with other laws.

As explained in more detail in the discussion that follows and in the section-by-section analysis of the final rule sections, the Bureau is finalizing the three sets of rules relating to successors in interest with significant adjustments to address concerns raised in the comments. The Bureau believes that the successor in interest provisions in the final rule are necessary to address the significant problems successors in interest continue to encounter with respect to the servicing of mortgage loans secured by their property, such as lack of access to information about the mortgage loan. The Bureau also believes that the rule, as finalized, addresses the operational, privacy, and other significant concerns raised by commenters.

As explained below, the final rule defines successor in interest and establishes requirements relating to confirming successors in interest. It also extends to confirmed successors in interest the protections of the mortgage servicing rules that the Bureau identified in the proposal (Regulation X's subpart C and §§ 1026.20(c), (d), and (e), 1026.36(c), and 1026.41), as well as two additional protections that were not part of the proposal (§§ 1024.17 and 1026.39). These provisions are referred to herein collectively as the Mortgage Servicing Rules.[34]

Consistent with the proposal, coverage under the final rule does not depend on whether a successor in interest has assumed the mortgage loan obligation (*i.e.,* legal liability for the mortgage debt) under State law. Whether a successor in interest has assumed a mortgage loan obligation under State law is a fact-specific question. The final rule does not affect this question but applies with respect to a successor in interest regardless of whether that person has assumed the mortgage loan obligation under State law.[35] As explained in comment 30(d)–2 to Regulation X and in comment 2(a)(11)–4 to Regulation Z, if a successor in interest assumes a mortgage loan obligation under State law or is otherwise liable on the mortgage loan obligation, the protections the successor in interest enjoys under Regulations X and Z are not limited to the protections that apply under §§ 1024.30(d) and 1026.2(a)(11) to a confirmed successor in interest.

Scope of Successor in Interest Rules

The Bureau proposed changes regarding who is considered a successor in interest for purposes of Regulation X's subpart C and Regulation Z. Current § 1024.38(b)(1)(vi) refers to the successor in interest of the deceased borrower. The Bureau proposed to define successor in interest using definitions based on section 341(d) of the Garn-St Germain Act, which generally prohibits the exercise of due-on-sale clauses with respect to certain protected transfers.[36] The Act protects certain types of transfers involving the death of a borrower.[37] In addition, the Garn-St Germain Act protects other categories of transfers: A transfer where the spouse or children of the borrower become an owner of the property; a transfer resulting from a decree of a dissolution of marriage, legal separation agreement, or from an incidental property settlement agreement, by which the spouse of the borrower becomes an owner of the property; a transfer into an *inter vivos* trust in which the borrower is and remains a beneficiary and which does not relate to a transfer of rights of occupancy in the property; and any other transfer or disposition described in regulations prescribed by the Federal Home Loan Bank Board.[38]

The Bureau proposed that, to the extent that certain mortgage servicing rules apply to successors in interest, the rules would apply to all successors in interest who acquired an ownership interest in the property securing a mortgage loan in a transfer protected by the Garn-St Germain Act, rather than only successors in interest who acquired an ownership interest upon a borrower's death. Accordingly, for the purposes of Regulation X, the Bureau proposed to define successor in interest in § 1024.31 as a member of any of the categories of successors in interest who acquired an ownership interest in the property securing a mortgage loan in a transfer protected by the Garn-St Germain Act. The Bureau also proposed to modify current § 1024.38(b)(1)(vi) to account for all transfers to successors in interest meeting this definition. Similarly, for the purposes of Regulation Z, proposed § 1026.2(a)(27) would have defined successor in interest to cover all categories of successors in interest who acquired an ownership interest in the dwelling securing a mortgage loan in a transfer protected by the Garn-St Germain Act.

For the reasons that follow and that are explained in the section-by-section analyses of §§ 1024.31 and 1026.2(a)(27)(i), the final rule includes definitions of successor in interest in §§ 1024.31 and 1026.2(a)(27)(i) that are modeled on categories of transfers protected in the Garn-St Germain Act, but the definitions do not cross-reference the Garn-St Germain Act itself. Specifically, after reviewing the comments, the Bureau is defining successor in interest for purposes of subpart C of Regulation X in § 1024.31 to mean a person to whom an ownership interest in a property

[33] 12 U.S.C. 1701j–3(d).

[34] The term Mortgage Servicing Rules has a broader meaning as used herein than it did in the proposal, where the Bureau used it to refer to the 2013 Mortgage Servicing Rules as amended in 2013 and 2014. The term Mortgage Servicing Rules as used herein includes §§ 1024.17 and 1026.39 in addition to the 2013 Mortgage Servicing Rules as amended in 2013 and 2014.

[35] As noted, the Bureau has also clarified in an interpretive rule that where a successor in interest who has previously acquired a legal interest in a dwelling agrees to be added as obligor on the mortgage loan, the servicer's express acknowledgment of the successor in interest as obligor does not constitute an ''assumption'' as that term is used in Regulation Z. *See* 79 FR 41631, 41632–33 (July 17, 2014).

[36] 12 U.S.C. 1701j–3(d).

[37] Specifically, the Act protects a transfer to a relative resulting from the death of a borrower and a transfer by devise, descent, or operation of law on the death of a joint tenant or tenant by the entirety. *Id.*

[38] *Id.* The Garn-St Germain Act also prohibits exercise of due-on-sale clauses with respect to certain other situations that do not involve transfer of an ownership interest in the property. *Id.* The Bureau's proposal would not have applied to these situations.

securing a mortgage loan subject to subpart C is transferred from a borrower, provided that the transfer falls in one or more of the following categories:

- A transfer by devise, descent, or operation of law on the death of a joint tenant or tenant by the entirety;
- A transfer to a relative resulting from the death of a borrower;
- A transfer where the spouse or children of the borrower become an owner of the property;
- A transfer resulting from a decree of a dissolution of marriage, legal separation agreement, or from an incidental property settlement agreement, by which the spouse of the borrower becomes an owner of the property; or
- A transfer into an *inter vivos* trust in which the borrower is and remains a beneficiary and which does not relate to a transfer of rights of occupancy in the property.[39]

The Bureau is finalizing an analogous definition for Regulation Z in § 1026.2(a)(27)(i).[40]

Whether to use the Garn-St Germain Act categories at all in defining successor in interest. Commenters offered different views on whether the Bureau should use the Garn-St Germain Act categories at all in defining the term successor in interest. Consumer advocacy groups and some State and local government commenters expressed support for including the Garn-St Germain Act categories in the definition.[41] For example, one consumer advocacy group indicated that, for a large percentage of the successors in interest it has assisted, the servicers' refusal to provide any information about the status of the account to the successor in interest has led to prolonged delinquency and unnecessary foreclosure proceedings. This group stated that it believes that the proposed definition of successor in interest would offer important protections to prevent unnecessary foreclosures and reduce unnecessary delays in reaching agreements. Another consumer advocacy group indicated that extending the rules to include all protected transfers under the Garn-St Germain Act would significantly benefit its vulnerable clients.

The office of a State Attorney General expressed support for extending protections to the Garn-St Germain Act categories and indicated that servicers often refuse to communicate with divorcees and other family transferees. A local government commenter also expressed strong support for including in the definition successors in interest who meet the criteria set forth in the Garn-St Germain Act based on its experience running a mortgage foreclosure diversion program over the past seven years.

Some industry commenters objected to the use of the Garn-St Germain Act framework in defining who is a successor in interest. Two trade associations stated that Congress did not intend for the Garn-St Germain Act to protect against any consequences of delinquency. These commenters stated that section 341 of the Garn-St Germain Act was designed to address when lenders may and may not require a loan modification. One of these trade associations suggested that the Garn-St Germain Act categories are not well-suited for use in the successor in interest definitions because a child who buys a property from a parent would be protected but a parent who buys a property from a child would not. Another trade association stated that the sole purpose of the Garn-St Germain Act was to preempt acceleration based on certain transfers of ownership on residential properties.

Despite the concerns expressed by some commenters, the Bureau continues to believe that it is appropriate to align the successor in interest definitions in Regulations X and Z in large part with the categories in section 341(d) of the Garn-St Germain Act. Although a few industry commenters attempted to characterize this provision differently, the text of section 341(d) clearly provides a broad exemption from due-on-sale enforcement for various categories of transfers. The legislative history of the Garn-St Germain Act reflects that Congress chose to create this broad exemption because it deemed such enforcement unfair and inappropriate.[42] For the same reasons that due-on-sale enforcement would be inappropriate in the context of these transfers, the Bureau believes it is also important to ensure that servicers do not interfere in other ways with the transferees' ability to take advantage of their ownership interest in the property. For example, just as due-on-sale enforcement can result in a successor in interest losing a property, a servicer's failure to provide information to a successor in interest about the status of a mortgage loan or to evaluate the successor in interest for available loss mitigation options could result in unnecessary foreclosure and loss of the successor in interest's ownership interest.

Congress identified in the Garn-St Germain Act the categories that it felt warranted protection from one type of foreclosure risk. The Bureau agrees that these general categories include the most vulnerable classes of transferees and has concluded that it is important to protect such transferees from other types of foreclosure risk and servicing abuses.

Notwithstanding the suggestion of one commenter to the contrary, the Bureau also believes that the categories established in section 341(d) of the Garn-St Germain Act provide adequate protection for transfers from child to parent. Section 341(d)(5) includes transfers from a relative (including from a child to a parent or from a parent to a child) that occur upon the death of a borrower. Section 341(d)(6) also includes ownership transfers from a parent to a child and between spouses that occur during the life of the borrower. The fact that section 341(d) does not include transfers from a child to a parent that occur during the life of the transferor reflects Congress's determination that transfers from parent to child need greater protection from due-on-sale enforcement. The Bureau

[39] The Bureau interprets ''spouse'' to include married same-sex spouses. *See* Memorandum on Ensuring Equal Treatment for Same-Sex Married Couples (Same-Sex Married Couple Policy) (June 25, 2014), *available at http://files.consumerfinance.gov/f/201407_cfpb_memo_ensuring-equal-treatment-for-same-sex-married-couples.pdf*.

[40] The final rule's definition of successor in interest for Regulation Z is identical to the definition for subpart C of Regulation X, except that the Regulation Z definition substitutes ''a dwelling securing a closed-end consumer credit transaction is transferred from a consumer'' for ''a property securing a mortgage loan is transferred from a borrower'' and substitutes ''consumer'' for ''borrower'' throughout. Both definitions of successor in interest are limited to transferees who receive an ownership in property that secures closed-end credit because § 1024.31 defines mortgage loan for purposes of Regulation X subpart C to exclude open-end lines of credit and § 1026.2(a)(27)(i) refers to closed-end consumer credit transactions. However, transferees of properties that secure open-end credit are entitled to protection as borrowers under RESPA and Regulation X and consumers under TILA and Regulation Z if they assume the loan obligation under State law or are otherwise liable on the mortgage loan obligation and may be protected under other laws.

[41] As discussed *infra,* these commenters generally also favored adding additional categories to the proposed definitions of successor in interest for Regulation X subpart C and Regulation Z.

[42] *See* S. Rep. No. 536, 97th Cong., at 24 (1982), *reprinted in* 1982 U.S.C.C.A.N. 3054, 3078 (''The Committee believes that it would be unfair and inappropriate for lenders to enforce due-on-sale clauses under certain circumstances—such as involuntary transfers resulting from the death of a borrower, transfers which rearrange ownership rights within a family, or transfers resulting from a separation or dissolution of a marriage. Similarly, further encumbrances of the property, such as second mortgages which are often used by families to send a child to college, or finance home improvements, will not trigger due-on-sale enforcement as long as the encumbrance does not relate to a transfer of rights of occupancy in the property.'').

believes that the same policy choice is appropriate in defining successor in interest in Regulations X and Z because lifetime transfers to children and spouses are both more common than lifetime transfers to parents and more central to ensuring that familial homesteads and wealth will be available to the next generation.[43]

Whether to cross-reference the Garn-St Germain Act in the definitions and whether to incorporate limitations imposed by the Garn-St Germain Act implementing regulations. Industry commenters asked whether the Bureau intended to incorporate the occupancy requirements of the Garn-St Germain Act implementing regulations administered by the Office of the Comptroller of the Currency (OCC), 12 CFR 191.5(b). The implementing regulations impose certain occupancy requirements and expressly exclude reverse mortgages from the scope of Garn-St Germain due-on-sale protection.[44] Commenters indicated uncertainty about whether the Bureau intended to apply the occupancy requirements that appear only in the Garn-St Germain Act implementing regulations and not in the Garn-St Germain Act.

An industry commenter suggested that the Bureau should omit reference to the Garn-St Germain Act in Regulations X and Z and instead enumerate the categories of transfers of ownership that would qualify for regulatory protection, in order to avoid unintended consequences. Other industry commenters asked the Bureau to clarify in the final rule how the existing exemptions and scope limitations in Regulations X and Z would apply to the servicing of a mortgage loan with respect to a successor in interest.

A trade association urged the Bureau to exempt reverse mortgages entirely. It stated that existing guidelines, protocols, and timelines governing Home Equity Conversion Mortgages insured by the Federal Housing Administration (FHA) require servicers of such reverse mortgages to reach out to and deal with persons who might fall within the Bureau's definition of successor in interest. This trade association said that its membership indicated that servicers of non-FHA-insured reverse mortgages follow similar processes. It also noted that reverse mortgages are exempt from many of the mortgage servicing requirements in Regulations X and Z. It suggested that applying the successor in interest requirements to reverse mortgage servicers would be burdensome and would provide little if any practical benefits given the servicing protocols and requirements already in place in the reverse mortgage industry.

A trade association requested that small servicers be exempted from complying with the prescriptive requirements of the successor in interest provisions. It stated that tracking successors in interest could require costly system modifications. The commenter indicated that an exemption for small servicers would be consistent with the Bureau's approach to other general servicing requirements for small servicers. By contrast, several consumer advocacy groups urged the Bureau to expand the requirements for small servicers beyond those in the proposal to require small servicers to comply with all of the proposed requirements of § 1024.38(b)(1)(vi).

Upon consideration, the Bureau has decided to incorporate the relevant categories of transfers directly into the final rule, rather than relying on a cross-reference to the Garn-St Germain Act. Accordingly, the final rule lists the specific categories of transfers that qualify a transferee to be a successor in interest, using categories that are modeled on categories protected by the Garn-St Germain Act. To ensure that the scope of the final rule does not change over time without further rulemaking by the Bureau, the Bureau has omitted the Garn-St Germain Act category that protects from due-on-sale enforcement any other transfer or disposition described in the Garn-St Germain Act implementing regulations.[45] The Bureau believes that listing the specific categories rather than including a cross-reference makes the definitions in Regulations X and Z clearer and easier to apply.

In restating the categories in the final rule, the Bureau has not incorporated certain scope limitations imposed by the Garn-St Germain Act itself or its implementing regulations. The Bureau notes that many of those limitations are similar in nature to those in the Mortgage Servicing Rules themselves and believes that it will be easier for servicers and more protective for consumers to let the Mortgage Servicing Rules' limitations determine the scope of coverage consistently for confirmed successors in interest as for other borrowers under the Mortgage Servicing Rules, rather than to import slightly varying limitations in the Garn-St Germain Act or OCC regulations.[46] The Mortgage Servicing Rules thus generally apply to confirmed successors in interest in the same manner that they do to other borrowers.

For example, section 341(d) of the Garn St-Germain Act by its terms only applies with respect to a real property loan secured by a lien on residential real property containing less than five dwelling units, including a lien on the stock allocated to a dwelling unit in a cooperative housing corporation, or on a residential manufactured home.[47] For ease of application and to align with other parts of Regulations X and Z, the Bureau has not incorporated these limitations into the definitions of successor in interest in the final rule. Instead, the definitions of successor in interest in the final rule incorporate the scope limitations from Regulations X and Z respectively by, for example, referring to a mortgage loan in the definition of successor in interest in § 1024.31 and to a dwelling securing a closed-end consumer credit transaction in § 1026.2(a)(27)(i).[48]

The Bureau has also decided not to incorporate certain limitations imposed by the Garn-St Germain Act implementing regulations. The implementing regulations issued by the OCC's predecessor, the Federal Home

[43] Another commenter suggested that using the Garn-St Germain Act categories could create inequitable results, noting that if three descendants inherit an unencumbered property that is later encumbered by only one descendant, there would be no successor in interest, but if the parent had encumbered the property with a mortgage loan prior to the inheritance, all three descendants would be successors in interest. The Bureau believes, however, that those situations are not comparable. In the former case, where the transfer of ownership occurs before the encumbrance, the interests of the heirs are generally only subject to the mortgage if they have consented to the mortgage.

[44] 12 CFR 191.5(b).

[45] 12 U.S.C. 1701j–3(d)(9). There are no such other categories currently in the OCC's regulation. *See* 12 CFR 191.5(b)(1). The Bureau has also omitted several categories in the Garn-St Germain Act that do not result in a transfer of ownership interest and that are therefore irrelevant for successor in interest status. *See* 12 U.S.C. 1701j–3(d)(1), (2), (4); *see also* 79 FR 74176, 74181 n.28 (Dec. 15, 2014) (noting that the proposal would not apply to the situations described in these categories).

[46] While the Garn-St Germain Act and its implementing regulations define a category of transactions that should receive protection from foreclosure through the exercise of a due-on-sale clause, the focus of the Garn-St Germain Act and its implementing regulations is solely on operation of due-on-sale protections, and the Bureau's focus, while related, is somewhat different.

[47] 12 U.S.C. 1701j–3(d).

[48] *See, e.g.,* § 1024.31 (defining mortgage loan for purposes of Regulation X subpart C as any federally related mortgage loan, as that term is defined in § 1024.2 subject to the exemptions in § 1024.5(b), but not including open-end lines of credit (home equity plans)); § 1026.2(a)(19) (defining dwelling for Regulation Z as a residential structure that contains one to four units, whether or not that structure is attached to real property, and noting that the term includes an individual condominium unit, cooperative unit, mobile home, and trailer, if it is used as a residence).

Loan Bank Board, exempt reverse mortgages from the due-on-sale protections in Garn-St Germain Act section 341(d).[49] They also impose certain occupancy requirements, which limit protection from due-on-sale enforcement to circumstances where the property was occupied or was to be occupied by the borrower.[50] The implementing regulations further limit protection from due-on-sale enforcement to circumstances where the transferee occupies or will occupy the property if it is an intra-familial transfer and to circumstances where the borrower is and remains an occupant of the property if it is a transfer to an *inter vivos* trust.[51]

Rather than incorporating these scope limitations into the final rule, the Bureau has decided to apply the exemptions and scope limitations in the existing Mortgage Servicing Rules to the servicing of a mortgage loan with respect to a confirmed successor in interest, as it proposed to do. For example, § 1024.30(b) exempts small servicers from §§ 1024.38 through 1024.41 (except § 1024.41(j)). Likewise, § 1024.30(b) provides an exemption from these sections with respect to reverse mortgage transactions and mortgage loan for which the servicer is a qualified lender as that term is defined in 12 CFR 617.7000. Accordingly, except as otherwise provided in § 1024.41(j), and consistent with the generally applicable scope limitations of the Mortgage Servicing Rules, §§ 1024.38 through 1024.41 do not apply to confirmed successors in interest with respect to small servicers, reverse mortgage transactions, and mortgage loans for which the servicer is a qualified lender. Similarly, § 1024.30(c) provides that § 1024.33(a) only applies to reverse mortgage loan transactions and that §§ 1024.39 through 1024.41 only apply to mortgage loans secured by property that is a borrower's principal residence. Accordingly, with respect to confirmed successors in interest, § 1024.33(a) only applies to reverse mortgage loan transactions, and §§ 1024.39 through 1024.41 only apply to mortgage loans secured by property that is the confirmed successor in interest's principal residence.[52]

The Mortgage Servicing Rules in Regulation Z contain similar exemptions and scope limitations, which also apply to the treatment of confirmed successors in interest under the final rule. For example, creditors, assignees, and servicers are exempt from § 1026.41's periodic statement requirements for mortgage loans serviced by a small servicer, as defined in § 1026.41(e)(4).[53]

Applying these existing exemptions and scope limitations to the servicing of a mortgage loan with respect to a confirmed successor in interest promotes clarity and consistency with other aspects of Regulations X and Z, making the rules easier to apply. It also furthers the policy goals that led to the adoption of those exemptions and scope limitations in the existing Mortgage Servicing Rules. In adopting the 2013 Mortgage Servicing Rules, the Bureau weighed relevant considerations for the exemptions and scope limitations and made a series of carefully calibrated judgments about the circumstances under which each of the rule's protections should apply.[54] For example, in limiting the scope of §§ 1024.39 through 1024.41 to mortgage loans that are secured by a borrower's principal residence in § 1024.30(c), the Bureau noted that the purpose of the early intervention requirement, the continuity of contact requirement, and the loss mitigation procedures is to help borrowers stay in their principal residences, where possible, while mitigating the losses of loan owners and assignees, by ensuring that servicers use clear standards of review for loss mitigation options.[55] The Bureau did not believe that this purpose would be furthered by extending those protections to mortgage loans for investment, vacation, or other properties that are not principal residences.[56] These same considerations support applying the same exemptions and scope limitations in the context of confirmed successors in interest.

Applying occupancy requirements from the Garn-St Germain Act implementing regulations to successors in interest would make Regulations X and Z more complex and difficult to implement and administer and would offer less protection to successors in interest. While certain Mortgage Servicing Rules will not apply due to existing exemptions and scope limitations,[57] the Bureau believes that successors in interest will benefit from other protections of the Mortgage Servicing Rules even if they do not occupy or intend to occupy the property, just as non-occupant borrowers currently do. For example, successors in interest, whether occupants or non-occupants, often encounter difficulties accessing information about the mortgage account and making payments and will benefit from the ability to submit requests for information and request payoff statements once they are confirmed.

The Bureau also believes it is appropriate to include reverse mortgages to the same extent that they are covered under the existing Mortgage Servicing Rules. The Bureau recognizes that there are many ways in which reverse mortgages differ from other mortgages. The exemptions and scope limitations in the existing Mortgage Servicing Rules are already tailored to these differences and ensure that consumers with reverse mortgages benefit from the protections that are relevant to their situations and that reverse mortgage servicers are not required to comply with Regulation X and Z protections that are not relevant to reverse mortgages. When a reverse mortgage is secured by a property that is acquired by a successor in interest, the successor in interest will benefit upon confirmation from the ability to invoke the Mortgage Servicing Rules that apply to reverse mortgages, just as the transferor borrower might benefit. For example, in many instances, successors in interest to properties that are secured by reverse mortgages will need to pay off the reverse mortgage in order to protect their ownership interest and will benefit from the information in a payoff statement available under § 1026.36(c). The Bureau believes that it will be easier for servicers to follow consistent rules with regard to reverse mortgages regardless of whether there has been a succession of interest with respect to a particular property and that such an approach provides greater protections to consumers that are

[49] 12 CFR 191.5(b)(1).

[50] 12 CFR 191.5(b).

[51] 12 CFR 191.5(b)(1)(v), (vi).

[52] In response to questions raised by commenters, the final rule clarifies in comments 30(d)–1 and 41(b)–1.ii to Regulation X that a property must be the confirmed successor in interest's primary residence for the procedures in § 1024.41 to apply.

[53] Section 1026.41 defines servicers to mean creditors, assignees, or servicers for the purposes of § 1026.41. The Bureau, therefore, also uses the term servicer to mean a creditor, assignee, or servicer in this discussion and in the section-by-section analysis of § 1026.41.

[54] *See, e.g.,* 78 FR 10696, 10718–22 (Feb. 14, 2013).

[55] *Id.* at 10722.

[56] For example, the Bureau noted that, for properties that are not the borrower's principal residence, the protections set forth in §§ 1024.39 through 41 might only serve to assist a non-occupying borrower to maintain cash flow from rental revenue during a period of delinquency. *Id.* Further, the Bureau recognized that, for certain properties that are not principal residences, there is a significant risk that a property may not be maintained and may present hazards and blight to local communities. *Id.* The Bureau also noted that this limitation is consistent with the California Homeowner Bill of Rights and the National Mortgage Settlement and that its incorporation would further the goal of creating uniform standards. *Id.*

[57] *See, e.g.,* § 1024.30(c)(2).

calibrated to the context of the Mortgage Servicing Rules.

The final rule also applies the same exemptions for small servicers that currently apply under the Mortgage Servicing Rules. Although a trade association suggested that it would be consistent with other mortgage servicing requirements to exempt small servicers entirely from the successor in interest provisions, the Bureau believes that the most consistent approach is to apply the same exemptions that exist in current Regulations X and Z to the final rule's new successor in interest provisions. These exemptions reflect the unique circumstances of small servicers, which may not have systems in place to implement certain requirements in a cost-effective way given their size. Although some consumer advocacy groups suggested that the Bureau should subject small servicers to the policies and procedures requirements in § 1024.38(b)(1)(vi), the Bureau believes that requiring small servicers to develop such policies and procedures could cause small servicers to incur incremental expenses which, because of their size, would be burdensome for them. Under the final rule, as under the proposal, § 1024.36(i), but not § 1024.38(b)(1)(vi), applies to small servicers. Accordingly, small servicers, for example, must respond to requests for information under § 1024.36(i) by providing a written description of the documents the servicer reasonably requires to confirm the person's identity and ownership interest in the property within the timeframe set forth in § 1024.36, even though small servicers are not required to maintain policies and procedures to determine promptly what documents the servicer reasonably requires to confirm the successor in interest's identity and ownership interest in the property. The Bureau believes that this approach appropriately balances the burden on small servicers with confirmed successors in interest's need to receive this information.

Whether to limit the Garn-St Germain Act categories to situations involving death, to persons who have assumed the loan obligation, or in other significant ways. Some industry commenters suggested narrowing the scope of the successor in interest provisions in various ways. A number of industry commenters suggested limiting the categories to situations involving the death of an obligor, as the current rule does, or the death of all obligors. These commenters said that providing loan-related information to a successor in interest who is not liable on the note could violate the financial privacy of living obligors and result in liability for servicers.

Other industry commenters suggested limiting the scope to successors in interest who obtain their interest through death or divorce, sometimes with additional triggering criteria. An industry commenter suggested limiting the scope to situations involving a mortgage transaction where either the borrower is deceased or the loan is in default due to delinquency and the borrower is unwilling to work with the servicer to resolve the default. A trade association suggested that the definition should be limited to circumstances where the successor inherits property after death, has been awarded property in a divorce action, or has received a quitclaim deed from the borrower.

Some industry commenters suggested other limiting factors for recognizing successors in interest. A trade association stated that transfers where the transferor borrower retains ownership rights and remains obligated on the loan do not actually involve a succession of interest. Some industry commenters also suggested that the Bureau should impose occupancy restrictions in the definition—for example, by limiting the definition to individuals who occupy the property as a primary residence. Two industry commenters urged the Bureau to exclude from the definition of successors in interest third parties who become successors in interest through ''take over the payments,'' contracts for deed, wrap notes, and similar sales transactions that are unauthorized by mortgagees and are in violation of due-on-sale clauses in the mortgage instruments.

In suggesting these limitations, some commenters expressed concern about excessive regulatory burden. Other industry commenters asserted that the scope of the successor in interest definitions in the proposal would allow borrowers to transfer the property solely to delay foreclosure and to influence whose income is considered in loss mitigation, which would impose additional costs on the holder of the mortgage. Others suggested that the definition should not include transfers while the transferor borrower is living (such as transfers where the child of a borrower becomes an owner or transfers into an *inter vivos* trust) because living transferor borrowers always have the option to create authority in a transferee through a power of attorney or other means should they wish to do so.

A number of industry commenters suggested that the Bureau should exclude anyone who has not assumed the mortgage loan obligation from the definitions of successor in interest in order to address their concerns about being required to interact with a person not legally obligated on the note. One commenter stated that it would not be appropriate to grant statutory rights to a person who is a legal stranger to the owner of the loan and against whom the owner of the loan may not proceed if the loan becomes delinquent. Another suggested that the primary reason that borrowers receive many protections under the mortgage servicing rules is because they have undertaken a substantial obligation to repay a loan and could suffer significant negative ramifications if they fail to meet that obligation. Some commenters expressed concern that the proposal would allow someone who is not a party to the loan agreement to modify its terms. A trade association indicated that treating people who have not assumed the loan as successors in interest would raise serious privacy concerns and suggested that the Bureau should provide a safe harbor if the final rule requires disclosure of nonpublic borrower information to non-obligated co-owners. Other industry commenters urged the Bureau to provide clarification, potentially in commentary, on the privacy implications of the proposed provision's coverage of successors-in-interest who have not assumed the mortgage loan obligation under State law.

By contrast, consumer advocacy groups and government commenters emphasized in their comments the need for broad coverage. A State Attorney General's office noted that it often must intervene on behalf of vulnerable non-borrowers who obtain an interest in a property through divorce or otherwise. It observed that servicers fail to communicate with these homeowners even when the loans at issue are owned by Fannie Mae and Freddie Mac, both of which have long directed servicers to work with divorcees. Several consumer advocacy groups reported that a large number of attorneys and housing counselors representing homeowners across the United States have been asked to supply a quitclaim deed to the servicer, even where the successor in interest had already provided a copy of a divorce decree that clearly transferred the property. One consumer advocacy group noted that it has seen cases involving divorced spouses and other intra-family transfers, as well as heirs, and that a large percentage of its successor in interest cases have led to prolonged delinquency and unnecessary foreclosure proceedings due to the servicers' refusal to provide any information about the status of the account to the successor in interest.

Another consumer advocacy group expressed particular concern about the need to protect successors in interest who have experienced intimate partner violence. This commenter explained that, for example, survivors of spousal abuse often receive the marital home in a divorce only to have mortgage servicers refuse to provide them with information about the mortgage loan if the loan is in the name of the former spouse. It also noted that survivors of spousal abuse often need to request loss mitigation assistance because of their changed economic circumstances after a divorce but are told they cannot apply for loss mitigation without the participation of the former spouse. The commenter noted that giving abusers sole access to necessary information about the loan or requiring their participation for loss mitigation applications perpetuates the dynamics of power and control inherent in abusive relationships.

A consumer advocacy group stated that assumption should not be a requirement for confirmation because successors in interest cannot evaluate whether it is in their best interests to assume a loan unless they have information about the status of the loan and whether it will be possible to avoid foreclosure. This commenter noted that successors in interest are harmed if they assume liability on a loan that is in default or foreclosure only to discover that there is no feasible loss mitigation option. The office of a State Attorney General raised similar concerns.

The Bureau is not limiting the scope, as industry commenters suggested, and is expanding the scope beyond the current rule's limitation to situations involving death. In issuing current § 1024.38(b)(1)(vi), the Bureau relied on information about difficulties faced by surviving spouses, children, and other relatives who succeed in the interest of a deceased borrower to a property that the successor in interest also occupied as a principal residence, when that property is securing a mortgage loan account solely in the name of the deceased borrower.[58] Since that time, the Bureau has received additional information that other categories of successors in interest who acquire an ownership interest in the property securing a mortgage loan in a transfer protected by the Garn-St Germain Act, such as divorced spouses, face similar difficulties to those identified by the Bureau in issuing the original policies and procedures requirement.[59] Many commenters confirmed that successors in interest who are transferred an ownership interest in property securing a mortgage loan upon divorce and through other protected transfers face similar challenges to those faced by successors in interest after a borrower's death, including, for example, difficulty obtaining information about the mortgage loan. In light of the information received through comments and published reports and the Bureau's market knowledge, the Bureau concludes that many successors in interest in the Garn-St Germain Act categories that do not involve a borrower's death face the same risk of unnecessary foreclosure and other consumer harm with respect to the mortgage loan and property as successors in interest who receive an ownership interest upon a borrower's death.

The Bureau does not believe it would be appropriate to limit the scope of the definition to transfers occurring upon death or to impose any of the alternative limitations suggested by commenters. As many commenters noted, divorcees and individuals who are legally separated from their spouses often need to communicate with servicers regarding mortgage loans that encumber property they have obtained through the divorce or legal separation process. Similarly, children or spouses who receive an ownership interest during the life of the transferor borrower and beneficiaries of *inter vivos* trusts may need information about the mortgage loan in order to ensure the property does not go into default or foreclosure. This can be particularly important in cases where the transferor borrower is unwilling or unable to handle financial matters relating to the property. Congress included these categories in the Garn-St Germain Act, as well as various categories occurring on the death of the transferor borrower, because it concluded that due-on-sale enforcement would be unfair and inappropriate with respect to these transferees.[60] The Bureau believes that these transferees are also at risk of losing the home or falling behind on the mortgage if they do not receive timely information from the servicer and are unable to communicate with the servicer about the mortgage loan. The Bureau, therefore, has decided not to exclude from the scope of the final rule's successor in interest protections the various Garn-St Germain Act categories of ownership interest transfers that occur during the life of the transferor borrower.

The Bureau has also decided not to limit the definitions of successor in interest to those who have assumed the loan obligation. As some commenters noted, successors in interest must have access to information about the loan in order to evaluate the viability of a legal assumption of the mortgage loan obligation. The Bureau recognizes the potential privacy concerns expressed by commenters raised by sharing information with successors in interest who are not obligated on the loan. However, the Bureau does not believe that these concerns warrant narrowing the scope of the successor in interest definitions. Instead, the Bureau is authorizing servicers to withhold certain types of sensitive information in response to requests for information and notices of error that involve successors in interest, as discussed below.

Commenters also expressed concern that defining successors in interest to include persons who are not obligated on the loan might needlessly delay foreclosure proceedings. The Bureau does not believe that this is a significant risk and does not believe that borrowers are likely to transfer ownership of real property simply as a delay tactic. Moreover, the final rule does not extend dual tracking protections during the pendency of the confirmation process. The final rule does, however, require servicers to review and evaluate loss mitigation applications from confirmed successors in interest in accordance with the procedures set forth in § 1024.41 if the property is the confirmed successor in interest's principal residence and the procedures set forth in § 1024.41 are otherwise applicable. The Bureau recognizes that, as with reviews and evaluations for other borrowers, these reviews and evaluations could result in short delays in some cases but believes it is important to extend these foreclosure protections to confirmed successors in interest for the reasons discussed in this discussion and in the section-by-section analysis of § 1024.30(d).

As noted above, two commenters suggested that the Bureau exclude from the definitions of successor in interest third parties who become successors in

[58] 78 FR 10695, 10781 (Feb. 14, 2013).

[59] For example, a national survey of attorneys and housing counselors representing homeowners in 2015 found that 55 percent of respondents were asked by a servicer to supply a quitclaim deed in circumstances where one was not needed or available because a divorce decree clearly transferred the property. Nat'l Consumer Law Ctr., *NCLC Survey Reveals Ongoing Problems with Mortgage Servicing* 1–2 (May 2015), *available at http://www.nclc.org/images/pdf/foreclosure_mortgage/mortgage_servicing/ib-servicing-issues-2015.pdf.*

[60] *See* S. Rep. No. 536, 97th Cong., 2d Sess. 23, *reprinted in* 1982 U.S.C.C.A.N. 3054, 3078.

interest through ''take over the payments,'' contracts for deed, wrap notes, and similar sales transactions. The final rule's definitions of successor in interest include transfers during the life of the transferor only if the recipient is a spouse, former spouse, or child of the transferor, or the beneficiary of an *inter vivos* trust. Third parties who do not fall into these categories and acquire the property during the life of the transferor are not successors in interest for the purpose of the final rule, regardless of how they obtain the property. Conversely, recipients who are spouses, former spouses, or children of the transferor or who are the beneficiaries of an *inter vivos* trust can be successors in interest even if they obtain the property through the types of contracts for deed or similar transactions to which the commenters are referring. For the reasons stated in this discussion and in the section-by-section analyses of §§ 1024.31 and 1026.2(a)(27)(i), the Bureau believes that it is appropriate to treat the categories of transferees described in §§ 1024.31 and 1026.2(a)(27)(i) as successors in interest for purposes of the final rule regardless of how they obtain an interest in the property, while not treating other transferees as successors in interest.

Whether to include in the successor in interest definitions additional categories, beyond those protected by the Garn-St Germain Act. The Bureau also solicited comment on whether additional categories of successors in interest, beyond those protected by the Garn-St Germain Act, should be covered by the Bureau's definitions of successor in interest. Consumer advocacy groups urged the Bureau to broaden the definition to include various categories that are not covered by the Garn-St Germain Act but that are similar to the Garn-St Germain Act categories. They suggested, for example, that the definition should include same-sex partners, as well as parents, siblings, and grandchildren who obtain an interest in the home through a quitclaim deed. Several consumer advocacy groups suggested that, in addition to the Garn-St Germain Act categories, the definition should cover any instance where there is not an enforceable due-on-sale clause, including situations where there is no due-on-sale clause in the mortgage.[61]

A number of consumer advocacy groups urged the Bureau to expand the definitions of successor in interest to include co-homeowners who did not sign the original note. They indicated that homeowners who are not borrowers on the note experience the same frustrations, problems, and potential harms as successors in interest.

Industry commenters stated that mortgagors may have elected not to sign the note. An industry commenter also stated that mortgagors always have the option to refinance the loan in their own name should they choose to do so.

The final rule does not cover categories of successors in interest beyond the categories established in the Garn-St Germain Act. Some of the categories that consumer advocacy groups suggested adding are already covered in part by the final rule categories that are modeled on the Garn-St Germain Act. For example, co-owners who did not sign the note will be covered upon the death of their co-owner if they are a joint tenant, a spouse who owns the property as a tenant by the entirety, or a relative who inherits an additional interest in the property. As finalized, the definitions also include transfers made where there is no due-on-sale clause in the mortgage instrument as long as the transfer falls within one of the specified categories listed in the definitions (such as a transfer to a relative resulting from the death of the transferor).

The Bureau considered adding certain additional categories to the scope of the definitions, such as non-relatives who receive property upon the death of a borrower, but decided not to do so for several reasons. Because the Bureau is applying the Mortgage Servicing Rules to confirmed successors in interest in large part to prevent unnecessary foreclosure, the Bureau believes that it is appropriate to align generally the successor in interest definitions with Congress's policy choice about which categories of successors in interest should be protected from foreclosure based on a lender's exercise of a due-on-sale clause. The Bureau also believes that the Garn-St Germain Act categories capture the most vulnerable classes of transferees that warrant successor in interest protection. Basing the definitions on the Garn-St Germain Act categories should assist servicers in identifying successors in interest, since servicers already need to comply with the Garn-St Germain Act. Further expansion of the scope of the successor in interest definitions beyond the Garn-St Germain Act categories might not be helpful to the property owners who would be added because, in the absence of due-on-sale protection, a servicer might be able to accelerate and foreclose independent of the final rule's successor in interest protections.

How to address the rights of transferor borrowers and their estates. A large number of commenters of various types described as confusing or inaccurate the use of the terms prior borrower and prior consumer in the proposal to refer to the person who transferred an ownership interest to the successor in interest.[62] Many of these commenters noted that a borrower who transfers an interest typically remains obligated on the mortgage loan. An industry commenter suggested substituting ''transferor-borrower'' for ''prior borrower.'' A number of commenters asserted that borrowers who retain ownership and remain obligated under the mortgage loan should continue to receive mortgage servicing rule protections, while a trade association suggested that the transferor borrower should stop receiving communications when a successor in interest is confirmed.

A number of commenters expressed concern that the Bureau's proposal would not provide adequate protection for the estates of transferor borrowers. Several consumer advocacy groups explained that estate representatives are protected by TILA and RESPA. These groups suggested that estates and their representatives should be able to obtain information and have payments applied correctly until the estate is closed. A trade association agreed with two caveats: It indicated that: (1) The servicer needs to verify that a person purporting to act as administrator or executor is properly acting in that capacity, and (2) If the estate is released from the loan obligation Regulation P may limit the estate's ability to access future loan information. Another trade association noted that the executor of an estate may ultimately be legally obligated to dispose of property and needs information in order to fulfill the executor's responsibilities. Other industry commenters suggested that protection for the estate should

[61] One consumer advocacy group suggested that the Bureau should include representatives of estates within the definitions of successor in interest. Estates and their representatives have unique interests and already benefit from protections under RESPA and TILA, which the final rule is not curtailing. The Bureau therefore has decided not to define estates or their representatives as successors in interest for purposes of this final rule. Estate-related issues are addressed further in the discussion of Regulation X comment 30(d)–3 in the section-by-section analysis of § 1024.30(d) and in the discussion of Regulation Z comment 2(a)(11)–4.iii in the section-by-section analysis of § 1026.2(a)(11), *infra.*

[62] ''Prior borrower'' appears in the proposed definition of successor in interest in proposed § 1024.31; proposed § 1024.36(i); and proposed Regulation X comments 30(d)–2, 38(b)(1)(vi)–2, and 39(b)(1)–5. ''Prior consumer'' appears in proposed § 1026.2(a)(27) and proposed Regulation Z comment 2(a)(11)–4.

terminate upon confirmation of a successor in interest.

The final rule substitutes ''borrower'' for ''prior borrower'' and ''consumer'' for ''prior consumer'' in the definitions of successor in interest and in other successor in interest provisions. As many commenters noted, a borrower who transfers an ownership interest typically remains obligated on the loan, making the word ''prior'' inapposite. In light of concerns raised by commenters regarding the need to protect transferor borrowers and their estates, the Bureau is also clarifying in comment 30(d)–3 to Regulation X and comment 2(a)(11)–4.iii to Regulation Z that, even after a servicer's confirmation of a successor in interest, the servicer is still required to comply with all applicable requirements of Regulations X and Z with respect to the borrower who transferred the ownership interest to the successor in interest. This final rule does not take away any existing rights of transferor borrowers or their estates under Regulations X and Z.

Confirming a Successor in Interest's Status

The Bureau proposed modifications to the Mortgage Servicing Rules in Regulation X relating to how a mortgage servicer confirms a successor in interest's identity and ownership interest in the property securing the mortgage loan.[63] Proposed § 1024.36(i) would have generally required a servicer to respond to a written request that indicates that the person making the request may be a successor in interest by providing that person with information regarding the documents the servicer requires to confirm the person's identity and ownership interest in the property. Proposed § 1024.38(b)(1)(vi) would have added several related modifications to the current policies and procedures provision involving successors in interest.

Proposed § 1024.38(b)(1)(vi)(A) would have required servicers to maintain policies and procedures that are reasonably designed to ensure that the servicer can, upon notification of the death of a borrower or of any transfer of the property securing a mortgage loan, promptly identify and facilitate communication with any potential successors in interest regarding the property. Proposed § 1024.38(b)(1)(vi)(B) would have required servicers to maintain policies and procedures reasonably designed to ensure that the servicer can, upon identification of a potential successor in interest, promptly provide to that person a description of the documents the servicer reasonably requires to confirm the person's identity and ownership interest in the property and how the person may submit a written request under § 1024.36(i) (including the appropriate address). Proposed § 1024.38(b)(1)(vi)(C) would have required servicers to maintain policies and procedures reasonably designed to ensure that, upon the receipt of such documents, the servicer can promptly notify the person, as applicable, that the servicer has confirmed the person's status, has determined that additional documents are required (and what those documents are), or has determined that the person is not a successor in interest. For the reasons set forth in this discussion and in the section-by-section analyses of §§ 1024.36(i) and 1024.38(b)(1)(vi), the Bureau is finalizing §§ 1024.36(i) and 1024.38(b)(1)(vi) with a number of adjustments to clarify the parties' obligations during the confirmation process.

Industry commenters asserted that the proposal would require servicers to know the intricacies of real property law, contract law, estate law, and family law in each of the fifty States; to apply the applicable State's law to each successor in interest's factual circumstances; and to provide legal advice to people claiming to be successors in interest. One commenter indicated that servicers can assist potential successors in interest by explaining, in general terms, what information the servicer may need before the servicer can recognize a successor as an owner, but servicers cannot give the impression to potential successors in interest that the servicer's determination resolves their property interest with finality or provides the best outcome based on their particular situation. Some commenters were also concerned that proposed § 1024.38(b)(1)(vi)(A) might require them to seek out potential successors in interest even in the absence of affirmative notification. Other commenters stated that broadening the scope of successor in interest rules would further increase the complexity of confirming a successor in interest's status. Many industry commenters requested greater precision about the confirmation process and servicers' responsibilities with respect to potential successors in interest. Some also requested that the Bureau provide a safe harbor for confirmation decisions or indicate that incorrect successorship determinations or non-determinations do not give rise to claims of unfair, deceptive, or abusive acts or practices in violation of the Dodd-Frank Act or other litigation.

As explained above, consumer advocacy groups reported in their comments that successors continue to face problems establishing their successor status. These groups urged the Bureau to create a private right of action to allow potential successors in interest to enforce the requirements of proposed §§ 1024.36(i) and 1024.38(b)(1)(vi) and a privately enforceable notice of error requirement related to successorship determinations. They suggested that rights under the final rule should be triggered by a homeowner's submission of documentation, rather than by the servicer's additional step of confirming the successor in interest's status.[64] They also encouraged the Bureau to establish time limits for the confirmation process and to institute other protections for potential successors in interest.

After reviewing the comments received, the Bureau is finalizing §§ 1024.36(i) and 1024.38(b)(1)(vi) with adjustments to clarify the parties' obligations during the confirmation process. As finalized, § 1024.36(i) generally requires a servicer to respond to a written request that indicates that the person making the request may be a successor in interest by providing that person with a written description of the documents the servicer reasonably requires to confirm the person's identity and ownership interest in the property. Section 1024.38(b)(1)(vi)(A) requires servicers to maintain policies and procedures reasonably designed to ensure that the servicer can, upon receiving notice of the death of a borrower or of any transfer of the property, promptly facilitate communication with any potential or confirmed successors in interest regarding the property. Section

[63] As the Bureau explained in the proposal, similar modifications to the Mortgage Servicing Rules in Regulation Z relating to how a mortgage servicer confirms a successor in interest's identity and ownership interest in the dwelling are unnecessary. The Mortgage Servicing Rules in Regulation X apply to the vast majority of mortgage loans to which the Mortgage Servicing Rules in Regulation Z apply. Accordingly, the rules under Regulation X relating to how a mortgage servicer confirms a successor in interest's identity and ownership interest in the property generally apply to loans to which the Mortgage Servicing Rules in Regulation Z apply, making unnecessary similar modifications to Regulation Z.

[64] In the alternative, some consumer advocacy groups suggested that the Bureau could include in the definition of borrower any successor in interest who has provided reasonable proof of the successor in interest's identity and ownership interest, unless the servicer provides a timely and reasonable response stating that the potential successor in interest will not be confirmed as a successor in interest and the reason for the lack of confirmation.

1024.38(b)(1)(vi)(B) requires servicers to maintain policies and procedures reasonably designed to ensure that the servicer can, upon receiving notice of the existence of a potential successor in interest, promptly determine the documents the servicer reasonably requires to confirm the person's identity and ownership interest in the property and promptly provide to the potential successor in interest a description of those documents and how the person may submit a written request under § 1024.36(i) (including the appropriate address). Section 1024.38(b)(1)(vi)(C) requires servicers to maintain policies and procedures reasonably designed to ensure that the servicer can, upon the receipt of such documents, promptly make a confirmation determination and promptly notify the person, as applicable, that the servicer has confirmed the person's status, has determined that additional documents are required (and what those documents are), or has determined that the person is not a successor in interest.

In response to the concerns raised by commenters, the Bureau has made a number of adjustments to the proposed confirmation process to delineate more clearly the parties' responsibilities during the confirmation process. For example, final § 1024.38(b)(1)(vi) makes clear that servicers do not need to search for potential successors in interest if the servicer has not received actual notice of their existence. The comments on the confirmation process set forth in proposed §§ 1024.36(i) and 1024.38(b)(1)(vi) and the changes that the Bureau has made in response to those comments are discussed in more detail in the section-by-section analyses of §§ 1024.36(i) and 1024.38(b)(1)(vi).

Like the proposal, the final rule does not require servicers to provide legal advice. The final rule does, however, require a servicer to have policies and procedures in place that are reasonably designed to ensure that the servicer can identify and communicate to potential successors in interest the documents that the servicer will accept as confirmation of the potential successor in interest's identity and ownership interest in the property. While confirmation determinations can in some cases raise complex issues, the relevant determinations regarding identity and ownership interest are determinations that servicers make on a regular basis in the course of their work already. Servicers routinely need to determine who has an ownership interest in the properties that secure their mortgage loans—for example, in identifying who to serve in a foreclosure action or who should receive other notices required by State law. Moreover, as explained in the section-by-section analysis of § 1024.38(b)(1)(vi), the final rule allows servicers to request additional documentation if they reasonably determine that they cannot make a determination of the potential successor in interest's status based on the documentation provided.

The Bureau is not creating a safe harbor from liability for claims alleging unfair, deceptive, or abusive acts or practices in violation of the Dodd-Frank Act related to successorship determinations. Although some industry commenters requested this type of protection, the Bureau does not believe it is appropriate to shield a servicer categorically from liability for unfair, deceptive, or abusive practices that may occur during the confirmation process or otherwise in the servicer's treatment of potential successors in interest.

Despite the urging of consumer advocacy groups, the final rule does not provide potential successors in interest a private right of action or a notice of error procedure for claims that a servicer made an inaccurate determination about successorship status or failed to comply with § 1024.36(i) or § 1024.38(b)(1)(vi).[65] The Bureau expects that the confirmation process established by the final rule will address the problems that many successors in interest have experienced to date in trying to get servicers to recognize their status. The Bureau and other Federal and State agencies will review servicers' compliance with respect to potential successors in interest through the agencies' supervision and enforcement authority and through complaint monitoring. Through that review, the Bureau can assess whether any additional enforcement mechanisms are necessary.

The Bureau is finalizing the confirmation process in §§ 1024.36(i) and 1024.38(b)(1)(vi) largely as proposed because it continues to believe that successors in interest have difficulty demonstrating their identity and ownership interest in the property to servicers' satisfaction.[66] The risk of harm to successors in interest is highest when a servicer does not promptly confirm a successor in interest's identity and ownership interest in the property. During this period, successors in interest may have difficulty obtaining information about the loan or finding out about loss mitigation options. Accordingly, when confirmation is delayed, the potential risk of foreclosure and other harms to the successor in interest increase. The difficulties faced by successors in interest with respect to confirmation of their status have thus caused successors in interest to face unnecessary problems with respect to the mortgage loans secured by the property, which may lead to unnecessary foreclosure on the property.

The Bureau's October 2013 Servicing Bulletin addressed these problems for a subset of successors in interest by requiring servicers to have policies and procedures in place to facilitate the provision of information to successors in interest who had inherited a property securing a deceased borrower's mortgage loan. The October 2013 Servicing Bulletin indicated that servicers should have a practice of promptly providing to any party claiming to be a successor in interest a list of all documents or other evidence the servicer requires, which should be reasonable in light of the laws of the relevant jurisdiction, for the party to establish (1) the death of the borrower and (2) the identity and legal interest of the successor in interest.[67] Nonetheless, consumer advocacy groups indicated in their comments that servicers continue to ask for unnecessary documents or multiple copies of the same documents or refuse to communicate with successors in interest at all. In addition, commenters reported that the categories of successors in interest as defined in the proposal, including those who inherit the property upon death of a family member, continue to experience difficulties in having servicers confirm the successor in interest's legal status.

Changes to the rules themselves are appropriate and necessary to clarify servicers' obligations and to ensure that the requirements are widely understood and enforceable. The rule changes establishing a more structured and defined confirmation process are particularly important to enable successors in interest to demonstrate efficiently their status to servicers and, where they do, to require servicers to

[65] Confirmed successors in interest, however, have the same private rights of action to enforce the Mortgage Servicing Rules as other borrowers and consumers.

[66] *See, e.g.,* Cal. Reinvestment Coal., *Chasm Between Words and Deeds X: How Ongoing Mortgage Servicing Problems Hurt California Homeowners and Hardest-Hit Communities* 20 (May 2014), *available at https://calreinvest.wordpress.com/2014/05/21/how-ongoing-mortgage-servicing-problems-hurt-california-homeowners-and-hardest-hit-communities/* (noting that majority of housing counselors surveyed reported continuation of previously reported problems regarding successors in interest, such as that ''servicers often . . . would require [such homeowners] to go through costly and unnecessary hoops'').

[67] October 2013 Servicing Bulletin at 2.

confirm promptly this status. Such prompt confirmation is critical to reduce the risk of unnecessary foreclosures and other consumer harm. Because the Bureau is applying the Mortgage Servicing Rules to confirmed successors in interest, enabling successors in interest to demonstrate their status to servicers efficiently and requiring servicers to confirm this status promptly will allow successors in interest to access the Mortgage Servicing Rules' protections as quickly as possible.

Applying Mortgage Servicing Rules to Confirmed Successors in Interest

The Bureau proposed to apply certain mortgage servicing rules in Regulations X and Z to confirmed successors in interest. Accordingly, proposed § 1024.30(d) would have provided that a successor in interest would be considered a borrower for purposes of Regulation X's subpart C once a servicer confirms the successor in interest's identity and ownership interest in a property that secures a mortgage loan covered by subpart C. Similarly, proposed § 1026.2(a)(11) would have provided that a confirmed successor in interest is a consumer for purposes of §§ 1026.20(c) through (e), 1026.36(c), and 1026.41. Under the proposal, these specified mortgage servicing rules would have applied with respect to a confirmed successor in interest regardless of whether that person has assumed the mortgage loan obligation (*i.e.,* legal liability for the mortgage debt) under State law. For the reasons that follow and that are discussed in the section-by-section analyses of §§ 1024.30(d) and 1026.2(a)(11), the Bureau is finalizing these provisions and related commentary with a number of adjustments to address concerns raised by commenters. The adjustments include changes to ensure that confirmed successors in interest can benefit from the escrow-related protections in § 1024.17 and mortgage transfer disclosures in § 1026.39, to clarify that the final rule generally does not require servicers to provide multiple copies of the same notice, to authorize servicers to withhold certain types of sensitive information in responding to requests under §§ 1024.35 or 1024.36, and to allow servicers to require confirmed successors in interest to return an acknowledgment form before the servicer sends servicing notices to them.[68]

Whether confirmed successors in interest need the protections of the Mortgage Servicing Rules. Many commenters of all types expressed support for the Bureau's general objectives in this rulemaking. Industry commenters were divided on whether successors in interest need or will benefit from the protections of the mortgage servicing rules. A trade association asserted that servicers restrict account information due to restrictions in the FDCPA, the GLBA, and Regulation P and that making changes to Regulations X and Z would not remove these restrictions. It also suggested that, under current law, successors in interest can obtain full account access by requesting it through a borrower or the borrower's estate.

An industry commenter suggested that the additional requirements and prohibitions could increase the cost of compliance by providing protections and rights to individuals that do not have a contractual obligation with the lender or servicer. This commenter suggested that finalizing the proposal could therefore have a chilling effect on consumer lending in the real estate market.

Some industry commenters raised specific concerns about extending loss mitigation protections to confirmed successors in interest. A trade association suggested, for example, that extending protections to successors in interest who acquire an ownership interest in property as a result of divorce, legal separation, transfers to a family trust, or a transfer to a spouse or a child could disrupt and delay the foreclosure process, as discussed above. Another industry commenter suggested that a servicer should not be required to engage in loss mitigation efforts with a successor in interest when the servicer is actively working with the primary borrower concerning a delinquency or loss mitigation effort involving the loan.[69]

Consumer advocacy groups took a different view. In their comments, they stated that surveys of attorneys and housing counselors representing homeowners indicate that successor in interest problems are widespread. They identified successor in interest problems as among the most difficult problems that attorneys and counselors representing homeowners face as they work to save homes from foreclosure. They stated that the actions taken by Federal agencies to date have not resolved the problems faced by successors in interest and that homeowners' advocates still report widespread stonewalling and obfuscation by servicers as they attempt to help successors obtain information about the mortgage and apply for needed loan modifications.

A number of consumer advocacy group commenters predicted that the number of successors in interest facing foreclosure or otherwise in need of protection is likely to grow given demographic trends, including the aging of baby boomers. They stated that, due to longer life expectancies, women often experience the death of a spouse or partner and that a large number of women who become the sole owner of a home upon the death of a spouse will not have been an original borrower on the loan. These consumer advocacy groups also noted that refinancing is unlikely to be an option for an increasing number of successors in interest because a significant percentage of homes now carry mortgage debt in excess of the value of the property.

One consumer advocacy group stated that servicers routinely provide misleading and incorrect information to survivors, which frequently leads to foreclosure on the family home. It also stated that servicers still refuse to share information about the mortgage with survivors and routinely demand that successors in interest who are already on the title or who have already provided proof that they inherited the property probate the property. It also stated that servicers persistently refuse to assist survivors with loan assumption, much less loss mitigation and loan modifications.

A number of consumer advocacy groups explained that many successors

[68] In discussing the successor in interest provisions, commenters also raised a number of specific questions or concerns relating to Regulations X and Z that could arise for borrowers or consumers regardless of whether they are confirmed successors in interest. The Bureau declines to address these issues in this rulemaking. Except as otherwise indicated in the final rule, the Mortgage Servicing Rules generally apply to confirmed successors in interest in the same way that these provisions apply to other types of borrowers and consumers.

[69] One industry commenter recommended that § 1024.41 protections cover only confirmed successors in interest who have applied to assume the loan and that assumption and loss mitigation reviews should run concurrently. As explained above, the Bureau has decided not to require assumption for successor in interest status and for similar reasons does not believe that the final rule should require individuals to apply for an assumption to receive protections as confirmed successors in interest. The final rule does not, however, prevent servicers from offering simultaneous reviews for assumption and loss modification to successors in interest who might be interested. The final rule also does not prevent a servicer from conditioning an offer for a loss mitigation option on the successor in interest's assumption of the mortgage loan obligation under State law or from offering loss mitigation options to the successor in interest that differ based on whether the successor in interest would simultaneously assume the mortgage loan obligation.

are eligible for loan modifications under applicable program rules but are experiencing unnecessary delays, frustrations, and an elevated risk of foreclosure due to servicers' unwillingness to review them properly for these loan modification programs. These groups indicated that, during each month of delay imposed by servicers in recognizing the status of a successor in interest or processing a loan modification application, the interest arrearage grows at the currently applicable note rate rather than at a modified rate. They noted that these delays can eat away at the equity in the home, push the loan further into default, and make it more difficult for successors in interest to qualify for a loan modification.

Another consumer advocacy group noted that the proposal might assist in resolving a paralyzing Catch-22, in which successors in interest are told that they cannot apply for loss mitigation without assuming the loan and that they cannot assume the loan without its being current, but they cannot bring the loan current without access to loss mitigation. The office of a State Attorney General noted in its comment that, by ensuring that servicers do not condition the review and evaluation of a loss mitigation application on the successor in interest's assumption of the mortgage obligation, the proposal would address a longstanding dilemma faced by successors in interest: Whether to assume a delinquent mortgage loan without knowing the terms of a prospective loan modification or even whether a modification is possible. This commenter explained that assuming any mortgage, especially a distressed one, is a major financial decision and successors in interest cannot know whether it is in their financial interest to assume the loan without knowing whether they qualify for a modification. It indicated that the initial loss mitigation review required by the proposal would allow successors in interest to make a more informed decision regarding whether to assume the mortgage loan obligation.

The Bureau is particularly concerned about reports from commenters and others indicating that successors in interest continue to have difficulty receiving information about the mortgage loan secured by the property or correcting errors regarding the mortgage loan account and that servicers sometimes refuse to accept, or may misapply, payments from successors in interest.[70] The Bureau is also concerned about reports that successors in interest often encounter difficulties when being evaluated for loss mitigation options, including that servicers often require successors in interest to assume the mortgage loan obligation under State law before evaluating the successor in interest for loss mitigation options.[71] Applying the Mortgage Servicing Rules in Regulation X to successors in interest provides these homeowners with access to information about the mortgage, helps successors in interest avoid unwarranted or unnecessary costs and fees, and prevents unnecessary foreclosure.

As many consumer advocacy groups recognized in their comments, it is especially important for the loss mitigation procedures in § 1024.41 to apply to successors in interest. When the Bureau issued the 2013 RESPA Servicing Final Rule, the Bureau observed that establishing national mortgage servicing standards ensures that borrowers have a full and fair opportunity to receive an evaluation for a loss mitigation option before suffering the harms associated with foreclosure.[72] The Bureau also recognized that these standards are appropriate and necessary to achieve the consumer protection purposes of RESPA, including facilitating borrowers' review for loss mitigation options, and to further the goals of the Dodd-Frank Act to ensure a fair, transparent, and competitive market for mortgage servicing.[73] These same consumer protection purposes are served by applying the loss mitigation procedures in § 1024.41 to confirmed successors in interest who, as homeowners of property securing a mortgage loan, may need to make payments on the loan to avoid foreclosure.

Successors in interest are a particularly vulnerable group of consumers, who often must make complex financial decisions with limited information during a period of extreme emotional stress. Successors in interest may be more likely than other homeowners to experience a disruption in household income and therefore may be more likely than other homeowners to need loss mitigation to avoid foreclosure. The Bureau therefore concludes that requiring servicers to evaluate a complete loss mitigation application received from a confirmed successor in interest under § 1024.41's procedures serves RESPA's consumer protection purposes.

Further, because a successor in interest's ability to repay the mortgage loan generally was not considered in originating the mortgage loan, successors in interest are particularly dependent on a prompt loss mitigation evaluation to assess the mortgage loan's long-term affordability as to the successor in interest.[74] Requiring servicers to evaluate a complete loss mitigation application received from a confirmed successor in interest supports the successor in interest in making a fully informed decision about whether to assume the mortgage loan obligation under State law.

The Bureau also believes that requiring servicers to comply with

[70] In one 2015 survey of attorneys and housing counselors representing homeowners, 55 percent of respondents had been asked by a servicer to supply a quitclaim deed where one was not needed or available because a divorce decree clearly transferred the property; 63 percent had been asked to provide probate documents or proof that the client was the estate representative even though the property passed through a right of survivorship deed or tenancy by the entirety; 66 percent had been asked to submit the same documents over and over again in an attempt to prove an ownership interest to the servicer; 28 percent reported that a servicer had demanded a quitclaim deed when the borrower was deceased; and another 28 percent indicated that a servicer had refused to tell them what documents they needed to prove successor in interest status. Alys Cohen, Nat'l Consumer Law Ctr., *Snapshots of Struggle: Saving the Family Home After a Death or Divorce, Successors Still Face Major Challenges in Obtaining Loan Modifications* (Mar. 2016), *available at https://www.nclc.org/images/pdf/pr-reports/report-snapshot-struggle.pdf*; Nat'l Consumer Law Ctr., *NCLC Survey Reveals Ongoing Problems with Mortgage Servicing* 2, 5 (May 2015), *available at http://www.nclc.org/images/pdf/foreclosure_mortgage/mortgage_servicing/ib-servicing-issues-2015.pdf*. A survey conducted in the summer of 2014 found that 63 percent of housing counselors reported servicers rarely or never had required policies in place to promptly identify and communicate with a successor in interest for a deceased borrower. Nat'l Council of La Raza & Nat'l Hous. Res. Ctr., *Are Mortgage Servicers Following the New Rules? A Snapshot of Compliance with CFPB Servicing Standards* 3, 7 (Jan. 9, 2015), *available at http://www.nclr.org/Assets/uploads/Publications/mortgageservicesreport_11215.pdf*.

[71] A 2015 national survey asked attorneys and housing counselors representing homeowners how frequently servicers refused to provide information about the loan or allow them to apply for a loan modification after proof of successor status was provided. Alys Cohen, Nat'l Consumer Law Ctr., *Snapshots of Struggle: Saving the Family Home After a Death or Divorce, Successors Still Face Major Challenges in Obtaining Loan Modifications* 17–18 (Mar. 2016), *available at https://www.nclc.org/images/pdf/pr-reports/report-snapshot-struggle.pdf*. Seventy percent of respondents said this happened sometimes, often, or most of the time in their successor in interest cases. *Id.* A similar proportion of respondents indicated that that they have not seen any recent improvement in problems with successors in interest seeking mortgage modifications. *Id.* at 16.

[72] 78 FR 10696, 10815 (Feb. 14, 2013).

[73] *Id.*

[74] Where a successor in interest who has previously acquired a legal interest in a dwelling is added as an obligor on the mortgage loan, the Regulation Z Ability-to-Repay Rule does not apply. *See* 79 FR 41631, 41632–33 (July 17, 2014).

§ 1024.41's procedures with respect to confirmed successors in interest will not impose significant costs on servicers. Although some commenters expressed concern about the costs of originating loans, the final rule, like the proposal, does not require servicers to originate any loans. The Bureau is not providing confirmed successors in interest any protections that are not already available to borrowers and therefore does not anticipate the final rule will result in any unusual disruption of the foreclosure process. Both industry and consumer advocacy group commenters indicated that servicers are often already subject to other non-regulatory requirements to communicate with successors in interest and evaluate them for loan modifications. The costs imposed by the final rule should therefore largely be limited to ensuring that such requirements are met in a consistent and timely way. The Bureau therefore does not expect any chilling effect on consumer lending in the real estate market.

Notwithstanding the concerns expressed by industry commenters regarding potential delays, confirmation of a successor in interest will not reset the 180-day period in § 1024.39(b) or the 120-day period in § 1024.41(f)(1)(i). Section 1024.39(b) provides that a servicer is not required to provide a written early intervention notice more than once during any 180-day period. Section 1024.41(f) provides that a servicer shall not make the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process unless a borrower's mortgage loan obligation is more than 120 days delinquent or another specified condition is met. Confirmation of a successor in interest does not change the date when a loan obligation becomes delinquent.

With respect to Regulation Z, applying the Mortgage Servicing Rules in Regulation Z to confirmed successors in interest will protect them against inaccurate and unfair payment crediting practices by the servicer of the mortgage loan on which they may be making payments and which encumbers their property. It will also help prevent unnecessary foreclosure by, for example, keeping confirmed successors in interest informed of the status of the mortgage loan. Moreover, the amendments to Regulation Z will help ensure that confirmed successors in interest receive prompt information about the amount necessary to pay off the mortgage loan, as other homeowners do under Regulation Z.

Whether to apply or clarify additional laws or regulations not discussed in the proposal. Some commenters identified additional sections of Regulations X and Z or of other laws or regulations that they believed the Bureau should address in the final rule's provisions relating to successors in interest. A number of consumer advocacy groups stated that, in order to achieve the Bureau's goal of applying all the mortgage servicing regulations to successors in interest, the final rule should also define successors in interest as borrowers for purposes of § 1024.17. These groups suggested that successors in interest are particularly likely to face escrow issues due to the transfer of ownership. They indicated that a transfer of ownership requires the new owner to take steps to obtain homeowner's insurance and, usually, to apply for the property tax homestead exemption in the new owner's own name.

A trade association also stated that a confirmed successor in interest should be a borrower for purposes of the escrow requirement in § 1024.17 and a consumer for purposes of the mortgage transfer disclosure requirements of § 1026.39. This commenter also identified various other laws and regulations that it suggested could be affected by a regulation addressing successors in interest, including additional provisions of Regulations X and Z; the Fair Credit Reporting Act and its implementing regulation, Regulation V; the FDCPA; the Servicemembers Civil Relief Act; and the Mortgage Assistance Relief Services regulation, Regulation O.

As these commenters noted, successors in interest confront the same types of escrow issues as borrowers protected by § 1024.17 and are particularly likely to experience escrow problems due to the transfer of ownership through which they acquired their ownership interest in the property. In issuing the proposal, the Bureau intended to include all of the mortgage servicing protections of Regulations X and Z, which, as the commenters noted, should include the escrow protections of § 1024.17. For the reasons set forth in this discussion and in the section-by-section analysis of § 1024.30(d), the Bureau is expanding the protections applicable to confirmed successors in interest in § 1024.30(d) to include § 1024.17. This effectuates the Bureau's stated intent in the proposal to apply all of the mortgage servicing rules in Regulation X to confirmed successors in interest and will ensure that confirmed successors in interest can obtain necessary escrow information.

The Bureau also believes that a confirmed successor in interest should be treated as a consumer for purposes of the mortgage transfer disclosure requirement in § 1026.39, as a trade association commenter suggested. The mortgage transfer disclosure notifies consumers of valuable information regarding certain transfers of ownership of a mortgage loan, including the name and contact information for the new owner of the mortgage loan and an agent or party authorized to resolve issues concerning the consumer's payments on the loan (if the owner's information cannot be used for that purpose).[75] Information of this nature will be helpful to confirmed successors in interest in many of the same ways that it is helpful to other borrowers—for example, if they seek to engage in loss mitigation, to ensure that payments on the account are properly applied, or to identify who has a security interest in their property. For the reasons set forth in this discussion and in the section-by-section analysis of § 1026.39, the Bureau is defining the term consumer in § 1026.2(a)(11) to include confirmed successors in interest for purposes of § 1026.39.

The Bureau has reviewed the other laws and regulations that commenters suggested that the Bureau should address and has concluded that they are largely outside the scope of this rulemaking.[76] Except as specifically addressed elsewhere in this final rule, the Bureau does not believe that further discussion or clarification is necessary with respect to these other laws and regulations as part of this rulemaking. However, the Bureau will continue to engage in ongoing outreach and monitoring with industry, consumer advocacy groups, and other stakeholders to identify issues that pose implementation challenges, create a risk of consumer harm, or require clarification.

Two industry commenters also suggested that the final rule should incorporate into Regulation Z or its commentary the Bureau's July 17, 2014, interpretive rule relating to the application of the Ability-to-Repay Rule to certain situations involving

[75] § 1026.39(d).

[76] For example, a trade association commenter suggested that the Bureau should address various issues relating to the right of rescission under § 1026.23. The Bureau did not propose any changes to § 1026.23 and is not making any changes to § 1026.23 in the final rule. Pursuant to § 1026.2(a)(11), a consumer for purposes of rescission under §§ 1026.15 and 1026.23 means a cardholder or natural person to whom consumer credit is offered or extended and also includes a natural person in whose principal dwelling a security interest is or will be retained or acquired, if that person's ownership interest in the dwelling is or will be subject to the security interest.

successors in interest.[77] One commenter indicated that doing so would increase servicer awareness. The Bureau plans to incorporate the interpretive rule into the commentary to Regulation Z at a later date.

Whether to require servicers to send duplicate copies of Mortgage Servicing Rule notices to confirmed successors in interest. Proposed Regulation Z comment 41(a)–5.ii would have provided that, if a servicer sends a periodic statement meeting the requirements of § 1026.41 to another consumer, the servicer need not also send a periodic statement to a successor in interest. The proposal did not address specifically whether servicers must provide duplicate copies of other types of required servicing notices.

A number of commenters asked the Bureau to clarify whether servicers must send multiple copies of required servicing notices after a successor in interest is confirmed. One industry commenter explained that most servicing platforms only allow for automated delivery of correspondence to one address. It indicated that a requirement to send items to multiple addresses or through differing communication channels (electronic or non-electronic) would create significant operational and systems challenges with concomitant costs. Another industry commenter suggested that the Bureau adopt, in Regulation X, language similar to proposed Regulation Z comment 41(a)–5.ii, providing that servicers need not send duplicative periodic statements to confirmed successors in interest. Another industry commenter suggested that a servicer should not be required to make live contact with a successor in interest when the servicer is actively working with the primary borrower concerning a delinquency or loss mitigation effort involving the loan.

Several consumer advocacy groups challenged the assumption that successors in interest receive copies of notices provided to the transferor borrower. They noted, for example, that the successor in interest and transferor borrower may not have any form of communication in a divorce or separation, especially in situations involving domestic violence. These groups encouraged the Bureau to require servicers to send additional copies of written early intervention notices to confirmed successors in interest. Another consumer advocacy group also suggested that anyone with an ownership interest should receive a copy of the periodic statement, provided they have given their contact information to the servicer.

The Bureau believes that it would be unnecessarily burdensome to require a servicer to send additional copies of notices required by the Mortgage Servicing Rules if the servicer is already providing the notice to another borrower or consumer on the account. As explained in the section-by-section analyses of §§ 1024.32(c)(4) and 1026.2(a)(11), the Bureau is adding § 1024.32(c)(4) and new commentary to § 1026.2(a)(11) to address whether duplicative notices are required for confirmed successors in interest for all of the Mortgage Servicing Rules. Section 1024.32(c)(4) provides that, except as required by § 1024.36, a servicer is not required to provide to a confirmed successor in interest any written disclosure required by § 1024.17, § 1024.33, § 1024.34, § 1024.37, or § 1024.39(b) if the servicer is providing the same specific disclosure to another borrower on the account. Section 1024.32(c)(4) also provides that a servicer is not required to comply with the live contact requirements set forth in § 1024.39(a) with respect to a confirmed successor in interest if the servicer is complying with those requirements with respect to another borrower on the account. Comment 2(a)(11)–4.iv clarifies that, except in response to an information request as required by § 1024.36, a servicer is not required to provide to a confirmed successor in interest any written disclosure required by § 1026.20(c), (d), or (e), § 1026.39, or § 1026.41 if the servicer is providing the same specific disclosure to another consumer on the account. These provisions clarify servicers' obligations under the final rule and should alleviate the concern that many commenters raised regarding the potential burden of providing duplicative notices to confirmed successors in interest.

The Bureau recognizes, however, that successors in interest do not in all cases have access to notices received by the transferor borrower and may need such notices. The provisions discussed above with regard to the servicer's obligations to send duplicative notices do not limit the ability of any confirmed successor in interest to request copies of notices and other information through an information request under § 1024.36. Thus, if a confirmed successor in interest is not in contact with a borrower on the account who is receiving the disclosures, the confirmed successor in interest can request information as needed through the information request process.

Gramm-Leach-Bliley Act and privacy concerns. In the proposal, the Bureau indicated that it believed that applying Regulation X's subpart C to confirmed successors in interest does not present privacy concerns. The proposal explained that the Bureau believed that a confirmed successor in interest's ownership interest in the property securing the mortgage loan is sufficient to justify enabling the successor in interest to receive information about the mortgage loan. However, because some people representing themselves as successors in interest may not actually have an ownership interest in the property, the Bureau recognized that requiring servicers to apply the communication, disclosure, and loss mitigation requirements from Regulations X and Z to successors in interest before servicers have confirmed the successor in interest's identity and ownership interest in the property might present privacy and other concerns. The Bureau solicited comment on whether any information that could be provided to successors in interest under §§ 1024.35 and 1024.36 presents privacy concerns and whether servicers should be permitted to withhold any information from successors in interest out of such privacy concerns.

Various industry commenters expressed concern that the proposal would require them to violate privacy laws, including the Gramm-Leach-Bliley Act (GLBA) and Regulation P, and would otherwise interfere with borrowers' privacy rights.[78] They noted

[77] The interpretive rule clarified that, where a successor in interest who has previously acquired a legal interest in a dwelling agrees to be added as obligor on the mortgage loan, the servicer's express acknowledgment of the successor in interest as obligor does not constitute an ''assumption'' as that term is used in Regulation Z. 79 FR 41631 (July 17, 2014). Accordingly, the Regulation Z Ability-to-Repay Rule does not apply when a creditor expressly accepts a successor in interest as obligor on a loan under these circumstances. *See id.* The interpretive rule also noted that the servicer must comply with any ongoing obligations pertaining to the extension of consumer credit, such as the ARM notice requirements under 12 CFR 1026.20(c) and (d) and the periodic statement requirement under 12 CFR 1026.41, after the successor in interest is added as an obligor on the mortgage note. *Id.* at 41633.

[78] Some industry commenters also suggested that the proposal might cause them to violate the information security standards required by the GLBA. Providing information to successors in interest would not violate the GLBA information security provisions, as long as disclosures are made in a manner consistent with those standards. For example, the Interagency Guidelines Establishing Information Security Standards require a financial institution to consider and, if appropriate, adopt measures including encryption of electronic customer information and controls to prevent employees from providing customer information to unauthorized individuals who may seek to obtain this information through fraudulent means. 66 FR 8616, 8633–34 (Feb. 1, 2001); 69 FR 77610 (Dec. 28, 2004). The final rule does not prevent a servicer

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that sharing information about the mortgage—including even the limited information about document requirements that would be available to potential successors in interest—would constitute a disclosure of nonpublic personal information to a nonaffiliated third party for purposes of the GLBA and Regulation P. Some requested clarity regarding what information they should release under the proposal, while others suggested that an interagency GLBA rulemaking would be required to adjust applicable privacy rules.

Some industry commenters provided specific examples of situations that might raise concern—for example, releasing contact information or sensitive information such as paystubs from a prior loss mitigation application in the context of a divorce or a domestic violence situation. Other industry commenters indicated that they were most concerned about giving a party that is not obligated on the loan access to financial records, especially in circumstances where the primary obligor remains fully obligated to the loan transaction or where there is litigation relating to the property and attendant obligation.

One industry commenter stated that these privacy concerns apply to the disclosure of the confirmed successor in interest's personal, private information to the existing borrower as well as to the disclosure of an existing borrower's personal, private information to the confirmed successor in interest. This commenter suggested that the final rule should not require servicers to comply with the requirements in §§ 1024.35 and 1024.36 relating to notices of error and requests for information if communicating with a confirmed successor in interest is otherwise prohibited under applicable law, including the FDCPA, or if the servicer reasonably determines that the response to the asserted error or information request would result in the disclosure of any personal, private information of the existing borrower or of the successor in interest. Alternatively, this commenter urged the Bureau to provide servicers a safe harbor from liability under the FDCPA with respect to disclosing information regarding the debt and other Federal and State laws with respect to disclosing personal, private information for an existing borrower or a confirmed successor in interest. It noted, for example, that the former husband of an existing borrower could submit a request for information seeking copies of loss mitigation efforts by his former wife, which might include her contact information and copies of her paystubs. Other industry commenters provided additional examples of types of sensitive information that should not be disclosed, such as Social Security numbers.

Some consumer advocacy groups and the office of a State Attorney General asserted that there are no privacy concerns raised by the proposal because of the successor in interest's ownership interest in the property securing the mortgage loan. One of these consumer advocacy groups stated that the original borrower's private financial information, including credit score, income, or expenses, is not relevant to the successor homeowner and need not be disclosed. This group also indicated that no successor in interest should have a need for the original borrower's location or contact information.[79] It stated that a successor in interest should not need access to other financial information of the borrower, as it will not be relevant to loss mitigation sought by the successor in interest.

The Bureau concludes that complying with the final rule does not cause servicers to violate the GLBA or its implementing regulations but recognizes the potential privacy and related concerns raised by commenters and has made adjustments in the final rule to address these concerns. Disclosing information to successors in interest as required under the final rule will not cause a servicer to violate the GLBA or Regulation P because the GLBA and Regulation P permit financial institutions to disclose information to comply with a Federal law or regulation.[80]

The Bureau continues to believe that a confirmed successor in interest's ownership interest in the property securing the mortgage loan is sufficient to warrant that person's access to information about the mortgage loan. The Bureau also believes it is important for confirmed successors in interest to be able to obtain information about the terms, status, and payment history of the mortgage loan. However, the Bureau agrees with commenters that confirmed successors in interest are unlikely to need information regarding the location or contact information of an original borrower or financial information of an original borrower other than the mortgage terms, status, and payment history. As commenters noted, providing additional financial, contact, or location information of other borrowers could raise privacy concerns and is not likely to assist the confirmed successor in interest in maintaining the property. The Bureau believes that this is especially true with respect to a borrower's Social Security number.

The Bureau believes that similar potential privacy concerns could arise when borrowers request information about potential and confirmed successors in interest. A potential or confirmed successor in interest could, for example, submit a loss mitigation application containing a Social Security number, contact information, and paystubs. Borrowers on the account who are not the person to whom the information pertains are unlikely to need to obtain from the servicer these types of information about potential or confirmed successors in interest.

To address the potential privacy concerns raised in the comments, the Bureau is adding new §§ 1024.35(e)(5) and 1024.36(d)(3). Pursuant to these provisions, a servicer responding to a request for information or a notice of error request for documentation may omit location and contact information and personal financial information (other than information about the terms, status, and payment history of the mortgage loan) if: (i) The information pertains to a potential or confirmed successor in interest who is not the requester; or (ii) The requester is a confirmed successor in interest and the information pertains to any borrower who is not the requester. These

from complying with these information security standards in dealing with successors in interest.

[79] This consumer advocacy group suggested that the Bureau create an FDCPA exemption for liability under FDCPA section 805(b). It also suggested that in doing so the Bureau should indicate that information that a debt collector is permitted to share with a confirmed successor in interest regarding the mortgage loan account should not include the location or contact information of the original borrower or any financial information of the original borrower other than the mortgage terms and status. As explained above, concurrently with issuing this final rule, the Bureau is issuing an interpretation of FDCPA section 805 that creates a safe harbor pursuant to FDCPA section 813(e). In light of this interpretation, no exemption from the requirements of FDCPA section 805(b) is required.

[80] 15 U.S.C. 6802(e)(8); 12 CFR 1016.15(a)(7)(i) (providing an exception to the GLBA's general prohibition on disclosing nonpublic personal information to a nonaffiliated third party absent notice and an opportunity to opt out of such disclosure where the disclosure is to comply with Federal, State, or local laws, rules, and other applicable legal requirements). A trade association suggested that, before disclosing information protected under Regulation P, the servicer should be able to require the recipient to agree not to redisclose the information unless permitted by law. Although 12 CFR 1016.11(c) imposes certain restrictions on the disclosure and use of information disclosed pursuant to a Regulation P exception in 12 CFR 1016.14 or 1016.15, neither the GLBA nor Regulation P requires the recipient of such information to enter into an agreement relating to these restrictions with the financial institution that discloses the information. The Bureau therefore declines to establish such a requirement under Regulation X or Z.

provisions allow servicers to limit the information that confirmed successors in interest may obtain about other borrowers (including other confirmed successors in interest) and that borrowers may obtain about potential and confirmed successors in interest who are not the requesting party.

FDCPA and related concerns. A number of industry commenters indicated in their comments that the requirement to send servicing notices and share information about the mortgage loan with confirmed successors in interest could subject them to liability under the FDCPA. While many mortgage servicers are not subject to the FDCPA, mortgage servicers that acquired a mortgage loan at the time that it was in default are subject to the FDCPA with respect to that mortgage loan.[81] Two specific areas of concern raised by commenters are discussed in turn below: (1) Whether the proposal would cause servicers that are debt collectors for purposes of the FDCPA to violate FDCPA section 805(b)'s general prohibition on communicating with third parties in connection with the collection of a debt, and (2) Whether providing periodic statements and other servicing notices to confirmed successors in interest who have not assumed the loan obligation under State law would be confusing or harassing.

Some commenters expressed concern that sharing information about the debt, such as periodic statements and responses to requests for information, with confirmed successors in interest who are not obligated on the loan could violate FDCPA section 805(b). They suggested that, if the proposal is adopted, the Bureau should create an FDCPA exemption or include commentary providing a safe harbor under the FDCPA when a servicer contacts a successor in interest regarding a debt that is not assumed by the successor in interest.

FDCPA section 805(b) generally prohibits debt collectors from communicating with third parties in connection with the collection of a debt, in the absence of a court order or prior consumer consent given directly to the debt collector.[82] FDCPA section 805(b) permits debt collectors to communicate with a person who is a consumer for purposes of section 805. FDCPA section 805(d), in turn, states that the term consumer for purposes of section 805 includes the consumer's spouse, parent (if the consumer is a minor), guardian, executor, or administrator.[83] The use of the word ''includes'' indicates that section 805(d) is an exemplary rather than exhaustive list of the categories of individuals that are ''consumers'' for purposes of FDCPA section 805.

The Bureau is issuing concurrently with this final rule an interpretive rule that constitutes an advisory opinion under FDCPA section 813(e)[84] interpreting consumer for purposes of FDCPA section 805 to include a confirmed successor in interest, as that term is defined in Regulation X § 1024.31 and Regulation Z § 1026.2(a)(27)(ii).[85] As provided in FDCPA section 813(e), no liability arises under the FDCPA for an act done or omitted in good faith in conformity with an advisory opinion of the Bureau while that advisory opinion is in effect. The Bureau's interpretive rule provides a safe harbor from liability under FDCPA section 805(b) for servicers communicating with a confirmed successor in interest about a mortgage loan secured by property in which the confirmed successor in interest has an ownership interest, in compliance with Regulations X and Z.

As the interpretive rule explains, given their relationship to the obligor, the mortgage loan, and the property securing the mortgage loan and the Bureau's extension of certain protections of Regulations X and Z to them, confirmed successors in interest are—like the narrow categories of persons enumerated in FDCPA section 805(d)—the type of individuals with whom the servicer needs to communicate. Interpreting consumers in section 805 to include confirmed successors in interest permits debt collectors to communicate with them about the mortgage loan without engaging in a third-party communication in violation of section 805(b). It also helps to ensure that confirmed successors in interest benefit from the protections for ''consumers'' in FDCPA section 805—including the debt collector generally being prohibited from communicating at a time or place the collector knows or should know is inconvenient and being required to cease communication upon written request from the consumer. The Bureau therefore has concluded that consumer as defined in section 805(d) includes a confirmed successor in interest, as that term is defined in Regulations X and Z.[86] The Bureau's interpretive rule should resolve commenters' concerns regarding potential liability under FDCPA section 805(b) for disclosures to confirmed successors in interest.[87]

An industry commenter suggested that successors who are not liable on the debt might be confused if they start receiving periodic statements. Another industry commenter suggested that sending loss mitigation-related letters and trying to establish right party contact with individuals not liable on a delinquent loan could be viewed as abusive or harassing debt collection efforts, in violation of FDCPA section 806.[88]

Under the final rule, confirmed successors in interest will receive servicing notices only after they have proceeded through the confirmation process. The servicing notices provide important information that will assist confirmed successors in interest in preserving their ownership interests in the properties secured by the relevant mortgage loans. Given this context, the Bureau does not believe that simply providing periodic statements and other servicing notices to the confirmed successor in interest pursuant to Regulations X and Z would be viewed as having the natural consequence of harassing, oppressing, or abusing the confirmed successor in interest under FDCPA section 806.

The Bureau recognizes, however, that some language appearing in the model and sample form notices in Regulations X and Z could suggest that the recipient of the notice is liable on the mortgage loan obligation and that it is possible

[81] A trade association commenter asserted that the FDCPA should not apply to mortgage loans and suggested that the Bureau exempt mortgage loans and mortgage servicers altogether from the FDCPA or, alternatively, from the FDCPA's debt validation and cease communication requirements. These comments are beyond the scope of this rulemaking, and the Bureau declines to address them, other than to note that mortgage servicers are not per se exempt from the FDCPA.

[82] 15 U.S.C. 1692c(b).

[83] 15 U.S.C. 1692c(d).

[84] 15 U.S.C. 1692k(e).

[85] *See* Bureau of Consumer Fin. Prot., Official Bureau Interpretations: Safe Harbors from Liability under the Fair Debt Collection Practices Act for Certain Actions Taken in Compliance with Mortgage Servicing Rules under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z) (Aug. 4, 2016), *available at http://www.consumerfinance.gov/policy-compliance/rulemaking/final-rules/safe-harbors-liability-under-fair-debt-collection-practices-act-certain-actions-taken-compliance-mortgage-servicing-rules-under-real-estate-settlement-procedures-act-regulation-x-and-truth-lending-act-regulation-z.*

[86] Because the interpretive rule applies only to the use of the term consumer in section 805, it does not affect the definition of consumer under the remaining FDCPA provisions.

[87] The interpretation does not relieve servicers that are debt collectors of their obligations under the FDCPA. For example, they must not: Engage in conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt; use any false, deceptive, or misleading representation or means in connection with the collection of a debt; or use unfair or unconscionable means to collect or attempt to collect any debt.

[88] 15 U.S.C. 1692d.

that this language, on its own without modification, could confuse confirmed successors in interest who have not assumed the mortgage loan obligation under State law and are not otherwise liable for it as to whether they are liable on the mortgage loan obligation. For example, some of these forms state: ''your loan,'' ''your interest rate,'' ''[y]ou are late on your mortgage payments,'' ''[y]ou must pay us for any period during which the insurance we buy is in effect but you do not have insurance,'' and ''you could be charged a penalty.'' [89]

As modified by the final rule, Regulations X and Z offer servicers various means that they can employ to ensure that communications required by the Mortgage Servicing Rules do not mislead confirmed successors in interest who have not assumed the mortgage loan obligation under State law and are not otherwise liable for it. One option available to servicers is to adjust the language in the notices to replace any terminology that might suggest liability. Regulation Z already permits modification of certain model and sample forms for ARM disclosures to remove language regarding personal liability to accommodate particular consumer circumstances or transactions not addressed by the forms,[90] and the final rule clarifies in revised comment 2 to Regulation X's appendix MS and new comments 20(e)(4)–3 and 41(c)–5 to Regulation Z that similar changes may be made to other model and sample form notices. For example, as revised, comment appendix MS to part 1024–2 permits servicers to substitute ''this mortgage'' or ''the mortgage'' in place of ''your mortgage'' in notices sent to a confirmed successor in interest who has not assumed the mortgage loan obligation under State law or is not otherwise liable on the mortgage loan obligation.

Another option available to servicers to reduce the risk of any potential confusion is to add an affirmative disclosure to the Mortgage Servicing Rule notices that clarifies that a confirmed successor in interest who has not assumed the mortgage loan obligation under State law and is not otherwise liable for it has no personal liability. For some of the required servicing notices, this type of disclosure could be added into the notice,[91] while for other types of notices the rules prohibit additional information in the notice but would permit an explanatory cover letter in the same transmittal.[92]

The Bureau recognizes that the foregoing options would require servicers to incur some costs because these options would involve customizing certain materials for confirmed successors in interest. To address this concern, and for the reasons stated in the section-by-section analyses of §§ 1024.32(c), 1026.20(f), 1026.39(f), and 1026.41(g), new § 1024.32(c)(1) allows servicers to provide an initial explanatory written notice and acknowledgment form to confirmed successors in interest who have not assumed the mortgage loan obligation under State law and are not otherwise liable on it. The notice explains that the confirmed successor in interest is not liable unless and until the confirmed successor in interest assumes the mortgage loan obligation under State law. The notice also indicates that the confirmed successor in interest must return the acknowledgment to receive servicing notices under the Mortgage Servicing Rules. Sections 1024.32(c), 1026.20(f), 1026.39(f), and 1026.41(g) relieve servicers that send this type of notice and acknowledgment form of the obligations to provide Mortgage Servicing Rule notices and to engage in live contacts with the confirmed successor in interest until the confirmed successor in interest provides the servicer an executed acknowledgment indicating a desire to receive the notices or assumes the mortgage loan obligation under State law.

These provisions relieve servicers of the costs associated with sending the notices to confirmed successors in interest who are not liable on the mortgage loan obligation and do not want them. However, the Bureau believes that when a confirmed successor in interest assumes a mortgage loan obligation under State law there is no longer any reason to suspend a servicer's obligation to provide notices and other communications that are otherwise required by the Mortgage Servicing Rules.[93] Additionally, the Bureau expects that servicers will provide additional copies of the written notice and acknowledgment form to confirmed successors in interest upon request; the Bureau recognizes that confirmed successors in interest who choose not to receive servicing notices at the time of confirmation may later wish to receive such notices and believes that servicers should facilitate subsequent requests from confirmed successors in interest to receive the notices.[94]

The final rule does not mandate that servicers use the initial notice and acknowledgment option or either of the two other options mentioned above but instead gives servicers the flexibility to use any of these options as the servicer deems appropriate to ensure clarity in its communications with confirmed successors in interest. Offering servicers these options will allow servicers to use their business judgment to determine the best approach in light of their particular situations and operational considerations.

The Bureau considered providing a safe harbor from UDAAP claims or FDCPA deception claims related to representations in notices about whether a confirmed successor in interest is liable on the mortgage loan obligation. The Bureau believes that such a safe harbor is unnecessary. The Bureau believes that UDAAP claims are unlikely to arise solely from servicers providing to confirmed successors in interest notices and information required by and in compliance with Regulations X or Z, particularly if servicers implement one of the approaches described above. The Bureau also believes that a safe harbor insulating servicers from liability related to their communications to confirmed successors in interest could undermine incentives for servicers to ensure that the overall effect of their communications with successors in interest is not deceptive and does not create consumer harm. The options that the Bureau is providing to servicers should allow servicers to choose the most cost-effective way to ensure that their communications do not confuse or deceive successors in interest who are not liable on the mortgage loan obligation under State law.

Legal Authority

Based on its experience and expertise with respect to mortgage servicing, the Bureau believes that the amendments relating to successors in interest promote the purposes of RESPA and TILA effectuated by the Mortgage Servicing Rules. As discussed below,

[89] Regulation X appendices MS–3(A) & MS–4; Regulation Z appendices H–4(D) & H–30.

[90] Regulation Z comments 20(c)(3)(i)–1, 20(d)(3)(i)–1.

[91] *See, e.g.,* Regulation X comment 39(b)(2)–1; Regulation Z comment 41(c)–1.

[92] *See, e.g.,* § 1024.37(c)(4), (d)(4), (e)(4).

[93] However, other provisions of existing Regulations X and Z may relieve servicers of the obligation to provide notices in those circumstances. For example, §§ 1026.17(d) and 1026.31(e) generally provide that, if there is more than one consumer, the disclosures required by Regulation Z subparts C and E may be made to any consumer who is primarily liable on the obligation, and comment 41(a)–1 to Regulation Z provides that, when two consumers are joint obligors with primary liability on a closed-end consumer credit transaction secured by a dwelling, the periodic statement may be sent to either one of them.

[94] *See* section-by-section analyses of § 1024.32(c)(2) and (3).

the Mortgage Servicing Rules apply to borrowers (for the Regulation X rules) and consumers (for the Regulation Z rules). As further discussed below, the Bureau believes that the terms borrowers in RESPA and consumers in TILA, as used in the relevant portions of the Mortgage Servicing Rules, should be understood to include confirmed successors in interest. In addition, the amendments relating to successors in interest are authorized under sections 6(j)(3), 6(k)(1)(E), and 19(a) of RESPA with respect to the Mortgage Servicing Rules in Regulation X and under section 105(a) of TILA with respect to the Mortgage Servicing Rules in Regulation Z. The amendments are also authorized under section 1022(b) of the Dodd-Frank Act, which authorizes the Bureau to prescribe regulations necessary or appropriate to carry out the purposes and objectives of Federal consumer financial laws.

Regulation X amendments relating to successors in interest. Some trade associations raised questions about whether RESPA permits the Bureau to regulate a servicer's conduct towards non-obligors and to create a private right of action for non-obligors. Two trade associations indicated that it is not clear that RESPA applies to servicers unless the servicer receives ''payments from a borrower'' who signed a federally related mortgage loan.[95]

Other commenters asserted that the Bureau's rulemaking appeared well within its legal authority. A consumer advocacy group noted that the Bureau relied on its rulemaking authority under the Dodd-Frank Act and RESPA to mandate a uniform loss mitigation framework that establishes appropriate mortgage servicing standards in the private market. It noted that RESPA already contained provisions with private rights of action and said that the Bureau's servicing regulations and proposed additions, including those related to successors in interest, simply further that existing scheme. It stated that by integrating successors in interest into the existing loss mitigation framework, the Bureau is faithfully executing its mission to implement and enforce consumer financial protection laws without imposing undue burdens on servicers who are already following the loss mitigation rules.

As explained below in the section-by-section analysis of § 1024.30(d), the final rule provides that a confirmed successor in interest shall be considered a borrower for purposes of § 1024.17 and subpart C of Regulation X. In light of its experience and expertise with respect to mortgage servicing, the Bureau believes that this interpretation promotes the purposes of RESPA effectuated through the provisions of the Mortgage Servicing Rules in Regulation X, which in turn were issued under, among other provisions, sections 6(j)(3), 6(k)(1)(E), and 19(a) of RESPA. Therefore, because the Bureau concludes that confirmed successors in interest are borrowers for purposes of the Mortgage Servicing Rules in Regulation X, these amendments are authorized under the same authorities on which the applicable Mortgage Servicing Rules are based.

Although a confirmed successor in interest will not necessarily have assumed the mortgage loan obligation under State law, the successor in interest, after the transfer of ownership of the property, will have stepped into the shoes of the transferor borrower for many purposes. As noted above, the successor in interest will typically need to make payments on the loan in order to avoid foreclosure on the property. The successor in interest's ability to sell, encumber, or make improvements to the property will also be limited by the lien securing the loan. In other words, the property rights of the confirmed successor in interest, like those of the transferor borrower, are subject to the mortgage loan.

The Bureau believes that State property law, which provides the context for RESPA, also supports treating confirmed successors in interest as borrowers. At common law, a successor in interest ''retains the same rights as the original owner, with no change in substance.'' [96] As a matter of State law, successors in interest have historically been afforded many of the same rights and responsibilities as the transferor borrower. For example, there is a significant amount of State law indicating that a successor in interest, like the transferor borrower, possesses the right to redeem following the mortgagee's foreclosure on the property.[97] Moreover, there is significant State law providing that the contractual rights and obligations under the mortgage loan of the transferor borrower are freely assignable to successors in interest.[98] Further, before the enactment of the Garn-St Germain Act, several States had longstanding prohibitions on the exercise of due-on-sale clauses, thereby limiting servicers to the same contractual remedies with respect to successors in interest as were available against the transferor borrower, whether or not the successor in interest under State law assumed the legal obligation to pay the mortgage.[99] Additionally, while successors in interest may not be personally liable on the mortgage note, absent their express assumption of such liability under State law, in a significant number of mortgages, the borrower on the note is also, under State law, not personally liable for the debt upon foreclosure because a deficiency judgment is not allowed.[100] Accordingly, under State law, a successor in interest is often in virtually the same legal position as the borrower on the note with respect to foreclosure.[101]

The Bureau also believes that this treatment of successors in interest is consistent with other aspects of Federal law. The Garn-St Germain Act protects successors in interest from foreclosure based on the mortgage loan due-on-sale clause after transfer of homeownership to them. Additionally, several bankruptcy courts have held that successors in interest are entitled to the same treatment as transferor borrowers, for example, with respect to curing an

[95] These trade associations also stated that the Bureau cannot proceed with this rulemaking because it lacks rulemaking authority under the Garn-St Germain Act. Because the Bureau is not purporting to write regulations under the Garn-St Germain Act, it does not require rulemaking authority under that Act.

[96] Black's Law Dictionary (9th ed. 2009).

[97] '' 'Property sold subject to redemption . . . may be redeemed in the manner hereinafter provided, by the . . . [j]udgment debtor, or his successor in interest in the whole or any part of the property. . . . .' '' *Phillips* v. *Hagart,* 45 P. 843, 843 (Cal. 1896) (quoting California Code of Civil Procedure section 705); *see also, e.g., Forty-Four Hundred E. Broadway Co.* v. *4400 E. Broadway Co.,* 660 P.2d 866, 868 (Ariz. Ct. App. 1982) (citing *Call* v. *Thunderbird Mortg. Co.,* 375 P.2d 169 (Cal. 1962)); *Brastrup* v. *Ellingson,* 161 NW. 553, 554 (N.D. 1917); *Tate* v. *Dinsmore,* 175 SW. 528, 529 (Ark. 1915).

[98] *See, e.g., Badran* v. *Household Fin. Corp.,* 2008 WL 4335098, at *4 (Mich. Ct. App. 2008); *Bermes* v. *Sylling,* 587 P.2d 377, 384 (Mont. 1978); *In re Fogarty's Estate,* 300 N.Y.S. 231 (N.Y. Sur. Ct. 1937).

[99] *See, e.g., Continental Fed. Sav. & Loan Ass'n* v. *Fetter,* 564 P.2d 1013, 1017 n.4 (Okla. 1977) (collecting cases). The Garn-St Germain Act later preempted restrictions on due-on-sale clauses generally but prohibited exercise of due-on-sale clauses with respect to certain categories of successors in interest. *See* 12 U.S.C. 1701j–3(b) (preempting restrictions); *id.* section 1701j–3(d) (prohibiting exercise for certain categories).

[100] Deficiency judgments against borrowers upon foreclosure are disallowed with respect to most residential mortgages in some States. *See* Connecticut Gen. Assembly, Office of Legislative Research, OLR Research Report 2010–R–0327, *Comparison of State Laws on Mortgage Deficiencies and Redemption Periods* (Dec. 9, 2011) (citing and updating Nat'l Consumer Law Ctr., Survey of State Foreclosure Laws (2009)), *available at http://www.cga.ct.gov/2010/rpt/2010-R-0327.htm.*

[101] The Bureau is aware that some courts have indicated that successors in interest would not ordinarily be considered borrowers under RESPA. These cases were decided without the benefit of or consideration of the purposes of the regulations that the Bureau is now finalizing.

arrearage on a mortgage and reinstating the loan.[102]

In addition, the amendments relating to successors in interest to the Mortgage Servicing Rules in Regulation X are independently authorized under sections 6(j)(3), 6(k)(1)(E), and 19(a) of RESPA. RESPA section 6(j)(3) authorizes the Bureau to establish any requirements necessary to carry out section 6 of RESPA; RESPA section 6(k)(1)(E) authorizes the Bureau to create obligations for servicers through regulation that it finds appropriate to carry out the consumer protection purposes of RESPA; and RESPA section 19(a) authorizes the Bureau to prescribe such rules and regulations as may be necessary to achieve the purposes of RESPA.[103]

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.[104] Specifically, with respect to mortgage servicing, the consumer protection purposes of RESPA include responding to borrower requests and complaints in a timely manner, maintaining and providing accurate information, helping borrowers avoid unwarranted or unnecessary costs and fees, and facilitating review for foreclosure avoidance options.

The Bureau believes that establishing procedures for confirmation of successors in interest and extending various protections in Regulation X to confirmed successors in interest achieves these purposes of RESPA.[105] As noted above, successors in interest are a vulnerable group of consumers. As owners of property securing a mortgage loan, they may face foreclosure unless they satisfy the loan's payment obligations. But, as also noted above, successors in interest often cannot obtain information about the loan, including options for loss mitigation, and may thus have difficulty avoiding foreclosure. The Bureau therefore believes that applying servicing protections in Regulation X to confirmed successors in interest is necessary and appropriate to assist confirmed successors in interest with the types of servicing problems and issues that are within the scope of RESPA's consumer protection purposes. Specifically, as explained in the section-by-section analysis of § 1024.30(d), extending the various Regulation X protections to confirmed successors in interest will establish procedures by which servicers must respond to confirmed successors in interest's requests and complaints in a timely manner, will require servicers to maintain and provide accurate information with respect to confirmed successors in interest, and will establish safeguards to help confirmed successors in interest avoid unwarranted or unnecessary costs and fees and to facilitate review of confirmed successors in interest's applications for foreclosure avoidance options.[106]

The Bureau also notes that confirmed successors in interest will have a private right of action under RESPA to enforce these rules. Under section 6(f) of RESPA, 12 U.S.C. 2605(f), ''[w]hoever fails to comply with any provision of this section shall be liable to the borrower for each such failure.'' For the reasons discussed above, the Bureau believes that the term borrower as used in the mortgage servicing provisions of RESPA should be understood to encompass confirmed successors in interest.

Regulation Z amendments relating to successors in interest. As noted in the section-by-section analysis of § 1026.2(a)(11), the Bureau is defining the term consumer to include a confirmed successor in interest for purposes of §§ 1026.20(c) through (e), 1026.36(c), 1026.39, and 1026.41. Those provisions establish certain protections for consumers with respect to their mortgage loans, and, as explained above in the context of the Regulation X, confirmed successors in interest step into the shoes of the transferor consumer for many purposes once they have obtained an ownership interest in the property. In light of its experience and expertise, the Bureau believes the term consumer in those provisions should be interpreted to include confirmed successors in interest. The Mortgage Servicing Rules in Regulation Z were authorized by, among other provisions, section 105(a) of TILA. Therefore, because the Bureau concludes that confirmed successors in interest are consumers for purposes of the Mortgage Servicing Rules in Regulation Z, these amendments are authorized under the same authorities on which the Mortgage Servicing Rules are based.

In addition, the amendments relating to successors in interest to the Mortgage Servicing Rules in Regulation Z are independently authorized under section 105(a) of TILA. That provision allows the Bureau to issue regulations that may contain such additional requirements, classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for all or any class of transactions, as in the judgment of the Bureau are necessary or proper to effectuate the purposes of TILA, to prevent circumvention or evasion thereof, or to facilitate compliance therewith. 15 U.S.C. 1604(a). The purposes of TILA include assuring the meaningful disclosure of credit terms to enable consumers to compare more readily the various credit

[102] *See, e.g., In re Smith,* 469 B.R. 198, 202 (Bankr. S.D.N.Y. 2012); *In re Curinton,* 300 B.R. 78, 82–86 (Bankr. M.D. Fla. 2003) (quoting *In re Garcia,* 276 B.R. 627, 631 (Bankr. D. Ariz. 2002)).

[103] A trade association commenter stated that the Bureau does not have the authority under RESPA to write loss mitigation or successorship regulations or to create a private right of action. It suggested that the Bureau's authority under RESPA sections 6(j)(3), 6(k), and 19(a) is circumscribed by the limited statutory purposes set forth in RESPA section 2(b). The Bureau disagrees. It would not be reasonable to read ''consumer protection purposes of this chapter'' in section 6(k) and ''the purposes of this chapter'' in section 19 in a way that would exclude Congress's purposes in enacting various provisions in section 6 of RESPA relating to servicing.

[104] 78 FR 10696, 10709 (Feb. 14, 2013).

[105] A trade association commenter claimed that the Bureau cannot now assert that successor in interest regulations are necessary under RESPA section 6(j)(3) because the statute was enacted in 1991 and HUD did not issue any successor in interest RESPA regulations when it had rulemaking authority. However, section 6(j)(3) does not limit the Bureau's rulemaking authority based on rules previously issued by HUD. The Bureau, like HUD before it, evaluates what is necessary to carry out RESPA section 6 on an ongoing basis.

[106] A trade association commenter suggested that the Bureau's authority under RESPA section 6(k)(1)(e) is limited by the canon of *ejusdem generis,* which provides that, when a general phrase follows a list of specific items, the general phrase must be construed to include only items of the same class as the specific items on the list. RESPA section 6(k)(1)(e) requires compliance with ''any other obligation'' that the Bureau finds ''by regulation to be appropriate to carry out the consumer protection purposes of'' RESPA. The commenter suggested that ''any other obligation'' cannot relate to successor in interest issues or loss mitigation issues because those topics are different from the categories identified in RESPA section 6(k)(1)(a) through (d) (force-placed insurance; fees for qualified written request responses; failure to timely correct errors; and failure to provide owner or assignee contact information). However, the Bureau does not agree that the canon of *ejusdem generis* is relevant to determining the scope of section 6(k)(1)(e). That provision generally authorizes the Bureau to create obligations for services that are ''appropriate to carry out the consumer protection purposes of [RESPA].'' In other words, it authorizes regulations that would further RESPA's consumer protection purposes, which, as explained above, the amendments related to successors in interest do. Moreover, even if the canon applied, contrary to the commenter's assertion, the disparate items listed in RESPA section 6(k)(1)(a) through (d) are not similar in kind, nor are they all related in a way that distinguishes them as a group from successor in interest and loss mitigation issues.

terms available and avoid the uninformed use of credit and to protect consumers against inaccurate and unfair credit billing practices. 15 U.S.C. 1601(a).

The Bureau believes that the amendments to Regulation Z relating to successors in interest are necessary or proper to effectuate TILA's purposes. Successors in interest are owners of dwellings securing mortgage loans and must typically meet the payment obligations on the loan in order to avoid foreclosure on their property. Successors in interest thus have a strong interest in obtaining timely and accurate account information from servicers as to the mortgage loan secured by their dwelling. As explained in the section-by-section analysis of § 1026.2(a)(11), to achieve TILA's purposes, confirmed successors in interest warrant the protections of §§ 1026.20(c) through (e), 1026.36(c), 1026.39, and 1026.41.

Some trade associations stated that it is not clear that TILA can apply to those who do not borrow. However, Regulation Z has defined consumer for decades to include non-obligors for purposes of rescission under §§ 1026.15 and 1026.23.[107] The Bureau is now interpreting the term consumer to include confirmed successors in interest for purposes of the Mortgage Servicing Rules in Regulation Z.[108]

B. Regulation X

Section 1024.6 Special Information Booklet at Time of Loan Application

6(d) Permissible Changes

Although the Bureau did not propose to amend § 1024.6(d), for the reasons set forth below, the Bureau is revising current § 1024.6(d)(1)(i) and renumbering it as § 1024.6(d)(1), eliminating § 1024.6(d)(1)(ii), and revising § 1024.6(d)(2).

Under § 1024.6(a), a lender must provide a copy of a special information booklet to certain applicants for a federally related mortgage loan. The special information booklet, adopted pursuant to section 5 of RESPA, helps mortgage loan applicants understand the nature and costs of settlement services.[109] The Bureau's publication entitled ''*Your Home Loan Toolkit: A Step-by-Step Guide,*'' updated the special information booklet to incorporate statutory amendments, the Bureau's Integrated Mortgage Disclosures Under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z) (TILA–RESPA Final Rule),[110] and additional contact information, online tools, and information on how to submit complaints.[111] Current § 1024.6(d)(i) and (ii) set forth the permissible changes that may be made to the special information booklet. The Bureau is revising the final sentence of current § 1024.6(d)(1)(i) to update the address to which requests for changes to the booklet beyond those permitted by the rule must be submitted.

Currently, § 1024.6(d)(1)(i) provides in relevant part that a request to the Bureau for the approval of certain changes to the booklet shall be submitted in writing to the address indicated in § 1024.3. However, § 1024.3 no longer includes this address. As revised and renumbered, final § 1024.6(d)(1) instead provides that a request to the Bureau for approval of certain changes shall be submitted in writing to the address indicated in the definition of *Public Guidance Documents* in § 1024.2.

Current § 1024.6(d)(1)(ii) sets forth three permissible changes that may be made to the special information booklet. Current § 1024.6(d)(1)(ii)(A) provides that, in the Complaints section of the booklet, it is a permissible change to substitute ''the Bureau of Consumer Financial Protection'' for ''HUD's Office of RESPA'' and ''the RESPA office.'' Current § 1024.6(d)(1)(ii)(B) provides that, in the Avoiding Foreclosure section of the booklet, it is a permissible change to inform homeowners that they may find information on and assistance in avoiding foreclosures at *http://www.consumerfinance.gov*. It further explains that the deletion of the reference to the HUD Web page, *http://www.hud.gov/foreclosure/*, in the Avoiding Foreclosure section of the booklet, is not a permissible change. Current § 1024.6(d)(1)(ii)(C) provides that, in the appendix to the booklet, it is a permissible change to substitute ''the Bureau of Consumer Financial Protection'' for the reference to the ''Board of Governors of the Federal Reserve System'' in the No Discrimination section of the appendix to the booklet. It also explains that, in the Contact Information section of the appendix to the booklet, it is a permissible change to add the following contact information for the Bureau: ''Bureau of Consumer Financial Protection, 1700 G Street NW., Washington, DC 20006; *www.consumerfinance.gov/learnmore*.'' Finally, it provides that it is also a permissible change to remove the contact information for HUD's Office of RESPA and Interstate Land Sales from the Contact Information section of the appendix to the booklet.

To reflect the Bureau's exclusive authority with regard to the special information booklet, the final rule eliminates § 1024.6(d)(1)(ii). The Bureau is removing the references to permissible changes that are no longer relevant because the stated language for which substitutions are authorized does not in appear in the special information booklet currently prescribed by the Bureau. A lender will not be permitted to change the special information booklet in the ways described above to reference the Department of Housing and Urban Development and the Board of Governors of the Federal Reserve System. Accordingly, the Bureau is renumbering § 1024.6(d)(1)(i) as § 1024.6(d)(1); removing § 1024.6(d)(1)(ii)(A), (B), and (C); and replacing the references to § 1024.6(d)(1)(ii) in § 1024.6(d)(1) with references to § 1024.6(d)(2).

For similar reasons, the Bureau is removing the final sentence of current § 1024.6(d)(2), which provides that references to HUD on the cover of the booklet may be changed to references to the Bureau.

Section 1024.9 Reproduction of Settlement Statements

9(a) Permissible Changes—HUD–1

Although the Bureau did not propose to amend § 1024.9(a), for the reasons set forth below, the Bureau is revising § 1024.9(a). Section 1024.9(a) sets forth the permissible changes and insertions that may be made when the HUD–1 settlement statement is reproduced. The HUD–1 or HUD–1A settlement statement (also HUD–1 or HUD–1A) is defined in § 1024.2 as ''the statement that is prescribed in this part for setting

[107] 12 CFR 1026.2(a)(11) (defining consumer for purposes of rescission under §§ 1026.15 and 1026.23 to include a natural person in whose principal dwelling a security interest is or will be retained or acquired, if that person's ownership interest in the dwelling is or will be subject to the security interest).

[108] A trade association commenter also suggested that RESPA section 17, 12 U.S.C. 2615, and TILA section 111(d), 15 U.S.C. 1610, might bar this rulemaking. They do not because the successor in interest provisions do not affect the validity or enforceability of any loan or mortgage agreement. The commenter also stated that the Bureau does not have the authority to rewrite State contract law or the mortgage default remedies that are available under State law. However, the final rule does not purport to alter State contract law principles. The final rule simply extends the Federal regulatory protections of the Mortgage Servicing Rules to confirmed successors in interest and provides other related Federal protections under the Mortgage Servicing Rules.

[109] 12 CFR 1024.2(b) (defining special information booklet for purposes of Regulation X).

[110] 78 FR 79730 (Dec. 31, 2013) (TILA–RESPA Final Rule).

[111] 80 FR 17414 (April 1, 2015). *See* 12 CFR 1026.19(g) (explaining similar requirements to those in § 1024.6).

forth settlement charges in connection with either the purchase or the refinancing (or other subordinate lien transaction) of 1- to 4-[person] family residential property.'' [112] Current § 1024.9(a)(5) explains that certain variations in layout and format to the HUD–1 are within the discretion of persons reproducing the HUD–1 and do not require prior HUD approval.

To reflect the Bureau's exclusive authority with regard to the HUD–1, the final rule revises § 1024.9(a)(5). Final § 1024.9(a)(5) explains that certain variations in layout and format to the HUD–1 are within the discretion of persons reproducing the HUD–1 and do not require prior Bureau approval.

9(c) Written Approval

The Bureau is revising § 1024.9(c) to update the address to which requests for deviations in the HUD–1 or HUD–1A forms beyond those permitted by the rule must be submitted. Currently, § 1024.9(c) provides in relevant part that a request to the Bureau for the approval of certain deviations shall be submitted in writing to the address indicated in § 1024.3. However, § 1024.3 no longer includes this address. Thus, as revised, § 1024.9(c) instead provides that a request to the Bureau for approval of the certain changes shall be submitted in writing to the address indicated in the definition of *Public Guidance Documents* in § 1024.2.

Section 1024.17 Escrow Accounts

17(h) Format for Initial Escrow Account Statement

17(h)(1)

Although the Bureau did not propose to amend § 1024.17(h)(1), for the reasons set forth below, the Bureau is revising § 1024.17(h)(1). Currently, § 1024.17(h)(1) provides that the format and a completed example for an initial escrow account statement are set out in Public Guidance Documents entitled ''Initial Escrow Account Disclosure Statement—Format'' and ''Initial Escrow Account Disclosure Statement—Example,'' available in accordance with § 1024.3. However, § 1024.3 no longer specifies how the public may request copies of Public Guidance Documents. Thus, as revised, § 1024.17(h)(1) instead provides that the format and a completed example for an initial escrow account statement are set out in Public Guidance Documents entitled ''Initial Escrow Account Disclosure Statement—Format'' and ''Initial Escrow Account Disclosure Statement—Example,'' available in accordance with the direction in the definition of *Public Guidance Documents* in § 1024.2.

Section 1024.30 Scope

30(c) Scope of Certain Sections

Paragraph 30(c)(2)

Although the Bureau did not propose to add comment 30(c)(2)–1, for the reasons set forth below, the Bureau is adopting new comment 30(c)(2)–1 to provide further clarification on the determination of whether a property is a principal residence for purposes of Regulation X.

Pursuant to § 1024.30(c)(2), the procedures set forth in §§ 1024.39 through 1024.41 regarding early intervention, continuity of contact, and loss mitigation only apply to a mortgage loan secured by a property that is a borrower's principal residence. Consequently, a borrower's protections under Regulation X depend on whether or not the property securing the loan is the borrower's principal residence. The Bureau has previously explained that the determination of whether a property is the borrower's principal residence is a fact specific inquiry, particularly when a property may appear to be vacant.[113] Several servicers have indicated to the Bureau that they remain uncertain as to the applicability of, for example, the 120-day foreclosure referral waiting period in § 1024.41(f)(1)(i) when a property is vacant.

Accordingly, the Bureau is adopting comment 30(c)(2)–1, which clarifies that, if a property ceases to be a borrower's principal residence, the procedures set forth in §§ 1024.39 through 1024.41 do not apply to a mortgage loan secured by that property. The comment further explains that the determination of principal residence status will depend on the specific facts and circumstances regarding the property and applicable State law. It further clarifies this explanation with an example explaining that a vacant property may still be a borrower's principal residence.

The Bureau understands that a vacant property may still be the principal residence of a borrower in certain circumstances. For example, the Bureau understands that a property may still be the borrower's principal residence where a servicemember relocates pursuant to permanent change of station orders, was occupying the property as his or her principal residence immediately prior to displacement, intends to return to the property at some point in the future, and does not own any other residential property.[114] Comment 30(c)(2)–1 clarifies that the vacancy of a property does not necessarily mean that the property is no longer the borrower's principal residence. Accordingly, a vacant property may still be covered by § 1024.41, meaning that the 120-day foreclosure referral waiting period could still apply to the mortgage loan securing that property.

New comment 30(c)(2)–1 provides servicers, borrowers, and other stakeholders with additional guidance as to the applicability of servicers' responsibilities under §§ 1024.39 through 1024.41. It should help ensure that borrowers do not lose critical protections under the mortgage servicing rules to which they are entitled. At the same time, the Bureau is not establishing a bright-line test in comment 30(c)(2)–1, as the determination of principal residence status will depend on the specific facts and circumstances regarding the property and applicable State law.

30(d) Successors in Interest

As explained in part V.A., the Bureau proposed to apply subpart C of Regulation X to confirmed successors in interest (as defined by the proposed definition of successor in interest, discussed in the section-by-section analysis of § 1024.31). Proposed § 1024.30(d) accordingly would have provided that a successor in interest must be considered a borrower for the purposes of subpart C of Regulation X once a servicer confirms the successor in interest's identity and ownership interest in a property that secures a mortgage loan covered by Regulation X's mortgage servicing rules. For the reasons set forth in part V.A. and in this discussion, the Bureau is finalizing § 1024.30(d) with only one substantive change. That change expands the scope of protections that apply to confirmed successors in interest to include the escrow-related requirements in § 1024.17. The Bureau has also made technical changes to incorporate the new definition of confirmed successor

[112] 12 CFR 1024.2.

[113] *See* Amendments to the 2013 Mortgage Rules, 78 FR 60382, 60407 (Oct. 1, 2013).

[114] *See* Making Home Affordable Program, Handbook for Servicers of Non-GSE Mortgages Version 5.0, *HAMP Tier 1 Eligibility Criteria,* at 64 (2016), *available at https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/mhahandbook_5.pdf*; Fed. Reserve Sys., Bureau of Consumer Fin. Prot., Fed. Deposit Ins. Corp., Nat'l Credit Union Ass'n., Office of the Comptroller of the Currency, Interagency Guidance on Mortgage Servicing Practices Concerning Military Homeowners with Permanent Change of Station Orders, (June 21, 2012), *available at http://files.consumerfinance.gov/f/201206_cfpb_PCS_Orders_Guidance.pdf.*

in interest in § 1024.31 into § 1024.30(d). As under the proposal, the exemptions and scope limitations in Regulation X's mortgage servicing rules apply to the servicing of a mortgage loan with respect to a confirmed successor in interest under the final rule.[115]

Commenters raised a number of concerns about the scope of the definition of successor in interest, which are discussed in part V.A. and the section-by-section analysis of § 1024.31. A number of industry commenters urged the Bureau not to finalize the rule. These commenters suggested, for example, that the Bureau might consider other approaches, such as best practices, guidance, and consumer education, or that the Bureau could delay action in order to solicit further comment or conduct further outreach to industry, governmental offices, and other stakeholders. Some industry commenters urged the Bureau to narrow the protections that would apply to confirmed successors in interest and not to add additional protections. For example, one industry commenter suggested that the Bureau limit the successor in interest rules and commentary to facilitating communication with successors in interest, while another suggested that the Bureau adopt only enhanced policies and procedures requirements setting forth objectives for servicers to meet. A number of industry commenters also urged the Bureau not to extend the protections of the mortgage servicing rules to potential successors in interest, noting that doing so could allow someone without a true ownership interest to initiate actions that might jeopardize the interests of the true owner or the privacy of any borrowers on the account.

One trade association submitted a comment listing a large number of additional regulatory provisions that the Bureau should address from Regulations X and Z and other regulations. As part of this list, this commenter stated that a confirmed successor in interest should be a borrower for purposes of § 1024.17.

A number of consumer advocacy group commenters also urged the Bureau to extend the protections of § 1024.17 to successors in interest. As discussed in part V.A. and the section-by-section analyses of §§ 1024.36(i) and 1024.38(b)(1)(vi), various consumer advocacy groups also suggested that successors in interest should receive additional protections prior to confirmation. Some consumer advocacy groups urged the Bureau to create a privately enforceable right triggered by the homeowner's submission of documentation, not the servicer's additional step of confirming the person's status. They also urged the Bureau to provide a limited notice of error procedure related to successor status before a foreclosure sale and to make both the request for information and notice of error procedures privately enforceable. Consumer advocacy groups also stated that the final rule should extend dual tracking protections to successors in interest even prior to confirmation, to ensure that the house is not lost to foreclosure before successor in interest status is determined. In their view, once a successor in interest has submitted a complete loan modification application, including reasonable documentation establishing the successor in interest's identity and ownership interest, within the timelines contained in § 1024.41(f) and (g), a servicer should not be permitted to initiate or continue with foreclosure until it has reviewed the proof of successor status and the application.

A large number of commenters of various types expressed concern about the proposal's use of the term prior borrower because the borrower who transfers an interest may still be liable on the loan obligation (absent a release) and a borrower for purposes of Regulation X.

For the reasons set forth in part V.A. and this discussion, the Bureau is expanding the protections applicable to confirmed successors in interest to include § 1024.17. The Bureau agrees that successors in interest confront the same types of escrow issues as borrowers who are currently protected by § 1024.17. As consumer advocacy groups noted in their comments, successors in interest are particularly likely to experience escrow problems due to the transfer of ownership through which they acquired their ownership interest in the property. In issuing the proposal, the Bureau intended to include all of the mortgage servicing protections of Regulations X and Z, which, as commenters noted, should include the escrow protections of § 1024.17. Expanding the protections afforded to confirmed successors in interest to include § 1024.17 effectuates the Bureau's stated intent in the proposal to extend all of the Regulation X mortgage servicing protections to confirmed successors in interest and ensures that confirmed successors in interest can obtain necessary escrow information.

The Bureau has reviewed the other sections of Regulation X that commenters suggested that the Bureau should address and does not believe that it is appropriate to add them to the regulatory provisions listed in § 1024.30(d). For example, a trade association stated that the final rule should define a confirmed successor in interest as a borrower for purposes of § 1024.11, which governs mailing of documents under Regulation X. However, it is not necessary to do so because § 1024.11 does not use the term borrower and, by its terms, already applies to any provision of Regulation X that requires or permits mailing of documents.

Although many industry commenters questioned the need to extend the protections of the Regulation X mortgage servicing rules to confirmed successors in interest, the Bureau concludes that such protections are necessary and appropriate. As numerous consumer advocacy groups, a local government commenter, and the office of a State Attorney General explained and illustrated in their comments, successors in interest face many of the challenges that Regulation X's mortgage servicing rules were designed to prevent. These comments are consistent with various published reports and the Bureau's market knowledge.[116] The same reasons that

[115] Section 1024.30(b) exempts small servicers from §§ 1024.38 through 1024.41 (except § 1024.41(j)). Likewise, § 1024.30(b) provides an exemption from these sections with respect to reverse mortgage transactions and mortgage loan for which the servicer is a qualified lender. Accordingly, except as otherwise provided in § 1024.41(j), §§ 1024.38 through 1024.41 do not apply to confirmed successors in interest with respect to small servicers, reverse mortgage transactions, and mortgage loans for which the servicer is a qualified lender. Under the final rule, however, §§ 1024.30 through 1024.37 apply with respect to reverse mortgages secured by a property acquired by a confirmed successor in interest. Section 1024.30(c) provides that § 1024.33(a) only applies to reverse mortgage transactions and that §§ 1024.39 through 1024.41 only apply to mortgage loans secured by property that is a borrower's principal residence. With respect to confirmed successors in interest, § 1024.33(a) only applies to reverse mortgage transactions, and §§ 1024.39 through 1024.41 only apply to mortgage loans secured by property that is the confirmed successor in interest's principal residence.

[116] *See* part V.A., *supra; see also* Bureau of Consumer Fin. Prot., *Supervisory Highlights Mortgage Servicing Special Edition (Issue 11)* at 15–16 (June 2016); Alys Cohen, Nat'l Consumer Law Ctr., *Snapshots of Struggle: Saving the Family Home After a Death or Divorce, Successors Still Face Major Challenges in Obtaining Loan Modifications* (Mar. 2016), *available at https://www.nclc.org/images/pdf/pr-reports/report-snapshot-struggle.pdf*; Nat'l Hous. Res. Ctr., *Servicer Compliance with CFPB Servicing Regulations* (Feb. 2016), *available at http://www.hsgcenter.org/wp-content/uploads/2016/02/NHRC-2016-Servicing-Survey-Report.pdf*; Nat'l Consumer Law Ctr., *NCLC Survey Reveals Ongoing Problems with Mortgage Servicing* 2, 5 (May 2015), *available at http://www.nclc.org/images/pdf/foreclosure_mortgage/mortgage_servicing/ib-servicing-issues-2015.pdf*; Nat'l Council of La Raza & Nat'l Hous. Res. Ctr., *Are Mortgage Servicers*

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supported the Bureau's adoption of the 2013 RESPA Servicing Final Rule also support § 1024.30(d): Successors in interest are homeowners whose property is subject to foreclosure if the mortgage loan obligation is not satisfied, even though the successor in interest may not have assumed that obligation under State law or otherwise be liable on the obligation. In addition to § 1024.17 as discussed above, the Bureau has considered each section of subpart C of Regulation X and believes that each section should apply to confirmed successors in interest.[117]

Specifically, the Bureau concludes that §§ 1024.35 and 1024.36 should apply to confirmed successors in interest.[118] When the Bureau issued §§ 1024.35 and 1024.36 in the 2013 RESPA Servicing Final Rule, the Bureau acknowledged that both borrowers and servicers would be best served if the Bureau were to define clearly a servicer's obligation to correct errors or respond to information requests.[119] Clearly defining a servicer's obligation with respect to a confirmed successor in interest will similarly benefit both servicers and confirmed successors in interest. Under current § 1024.38(b)(1)(vi), servicers are required to have policies and procedures reasonably designed to ensure that the servicer can identify and communicate with successors in interest upon notification of the death of a borrower. Because §§ 1024.35 and 1024.36 do not currently necessarily apply to successors in interest, however, the extent of the obligation to communicate with successors in interest and how a successor in interest may obtain information from a servicer are not clear. Sections 1024.35 and 1024.36 will provide important protections to confirmed successors in interest. For instance, § 1024.35 will provide confirmed successors in interest with protections regarding a servicer's failure to accept payments conforming to the servicer's written requirements for payments. Additionally, § 1024.36's requirements to provide information about the mortgage loan will help prevent unnecessary foreclosure on the confirmed successor in interest's property by, for example, ensuring that a confirmed successor in interest can obtain information about the payment history of the loan. Because confirmed successors in interest, like transferor borrowers, bear the risk of unnecessary foreclosure as homeowners of the property, §§ 1024.35 and 1024.36 should apply to confirmed successors in interest.

The Bureau solicited comment on whether any information that could be provided to successors in interest under §§ 1024.35 and 1024.36 presents privacy concerns and whether servicers should be permitted to withhold any information from successors in interest out of such privacy concerns. A number of commenters expressed concerns regarding privacy issues, which are discussed in more detail in part V.A. In light of these concerns, the Bureau is amending §§ 1024.35 and 1024.36 to allow servicers to limit the information that confirmed successors in interest may obtain about other borrowers and that all borrowers may obtain about potential and confirmed successors in interest, as discussed in the section-by-section analyses of §§ 1024.35 and 1024.36.[120]

As explained in part V.A., after considering the comments received, the Bureau has decided that the loss mitigation procedures contained in § 1024.41 should apply to confirmed successors in interest and that servicers should be required to evaluate confirmed successors in interest for loss mitigation options to prevent unnecessary foreclosure. Significant consumer harm flows from a servicer's failure to afford a confirmed successor in interest the same access to loss mitigation as other homeowners. The Bureau also believes that requiring servicers to evaluate confirmed successors in interest for loss mitigation prior to the confirmed successor in interest's assumption of liability for the mortgage debt under State law is consistent with Fannie Mae and Freddie Mac guidelines and serves RESPA's purposes as discussed in part V.A.[121]

Consistent with the proposal and with § 1024.41's treatment of borrowers generally, the final rule does not require a servicer to offer a successor in interest any particular loss mitigation option.[122] The final rule also does not prevent a servicer from conditioning an offer for a loss mitigation option on the successor in interest's assumption of the mortgage loan obligation under State law or from offering loss mitigation options to the successor in interest that differ based on whether the successor in interest would simultaneously assume the mortgage loan obligation. Under the final rule, however, a servicer cannot condition review and evaluation of a loss mitigation application on a confirmed successor in interest's assumption of the mortgage obligation. If the property is the confirmed successor in interest's principal residence and the procedures set forth in § 1024.41 are otherwise applicable, a servicer is, for example, required under § 1024.41(b) to respond to a loss mitigation application from the confirmed successor in interest and exercise reasonable diligence in obtaining documents and information to complete the loss mitigation application. The foreclosure prohibitions under § 1024.41(f) and (g) may also apply.

For similar reasons, the early intervention and continuity of contact requirements contained in §§ 1024.39 and 1024.40 should apply to confirmed

Following the New Rules? A Snapshot of Compliance with CFPB Servicing Standards 3, 7 (Jan. 9, 2015), *available at http://www.nclr.org/Assets/uploads/Publications/mortgageservicesreport_11215.pdf*; Nat'l Consumer Law Ctr., *Examples of Cases Where Successors in Interest and Similar Parties Faced Challenges Seeking Loan Modifications and Communicating with Mortgage Servicers* (July 1, 2014), *available at http://www.nclc.org/images/pdf/foreclosure_mortgage/mortgage_servicing/successor-stories-2014.pdf*; Cal. Reinvestment Coal., *Chasm Between Words and Deeds X: How Ongoing Mortgage Servicing Problems Hurt California Homeowners and Hardest-Hit Communities* (May 2014), *available at http://www.calreinvest.org/publications/california-reinvestment-coalition-research*; Nat'l Hous. Res. Ctr., *National Mortgage Settlement Servicing Standards and Noncompliance: Results of a National Housing Counsel Survey* 8 (June 5, 2013), *available at content/uploads/2013/06/NMS_Findings.pdf*; Cal. Reinvestment Coal., *Chasm Between Words and Deeds IX: Bank Violations Hurt Hardest Hit Communities* (Apr. 2013), *available at http://www.calreinvest.org/publications/california-reinvestment-coalition-research.*

[117] As explained in part V.A., *supra,* and in the section-by-section analyses of § 1024.32(c)(1) through (4), *infra,* the final rule includes additional provisions governing how the Mortgage Servicing Rules in Regulation X apply to confirmed successors in interest.

[118] As described in the section-by-section analysis of § 1024.36(i), *infra,* in addition to applying the Mortgage Servicing Rules, including § 1024.36, with respect to confirmed successors in interest, the Bureau is also finalizing a new information request requirement in § 1024.36(i) that applies before the servicer has confirmed the successor in interest's status.

[119] 78 FR 10695, 10736 (Feb. 14, 2013).

[120] The Bureau also considered, as an alternative, the approach suggested by an industry commenter that would have allowed servicers to omit ''personal, private information.'' The Bureau concluded that such a standard would have proved difficult to apply and could, in many instances, have resulted in servicers withholding information that confirmed successors in interest need to preserve their ownership interest in the property.

[121] *See* Fannie Mae, Servicing Guide Announcement SVC–2013–17 (Aug. 28, 2013), *available at https://www.fanniemae.com/content/announcement/svc1317.pdf*; Freddie Mac, Bulletin 2013–3 (Feb. 15, 2013), *available at http://www.freddiemac.com/singlefamily/guide/bulletins/pdf/bll1303.pdf.*

[122] A trade association also stated it was not clear if the proposal would require servicers to allow confirmed successors in interest to assume the loan. State law may require servicers to allow confirmed successors in interest to assume the loan, but the Bureau is not interpreting State law, and the final rule does not require assumptions as a matter of Federal law.

successors in interest.[123] In issuing these provisions in the 2013 RESPA Servicing Final Rule, the Bureau stated that §§ 1024.39 and 1024.40 are appropriate to achieve the consumer protection purposes of RESPA, including to help borrowers avoid unwarranted or unnecessary costs and fees and to facilitate review of borrowers for foreclosure avoidance options.[124] The Bureau further determined that §§ 1024.39 and 1024.40 are necessary and appropriate to carry out the purposes of the Dodd-Frank Act of ensuring that markets for consumer financial products and services are fair, transparent, and competitive; that consumers are provided with timely and understandable information to make responsible decisions about financial transactions; and that markets for consumer financial products and services operate transparently and efficiently to facilitate access and innovation.[125] These same consumer protection purposes are served by applying §§ 1024.39 and 1024.40 to confirmed successors in interest, who, as homeowners of a property securing a mortgage loan, may be required to make payments on the loan to avoid foreclosure. In particular, the protections provided by §§ 1024.39 and 1024.40 serve to prevent unnecessary foreclosure by alerting confirmed successors in interest to any delinquency on the mortgage loan secured by their property and assisting with the process of applying for loss mitigation options.

Finally, the Bureau concludes that the requirements contained in § 1024.33 (regarding mortgage servicing transfers), § 1024.34 (regarding escrow payments and account balances), and § 1024.37 (regarding force-placed insurance) should apply to confirmed successors in interest. The same rationale for applying these rules to any borrower applies with respect to confirmed successors in interest, who are also homeowners and may be required to make payments on the loan to avoid foreclosure. Confirmed successors in interest, like other borrowers, need to know where to send their mortgage payments in the event of a servicing transfer. They also need to know the balance of the escrow loan account, how their payments into that account are applied, and the status of tax and homeowner's insurance payments made from the escrow account. Like other borrowers, they also need information about any force-placed insurance the servicer has taken out on their property. Moreover, it would add unnecessary complexity to the rules to apply the rest of the Mortgage Servicing Rules in Regulation X to confirmed successors in interest but not to apply §§ 1024.33, 1024.34, and 1024.37 to them. The Bureau believes it is preferable to apply all of the Mortgage Servicing Rules in Regulation X to confirmed successors in interest, unless there is a compelling reason not to apply a particular rule. The Bureau solicited comment as to whether any such compelling reasons exist with respect to §§ 1024.33, 1024.34, and 1024.37. After reviewing the comments, the Bureau has not identified any compelling reasons not to apply a particular provision of the Mortgage Service Rules in Regulation X to confirmed successors in interest.

While industry commenters expressed a number of concerns relating to the cost of complying with the Regulation X mortgage servicing requirements with respect to confirmed successors in interest, many of the requirements that they identified as particularly burdensome or costly are not part of the final rule. For example, a number of industry commenters indicated that it would be costly and might require systems changes if the final rule required servicers to send confirmed successors in interest duplicate copies of mortgage servicing rule notices that the servicer was also sending to another borrower on the account. The final rule includes new § 1024.32(c)(4), which clarifies that such duplicate notices are generally not required. Other industry commenters expressed concern that it would be costly if the final rule required servicers to preserve until confirmation information requests from potential successors in interest who request information other than a list of documents required for confirmation. Section 1024.36(i) does not require servicers to preserve this type of request. Similarly, a number of industry commenters said that it would be burdensome if the final rule allowed requests for information under § 1024.36(i) to be sent to any address for the servicer. Like the proposal, the final rule permits the servicer to establish an exclusive address. Some trade associations suggested that the Bureau should have considered the costs for servicers to become equipped to originate mortgage loans. Because the final rule does not require servicers to originate mortgage loans, this type of cost, like many others mentioned by commenters, is not one imposed by the final rule.[126]

Nevertheless, the Bureau recognizes that providing confirmed successors in interest with protections under § 1024.17 and subpart C will cause servicers to incur some costs. As many industry commenters noted, servicers may need to devote additional resources to assessing the identity and ownership interest of potential successors in interest as part of the confirmation process established by the final rule. The Bureau expects that these additional costs will be limited because servicers already routinely make these types of determinations. For example, servicers confirm the identity of potential successors in interest and other third parties when such parties assume the mortgage loan obligation under State law. Prior to bringing a foreclosure action, servicers also generally have to determine who owns the property at issue, in order to ensure that all proper parties are notified. Moreover, the final rule allows a servicer to require additional documentation from a potential successor in interest if it reasonably determines that it cannot make a confirmation determination based on the documentation provided by the potential successor in interest.[127] The

[123] Although one industry commenter expressed concern that sending loss mitigation related letters and trying to establish right party contact with individuals not liable on a delinquent loan could constitute abusive or harassing debt collection efforts, in violation of FDCPA section 806, 15 U.S.C. 1692d, the Bureau does not believe that providing this important information about the property at issue to confirmed successors in interest in a notice that is required by Regulation X will be abusive or harassing absent other conduct making the overall effect of the communication abusive or harassing, as explained in part V.A., *supra.* Additionally, if upon confirmation a servicer sends an initial written notice and acknowledgment form to a confirmed successor in interest who is not liable on the mortgage loan obligation in compliance with the requirements of § 1024.32(c)(1) through (3), the final rule gives the servicer the option not to send Mortgage Servicing Rule notices to the confirmed successor in interest until the confirmed successor in interest requests them through the acknowledgment. *See* part V.A., *supra,* and the section-by-section analysis of § 1024.32(c), *infra.*

[124] 78 FR 10696, 10791 (Feb. 14, 2013) (discussing § 1024.39); *see also id.* at 10809–10 (discussing § 1024.40).

[125] *Id.* at 10791 (citing section 1021(a) and (b) of the Dodd-Frank Act).

[126] Successors in interest may have a right under State law to assume the mortgage loan obligation, but that is independent of the final rule, which does not mandate assumptions. In any event, a successor in interest's assumption of the loan obligation generally would not result in a new origination. The Bureau's July 2014 interpretive rule clarified that, where a successor in interest who has previously acquired a legal interest in a dwelling is added as an obligor on the mortgage loan, the Regulation Z Ability-to-Repay Rule does not apply. *See* 79 FR 41631, 41632–33 (July 17, 2014).

[127] Comment 38(b)(1)(vi)–4 explains, for example, that, if there is pending litigation involving the potential successor in interest and other claimants regarding who has title to the property at issue, a servicer may specify that documentation of a court determination or other resolution of the litigation is

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Bureau anticipates that these considerations will mitigate any additional costs associated with making confirmation determinations in conformance with the final rule.

Servicers may also have to devote additional resources to tracking successors in interest, providing responses to information requests from confirmed successors in interest, handling error resolution, responding to and evaluating loss mitigation applications from successors in interest, and otherwise communicating with successors in interest. Providing confirmed successors in interest with § 1024.41's protections may delay foreclosure on the property securing the mortgage loan in some cases, as discussed above. However, because servicers are already required to comply with the requirements of § 1024.17 and subpart C with respect to transferor borrowers, the additional cost to servicers to apply these requirements to confirmed successors in interest should be limited. Moreover, applying these protections may result in the avoidance of unnecessary foreclosures where loss mitigation options are available, thus providing benefits to all parties.

The final rule limits the application of § 1024.30(d) to confirmed successors in interest.[128] Because some people representing themselves as successors in interest may not actually have an ownership interest in the property, requiring servicers to apply Regulation X's communication, disclosure, and loss mitigation requirements to successors in interest before the servicer has confirmed the successor in interest's identity and ownership interest in the property could present privacy and other concerns, as many commenters noted. The Bureau also believes it would be inappropriate to require servicers to incur substantial costs before confirming the successor in interest's identity and ownership interest in the property. The final rule includes, however, a new information request for potential successors in interest and revised policies and procedures requirements relating to potential successors in interest, which are discussed in the section-by-section analyses of §§ 1024.36(i) and 1024.38(b)(1)(vi), as well as new Regulation Z commentary related to payments by successors in interest, which is discussed in the section-by-section analysis of § 1026.36(c).

Proposed comment 30(d)–1 would have clarified the requirement in proposed § 1024.30(d) that a successor in interest must be considered a borrower for the purposes of Regulation X's subpart C once a servicer confirms the successor in interest's identity and ownership interest in the property. The proposed comment included an example of the application of § 1024.41's loss mitigation procedures to successors in interest and a cross-reference to § 1024.36(i)'s requirement that a servicer must respond to written requests for certain information from a potential successor in interest.

The Bureau is finalizing proposed comment 30(d)–1 with a number of changes. To conform to final § 1024.30(d), the final version of comment 30(d)–1 identifies § 1024.17 as a protection applicable to confirmed successors in interest. As finalized, comment 30(d)–1 explains that a confirmed successor in interest must be considered a borrower for purposes of subpart C and § 1024.17, regardless of whether the successor in interest assumes the mortgage loan obligation under State law. An industry commenter suggested that the Bureau clarify that the treatment of a successor in interest may depend on whether the property is the successor in interest's principal residence, noting that, under § 1024.30(c)(2), §§ 1024.39 through 1024.41 only apply to mortgage loans that are secured by a property that is a borrower's principal residence. In illustrating how § 1024.41's loss mitigation procedures apply to confirmed successors in interest, the final version of comment 30(d)–1 indicates that the property must be the confirmed successor in interest's principal residence and that the procedures set forth in § 1024.41 must otherwise be applicable. Because comment 30(d)–1 addresses the treatment of confirmed successors in interest, the Bureau has eliminated the cross-reference to § 1024.36(i) that appeared in proposed comment 30(d)–1 and has added the word confirmed in the comment heading. The final version of comment 30(d)–1 also includes technical changes to incorporate the new definition of confirmed successor in interest.

The final version of comment 30(d)–1 also clarifies that treatment of a confirmed successor in interest as a borrower for purposes of § 1024.17 and subpart C does not affect whether the confirmed successor in interest is subject to the contractual obligations of the mortgage loan agreement, which is determined by applicable State law. This addition clarifies that confirmation of a successor in interest who has not assumed the loan obligation and is not otherwise liable on the obligation does not make the successor in interest a ''borrower'' for liability purposes.[129] Consistent with an interpretive rule that the Bureau is issuing concurrently with this final rule, comment 30(d)–1 also clarifies that communications in compliance with Regulation X to a confirmed successor in interest as defined in § 1024.31 do not violate FDCPA section 805(b) because the term consumer for purposes of FDCPA section 805 includes any person who meets the definition in Regulation X of confirmed successor in interest.

The final rule also adds new comment 30(d)–2 relating to assumption of the mortgage loan obligation under State law. This new comment clarifies that a servicer may not require a confirmed successor in interest to assume the mortgage loan obligation under State law to be considered a borrower for purposes of § 1024.17 and subpart C. As explained in part V.A., the Bureau believes that it is important to make the protections of the Mortgage Servicing Rules available to confirmed successors in interest who have not assumed the mortgage loan obligation under State law because confirmed successors in interest may need information about the loan in order to decide whether to assume the loan obligation and to protect their ownership interest.

New comment 30(d)–2 further explains that, if a successor in interest assumes a mortgage loan obligation under State law or is otherwise liable on the mortgage loan obligation, the protections that the successor in interest enjoys under Regulation X are not limited to the protections that apply under § 1024.30(d) to a confirmed

required before a confirmation determination can be made. Additionally, if a servicer requires additional information in order to identify the documents required for confirmation in response to a written request under § 1024.36(i), the final rule allows the servicer to provide a response that includes examples of documents typically accepted to establish identity and ownership interest in a property, indicates that the person may obtain a more individualized description of required documents by providing additional information, specifies what additional information is required, and provides contact information for further assistance.

[128] However, a successor in interest could be a borrower for purposes of the Mortgage Servicing Rules in Regulation X (both currently and as amended by the final rule), even if the successor in interest has not been confirmed, if the successor in interest has assumed the mortgage loan obligation under State law or is otherwise obligated on the mortgage loan. Section 1024.30(d) does not prevent an unconfirmed successor in interest from being a borrower for purposes of Regulation X.

[129] Since confirmation does not affect liability under State law, it would not be accurate, for example, for a servicer to report to a consumer reporting agency that a confirmed successor in interest is delinquent on the mortgage loan if the confirmed successor in interest has not assumed the mortgage loan obligation under State law and is not otherwise liable for it.

successor in interest. This addition clarifies that § 1024.30(d) does not abrogate the Regulation X protections that already exist for persons (including potential or confirmed successors in interest) who assume a mortgage loan obligation under State law.

Proposed comment 30(d)–2 addressed how a servicer's confirmation of a successor in interest's identity and ownership interest in the property would affect the borrower who transferred the ownership interest. The proposed comment would have provided that, even after a servicer's confirmation of a successor in interest's identity and ownership interest in the property, the servicer would still be required to comply with the requirements of Regulation X's subpart C with respect to the prior borrower, unless that borrower also had either died or been released from the obligation on the mortgage loan. The proposed comment also would have provided that the prior borrower would retain any rights under Regulation X's subpart C that accrued prior to the confirmation of the successor in interest to the extent these rights would otherwise survive the prior borrower's death or release from the obligation. For the reasons stated in part V.A. and in this discussion, the Bureau is finalizing proposed comment 30(d)–2, renumbered as comment 30(d)–3, with substantial revisions to make it clear that confirmation of a successor in interest does not strip the borrower who transferred the ownership interest of any protections under Regulation X.[130]

As explained in part V.A., the Bureau received many comments objecting to the use of the term prior borrower on the grounds that it was confusing and inaccurate. A number of commenters also expressed concern that the Bureau's proposal would not provide adequate protection to transferor borrowers or the estates of transferor borrowers.

As many commenters noted, the term prior borrower is inapt because a transferor borrower may still be liable on the mortgage note and may have significant legal interests at stake with respect to the mortgage loan. For example, the servicer may continue to report the performance of the loan on the transferor borrower's credit report, and, in the event of foreclosure, the transferor borrower could be liable for any deficiency, depending on the contract terms and applicable State law. The Bureau also recognizes that, when a transferor borrower dies, the estate and its representative have an important role to play and that Regulation X can provide valuable information and protections to estates even after confirmation of a successor in interest.

In light of these considerations, the Bureau does not intend for the final rule to take away the protections that Regulation X currently provides for living transferor borrowers or for estates of transferor borrowers and their representatives and has significantly revised proposed comment 30(d)–2 to make this clear. As finalized, comment 30(d)–3 provides that, even after a servicer's confirmation of a successor in interest, the servicer is still required to comply with all applicable requirements of Regulation X with respect to the borrower who transferred the ownership interest to the successor in interest.

The Bureau acknowledges that, under the final rule, servicers will sometimes be required to comply with the Mortgage Servicing Rules in Regulation X with respect to more than one person—such as the transferor borrower or the transferor borrower's estate and the confirmed successor in interest, as well as, in some cases, multiple confirmed successors in interest who each acquire an ownership interest in a property. Although some commenters expressed concern about this, the Bureau notes that the Mortgage Servicing Rules already may apply with respect to more than one borrower for a particular mortgage loan. Spouses, for example, are commonly jointly obligated on the mortgage note, and the Mortgage Servicing Rules apply with respect to each borrower in such cases. In addition, the final rule includes new § 1024.32(c)(4), which makes it clear that servicers generally do not need to send Regulation X notices to confirmed successors in interest if the notices would be duplicative of notices sent to another borrower on the account. Accordingly, the Bureau does not believe that applying the Mortgage Servicing Rules in Regulation X to confirmed successors in interest presents novel challenges for servicers in this regard.

Section 1024.31 Definitions

Confirmed Successor in Interest

For clarity and ease of reference, the Bureau is adding a definition of confirmed successor in interest to § 1024.31 in the final rule. As finalized, § 1024.31 defines confirmed successor in interest for purposes of subpart C of Regulation X as a successor in interest once a servicer has confirmed the successor in interest's identity and ownership interest in a property that secures a mortgage loan subject to subpart C of Regulation X. This new definition was not part of the proposal but is consistent with how the Bureau used the term confirmed successor in interest in the preamble to the proposal. The Bureau is also finalizing a definition of successor in interest, as discussed below.

Delinquency

Section 1024.31 contains definitions for various terms that are used throughout the provisions of subpart C of Regulation X. It does not contain a generally-applicable definition of the term ''delinquency.'' However, delinquency is defined for the specific purposes of §§ 1024.39(a) and (b) and 1024.40(a) as beginning ''on the day a payment sufficient to cover principal, interest, and, if applicable, escrow for a given billing cycle is due and unpaid, even if the borrower is afforded a period after the due date to pay before the servicer assesses a late fee.''[131] Delinquency is not defined for purposes of other sections of subpart C, including § 1024.41(f)(1), which prohibits a servicer from making the first notice or filing for foreclosure unless ''[a] borrower's mortgage loan obligation is more than 120 days delinquent.''

To ensure that the term ''delinquency'' is interpreted consistently throughout Regulation X's mortgage servicing rules, the Bureau proposed to remove the current definition of delinquency applicable to §§ 1024.39(a) and (b) and 1024.40(a) and to add a general definition of delinquency in § 1024.31 that would apply to all sections of subpart C.[132] The Bureau proposed to define delinquency as a period of time during which a borrower and the borrower's mortgage loan obligation are delinquent. The proposed definition would have provided that a borrower and a borrower's mortgage loan obligation are delinquent beginning on the day a periodic payment sufficient to cover principal, interest, and, if applicable, escrow, became due and unpaid, until such time as the outstanding payment is made.[133] Delinquency under the

[130] As described in the section-by-section analysis of § 1026.2(a)(11), *infra*, the Bureau is making parallel revisions to similar commentary with respect to Regulation Z's requirements.

[131] Comments 39(a)–1.i and 40(a)–3.

[132] The proposed definition would not have affected the interpretation of § 1024.33(c), which prohibits servicers from treating a borrower as ''late for any purpose'' if a transferee servicer receives a payment from a borrower within the 60-day period beginning on the effective date of a transfer.

[133] All three concepts—delinquency, delinquent borrower, and delinquent mortgage loan obligation—are used interchangeably throughout subpart C. *See, e.g.,* 12 CFR 1024.39(a) (''delinquent borrower''; ''borrower's delinquency''); 12 CFR

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proposed definition would not have been triggered by a borrower's failure to pay a late fee, consistent with current comments 39(a)–1.i and 40(a)–3. The Bureau believed that it was unlikely that servicers would initiate foreclosure on borrowers who are current with respect to principal, interest, and escrow payments solely because of a failure to pay accumulated late charges. In contrast with the definition of delinquency currently found in comments 39(a)–1.i and 40(a)–3, the proposed definition would not have included the phrase ''for a given billing cycle.'' The proposal explained that, as used in the context of the live contact and continuity of contact requirements under §§ 1024.39 and 1024.40, respectively, ''for a given billing cycle'' was intended to ensure that the servicer met the respective requirements of those rules during each billing cycle in which the borrower was delinquent. However, such a definition would have created incongruities if applied to the 120-day foreclosure referral waiting period in § 1024.41(f)(1)(i).

The Bureau sought to provide servicers, borrowers, and other stakeholders with clear guidance on how to determine whether a borrower is delinquent for purposes of Regulation X's servicing provisions and when the borrower's delinquency began. Since the publication of the 2013 RESPA Servicing Final Rule, the Bureau had received numerous inquiries about how servicers should calculate delinquency with respect to those provisions of the Mortgage Servicing Rules that refer to delinquency but do not define delinquency. In particular, stakeholders had asked the Bureau how servicers should calculate the 120-day foreclosure referral waiting period set forth in § 1024.41(f)(1)(i).[134]

The Bureau also proposed three new comments to the proposed definition of delinquency. Proposed comment 31 (Delinquency)–1 essentially restated existing comments 39(a)–1.i and 40(a)–3 by stating that a borrower becomes delinquent beginning the day on which the borrower fails to make a periodic payment, even if the servicer grants the borrower additional time after the due date to pay before charging the borrower a late fee.

Proposed comment 31 (Delinquency)–2 addressed how delinquency should be calculated if a servicer applies a borrower's payments to the oldest outstanding periodic payment. Proposed comment 31 (Delinquency)–2 would have clarified that, if a servicer applies payments to the oldest outstanding periodic payment, the date of the borrower's delinquency must advance accordingly. The proposed comment included an example illustrating this concept. The Bureau understood from its outreach that many servicers credit payments made to a delinquent account to the oldest outstanding periodic payment; in fact, the Fannie Mae's and Freddie Mac's model deeds of trust require this.[135] The Bureau also understood that most servicers already do not treat such a borrower as seriously delinquent and do not initiate loss mitigation procedures or seek to foreclose on that borrower. As such, the Bureau explained that the proposed comment would not place a significant additional burden on most servicers. Moreover, because the proposed comment would not have required servicers to apply payments to the oldest outstanding periodic payment, consistent with the Bureau's decision in the context of the 2013 TILA Servicing Final Rule, servicers who do not apply payments to the oldest outstanding periodic payment would be unaffected.

Proposed comment 31 (Delinquency)-3 would have permitted servicers to apply a payment tolerance to partial payments under certain circumstances. The Bureau learned from its pre-proposal outreach that some servicers elect or are required to treat borrowers as having made a timely payment even if they make payments that are less than the amount due by some small amount (perhaps as a result of a scrivener's error or a recent ARM payment adjustment), such that the account is reflected as current in the servicer's systems. Proposed comment 31 (Delinquency)-3 would have permitted servicers that elect to advance outstanding funds to a borrower's mortgage loan account to treat the borrower's insufficient payment as timely, and therefore not delinquent, for purposes of Regulation X's mortgage servicing rules. The comment would have clarified, however, that if a servicer chooses not to treat the borrower as delinquent for purposes of subpart C of Regulation X, the borrower is not delinquent as defined in § 1024.31. This clarification was intended to prevent servicers from selectively applying a payment tolerance only where doing so benefits the servicer. The Bureau sought comment on whether it should limit servicers' use of a payment tolerance to a specific dollar amount or percentage of the periodic payment amount and, if so, what the specific amount or percentage should be.

The Bureau sought comment regarding whether the proposed definition of delinquency had the potential of interfering with industry's existing policies and procedures and on whether there were better ways to articulate the proposed definition. The Bureau received a number of comments. Most commenters generally supported the proposal, and some stated that it reflected industry's general understanding of the term. One industry commenter expressed concern with the proposal's treatment of a borrower as delinquent until such time as the outstanding payment is made. The commenter noted that, in the section-by-section analysis of § 1024.41(i) discussing duplicative requests, the Bureau assumed that a borrower who is performing on a permanent loan modification does not meet the definition of delinquency that the Bureau was proposing. The commenter stated that a borrower performing on a permanent loan modification may not have made all outstanding payments and therefore would be considered delinquent under the proposal, contrary to the Bureau's assumption.

Several industry commenters expressed concern that the proposal addressed only breaches of the mortgage loan obligation regarding the borrower's periodic payment obligation and did not specifically address other breaches of the mortgage loan obligation. They stated that, in addition to delinquency, borrowers may breach mortgage contracts in other ways, including through, for example, non-occupancy of the property, waste, damage to the property, and civil or criminal violations that could result in forfeiture of the property.[136] A few industry

1024.39(b) (same); 12 CFR 1024.41(f)(1)(i) (''A borrower's mortgage loan obligation is more than 120 days delinquent'').

[134] For example, in advance of the proposal, some servicers that apply a borrower's payments to the oldest outstanding periodic payment sought guidance from the Bureau about how to calculate the length of a borrower's delinquency. *See* Am. Bankers Ass'n. Letter to Bureau of Consumer Fin. Prot. (Oct. 24, 2014), *available at http://www.aba.com/Advocacy/commentletters/Documents/ABALetterRollingDelinquencies102414.pdf*.

[135] *See, e.g.,* Fannie Mae, *Security Instruments, https://www.fanniemae.com/singlefamily/security-instruments* (security instruments for various states but with a uniform covenant that payments shall be applied to each periodic payment in the order in which it became due); Fannie Mae & Freddie Mac, California Single Family Uniform Instrument, Form 3005–4, *available at https://www.fanniemae.com/content/legal_form/3005w.doc*; Fannie Mae & Freddie Mac, New York Single Family Uniform Instrument, Form 3033, *available at https://www.fanniemae.com/content/legal_form/3033w.doc*.

[136] The Bureau notes that these other types of breaches are sometimes referred to as non-monetary breaches or non-monetary defaults, even though they may involve a monetary aspect (such as failure

commenters expressed concern that a borrower's failure to pay taxes or insurance outside of escrow would not meet the proposed definition of delinquency. Some industry commenters requested that the Bureau clarify whether these types of contractual defaults would be considered a delinquency that would trigger the 120-day period under § 1024.41(f)(1)(i) during which a servicer may not make the first notice or filing required by applicable law for any judicial or non-judicial foreclosure. Several industry commenters requested that the 120-day foreclosure referral waiting period under § 1024.41(f)(1)(i) not apply when borrowers commit ''waste'' or abandonment in violation of the underlying mortgage contract because these forms of default impair the value of the collateral.

Many industry commenters also expressed concern that the proposal did not specifically address ''rolling delinquencies.'' These commenters described rolling delinquencies as situations where the borrower becomes delinquent, resumes making payments but does not make all outstanding payments to cure the delinquency, and the servicer's application of payments to the oldest outstanding payment advances the borrower's delinquency. A primary concern among commenters was a situation where a servicer would never be able to pursue foreclosure because a borrower is delinquent but never become more than 120 days delinquent because of the rolling delinquency. In this circumstance, § 1024.41(f)(1)(i), as described above, would prohibit the servicer from making the first notice or filing required by applicable law for any judicial or non-judicial foreclosure. Industry commenters urged the Bureau to provide clarity on the application of § 1024.41(f)(1)(i) to rolling delinquencies. A few commenters suggested the Bureau permit servicers to file for foreclosure when a borrower has been continuously delinquent for a period of time, but does not becomes more than 120 days delinquent. Two commenters requested that the Bureau clarify that servicers have the right to accelerate the mortgage loan if permitted by State law and the contract and can then refer the mortgage loan to foreclosure if the accelerated amount is not paid after 120 days.

One consumer advocacy group expressed support for the clarification in proposed comment 31 (Delinquency)-2 that, if a servicer applies payments to the oldest outstanding periodic payment, a payment by a delinquent borrower advances the date the borrower's delinquency began. This commenter recommended the Bureau consider requiring servicers to apply borrower payments to the oldest outstanding periodic payment. This commenter said that this guidance is consistent with Fannie Mae and Freddie Mac guidelines and, as such, should not impose significant costs on industry.

Several industry commenters and one consumer advocacy group expressed support for proposed comment 31 (Delinquency)-3. Some industry commenters stated that servicers do not always advance outstanding funds to address the insufficient payment. They said, for example, that servicers may use escrow funds to make up the delinquency. One consumer advocacy group recommended that the Bureau limit servicers' use of a payment tolerance to 10 dollars. Several industry commenters requested that a limit on payment tolerances not be set, but recommended that, if the Bureau did set a limit, such a limit should be set at a dollar amount rather than a percentage. One industry commenter suggested that any limit be set at an amount not to exceed five dollars.

For the reasons discussed below, the Bureau is adopting the definition of delinquency in § 1024.31 with changes from the proposal. The Bureau is adopting a revised definition of delinquency in § 1024.31 and adopting comments 31 (Delinquency)-1 and -2 with revisions for clarity. The Bureau is making minor revisions to comment 31 (Delinquency)-3 in light of comments, and is adopting new comment 31 (Delinquency)-4 for further clarity.

As adopted, the definition of delinquency in § 1024.31 explains that delinquency means a period of time during which a borrower and a borrower's mortgage loan obligation are delinquent. It further explains that a borrower and a borrower's mortgage loan obligation are delinquent beginning on the date a periodic payment sufficient to cover principal, interest, and, if applicable, escrow becomes due and unpaid, until such time as no periodic payment is due and unpaid.

The Bureau recognizes that the proposed language indicating that the delinquency ends when the outstanding payment is made may have caused uncertainty as to whether a borrower performing on a permanent loan modification would have been delinquent under the proposed definition of delinquency. Accordingly, the Bureau is revising the definition of delinquency to clarify that a borrower and a borrower's mortgage loan obligation are delinquent beginning on the date a periodic payment sufficient to cover principal, interest, and, if applicable, escrow becomes due and unpaid, until such time as no periodic payment is due and unpaid. By providing that the delinquency exists only until no periodic payment is due and unpaid, the revised definition of delinquency addresses a situation where a borrower may not have made the outstanding payment, but no periodic payment is due and unpaid. For example, a borrower performing under a permanent loan modification agreement may not have made all outstanding payments but may be making all periodic payments due and owing under the modified contract terms. Thus, a borrower performing on a permanent loan modification is not delinquent under § 1024.31.

The definition of delinquency in § 1024.31 applies only for purposes of the mortgage servicing rules in Regulation X. It is not intended to affect industry's existing policies and procedures for identifying and working with borrowers who are late or behind on their payments, or existing requirements imposed by other laws or regulations, such as the Fair Credit Reporting Act and Regulation V. Servicers may use different definitions of ''delinquency'' for operational purposes. Servicers may also use different or additional terminology when referring to borrowers who are late or behind on their payments—for example, servicers may refer to borrowers as ''past due'' or ''in default,'' and may distinguish between borrowers who are ''delinquent'' and ''seriously delinquent.''

The Bureau is finalizing comment 31 (Delinquency)-1 to provide further clarity and reflect the changes to § 1024.31. Comment 31 (Delinquency)-1 explains that a borrower's delinquency begins on the date an amount sufficient to cover a periodic payment of principal, interest, and, if applicable, escrow becomes due and unpaid, and lasts until such time as no periodic payment is due and unpaid, even if the borrower is afforded a period after the due date to pay before the servicer assesses a late fee. Comment 31 (Delinquency)-1 clarifies that the delinquency lasts until no periodic payment is due and unpaid.

The Bureau is finalizing comment 31 (Delinquency)-2 substantially as proposed, with minor revisions for clarity. Comment 31 (Delinquency)-2 provides that if a servicer applies payments to the oldest outstanding periodic payment, a payment by a

to pay homeowners association dues or taxes outside of escrow).

delinquent borrower advances the date the borrower's delinquency began. It provides an illustrative example. The Bureau notes that some commenters asked about how proposed comment 31 (Delinquency)-2 would impact a servicer's obligations under the 120-day foreclosure referral waiting period in § 1024.41(f)(1)(i). Because the definition of delinquency in § 1024.31 applies to all provisions of subpart C of Regulation X, it applies to § 1024.41(f)(1)(i). Therefore, if a servicer credits a payment by a delinquent borrower to the oldest missed payment, the result is that the 120-day foreclosure referral waiting period in § 1024.41(f)(1)(i) is advanced.

The Bureau declines to adopt a requirement in the final rule that servicers must apply payments to the oldest outstanding periodic payment. As the Bureau has previously explained, such a requirement would provide limited consumer benefit and may pose a conflict with State law.[137] The Bureau continues to believe, however, as it stated in the 2012 TILA Servicing Proposal, that this method of crediting payments provides greater consumer protection.[138] The Bureau will continue to monitor the market to evaluate servicers' payment crediting practices and those practices' effects on consumers.

The Bureau is finalizing comment 31 (Delinquency)-3 with changes from the proposal. Final comment 31 (Delinquency)-3 provides that, for any given billing cycle for which a borrower's payment is less than the periodic payment due, if a servicer chooses not to treat a borrower as delinquent for purposes of any section of subpart C, that borrower is not delinquent as defined in § 1024.31. Comment 31 (Delinquency)-3 thus does not specify a method by which a servicer covers a payment tolerance, unlike the proposal. The Bureau received comments indicating that servicers may cover a payment tolerance in a variety of ways, including by advancing the outstanding payment amount to a borrower's account, as suggested in the proposal, and applying escrow funds to make up the delinquency. The Bureau understands that these servicers would prefer not to initiate early intervention communications, continuity of contact requirements, or loss mitigation procedures with those borrowers for that given billing cycle. The Bureau does not intend to mandate how servicers cover a payment tolerance. Servicers are permitted to use any method permitted by applicable law to cover a payment tolerance. However, the Bureau reminds servicers of their obligations to make full and timely payments from escrow[139] and cautions that reliance on application of a payment tolerance to escrow funds should not, for example, occasion a default in the payment of property taxes.

The Bureau understands that servicers may collect the amounts included in a payment tolerance from the borrower at a later date. The Bureau believes that such a practice would still fall within the scope of the comment but cautions that a servicer may not cancel or rescind a payment tolerance applied for a given billing cycle for purposes of determining the date on which the borrower's delinquency began.

The Bureau declines to set a tolerance limit in the rule. The Bureau understands that the maximum amount servicers use for a payment tolerance is generally relatively small, ranging from $10 to $50.[140] It is not clear from the comments that a tolerance limit should be adopted, or what an appropriate limit would be. As a servicer's application of a payment tolerance is voluntary and, as noted above, prevents a borrower from becoming delinquent, the Bureau does not believe a tolerance limit is necessary to protect against borrower harm.

Finally, in light of comments, the Bureau is adopting new comment 31 (Delinquency)-4 to address a creditor's right to accelerate payment under the contract. Comment 31 (Delinquency)-4 provides that subpart C of Regulation X does not prevent a creditor from exercising a right provided by a mortgage loan contract to accelerate payment for a breach of that contract. Comment 31 (Delinquency)-4 further explains that failure to pay the amount due after the creditor accelerates the mortgage loan obligation in accordance with the mortgage loan contract would begin or continue delinquency.

As noted above, several industry commenters requested that the final rule address breaches of the underlying mortgage agreement other than the borrower's monthly periodic payment obligation or rolling delinquencies where the borrower is delinquent but does not become more than 120 days delinquent. Two commenters requested that the final rule clarify the right to accelerate the mortgage loan if permitted by State law and the contract. The Bureau previously explained the relationship between acceleration and delinquency in the preamble to the 2013 TILA Servicing Final Rule. The Bureau explained that, because the definition of ''periodic payment'' is intended to reflect the consumer's contractual obligation, to the extent a consumer's mortgage loan has been accelerated (such that the periodic payment constitutes the total amount owed for all principal and interest), this total accelerated amount may be appropriately accounted for within this definition of a periodic payment,[141] and would constitute the new amount due. Comment 31 (Delinquency)-4 applies to permissible acceleration permitted based on any breach of the underlying mortgage loan obligation. Depending on the contract, this could include, for example, the borrower's failure to pay the monthly periodic payment amount on the payment due date as well as the borrower's failure to comply with other components of the contract, such as requirements to pay property taxes, maintain insurance, or pay late fees. If the borrower reinstates the loan or otherwise cures the arrearage following acceleration, the borrower would no longer be delinquent under the definition set forth in § 1024.31.

Certain industry commenters requested an exemption from the 120-day foreclosure referral waiting period under § 1024.41(f)(1)(i) where there is a breach of the underlying mortgage agreement other than the borrower's monthly periodic payment obligation. Section 1024.41(f)(1) prohibits a servicer from making the first notice or filing required under applicable law for any judicial or non-judicial foreclosure process unless one of three circumstances occurs: The mortgage loan obligation is more than 120 days delinquent, the foreclosure is based on a borrower's violation of a due-on-sale clause, or the servicer is joining the foreclosure of a superior or subordinate lienholder.[142] The Bureau is not providing exemptions from the

[137] 78 FR 10901, 10956 (Feb. 14, 2013).

[138] *See* 77 FR 57318, 57352–53 (Sept. 17, 2012).

[139] 12 CFR 1024.34(a).

[140] The variation in the payment tolerance amounts used could relate to whether the servicer is bound by the terms of the National Mortgage Settlement, which includes a mandatory payment tolerance policy: Servicers subject to the National Mortgage Settlement must accept and credit up to two payments that come within $50 of the scheduled payment to the borrower's account. The National Mortgage Settlement is *available at: http://www.nationalmortgagesettlement.com/*. The five servicers subject to the National Mortgage Settlement are Bank of America, JP Morgan Chase, Wells Fargo, CitiMortgage, and Ally/GMAC. Ocwen reached a separate settlement agreement containing an identical provision at a later time, also *available at http://www.nationalmortgagesettlement.com/*.

[141] 78 FR 10902, 10954 (Feb. 14, 2013).

[142] The Bureau is amending § 1024.41(f)(1)(iii) to include a servicer's joining of a superior or subordinate lienholder. *See* section-by-section analysis of § 1024.41(f)(1)(iii).

requirements of § 1024.41(f)(1) for breaches of the contract other than the borrower's monthly periodic payment obligation. In the Amendments to the 2013 Mortgage Rules, the Bureau declined to exempt servicers from the borrower protections set forth in § 1024.41 for delinquent borrowers simply because these borrowers may have breached other components of the underlying mortgage, such as requirements to pay property taxes, maintain insurance, or pay late fees.[143] The Bureau expressed concern that additional exemptions would create uncertainty and could potentially be construed in a manner to permit evasion of the requirements of § 1024.41(f). Additionally, the Bureau explained that an exemption from the pre-foreclosure review period is not appropriate merely because foreclosure is based upon an obligation other than the borrower's monthly payment.[144] In many instances, these borrowers are experiencing financial distress and may benefit from time to seek loss mitigation.[145]

For similar reasons, the Bureau again declines to adopt a specific exemption from § 1024.41(f)(1) for situations where a borrower may be committing ''waste'' in violation of an underlying mortgage agreement. The Bureau explained in the Amendments to the 2013 Mortgage Rules that it was concerned that such an exemption could be used to circumvent the 120-day prohibition for borrowers who are also delinquent.[146] The Bureau also noted that what constitutes waste is a very fact-specific determination.[147] The Bureau recognizes that, as some commenters suggested, § 1024.41(f)(1) may disadvantage servicers in situations where the property deteriorates during the 120-day foreclosure referral waiting period. However, the Bureau continues to believe that borrowers may be harmed by the risks associated with a broader set of exemptions from the requirements of § 1024.41(f)(1).

Additionally, the Bureau declines to adopt an exception to § 1024.41(f)(1) for rolling delinquencies. The Bureau does not want to encourage servicers to proceed to foreclosure in situations, where, as explained above, a borrower may have only missed one or two payments. Additionally, the Bureau believes that servicers may have alternative means for addressing situations where a borrower is delinquent but does not become more than 120 days delinquent, including acceleration of the loan where permitted under the contract and applicable law, as discussed in comment 31 (Delinquency)-4.

Successor in Interest

The Bureau proposed to add a definition of successor in interest to § 1024.31 that would be broader than the category of successors in interest contemplated by current § 1024.38(b)(1)(vi) and would cover all categories of successors in interest who acquired an ownership interest in the property securing a mortgage loan in a transfer protected by the Garn-St Germain Act. The proposed definition stated that a successor in interest is a person to whom an ownership interest in a property securing a mortgage loan is transferred from a prior borrower, provided that the transfer falls under an exemption specified in section 341(d) of the Garn-St Germain Act. The Bureau is finalizing the definition of successor in interest with several adjustments to address concerns raised by commenters.

As explained in part V.A., some industry commenters objected to the use of the Garn-St Germain Act framework, and many industry commenters urged the Bureau to narrow the scope of the definition of successor in interest substantially—for example, to limit the scope to just situations involving death or death or divorce. Others urged the Bureau to exclude anyone who has not assumed the mortgage loan obligation from the definition of successor in interest. Some suggested excluding certain types of transactions, such as reverse mortgages.

Consumer advocacy group commenters generally supported use of the Garn-St Germain Act framework and urged the Bureau to broaden the definition to include various categories that are not covered by the Garn-St Germain Act but that are similar to the Garn-St Germain Act categories. They suggested, for example, that the definition should include unmarried partners, relatives other than a spouse or child of the borrower who obtain an interest in the home through a quitclaim deed, unrelated transferees, and co-homeowners who did not sign the original loan.

Some commenters raised questions about whether the Bureau intended to incorporate the occupancy requirements of the Garn-St Germain Act implementing regulations administered by the OCC in 12 CFR part 191. An industry commenter suggested that the Bureau should omit reference to the Garn-St Germain Act and instead enumerate the categories of transfer of ownership that would qualify for regulatory protection, in order to avoid unintended consequences.

A large number of commenters of various types expressed concern about the use of the term prior borrower. These commenters noted that the borrower who transfers an interest may still be liable on the loan obligation (absent a release) and may still be a borrower for purposes of Regulation X.

For the reasons explained in part V.A. and in this discussion, the Bureau is finalizing the definition of successor in interest in § 1024.31 using the Garn-St Germain Act framework but with both substantive and technical changes. The Bureau continues to believe that it is appropriate to use the categories of transfers of ownership interest protected under section 341(d) of the Garn-St Germain Act in defining successors in interest for purposes of subpart C of Regulation X. Congress recognized that it would be inappropriate to allow lenders to exercise a due-on-sale clause with respect to these transferees, and the Bureau has concluded that it would also be inappropriate to allow these categories of transferees to lose their ownership interests because they were unable to avail themselves of the protections of the Mortgage Servicing Rules with respect to a mortgage loan on their property. As explained in part V.A., the Bureau has considered commenters' suggestions about substantially broadening or narrowing the Garn-St Germain Act categories but has concluded that the Garn-St Germain Act categories remain the best framework to use in defining successor in interest in the final rule.

Because a transferor borrower may still be a borrower after the transfer, the final rule substitutes ''borrower'' where ''prior borrower'' appeared in the proposed definition of successor in interest. For clarity and ease of reference, the final rule does not include a cross-reference to the Garn-St Germain Act but instead lists the specific categories of transfers that could render a transferee a successor in interest. The categories are modeled on categories protected by section 341(d) of the Garn-St Germain Act. To ensure that the scope of the final rule does not change without further rulemaking by the Bureau, the Bureau has omitted the Garn-St Germain Act category that protects from due-on-sale enforcement any other transfer or disposition described in the Garn-St Germain Act implementing regulations.[148]

[143] Amendments to the 2013 Mortgage Rules, 78 FR 60382, 60406 (Oct. 1, 2013).

[144] *Id.*

[145] *Id.*

[146] *Id.*

[147] *Id.*

[148] 12 U.S.C. 1701j–3(d)(9). The Bureau has also omitted several categories in section 341(d) of the

Continued

Additionally, in restating the categories in the final rule, the Bureau has not incorporated certain scope limitations imposed by the Garn-St Germain Act or its implementing regulations, such as the exclusion for reverse mortgages and certain occupancy requirements in 12 CFR 191.5(b). As explained in part V.A., these adjustments promote clarity and consistency with other aspects of Regulation X and with the final definition of successor in interest in Regulation Z. The final rule thus provides that the term successor in interest means a person to whom an ownership interest in a property securing a mortgage loan subject to subpart C is transferred from a borrower, provided that the transfer is:

- A transfer by devise, descent, or operation of law on the death of a joint tenant or tenant by the entirety;
- A transfer to a relative resulting from the death of a borrower;
- A transfer where the spouse or children of the borrower become an owner of the property;
- A transfer resulting from a decree of a dissolution of marriage, legal separation agreement, or from an incidental property settlement agreement, by which the spouse of the borrower becomes an owner of the property; or
- A transfer into an *inter vivos* trust in which the borrower is and remains a beneficiary and which does not relate to a transfer of rights of occupancy in the property.

The final rule adds new comment 31 (Successor in interest)-1 to the § 1024.31 definition of successor in interest to clarify how the definition applies when property is held in a joint tenancy or a tenancy by the entirety. A trade association questioned whether the proposal would protect a non-borrower owner who holds property in a tenancy by the entirety when the borrower owner dies if there is not a transfer under state law. This commenter stated that, if property is held in a tenancy by the entirety, it is not clear that there is a property transfer when one owner dies because State law may provide that the survivor continues to own an undivided interest in the entire property and that the late spouse's property interest simply terminates.

The Bureau believes it is important to extend protections to a tenant by the entirety upon the death of a borrower spouse and to a joint tenant upon the death of a borrower joint tenant. The Bureau is adding comment 31 (Successor in interest)-1 to the definition of successor in interest in § 1024.31 to clarify that, if a borrower who has an ownership interest as a joint tenant or tenant by the entirety in a property securing a mortgage loan subject to Regulation X's subpart C dies, a surviving joint tenant or tenant by the entirety with a right of survivorship in the property is a successor in interest as defined in § 1024.31.

The final rule also adds new comment 31 (Successor in interest)-2 to the definition of successor in interest, which clarifies how the definition applies to *inter vivos* trusts. The comment explains that, in the event of a transfer into an *inter vivos* trust in which the borrower is and remains a beneficiary and which does not relate to a transfer of rights of occupancy in the property, the beneficiaries of the *inter vivos* trust rather than the *inter vivos* trust itself are considered to be the successors in interest for purposes of § 1024.31. This clarification ensures that a trust is not a successor in interest under these circumstances. It is also consistent with comment 3(a)–10 to Regulation Z, which explains that credit extended for consumer purposes to certain trusts is considered to be credit extended to a natural person rather than credit extended to an organization.

Section 1024.32 General Disclosure Requirements

32(c) Successors in Interest

Several commenters raised concerns as to how disclosures required under various mortgage servicing rules in Regulation X apply to successors in interest. To address these concerns, the final rule includes new § 1024.32(c) relating to general disclosure requirements for successors in interest. Section 1024.32(c)(1) through (3) relates to an optional notice and acknowledgment form that servicers may provide upon confirmation to confirmed successors in interest who have not assumed the mortgage loan obligation and are not otherwise liable on the mortgage loan obligation. Section 1024.32(c)(4) generally relieves a servicer of the obligation to provide disclosures to a confirmed successor in interest and to engage in live contacts with a confirmed successor as required by §§ 1024.17, 1024.33, 1024.34, 1024.37, and 1024.39 if the servicer is complying with those requirements with respect to another borrower on the account.

32(c)(1) Optional Notice With Acknowledgment Form

Some commenters expressed concern about the requirement to send mortgage servicing notices to confirmed successors in interest who are not liable on the loan obligation under State law, suggesting that such contact could be viewed as confusing or harassing or could result in liability under the FDCPA. The Bureau believes that the notices and other communications required by the Mortgage Servicing Rules in Regulation X provide critical information that successors in interest will generally want to receive. However, the Bureau also recognizes that the language typically used in many of the required notices could suggest that the recipient is liable on the loan obligation. As explained in part V.A., the Bureau is therefore providing servicers with various options they can use to help ensure that confirmed successors in interest who are not liable on the mortgage loan obligation are not confused or deceived about their status. For the reasons set forth in part V.A. and in this discussion, § 1024.32(c) provides one such option, authorizing servicers, upon confirming such a successor in interest, to provide a written notice that explains the confirmed successor in interest's status together with a separate acknowledgment form for the confirmed successor in interest to return.

Section 1024.32(c)(1) provides that the written notice must clearly and conspicuously explain:

- The servicer has confirmed the successor in interest's identity and ownership interest in the property;
- Unless the successor in interest assumes the mortgage loan obligation under State law, the successor in interest is not liable for the mortgage debt and cannot be required to use the successor in interest's assets to pay the mortgage debt, except that the lender has a security interest in the property and a right to foreclose on the property, when permitted by law and authorized under the mortgage loan contract;
- The successor in interest may be entitled to receive certain notices and communications about the mortgage loan if the servicer is not providing them to another confirmed successor in interest or borrower on the account;
- In order to receive such notices and communications, the successor in interest must execute and provide to the servicer an acknowledgment form that:
  - Requests receipt of such notices and communications if the servicer is not providing them to another

Garn-St Germain Act that do not result in a transfer of ownership interest and that are therefore irrelevant for successor in interest status. *See* 12 U.S.C. 1701j–3(d)(1), (2), (4); *see also* 79 FR 74176, 74181 n.28 (Dec. 15, 2014) (noting that the proposal would not apply to the situations described in these categories).

confirmed successor in interest or borrower on the account; and

○ Indicates that the successor in interest understands that such notices do not make the successor in interest liable for the mortgage debt and that the successor in interest is only liable for the mortgage debt if the successor in interest assumes the mortgage loan obligation under State law; and

○ Informs the successor in interest that there is no time limit to return the acknowledgment but that the servicer will not begin sending such notices and communications to the confirmed successor in interest until the acknowledgment is returned; and

• Whether or not the successor in interest executes the acknowledgment form, the successor in interest is entitled to submit notices of error under § 1024.35, requests for information under § 1024.36, and requests for a payoff statement under § 1026.36 with respect to the mortgage loan account, with a brief explanation of those rights and how to exercise them, including appropriate address information. Section 1024.32(c)(1) also provides that the acknowledgment form may not require acknowledgment of any items other than those identified in § 1024.32(c)(1)(iv).

Comment 32(c)(1)–1 explains that a servicer may identify in the acknowledgment form examples of the types of notices and communications that the successor in interest may be entitled to receive, such as periodic statements and mortgage servicing transfer notices. The comment clarifies that any examples provided should be the types of notices or communications that would be available to a confirmed successor in interest if the confirmed successor in interest executed the acknowledgment and returned it to the servicer.

As explained in the section-by-section analysis of § 1024.32(c)(2), a servicer that provides a written notice and acknowledgment form meeting these requirements need not send any further disclosures under the Mortgage Servicing Rules in Regulation X to the confirmed successor in interest until the confirmed successor in interest either assumes the mortgage loan obligation under State law or executes an acknowledgment and provides it to the servicer. As discussed in part V.A., the Bureau believes that, together with § 1024.32(c)(2), § 1024.32(c)(1) provides servicers a cost-effective means that they can use to help ensure that confirmed successors in interest understand their status.

32(c)(2) Effect of Failure To Execute Acknowledgment

New § 1024.32(c)(2) addresses the consequences if a servicer provides a written notice and acknowledgment form in compliance with § 1024.32(c)(1) to a confirmed successor in interest who is not liable on the mortgage loan obligation. In that event, § 1024.32(c)(2) provides that the servicer is not required to provide to the confirmed successor in interest any written disclosure required by § 1024.17, § 1024.33, § 1024.34, § 1024.37, or § 1024.39 or to comply with the live contact requirements in § 1024.39(a) with respect to the confirmed successor in interest until the confirmed successor in interest either assumes the mortgage loan obligation under State law or executes an acknowledgment and provides it to the servicer.[149] The Bureau believes it is appropriate for § 1024.32(c)(2) to excuse servicers from the requirement to send notices required by the Mortgage Servicing Rules in Regulation X if the servicers have not received an acknowledgment back from a confirmed successor in interest, because doing so relieves servicers of the costs associated with sending notices to confirmed successors in interest who are not liable on the mortgage loan obligation and do not want notices. However, if a confirmed successor in interest assumes a mortgage loan obligation under State law, the information in the initial notice and acknowledgment form is no longer applicable, and § 1024.32(c)(2) accordingly does not suspend the servicer's obligation to provide notices required by the Mortgage Servicing Rules in Regulation X.

Comment 32(c)(2)–1 explains that a confirmed successor in interest may provide an executed acknowledgment that complies with § 1024.32(c)(1)(iv) to the servicer at any time after confirmation. This ensures that confirmed successors in interest who have received an initial written notice and acknowledgment form pursuant to § 1024.32(c)(1) do not lose the opportunity to receive Regulation X mortgage servicing disclosures due to lapse of time.

Comment 32(c)(2)–2 explains the effect of a successor in interest's revocation of an acknowledgment. If a confirmed successor in interest who is not liable on the mortgage loan obligation executes and then later revokes an acknowledgment pursuant to § 1024.32(c)(1)(iv), the servicer is not required to provide to the confirmed successor in interest any written disclosure required by § 1024.17, § 1024.33, § 1024.34, § 1024.37, or § 1024.39 or to comply with the live contact requirements in § 1024.39(a) with respect to the confirmed successor in interest from the date the revocation is received until the confirmed successor in interest either assumes the mortgage loan obligation under State law or executes a new acknowledgment that complies with § 1024.32(c)(1)(iv) and provides it to the servicer.

32(c)(3) Additional Copies of Acknowledgment

As comment 32(c)(2)–1 explains, confirmed successors in interest may return an executed acknowledgment that complies with § 1024.32(c)(1)(iv) to the servicer at any time after confirmation. Once a confirmed successor in interest has returned an executed acknowledgment form, the servicer must provide to the confirmed successor in interest any written disclosures required by §§ 1024.17, 1024.33, 1024.34, 1024.37, and 1024.39 (as well as any required by Regulation Z) and comply with the live contact requirements in § 1024.39(a) unless and until the confirmed successor in interest revokes the acknowledgment. The Bureau wants to ensure that confirmed successors in interest who have received an initial written notice and acknowledgment form pursuant to § 1024.32(c)(1) are able to avail themselves of these protections at any time, even if they are unable to locate the original acknowledgment form they received. Accordingly, § 1024.32(c)(3) specifies that, if a servicer provides a confirmed successor in interest with a written notice and acknowledgment form in accordance with § 1024.32(c)(1), the servicer must make additional copies of the written notice and acknowledgment form available to the confirmed successor in interest upon written or oral request.

32(c)(4) Multiple Notices Unnecessary

The Bureau is adding new § 1024.32(c)(4) to the final rule to make it clear that servicers generally do not need to provide a duplicate copy of a notice required by the Mortgage Servicing Rules in Regulation X to a confirmed successor in interest if the servicer is providing the same notice to another borrower. A number of commenters asked the Bureau to clarify whether servicers must send multiple copies of notices required by the Mortgage Servicing Rules in Regulation X after a successor in interest is confirmed. One industry commenter explained that most servicing platforms

[149] Similar provisions in §§ 1026.20(f), 1026.39(f), and 1026.41(g) address the disclosures required by Regulation Z.

only allow for automated delivery of correspondence to one address. It indicated that a requirement to send items to multiple addresses or through differing communication channels would create significant operational and systems challenges with concomitant costs. Another industry commenter suggested that the Bureau could adopt commentary to the Mortgage Servicing Rules in Regulation X that is similar to proposed Regulation Z comment 41(a)–5.ii, which indicated that servicers do not need to send duplicative periodic statements to confirmed successors in interest.

The Bureau agrees that it would be unnecessarily burdensome to require servicers to provide the notices or communications required by the Mortgage Servicing Rules in Regulation X to a confirmed successor in interest if the same notice is already being provided to another borrower on the account. Section 1024.32(c)(4) accordingly clarifies that, except as required by § 1024.36, a servicer is not required to provide to a confirmed successor in interest any written disclosure required by § 1024.17, § 1024.33, § 1024.34, § 1024.37, or § 1024.39(b) if the servicer is providing the same specific disclosure to another borrower on the account. Section 1024.32(c)(4) also provides that a servicer is not required to comply with the live contact requirements set forth in § 1024.39(a) with respect to a confirmed successor in interest if the servicer is complying with those requirements with respect to another borrower on the account.[150] Section 1024.32(c)(4) thus reduces the burden imposed on servicers by Regulation X's successor in interest provisions.

Section 1024.32(c)(4) does not, however, limit the ability of any confirmed successor in interest to request copies of notices and other information through an information request under § 1024.36. Thus, confirmed successors in interest who are not receiving the required servicing communications because the servicer is providing them to another borrower on the account can request additional information as needed through the information request process.

Comment 32(c)(4)–1 explains that a servicer may rely on § 1024.32(c)(4) if the servicer provides a specific written disclosure required by § 1024.17, § 1024.33, § 1024.34, § 1024.37, or § 1024.39(b) to another borrower. The comment notes, for example, that a servicer is not required to provide a force-placed insurance notice required under § 1024.37 to a confirmed successor in interest if the servicer is providing the same force-placed insurance notice to a transferor borrower or to another confirmed successor in interest.

Legal Authority

The Bureau relies on section 19(a) of RESPA, 12 U.S.C. 2617(a), to implement new § 1024.32(c). For the reasons explained above, the Bureau believes that these amendments are necessary to provide a cost-effective process by which servicers can provide confirmed successors in interest the information required by this final rule.

Section 1024.35 Error Resolution Procedures

35(e) Response to Notice of Error

35(e)(5) Omissions in Responding to Requests for Documentation

Section 1024.35 sets forth error resolution requirements that servicers must follow to respond to errors asserted by borrowers. When a servicer determines that no error occurred, § 1024.35(e)(4) generally requires the servicer to provide in response to the borrower's request, at no charge, copies of documents and information relied upon by the servicer in making that determination. As explained in part V.A., the Bureau proposed to apply § 1024.35 as well as the information request requirements of § 1024.36 to confirmed successors in interest. The Bureau requested comment on whether any information that could be provided to successors in interest under §§ 1024.35 and 1024.36 presents privacy concerns and whether servicers should be permitted to withhold any information from successors in interest out of such privacy concerns. In light of the concerns expressed in the comments received, as discussed in part V.A. and in this discussion, the Bureau is adding new § 1024.35(e)(5) to allow servicers to limit the information that confirmed successors in interest may obtain under § 1024.35(e)(4) about other borrowers and to limit the information that borrowers may obtain under § 1024.35(e)(4) about potential and confirmed successors in interest who are not the requesting party.

As noted in part V.A., some industry commenters recommended that disclosures under §§ 1024.35 and 1024.36 be limited due to privacy concerns. An industry commenter suggested that these privacy concerns apply not only to the disclosure of the existing borrower's personal, private information to the confirmed successor in interest, but also to the disclosure of the confirmed successor in interest's personal, private information to the existing borrower. A consumer advocacy group commented that the original borrower's private financial information is not relevant to the successor in interest and that no successor in interest should have a need for information about the original borrower's location or contact information.

The Bureau continues to believe that it is important for confirmed successors in interest to be able to obtain information about the terms, status, and payment history of the mortgage loan. However, the Bureau recognizes that providing additional financial information about other borrowers or contact or location information for them could raise privacy concerns and is not likely to assist the confirmed successor in interest in maintaining the property. The Bureau believes that this is especially true with respect to a borrower's Social Security number. Based on similar potential privacy concerns, the Bureau also believes that it is appropriate to allow servicers to withhold certain information provided by potential and confirmed successors in interest from borrowers on the account who are not the person to whom the information pertains.

To address these potential privacy concerns, § 1024.35(e)(5) provides that, in responding to a request for documentation under § 1024.35(e)(4), a servicer may omit location and contact information and personal financial information (other than information about the terms, status, and payment history of the mortgage loan) if: (1) The information pertains to a potential or confirmed successor in interest who is not the requester; or (2) the requester is a confirmed successor in interest and the information pertains to any borrower who is not the requester. This provision allows servicers to limit the information that confirmed successors in interest can obtain about other borrowers (including other confirmed successors in interest) and to protect certain sensitive information about potential and confirmed successors in interest from disclosure to borrowers who are not the person to whom the information pertains.[151] The Bureau

[150] For example, if a servicer confirms multiple successors in interest and complies with the live contact requirements in § 1024.39(a) with respect to one confirmed successor in interest, the servicer is not required to comply with the live contact requirements with respect to any of the other confirmed successors in interest.

[151] The final rule does not, however, make any changes with respect to the types of information that joint borrowers who are not confirmed successors in interest can obtain about each other.

believes the restrictions in § 1024.35(e)(5) appropriately balance potential privacy concerns with the need to make mortgage information available to confirmed successors in interest and other borrowers.

Section 1024.36 Requests for Information

36(a) Information Request

Section 1463(a) of the Dodd-Frank Act amended RESPA to add section 6(k)(1)(D), which states that a servicer shall not fail to provide information regarding the owner or assignee of a mortgage loan within ten business days of a borrower's request. Currently, when a borrower submits a request for information under § 1024.36(a) asking for the owner or assignee of a mortgage loan held by a trust in connection with a securitization transaction and administered by an appointed trustee, comment 36(a)–2 provides that the servicer complies with § 1024.36(d) by identifying both the name of the trust and the name, address, and appropriate contact information for the trustee. The comment provides that, among other examples, if a mortgage loan is owned by Mortgage Loan Trust, Series ABC–1, for which XYZ Trust Company is the trustee, the servicer complies with § 1024.36(d) by responding to a request for information regarding the owner or assignee of the mortgage loan by identifying the owner as Mortgage Loan Trust, Series ABC–1, and providing the name, address, and appropriate contact information for XYZ Trust Company as the trustee. Proposed amendments to comment 36(a)–2 would have changed how a servicer must respond to such requests when Fannie Mae or Freddie Mac is the trustee, investor, or guarantor. The Bureau is adopting comment 36(a)–2 with changes.

In advance of the proposal, the Bureau received information from industry that providing borrowers with detailed information about the trust when Fannie Mae or Freddie Mac is the trustee, investor, or guarantor could be unnecessarily burdensome on servicers. According to industry, servicers' systems do not typically track the name of the trust for each such loan, so a servicer must ask the trustee for this information each time it receives an information request asking for the loan's owner or assignee. Moreover, because the loss mitigation provisions for loans sold to Fannie Mae or Freddie Mac are determined by Fannie Mae or Freddie Mac and not by the trust, the trust-identifying information may be of less value to borrowers when Fannie Mae or Freddie Mac is the trustee, investor, or guarantor. Industry requested that the Bureau reconsider the requirement for a servicer to provide specific trust-identifying information for loans governed by Fannie Mae's or Freddie Mac's servicing guidelines.

In the proposal, the Bureau stated its belief that, with respect to a loan for which Fannie Mae or Freddie Mac is the trustee, investor, or guarantor, servicers may not need to identify both the trustee and the trust in response to all requests for information seeking ownership information. If a borrower knows that Fannie Mae or Freddie Mac is the trustee, investor, or guarantor, the borrower could look to the Fannie Mae or Freddie Mac servicing guide and related bulletins to learn what loss mitigation options are available, what foreclosure processes the servicer must follow, how the servicer is compensated, and a wide variety of other information applicable to the loan, without distinction based on the particular trust. Borrowers can also access the appropriate Web site to learn more information once they know which entity's guidelines apply; both Fannie Mae and Freddie Mac maintain Web sites containing a considerable amount of information relating to standards affecting borrowers' mortgage loans. Fannie Mae and Freddie Mac also maintain dedicated telephone lines for borrower inquiries. Thus, requiring a servicer to identify Fannie Mae or Freddie Mac as the owner or assignee of the loan (without also identifying the name of the trust) could give borrowers access to the critical information about loss mitigation options and other investor requirements.

At the same time, the Bureau sought to preserve a borrower's right to obtain the identity of the trust by submitting a request for information under § 1024.36(a). Prior to the proposal, consumer advocacy groups informed the Bureau that borrowers need trust-identifying information in order to raise certain claims or defenses during litigation, as well as to exercise the extended right of rescission under § 1026.23(a)(3) when applicable. Further, the Bureau understood that, for loans held in a trust for which Fannie Mae or Freddie Mac is not the trustee, investor, or guarantor, a borrower would need the trust-identifying information to determine what loss mitigation options are available.

Accordingly, the Bureau proposed to revise comment 36(a)–2 to provide that, for loans for which Fannie Mae or Freddie Mac is the trustee, investor, or guarantor, a servicer could comply with § 1024.36(d) by responding to requests for information asking only for the owner or assignee of the loan by providing only the name and contact information for Fannie Mae or Freddie Mac, as applicable, without also providing the name of the trust. However, proposed comment 36(a)–2 would have also provided that, if a request for information expressly requested the name or number of the trust or pool, the servicer would comply with § 1024.36(d) by providing the name of the trust and the name, address, and appropriate contact information for the trustee, regardless of whether or not Fannie Mae or Freddie Mac is the trustee, investor, or guarantor.

The Bureau believed that proposed comment 36(a)–2 would preserve a borrower's access to information while reducing burden on servicers by no longer requiring them to obtain trust-identifying information for loans for which Fannie Mae or Freddie Mac is the trustee, investor, or guarantor. Further, the Bureau believed that, by requiring servicers to provide specific trust-identifying information upon a request expressly seeking such information, proposed comment 36(a)–2 would ensure that borrowers who do need specific trust-identifying information could obtain it. The proposed amendments also restructured comment 36(a)–2 for clarity. The proposed changes would not have affected a servicer's existing obligations with respect to loans not held in a trust for which an appointed trustee receives payments on behalf of the trust, or with respect to any loan held in a trust for which neither Fannie Mae nor Freddie Mac is the trustee, investor, or guarantor.

Proposed comment 36(a)–2.i would have also clarified that a servicer would not be the owner or assignee for purposes of § 1024.36(d) if the servicer holds title to the loan, or title is assigned to the servicer, solely for the administrative convenience of the servicer in servicing the mortgage loan obligation. This change was intended to bring the § 1024.36(d) commentary clearly in line with the Regulation Z provisions in § 1026.39 related to transfer of ownership notices. As to loans held in a trust for which Fannie Mae or Freddie Mac is not the investor, guarantor, or trustee, proposed comments 36(a)–2.ii.A and 36(a)–2.ii.B would have preserved the obligation in existing comment 36(a)–2.ii that servicers comply with § 1024.36(d) by identifying both the trust and the trustee of such loans to the borrower, regardless of how the borrower phrased the request for ownership information.

Similarly, the proposed amendments would not have changed a servicer's requirements for responding to requests for ownership information for loans for which the Government National Mortgage Association (Ginnie Mae) is the guarantor. As noted in both current comment 36(a)–2 and proposed comment 36(a)–2.ii.B, Ginnie Mae is not the owner or assignee of the loan solely as a result of its role as a guarantor. In addition, servicing requirements for those loans are governed by the Federal agency insuring the loan—such as the Federal Housing Association, the Department of Veterans Affairs, the Rural Housing Services, or the Office of Public and Indian Housing—not by Ginnie Mae itself.

Industry commenters generally expressed strong support for the Bureau's proposal to permit servicers to respond to nonspecific requests for information about the owner or assignee of the loan by providing only the name and contact information for Fannie Mae and Freddie Mac, as applicable. These commenters stated that permitting servicers to provide this more limited information for loans where Fannie Mae or Freddie Mac was the investor, guarantor, or trustee would reduce the burden on servicers without adversely affecting a borrower's ability to obtain information on the owner or assignee of the mortgage loan. Certain industry commenters requested limits on the proposed requirement for a servicer to provide the name and number of the trust or pool even when borrowers expressly request such information. One commenter stated that providing this specific information would be burdensome and not relevant to the transaction and requested that the final rule include a list of legitimate reasons or conditions that a borrower must certify exist before a servicer would be required to provide this trust-identifying information.

Freddie Mac expressed general support for proposed comment 36(a)–2 but said that the language ''investor, guarantor, or trustee'' could refer to loans that were not covered by Freddie Mac's servicing guide. The commenter explained that Freddie Mac's servicing guide applies when Freddie Mac is the trustee of a trust that owns a mortgage loan, because servicers of loans held by such trusts are required to service those loans in accordance with the servicing guide. However, the commenter stated that where Freddie Mac is acting as an investor or guarantor, rather than a trustee, the servicer is not necessarily required to comply with all of the requirements of the servicing guide with respect to that loan. The commenter recommended that the Bureau remove the reference to ''investor'' or ''guarantor'' in proposed comment 36(a)–2.

Consumer advocacy groups urged the Bureau not to adopt the proposed revisions to comment 36(a)–2. These commenters stated that there is a distinction between guarantors and owners of a loan, and that the Fannie Mae servicing guide does not fully apply to all loans that Fannie Mae guarantees. These commenters stated that borrowers may not be able to obtain all relevant information regarding loss mitigation options in Fannie Mae's servicing guide.

The Bureau conducted further outreach with FHFA, Freddie Mac, and Fannie Mae. According to these stakeholders, where Fannie Mae or Freddie Mac is the owner of the loan or the trustee of the securitization trust in which the loan is held, the loan is subject to the servicing requirements of Fannie Mae's or Freddie Mac's servicing guide. Fannie Mae or Freddie Mac are the owner or trustee for the overwhelming majority of loans in which they have an interest. Both Fannie Mae and Freddie Mac, however, are investors in other loans, often through a securitization trust, for which they are not the trustee, and, in these cases, the requirements of the servicing guides may not necessarily apply. Where loans are held in such securitization trusts, the Bureau understands that servicers would be able to identify the name of the trust that holds the loan.

The Bureau is finalizing comment 36(a)–2 with changes. Comment 36(a)–2.i explains that, when a loan is not held in a trust for which an appointed trustee receives payments on behalf of the trust, a servicer complies with § 1024.36(d) by responding to a request for information regarding the owner or assignee of a mortgage loan by identifying the person on whose behalf the servicer receives payments from the borrower. The comment further explains that a servicer is not the owner or assignee for purposes of § 1024.36(d) if the servicer holds title to the loan, or title is assigned to the servicer, solely for the administrative convenience of the servicer in servicing the mortgage loan obligation. Comment 36(a)–2.i also explains that Ginnie Mae is not the owner or assignee for purposes of such requests for information solely as a result of its role as the guarantor of the security in which the loan serves as the collateral.

Comment 36(a)–2.ii explains that, when the loan is held in a trust for which an appointed trustee receives payments on behalf of the trust, a servicer complies with § 1024.36(d) by responding to a borrower's request for information regarding the owner, assignee, or trust of the mortgage loan with the information, as applicable, as set forth in comment 36(a)–2.ii.A through C.

The Bureau is finalizing comment 36(a)–2.ii.A with changes. Comment 36(a)–2.ii.A explains that, for any request for information where Fannie Mae or Freddie Mac is not the owner of the loan or the trustee of the securitization trust in which the loan is held, the servicer complies with § 1024.36(d) by responding to a borrower's request for information by providing information on: The name of the trust and the name, address, and appropriate contact information for the trustee. It provides an illustrative example. Comment 36(a)–2.ii.A makes clear that, where Fannie Mae or Freddie Mac is not the owner or trustee of the securitization trust in which the loan is held, a servicer must respond to even a nonspecific request for the identity of the owner or assignee by providing information about the trust and contact information for the trustee.

The Bureau is also finalizing comment 36(a)–2.ii.B with changes. The Bureau proposed comment 36(a)–2.ii.B to provide a limited exception where a borrower makes a nonspecific request for information regarding the owner or assignee of a loan for which Fannie Mae or Freddie Mac is the investor, guarantor, or trustee. As explained in the proposal, the Bureau understood that such loans would be subject to servicing requirements set forth in Fannie Mae's or Freddie Mac's respective servicing guide. However, the Bureau now understands that this reasoning may not apply to loans for which Fannie Mae or Freddie Mac is the investor or guarantor of the loan, but not the trustee or owner of the loan.

Accordingly, the Bureau is finalizing comment 36(a)–2.ii.B to explain that, if the request for information did not expressly request the name or number of the trust or pool and Fannie Mae or Freddie Mac is the owner of the loan or the trustee of the securitization trust in which the loan is held, the servicer complies with § 1024.36(d) by responding to a borrower's request for information by providing the name and contact information for Fannie Mae or Freddie Mac, as applicable, without also providing the name of the trust. The Bureau's intent, by referring to the ''owner or the trustee of the securitization trust in which the loan is held'' in comment 36(a)–2.ii.B, is to permit a servicer to respond to a nonspecific request for information by providing only the name and contact information for Fannie Mae or Freddie Mac, as applicable, for only those loans that are subject to Fannie Mae's or Freddie Mac's servicing guide but not for other loans.

The Bureau is adding comment 36(a)–2.ii.C to explain that if the request for information did expressly request the name or number of the trust or pool and Fannie Mae or Freddie Mac is the owner of the loan or the trustee of the securitization trust in which the loan is held, the servicer complies with § 1024.36(d) by responding to a borrower's request for information by providing the name of the trust and the name, address, and appropriate contact information for the trustee, as in comment 36(a)–2.ii.A above.

The Bureau is not adopting additional requirements for borrowers making specific information requests, as some commenters suggested. Requiring borrowers to provide additional detail regarding their requests would not alleviate any burden on servicers associated with providing required trust-identifying information but would impose a burden on borrowers in obtaining information.

36(d) Response to Information Request

36(d)(3) Omissions in Responding to Requests

Section 1024.36 sets forth servicers' obligations in responding to a request for information from a borrower. As explained in part V.A., the Bureau proposed to apply § 1024.36 as well as the notice of error requirements of § 1024.35 to confirmed successors in interest. The Bureau requested comment on whether any information that could be provided to successors in interest under §§ 1024.35 and 1024.36 presents privacy concerns and whether servicers should be permitted to withhold any information from successors in interest out of such privacy concerns. In light of the concerns expressed in the comments received, as discussed in part V.A. and in this discussion, the Bureau is adding new § 1024.36(d)(3) to allow servicers to limit the information that confirmed successors in interest may obtain under § 1024.36 about other borrowers and to limit the information that borrowers may obtain under § 1024.36 about potential and confirmed successors in interest who are not the requesting party.

As noted in part V.A., some industry commenters recommended that disclosures under §§ 1024.35 and 1024.36 be limited due to privacy concerns. An industry commenter suggested that these privacy concerns apply not only to the disclosure of the existing borrower's personal, private information to the confirmed successor in interest, but also to the disclosure of the confirmed successor in interest's personal, private information to the existing borrower. A consumer advocacy group commented that the original borrower's private financial information is not relevant to the successor homeowner and that no successor in interest should have a need for information about the original borrower's location or contact information.

The Bureau continues to believe that it is important for confirmed successors in interest to be able to obtain information about the terms, status, and payment history of the mortgage loan. However, the Bureau recognizes that providing additional financial information about other borrowers or contact or location information for them could raise privacy concerns and is not likely to assist the confirmed successor in interest in maintaining the property. The Bureau believes that this is especially true with respect to a borrower's Social Security number. Based on similar potential privacy concerns, the Bureau also believes that it is appropriate to allow servicers to withhold certain information provided by potential and confirmed successors in interest from borrowers on the account who are not the person to whom the information pertains.

To address these potential privacy concerns, § 1024.36(d)(3) provides that, in responding to a request for information, a servicer may omit location and contact information and personal financial information (other than information about the terms, status, and payment history of the mortgage loan) if: (1) The information pertains to a potential or confirmed successor in interest who is not the requester; or (2) the requester is a confirmed successor in interest and the information pertains to any borrower who is not the requester. This provision allows servicers to limit the information that confirmed successors in interest can obtain about other borrowers (including other confirmed successors in interest) and to protect certain sensitive information about potential and confirmed successors in interest from disclosure to borrowers who are not the person to whom the information pertains.[152] The Bureau believes the restrictions in § 1024.36(d)(3) appropriately balance potential privacy concerns with the need to make mortgage information available to confirmed successors in interest and other borrowers.

[152] The final rule does not, however, make any changes with respect to the types of information that joint borrowers who are not confirmed successors in interest can obtain about each other.

36(i) Successors in Interest

The Bureau proposed a new request for information requirement regarding the confirmation of a successor in interest's identity and ownership interest in the property. Proposed § 1024.36(i) would have required a servicer to respond to a written request that indicates that the person may be a successor in interest and that includes the name of the prior borrower and information that enables the servicer to identify that borrower's mortgage loan account. Under the proposal, a servicer would have to respond to such a request by providing the person with information regarding the documents the servicer requires to confirm the person's identity and ownership interest in the property. With respect to the written request, the proposal would have required the servicer to treat the person as a borrower for the purposes of the procedural requirements of § 1024.36(c) through (g). The proposal also would have provided that, if a servicer has established an address that a borrower must use to request information pursuant to § 1024.36(b), a servicer must comply with the requirements of § 1024.36(i) only for requests received at the established address. Servicers would have been required to comply with proposed § 1024.36(i) before confirming the successor in interest's identity and ownership interest in the property. For the reasons set forth in part V.A. and in this discussion, the Bureau is finalizing § 1024.36(i) with adjustments to clarify the parties' obligations during the confirmation process.

Commenters expressed divergent views regarding proposed § 1024.36(i). Consumer advocacy groups suggested that the Bureau should not limit the provision to written requests. They suggested that successors in interest are unlikely to know about the request for information procedure due to their lack of prior contact with the servicer. They also suggested that a successor in interest should not need to use specific wording to trigger a response under § 1024.36(i). A consumer advocacy group suggested that a servicer should have to respond if the information provided is sufficient to put the servicer on notice that the person is a potential successor in interest.

A number of consumer advocacy groups also objected to the requirement in the proposal that a potential successor in interest use a specific address if a servicer has established one.

One such group indicated that expecting a successor in interest, who often is handling many complicated personal, legal, and financial affairs in a time of grieving, to ascertain and use the servicer's established contact address would be unreasonable and overly burdensome. This group also suggested that the Bureau could require servicers, upon hearing of the death of a borrower, to send a letter to the home containing information about how successors in interest can confirm their status and explaining the servicer's obligations under § 1024.36(i). Another consumer advocacy group suggested that, if a servicer receives a request for information at a non-designated location, it should respond by notifying the potential successor in interest of the correct address for submission of requests for information.

This commenter indicated that successors in interest need prompt information identifying specific documents and that vague references to ''probate documents'' or ''legal documents,'' without further elaboration, are not sufficient. It noted that delays cause significant problems because loans may become delinquent to the point that loss mitigation options that would have been available earlier are no longer viable. It suggested that, for purposes of servicers responding to requests for information under § 1024.36(i), the final rule should define promptly as within 15 days for clarity.

Consumer advocacy groups also urged the Bureau not to require resubmission of requests that seek information other than the description of documents required for confirmation, suggesting that requiring successors in interest to resubmit such requests would cause unnecessary delay and could be confusing. These commenters suggested that servicers should be required to respond to requests for information on other issues related to the servicing of the mortgage once they have received proof of successor in interest status, with time running from the date the successor in interest provides necessary documentation showing successor in interest status. A consumer advocacy group stated that this would save time and streamline the process, where time is often of the essence.[153] Another consumer advocacy group urged the Bureau to clarify how § 1024.36(f)(1)(i)'s rule on duplicative information relates to § 1024.36(i). This group suggested that § 1024.36(f)(1)(i)'s rule should only apply if duplicative information was requested by the same person.

Industry commenters raised a variety of different concerns related to the requirements in § 1024.36(i), with some suggesting that the Bureau should not finalize the provision at all and others suggesting changes. Some industry commenters supported the proposal's requirement that requests must be in writing to trigger the requirements of § 1024.36(i). For example, a trade association stated that allowing oral requests would create a risk of fraud.

A number of industry commenters also indicated that the Bureau should clarify what it means by ''indicates that a person may be a successor in interest'' or should substitute narrower language. For example, one trade association suggested § 1024.36(i) should only apply if the requester specifically asks for information on how to confirm the requestor's status as a successor in interest, although the commenter did not think that the final rule should require use of the term successor in interest.[154] Another industry commenter suggested that a servicer should be required to provide information regarding the documents the servicer requires to confirm a person's identity and ownership interest in the property in response to a request that affirmatively states that there has been a transfer of the property, a divorce, legal separation, or death of a borrower, or that the writer has become the owner of the property. This commenter also stated that a servicer should not be required to respond to a request from a non-borrower that does not include any statement that indicates the non-borrower may have an interest in the property.

Industry commenters also requested that, where a servicer has established an address, the final rule should limit servicers' obligation to requests received at that address. They suggested that it would be burdensome for servicers to respond to inquiries from potential successors in interest received at an address other than the established address because it would require servicers to monitor every location where a request for information could be sent. An industry commenter noted that requiring use of the established address would align treatment of requests for information under § 1024.36(i) with how other requests for information are treated under § 1024.36. Other industry commenters suggested that it would facilitate servicers' tracking of requests and that servicers would not be able to respond quickly unless they receive requests through an established address.

A number of industry commenters responded to the Bureau's request for comment regarding what requirements should apply if a potential successor in interest submits a request for information other than a description of the documents required for confirmation. Industry commenters generally urged the Bureau not to require a response unless the successor in interest resubmits the request upon confirmation, and some suggested that the final rule should require servicers to inform potential successors in interest that they would need to resubmit such requests upon confirmation. An industry commenter suggested that it might confuse successors in interest to get a response to an outdated request. Another suggested that resubmission would be much more efficient, in part because any number of variables could have changed the information that the successor in interest is seeking during the elapsed time between initial submission and confirmation. Various industry commenters noted that it would be a significant burden and might require costly systems changes to preserve requests until confirmation. An industry commenter suggested that there is nothing analogous in the servicing requirements that requires a servicer to keep consumer information requests prior to the establishment of a relationship. By contrast, one trade association suggested that the final rule should require servicers to provide confirmed successors in interest information requested prior to confirmation and that the timelines servicers must meet to provide such information should run from time of confirmation.

Industry commenters expressed concerns relating to the timeframes specified in § 1024.36(i) and indicated that the process described in the proposal was too rigid. Some trade associations suggested that there should be no deadline imposed. They noted that, with only the loan identified, the servicer may not know, for example, who the claimant is, the nature of the claim, the basis of the claim, whether the claim will be contested, whether the claimant is a minor, or where the

[153] Consumer advocacy groups also suggested that the Bureau should make the request for information for potential successors in interest privately enforceable. As explained in part V.A., *supra*, the Bureau declines to do so.

[154] Another trade association suggested that the final rule should limit servicers' obligations to written communications that specifically request information about confirming the person's status as a successor in interest or indicate the nature of the transfer of ownership interest. Yet another trade association suggested that the final rule should limit servicers' obligations to written communications that specifically identify the writer as one claiming to be a successor in interest to property rights and the manner in which and under what authority the claim is made.

borrower lived when the claim arose.[155] These commenters suggested that several rounds of communication are required in all or almost all instances because servicers need to start with basic questions and then move to more detailed questions. These commenters also suggested that servicers might deny claims unnecessarily if the final rule imposes a deadline that does not provide enough time. They also provided a sample model form for the first iteration of servicer requests for information from claimants. They indicated that servicers do not currently maintain the list of documents required by proposed § 1024.36(i) and suggested that a complete list of all documents a servicer might need would overwhelm potential successors in interest. One of these commenters also stated that servicers need to be able to verify a claimant's agent.[156]

An industry commenter also expressed concern that proposed comment 36(i)–1 might be inconsistent with the proposed regulation. It noted that the proposed commentary stated that servicers do not have to provide any additional information that may be requested by the potential successor in interest, while proposed § 1024.36(i) stated that, with respect to the written request, a servicer shall treat the person as a borrower for the purposes of the requirements of § 1024.36(c) through (g).

The Bureau is finalizing the requirements of proposed § 1024.36(i) in § 1024.36(i)(1) and (4), with adjustments in response to the comments received and technical changes for clarity.[157] Like proposed § 1024.36(i), § 1024.36(i)(4) provides that, if a servicer has established an address that a borrower must use to request information pursuant to § 1024.36(b), a servicer must comply with the requirements of § 1024.36(i)(1) only for requests received at the established address.

In light of industry comments indicating that more than one round of communication may be required in some instances, the Bureau has also added language in § 1024.36(i)(2) addressing circumstances where servicers are not able to respond fully based on the information provided in a request under § 1024.36(i)(1). As with other requests under § 1024.36, the Bureau anticipates that servicers may contact the requestor informally to clarify the request and obtain additional relevant information that may be needed to respond to the request. Through such contacts, servicers may be able to obtain any missing information that they need to respond fully within the time limits. However, if a request under § 1024.36(i)(1) does not provide sufficient information to enable the servicer to identify the documents the servicer reasonably requires to confirm the person's identity and ownership interest in the property, § 1024.36(i)(2) allows the servicer to provide a response that includes examples of documents typically accepted to establish identity and ownership interest in a property; indicates that the person may obtain a more individualized description of required documents by providing additional information; specifies what additional information is required to enable the servicer to identify the required documents; and provides contact information, including a telephone number, for further assistance. A servicer's response under § 1024.36(i)(2) must otherwise comply with the requirements of § 1024.36(i)(1). Notwithstanding the duplicative request rule of § 1024.36(f)(1)(i), if a potential successor in interest subsequently provides the required information specified by the servicer pursuant to § 1024.36(i)(2) either orally or in writing, the servicer must treat the new information, together with the original request, as a new, non-duplicative request under § 1024.36(i)(1), received as of the date the required information was received, and must respond accordingly. These changes should help ensure that servicers can comply with their obligations under § 1024.36(i) in responding to requests that provide very limited information about a potential successor in interest's circumstances.

The Bureau has also incorporated the substance of proposed comment 36(i)–1 into § 1024.36(i)(3), which provides that, in responding to a request under § 1024.36(i)(1) prior to confirmation, the servicer is not required to provide any information other than the information specified in § 1024.36(i)(1) and (2). Section 1024.36(i)(3) also provides that, in responding to a written request under § 1024.36(i)(1) that requests other information, the servicer must indicate that the potential successor in interest may resubmit any request for information once confirmed as a successor in interest. The Bureau believes that addressing these issues in this manner in § 1024.36(i)(3) rather than in the commentary obviates the concern expressed by an industry commenter that the commentary might be inconsistent with the regulation.

As indicated in part V.A., § 1024.36(i) addresses problems faced by successors in interest in confirming their identity and ownership interest in the property securing the mortgage loan and may help them avoid unnecessary foreclosure on the property. Section 1024.36(i) is complemented by § 1024.38(b)(1)(vi), which requires servicers to maintain certain policies and procedures relating to potential successors in interest. Section 1024.38(b)(1)(vi)(B) requires servicers to have policies and procedures to determine promptly what documents are reasonable to require from successors in interest in particular circumstances, so that the servicer is prepared to provide promptly a description of those documents, while § 1024.36(i) gives potential successors in interest a mechanism to obtain this information from servicers. The separate requirement in § 1024.36(i) is appropriate, in addition to the policies and procedures requirement in § 1024.38(b)(1)(vi), because information regarding the documents the servicer requires to confirm a successor in interest's status may be of importance to each individual potential successor in interest.

As the Bureau explained in the proposal, § 1024.36(i) applies to a broad range of written communications from potential successors in interest. A potential successor in interest does not need to request specifically that the servicer provide information regarding the documents the servicer requires to confirm the person's identity and ownership interest in the property. As with other requests for information, the successor in interest also does not need to indicate specifically that the request is a written request under § 1024.36 or to make the request in any particular

[155] Another industry commenter made a similar point, noting that a letter from a potential successor may not provide sufficient information to allow the servicer to identify what documents are required and could, for example, simply state that a borrower died or that a divorce is being executed.

[156] An industry commenter also suggested that proposed § 1024.36(i) would require servicers to violate privacy law requirements by implicitly confirming that a customer has a mortgage loan serviced by the servicer. Disclosing information to potential successors in interest as required under the final rule will not cause a servicer to violate the GLBA or Regulation P because the GLBA and Regulation P permit financial institutions to disclose information to comply with a Federal law or regulation. 15 U.S.C. 6802(e)(8); 12 CFR 1016.15(a)(7)(i).

[157] For example, the Bureau has added language in § 1024.36(i)(1) that specifically requires servicers to provide in their written response contact information for further assistance, to ensure that it is clear that this requirement of § 1024.36(d)(1) applies to requests under § 1024.36(i). The Bureau has also substituted ''a written description of'' for ''information regarding.'' This clarifies that the response must be written and aligns § 1024.36(i) with similar language used in § 1024.38(b)(1)(vi)(B), which refers to a ''description'' of the documents the servicer reasonably requires to confirm the potential successor in interest's identity and ownership interest in the property.

form. Accordingly, servicers are required to provide the information in response to any written communication indicating that the person may be a successor in interest that is accompanied by the name of the transferor borrower and information that enables the servicer to identify that borrower's mortgage loan account and that is received at the address established by the servicer under § 1024.36(b) if the servicer has established one.

This broad coverage is appropriate because some successors in interest may not be aware that they need to confirm their identity and ownership interest in the property. As consumer advocacy groups noted, successors in interest may not know the exact words to use in framing their requests. Requiring servicers to respond only to a written communication that actually requests a description of the documents required for confirmation would deprive many successors in interest of the information they need to protect their ownership interest and could subject them to unnecessary foreclosures.

Section 1024.36(i) applies with respect to the servicer's receipt of written communication from any potential successor in interest.[158] Even though a servicer may be unaware at the time of initial contact with a potential successor in interest whether the potential successor in interest is in fact a successor in interest as defined in this final rule, in these situations the servicer should still communicate with the potential successor in interest about confirmation and should not wait until it has reason to believe that the definition of successor in interest is met.

Many requests under § 1024.36(i) may indicate the nature of the transfer of the ownership interest from the transferor borrower to the successor in interest. In those cases, servicers will respond with information that is relevant to that potential successor in interest's specific situation. If the potential successor in interest does not indicate the nature of the transfer of the ownership interest to the potential successor in interest, the final rule allows the servicers to provide a response that includes examples of documents typically accepted to establish identity and ownership interest in a property, indicates that the requestor may obtain a more individualized description of required documents by providing additional information, specifies what additional information is required to enable the servicer to identify the required documents, and provides contact information for further assistance. As with other situations where servicers are responding to customer inquiries, the Bureau believes that servicers will in many instances contact the potential successor in interest for clarifying information before providing the formal notice required under § 1024.36(i).

Section 1024.36(c) through (g) establishes various requirements governing servicers' responses to requests for information under § 1024.36, such as acknowledgment requirements and time limits. Except as otherwise provided in the final rule, the Bureau believes it is appropriate for servicers to handle requests for information under § 1024.36(i) in the same way that they handle other requests for information under § 1024.36 and therefore has decided to apply the requirements of § 1024.36(c) through (g) to requests under § 1024.36(i). For example, the final rule requires servicers to respond to a request under § 1024.36(i) in writing, as they would for any other request for information. As a result, the information servicers provide will be memorialized, which should help to avoid uncertainty.

The Bureau also concludes that it is appropriate to limit servicers' obligation to respond under § 1024.36(i) to those requests received at an established address if a servicer has established one under § 1024.36(b), as § 1024.36 does for other requests for information. As many industry commenters noted, servicers would have difficulty responding promptly and efficiently to requests for information from potential successors in interest at locations other than the established address. Because servicers that have established an address are not ordinarily required to respond to requests for information received at other locations, servicers would need to train staff and set up systems at these locations to comply with § 1024.36(i). Further, the Bureau anticipates that most successors in interest will be able to send information requests to the established address. Successors in interest may in some circumstances have access to written communications provided to the transferor borrower that identify the established address. Additionally, under § 1024.36(b), a servicer that establishes an address for receipt of information requests must post the established address on any Web site maintained by the servicer if the Web site lists any contact address for the servicer. Furthermore, as explained in the section-by-section analysis of § 1024.38(b)(1)(vi), servicers subject to § 1024.38(b)(1)(vi) must have policies and procedures reasonably designed to ensure that they are able to respond promptly with information that includes the appropriate address for a § 1024.36(i) request upon receiving notice of the existence of a potential successor in interest, even if the notice is oral or received at an address that is not the address a servicer has established for requests under § 1024.36.

Because § 1024.36(c) through (g) applies to requests under § 1024.36(i), § 1024.36(f)(1)(i)'s rule on duplicative information applies to requests under § 1024.36(i). Section 1024.36(i) does not require a servicer to respond to a request if the information requested is substantially the same as information previously requested by the borrower for which the servicer has previously complied with its obligation to respond. The fact that information was previously requested by a different borrower would not excuse a servicer from compliance under § 1024.36(f)(1)(i) because, in that situation, the information would not have been requested ''by the borrower'' for purposes of § 1024.36(f)(1)(i).[159] Except as provided in § 1024.36(i)(2), a servicer need not respond to repeated requests under § 1024.36(i) for substantially the same information from the same potential successor in interest, if the servicer has previously complied with its obligation to respond to that potential successor in interest.[160]

[158] Pursuant to the Bureau's Same-Sex Married Couple Policy, *see supra* note 39, a same-sex spouse would be evaluated for confirmation as a successor in interest under § 1024.38(b)(1)(vi) as would any other potential successor in interest. As with any potential successor in interest, confirmation as a successor in interest would depend on whether the person meets the definition of successor in interest in § 1024.31.

[159] A trade association commenter suggested that the Bureau should indicate that, if a borrower receives information in response to a request for information and a confirmed successor later requests the same information, the second request should be deemed duplicative unless the first requester (or the first requester's estate) has been released from the loan obligation before the servicer receives the second request. The Bureau does not believe this interpretation would be consistent with the language of § 1024.36 for the reasons stated above. This commenter also asserted that, if a borrower asserts an error and a confirmed successor later asserts the same error, the second assertion should be deemed duplicative. The fact that an error asserted by a confirmed successor in interest is substantially the same as an error previously asserted by a transferor borrower would not excuse a servicer from compliance with the notice of error requirements in § 1024.35 because, in that situation, the error would not have been previously ''asserted by the borrower'' for purposes of § 1024.35(i).

[160] For the reasons explained in part V.A., the application of the scope provision in Regulation X's subpart C (§ 1024.30(b)) to successors in interest means that § 1024.36(i), but not § 1024.38(b)(1)(vi), applies to small servicers, with respect to reverse mortgage transactions, and with respect to mortgage loans for which the servicer is a qualified lender. Accordingly, small servicers, for example, are required to respond to requests for information under § 1024.36(i) by providing a written

Proposed comment 36(i)–1 would have provided that, for the purposes of requests under § 1024.36(i), a servicer would only have been required to provide information regarding the documents the servicer requires to confirm the person's identity and ownership interest in the property, not any other information that may also be requested by the person. As explained above, the Bureau has decided to address this issue in regulation text. As finalized, § 1024.36(i)(3) indicates that, prior to confirmation, the servicer is not required to provide any information the person may request, other than the information specified in § 1024.36(i)(1) and (2). The Bureau is not finalizing proposed comment 36(i)–1 because it would be redundant of § 1024.36(i)(3).

As noted above, industry commenters requested that the Bureau clarify what types of communications might indicate that a person may be a successor in interest for purposes of § 1024.36(i). As finalized, comment 36(i)–1 provides examples of written requests that indicate that a person may be a successor in interest, including a written statement from a person other than a borrower indicating that there has been a transfer of ownership or of an ownership interest in the property to the person or that a borrower has been divorced, legally separated, or died; or a written loss mitigation application received from a person other than a borrower. Providing this non-exhaustive list of examples in the commentary will assist servicers in understanding the types of contacts that constitute requests for information under § 1024.36(i).

The Bureau is also adding comment 36(i)–2, which addresses the time limits for servicers to respond to a request for information under § 1024.36(i). The comment notes that a servicer must respond to a request under § 1024.36(i) not later than the time limits set forth in § 1024.36(d)(2). It explains that servicers subject to § 1024.38(b)(1)(vi)(B) must also maintain policies and procedures reasonably designed to ensure that, upon receiving notice of the existence of a potential successor in interest, the servicer can promptly determine the documents the servicer reasonably requires to confirm that person's identity and ownership interest in the property and promptly provide to the potential successor in interest a description of those documents and how the person may submit a written request under § 1024.36(i) (including the appropriate address). The comment also explains that, depending on the facts and circumstances of the request, responding promptly may require a servicer to respond more quickly than the time limits established in § 1024.36(d)(2).

The Bureau considered, as an alternative, imposing a rigid, shorter time period, such as 15 days, that would apply to all requests under § 1024.36(i), as some consumer advocacy groups had suggested. The Bureau believes that such a rigid deadline might be difficult to meet for more complex requests and has therefore chosen to impose the same time limits established for other requests for information in § 1024.36, with the expectation that the policies and procedures established pursuant to § 1024.38(b)(1)(vi)(B) will provide for faster responses in appropriate cases when the facts and circumstances make that feasible, in order to avoid the harms that can result from confirmation delays, including unnecessary foreclosures. In light of those harms, the Bureau also declines to allow servicers more time to respond to requests for information from potential successors in interest than servicers have to respond to other requests for information or to set no time limit, as some industry commenters suggested.

The Bureau is also adding comment 36(i)–3, which addresses agents of potential successors in interest. Once a servicer confirms a successor in interest, the confirmed successor in interest can take various steps through an agent because the confirmed successor in interest is treated as a borrower or consumer for purposes of a number of provisions in Regulations X and Z that permit borrowers or consumers to operate through agents.[161] The proposal, however, did not address agents of potential successors in interest. Existing comment 36(a)–1 addresses agents for purposes of information requests under § 1024.36 but does not apply to information requests that potential successors in interest submit under § 1024.36(i).

The Bureau believes that potential successors in interest should be able to submit requests pursuant to § 1024.36(i) through an agent and is adding comment 36(i)–3 to that end. Comment 36(i)–3 clarifies that an information request pursuant to § 1024.36(i) is submitted by a potential successor in interest if it is submitted by an agent of the potential successor in interest. As a trade association noted in its comment, servicers must be able to verify the agents of potential successors in interest. Comment 36(i)–3 therefore states that servicers may undertake reasonable procedures to determine if a person that claims to be an agent of a potential successor in interest has authority from the potential successor in interest to act on the potential successor in interest's behalf, for example, by requiring that a person that claims to be the agent provide documentation from the potential successor in interest stating that the purported agent is acting on the potential successor in interest's behalf. The comment explains that, upon receipt of such documentation, the servicer shall treat the request for information as having been submitted by the potential successor in interest.

The Bureau anticipates that it will be easy for servicers to implement the process described in comment 36(i)–3 because it is modeled on that of comment 36(a)–1, which applies to other types of requests for information under § 1024.36. The Bureau believes comment 36(i)–3 is necessary and helpful because potential successors in interest who are experiencing difficulty in the confirmation process or in understanding the mortgage obligations that encumber their property may turn, for example, to housing counselors or other knowledgeable persons to assist them in addressing such issues.[162]

Section 1024.37 Force-Placed Insurance

37(c) Requirements Before Charging Borrower for Force-Placed Insurance

37(c)(2) Content of Notice

37(c)(2)(v)

Under § 1024.37(b), a servicer may not charge a borrower for force-placed insurance ''unless the servicer has a reasonable basis to believe that the borrower has failed to comply with the mortgage loan's contract requirement to maintain hazard insurance.'' Section 1024.37(c)(1) requires a servicer to provide to a borrower an initial notice and a reminder notice before assessing a fee or charge related to force-placed insurance. Sections 1024.37(c)(2) and 1024.37(d)(2) specify the notices' content. Current § 1024.37(c)(2)(v) requires the initial notice to include a statement that, among other things, ''the

description of the documents the servicer requires to confirm the person's identity and ownership interest in the property, even though small servicers are not required to maintain policies and procedures to decide promptly what documents the servicer reasonably requires to confirm the successor in interest's identity and ownership interest in the property.

[161] *See, e.g.,* Regulation X comments 31 (Loss mitigation application)–1, 35(a)–1, 36(a)–1.

[162] For example, the Bureau believes that the clarification in comment 36(i)–3 may be helpful in cases where successors in interest are minors. A trade association commenter indicated that servicers should not be required to enter into contracts with claimants who are minors, but the final rule does not impose any such requirement.

borrower's hazard insurance is expiring or has expired, as applicable, and that the servicer does not have evidence that the borrower has hazard insurance coverage past the expiration date. . . .'' Section 1024.37(d)(2)(i)(C) requires the reminder notice to include the same statement if, after providing the initial notice, a servicer does not receive any evidence of hazard insurance. These provisions do not specify what a notice must state if a borrower has insufficient coverage, such as when the borrower's insurance provides coverage in a dollar amount less than that required by the mortgage loan contract. The Bureau proposed to amend § 1024.37(c)(2)(v) to address situations in which a borrower has insufficient, rather than expiring or expired, hazard insurance. The Bureau is finalizing § 1024.37(c)(2)(v) as proposed.

In advance of the proposal, the Bureau was concerned that the statements required by § 1024.37(c)(2)(v) and (d)(2)(i)(C) may not afford servicers flexibility to address circumstances in which a borrower has insufficient coverage. When a borrower has hazard insurance that is insufficient under the mortgage loan contract's requirements, a statement that coverage has expired or is expiring may not be applicable. Similarly, the notices must state that the servicer does not have evidence that the borrower has hazard insurance past the coverage date, but § 1024.37 does not permit the notices to instead state that the servicer lacks evidence that the borrower's hazard insurance provides sufficient coverage. Moreover, § 1024.37(c)(4) and (d)(4) prohibit a servicer from including in the force-placed insurance notices any information other than that required by § 1024.37(c)(2) or (d)(2). A servicer cannot explain on the notice itself that the borrower's hazard insurance is insufficient rather than expired or expiring. Although a servicer could include such an explanation on a separate piece of paper in the same transmittal as the force-placed insurance notice,[163] the Bureau believed that servicers and borrowers could benefit if servicers were able to state on the notice itself that the servicer lacks evidence of sufficient coverage.

Accordingly, the Bureau proposed to amend § 1024.37(c)(2)(v) to provide that the force-placed insurance notices must include a statement that the borrower's hazard insurance is expiring, has expired, or provides insufficient coverage, as applicable, and that the servicer does not have evidence that the borrower has hazard insurance coverage past the expiration date or evidence that the borrower has hazard insurance that provides sufficient coverage, as applicable. The Bureau believed that this amendment might enable servicers to provide borrowers with notices that are more accurately tailored for their precise circumstances and potentially avoid confusing a borrower whose coverage is not expiring but is insufficient under the mortgage loan contract. The Bureau solicited comment on whether other modifications to the required content of the force-placed insurance notices are necessary or appropriate to address circumstances in which a servicer force-places insurance for reasons other than expired or expiring coverage.

The Bureau received a number of comments from industry and consumer advocacy groups on its proposal to revise the notices under § 1024.37 to include a statement regarding insufficient coverage. The vast majority of commenters expressed support for the proposed revisions and agreed that a statement regarding insufficient coverage on the notices required by § 1024.37 would provide greater clarity to borrowers. One industry commenter recommended that the notices also include a statement to address a situation where the borrower purchases insurance through a company that the lender or servicer does not allow.

The Bureau is finalizing § 1024.37(c)(2)(v) as proposed. Section 1024.37(c)(2)(v) provides that the force-placed insurance notices must include a statement that the borrower's hazard insurance is expiring, has expired, or provides insufficient coverage, as applicable, and that the servicer does not have evidence that the borrower has hazard insurance coverage past the expiration date or evidence that the borrower has hazard insurance that provides sufficient coverage, as applicable. The Bureau declines to further modify the notices to specifically address a circumstance raised by one commenter in which a servicer force-places insurance because the borrower purchases insurance through a company that the lender or servicer does not allow. Where a borrower's hazard insurance does not satisfy the requirements of the mortgage loan contract, a servicer may explain on the force-placed insurance notices that the borrower's hazard insurance provides insufficient coverage. Any additional detail regarding the borrower's specific circumstances may be included with the force-placed insurance notice, on a separate piece of paper, as permitted under § 1024.37(c)(4).

37(c)(4) Additional Information

Section 1024.37(c) currently requires servicers to provide a borrower a notice at least 45 days before assessing a fee or charge related to force-placed insurance. Section 1024.37(c)(4) prohibits a servicer from including in the notice any information other than that required by § 1024.37(c)(2), though a servicer may provide a borrower with additional information on separate pieces of paper in the same transmittal. In the 2013 RESPA Servicing Final Rule, the Bureau explained that providing required information along with additional information in the same notice could obscure the most important information or lead to information overload. The Bureau instead permitted servicers to provide additional information on separate pieces of paper in the same transmittal.[164]

However, in advance of the proposal, the Bureau received questions regarding whether servicers may include a borrower's mortgage loan account number in the notices required by § 1024.37, including the initial notice required by § 1024.37(c)(1)(i). As indicated in the proposal, the Bureau believed it could be appropriate to give servicers the flexibility to include a borrower's mortgage loan account number in the notices required by § 1024.37. An account number is a customary disclosure on communications between a servicer and a borrower. The Bureau also believed that including the borrower's mortgage loan account number could help facilitate communications between a borrower and a servicer regarding a notice provided under § 1024.37. Therefore, the Bureau proposed to amend § 1024.37(c)(4) to grant servicers flexibility to include a borrower's mortgage loan account number in the notices required by § 1024.37.

The Bureau received numerous comments on the proposal to permit the inclusion of the mortgage loan account number in the notices required by § 1024.37. The Bureau received several comments from industry and consumer advocacy groups expressing support for the proposal to allow servicers to include the mortgage loan account number in the written notice required by § 1024.37(c)(1)(i). One industry commenter representing credit unions stated that including the mortgage loan account number in the written notices would help borrowers identify the loan for which the written notice applies and would facilitate communication between the borrower and the credit

[163] *See* 12 CFR 1024.37(c)(2) and (d)(2).

[164] 78 FR 10695, 10770 (Feb. 14, 2013).

union. Another industry commenter stated that permitting servicers to include the mortgage loan account number in the notices required by § 1024.37(c)(1)(i) and (ii), and (e)(1)(i) would improve clarity and continuity in the communications between borrowers and servicers. A consumer advocacy group requested that the inclusion of the mortgage loan account number in the written notices be made mandatory to avoid confusion that may occur when servicers manage two or more accounts that pertain to the same borrower. One industry commenter recommended that such inclusion remain discretionary.

Several commenters urged the Bureau to allow other additional information to be included in the notices required by § 1024.37. One industry commenter requested that § 1024.37(c)(4) permit servicers to include information that would improve borrower understanding of the notices, while another recommended that the rule permit additional information so long as it was related to the general content of the notice. One consumer advocacy group stated that the notices under § 1024.37 would provide borrowers greater clarity if they included information on the dollar amount of coverage the servicer claims is needed and the fair market value of the home that the servicer used to determine the amount of coverage needed. The commenter stated that this information would help borrowers understand why the servicer was delivering a notice resulting from insufficient insurance coverage. Several industry commenters requested that § 1024.37(c)(4) also permit the notices to include information on force-placed insurance required by State law. These commenters stated that delivering the notices required by § 1024.37(c) and State law separately increases costs to servicers and may result in borrower confusion.

The Bureau is adopting § 1024.37(c)(4) as proposed. Section 1024.37(c)(4) provides that, except for the mortgage loan account number, a servicer may not include any information other than the information required by § 1024.37(c)(2) in the written notice required by § 1024.37(c)(1)(i). It further explains that a servicer may provide such additional information to a borrower on separate pieces of paper in the same transmittal. The Bureau declines to make the inclusion of the mortgage loan account number in the notices required by § 1024.37 mandatory, as one commenter recommended. Servicers should have flexibility to determine when the inclusion of the mortgage loan account number in the notices would be helpful to facilitating communication and borrower understanding.

The Bureau is not permitting additional types of information to be included in the notices required by § 1024.37, as some commenters recommended. In contrast to the mortgage loan account number, the Bureau believes that including information such as the dollar amount of coverage the servicer claims is needed or information on force-placed insurance required by State law, as suggested by some commenters, could obscure the required notices or create information overload in the required notices that could result in borrower uncertainty. Although such information may be helpful to borrowers, the Bureau believes it is more appropriately included on separate pieces of paper in the same transmittal under § 1024.37(c)(4).

37(d) Reminder Notice

37(d)(2) Content of the Reminder Notice

37(d)(2)(ii) Servicer Lacking Evidence of Continuous Coverage

The Bureau proposed to amend § 1024.37(d)(2)(ii), which specifies the information a force-placed insurance reminder notice must contain if a servicer does not have evidence that the borrower has had hazard insurance in place continuously. Currently, this provision does not address the scenario in which a servicer receives evidence that the borrower has had hazard insurance in place continuously, but the servicer lacks evidence that the continued hazard insurance is sufficient under the mortgage loan contract. While a servicer could include on a separate piece of paper a statement clarifying that it is purchasing insurance due to insufficient coverage, the Bureau believed it may be preferable for the notice itself to be clear in this regard.

In order to align the requirements of § 1024.37(d)(2)(ii) with the proposed changes to § 1024.37(c)(2)(v), the Bureau proposed to amend § 1024.37(d)(2)(ii) to clarify that the provision applies when a servicer has received hazard insurance information after providing the initial notice but has not received evidence demonstrating that the borrower has had sufficient hazard insurance coverage in place continuously. The Bureau solicited comment on whether other modifications to the required contents of the force-placed insurance notices are necessary or appropriate to address circumstances in which a servicer force-places insurance for reasons other than expired or expiring coverage.

The majority of commenters discussing the proposed revisions to § 1024.37 expressed support for the Bureau's proposal to address situations in which a borrower has insufficient, rather than expiring or expired, hazard insurance. A discussion of these comments is included in the section-by-section analysis of § 1024.37(c)(2).

The Bureau is finalizing § 1024.37(d)(2)(ii) as proposed. Final § 1024.37(d)(2)(ii) explains that this provision applies when a servicer has received hazard insurance information after delivering to a borrower or placing in the mail the notice required by § 1024.37(c)(1)(i), but has not received, from the borrower or otherwise, evidence demonstrating that the borrower has had sufficient hazard insurance coverage in place continuously. The requirements of final § 1024.37(d)(2)(ii) align with the requirements of final § 1024.37(c)(2)(v), discussed in the section-by section analysis of § 1024.37(c)(2)(v).

37(d)(2)(ii)(B)

The Bureau proposed to correct the statement in § 1024.37(d)(2)(ii)(B) that the notice must set forth the information required by § 1024.37(c)(2)(ii) through (iv), (x), (xi), and (d)(2)(i)(B) and (D). Section 1024.37(d)(2)(ii)(B) should state that the notice must also set forth information required by § 1024.37(c)(2)(ix). The Bureau did not receive comments on this proposed correction and is finalizing § 1024.37(d)(2)(ii)(B) as proposed.

37(d)(3) Format

Section 1024.37(d)(3) sets forth certain formatting requirements for the reminder notice required by § 1024.41(c)(1)(ii). The reminder notice contains some of the same information as the initial notice provided under § 1024.37(c)(1)(i). The proposal would have made a technical correction to § 1024.37(d)(3) to state that the formatting instructions in § 1024.37(c)(3), which apply to information set forth in the initial notice, also apply to the information set forth in the reminder notice provided pursuant to § 1024.37(d). The purpose of this change was to clarify that, when the same information appears in both the initial and the reminder notice, that information must be formatted the same in both notices. The Bureau did not receive comments in response to the proposed technical correction to § 1024.37(d)(3) and is finalizing as proposed.

37(d)(4) Additional Information

The Bureau proposed two amendments with respect to § 1024.37(d)(4). First, the Bureau proposed to amend § 1024.37(d)(4) to give servicers the flexibility to include a borrower's mortgage loan account number in the notice required by § 1024.37(c)(1)(ii). For the reasons discussed in the section-by-section analysis of § 1024.37(c)(4), the Bureau believed that giving servicers flexibility to include the account number might benefit servicers and borrowers without obscuring other information on the notice or leading to information overload. The Bureau sought comment on this proposal to grant servicers flexibility to include a borrower's mortgage loan account number in the notices required by § 1024.37 and whether there are other types of information that servicers should be allowed to include that would not obscure the required disclosures or create information overload. The Bureau also proposed technical corrections to renumber comment 37(d)(4)–1 as comment 37(d)(5)–1 and to correct an erroneous reference in that comment to § 1024.37(d)(4), which instead should be a reference to § 1024.37(d)(5).

The Bureau received numerous comments in response to its proposal to permit servicers to include a borrower's mortgage loan account number in the notices required by § 1024.37. The Bureau has included a discussion of these comments in the section-by-section analysis of § 1024.37(c)(4).

The Bureau is finalizing § 1024.37(d)(4) as proposed, and is renumbering comment 37(d)(4)–1 as comment 37(d)(5)–1 with certain changes for clarity. Section 1024.37(d)(4) explains that, except for the borrower's mortgage loan account number, a servicer may not include any information other than information required by § 1024.37(d)(2)(i) or (ii), as applicable, in the written notice required by § 1024.37(c)(1)(ii). It further explains that a servicer may provide such additional information to a borrower on separate pieces of paper in the same transmittal. Final § 1024.37(d)(4) is consistent with final § 1024.37(c)(4), which allows servicers to include the borrower's mortgage loan account number in the written notice required by § 1024.37(c)(1)(i).

37(d)(5) Updating Notice With Borrower Information

For the reasons discussed above, the Bureau is renumbering comment 37(d)(4)–1 as comment 37(d)(5)–1 and is finalizing comment 37(d)(5)–1 substantially as proposed. Comment 37(d)(5)–1 explains that, if the written notice required by § 1024.37(c)(1)(ii) was put into production a reasonable time prior to the servicer delivering or placing the notice in the mail, the servicer is not required to update the notice with new insurance information received. It clarifies that, for purposes of § 1024.37(d)(5), a reasonable time is no more than five days (excluding legal holidays, Saturdays, and Sundays). The final rule revises current comment 37(d)(5)–1 to remove superfluous language regarding a servicer preparing a written notice in advance of delivering or placing the notice in the mail and that the information received is about the borrower, and to make clear that five days is the maximum period of time that would be considered a reasonable time for purposes of § 1024.37(d)(5).

37(e) Renewing or Replacing Force-placed Insurance

37(e)(4) Additional Information

The Bureau proposed two amendments with respect to § 1024.37(e)(4). First, the Bureau proposed to amend § 1024.37(e)(4) to give servicers the flexibility to include a borrower's mortgage loan account number in the notice required by § 1024.37(e)(1)(i). For the reasons discussed in the section-by-section analysis of § 1024.37(c)(4), the Bureau explained that giving servicers flexibility to include the account number may benefit servicers and borrowers without obscuring other information on the notice or leading to information overload. Second, the Bureau proposed a technical correction to remove the unnecessary words ''[a]s applicable'' from § 1024.37(e)(4).

Numerous commenters discussed the Bureau's proposal to permit the inclusion of the mortgage loan account number in the notices required by § 1024.37. The Bureau has included a discussion of these comments in the section-by-section analysis of § 1024.37(c)(4).

The Bureau is finalizing § 1024.37(e)(4) substantially as proposed, with a technical correction. Section 1024.37(e)(4) provides that, except for the borrower's mortgage loan account number, a servicer may not include any information other than information required by § 1024.37(e)(2) in the written notice required by § 1024.37(e)(1). It further explains that a servicer may provide such additional information to a borrower on separate pieces of paper in the same transmittal. The Bureau is making a technical correction in this final rule to add a missing ''the'' to the second sentence of § 1024.37(e)(4).

Legal Authority

These amendments and clarifications to § 1024.37 implement sections 6(k)(1)(A), 6(k)(2), 6(l), and 6(m) of RESPA.

Section 1024.38 General Servicing Policies, Procedures, and Requirements

38(b) Objectives

38(b)(1)(vi) Successors in Interest

Current § 1024.38(b)(1)(vi) provides that servicers shall maintain policies and procedures that are reasonably designed to achieve the objective of, upon notification of the death of a borrower, promptly identifying and facilitating communication with the successor in interest of the deceased borrower with respect to the property securing the deceased borrower's mortgage loan. The Bureau proposed several modifications to this requirement.

Proposed § 1024.38(b)(1)(vi) would have expanded the current policies and procedures requirement regarding identifying and communicating with successors in interest. Proposed § 1024.38(b)(1)(vi)(A) would have required servicers to maintain policies and procedures that are reasonably designed to ensure that the servicer can promptly identify and facilitate communication with any potential successors in interest upon notification either of the death of a borrower or of any transfer of the property securing a mortgage loan. Proposed § 1024.38(b)(1)(vi)(B) would have required servicers to maintain policies and procedures that are reasonably designed to ensure that the servicer can, upon identification of a potential successor in interest—including through any request made by a potential successor in interest under § 1024.36(i) or any loss mitigation application received from a potential successor in interest—provide promptly to the potential successor in interest a description of the documents the servicer reasonably requires to confirm that person's identity and ownership interest in the property and how the person may submit a written request under § 1024.36(i) (including the appropriate address). Proposed § 1024.38(b)(1)(vi)(C) would have required servicers to maintain policies and procedures that are reasonably designed to ensure that the servicer can, upon the receipt of such documents (*i.e.,* those the servicer reasonably requires to confirm that person's identity and ownership interest in the property), promptly notify the person, as applicable, that the servicer has confirmed the person's status, has determined that additional documents are required (and what those documents are), or has determined that the person is not a successor in interest. Proposed commentary to § 1024.38(b)(1)(vi) would have clarified these requirements, including providing examples illustrating documents a servicer may require under certain circumstances. For the reasons stated in part V.A. and this discussion, the Bureau has decided to finalize proposed § 1024.38(b)(1)(vi) and related commentary with a number of changes.

In their comments, consumer advocacy groups generally supported the substance of the proposed changes to § 1024.38(b)(1)(vi), noting that they would bring greater clarity to the process and specificity regarding servicers' obligations. A number of these groups urged the Bureau to move all of the requirements of § 1024.38(b)(1)(vi) to a privately enforceable section of Regulation X and to require small servicers to comply with them. Some commenters also suggested that the final rule should create an appeal process or notice of error procedure, with a private right of action, that successors in interest could use to challenge unfavorable determinations relating to successor status. Consumer advocacy groups also encouraged the Bureau to establish specific time limits for the confirmation process.

Consumer advocacy groups emphasized the need for servicers to identify promptly the specific documents required for confirmation. The office of a State Attorney General commented that, in its experience, servicers do not consider the successor in interest's circumstances or State-specific requirements and instead impose the same requirements on all potential successors in interest, forcing them to expend time and resources needlessly to establish their ownership interest in the property. This commenter supported requiring servicers to implement State-specific policies relating to necessary proof to establish an ownership interest under proposed § 1024.38(b)(1)(vi)(B). It stated that the required documents should take into account the relevant jurisdiction, the successor in interest's specific situation, and the documents already in the servicer's possession.

A number of industry commenters urged the Bureau to provide greater clarity regarding servicers' obligations in confirming successors in interest. These commenters requested clear and reasonable requirements for identifying and communicating with successors in interest. Some of these industry commenters urged the Bureau to lay out a process for identifying and communicating with potential successors and to provide a safe harbor in the final rule for servicers that comply with that process.

Various industry commenters expressed concern that the proposal might require them to provide legal advice to potential successors in interest. A trade association suggested that it would be a monumental task to create and maintain over time policies and procedures appropriate for each jurisdiction to address the varying situations that might arise. Another industry commenter urged the Bureau to indicate that the burden of determining the appropriate jurisdictionally valid documents lies with the successor in interest. It recommended that the final rule limit a servicer's obligation to a potential successor in interest to providing general examples of documents typically accepted to establish identity and ownership interest in the property, similar to the examples provided in proposed comment 38(b)(1)(vi)–2.

Industry commenters also stated that servicers should not be put in the position of having to adjudicate the validity of a potential successor's ownership interest, particularly when there are competing claims from other parties. These commenters indicated that they did not want to get drawn into contentious divorce disputes or other civil litigation.

Two trade associations stated that the Bureau should permit servicers to adjust their practices to the actual and potential risks of illegal activity or erroneous information. They referred to requirements under the Bank Secrecy Act to verify the identity of persons who seek to open accounts and stated that servicers need to be able to decline to recognize a claimant as a borrower, where appropriate.

A number of industry commenters expressed concern about the requirement in proposed § 1024.38(b)(1)(vi)(A) to identify potential successors in interest. An industry commenter suggested that a requirement to identify any potential successors in interest could open servicers up to civil liability where the servicer has not identified all potential successors in interest. Other industry commenters expressed concern that proposed § 1024.38(b)(1)(vi)(A) might require servicers to seek out potential successors in interest. Some industry commenters suggested that the Bureau should not extend the scope of the obligation in § 1024.38(b)(1)(vi) beyond the scope of the definition of successor in interest in proposed § 1024.31. At least one industry commenter found the interplay between proposed § 1024.38(b)(1)(vi) and proposed § 1024.36(i) confusing.

Commenters expressed widely divergent views on whether § 1024.38(b)(1)(vi) should require servicers to respond to potential successors in interest in writing. Consumer advocacy groups and the office of a State Attorney General recommended requiring a written response, given the continuing problems they have seen successors in interest encounter in establishing their status. The office of a State Attorney General stated that requiring a written response would prevent miscommunications and provide clear documentation in the event of a transfer of servicing. This commenter noted that it has worked with homeowners who have had to reestablish their successor in interest status after a transfer of servicing rights. It also indicated that a homeowner who has written confirmation from a previous servicer is less likely to have to repeat the successor identification process with the new servicer. Consumer advocacy groups suggested that a written response might be helpful if a potential successor in interest is seeking assistance from an advocate. These groups indicated that, if a potential successor in interest is not confirmed, the servicer should include in its written response an explanation of reasons for the determination as well as an explanation of how to submit a written notice of error.

In contrast, industry commenters indicated that the Bureau should not require a written response. Some industry commenters suggested that servicers should have the flexibility to decide whether confirmation of the successor in interest should be in writing, oral, or both. One industry commenter noted that, if there is a danger of foreclosure, for example, a servicer could communicate a confirmation determination verbally to avoid mailing delays.

Commenters also expressed divergent views on whether the final rule should define the term promptly for purposes of § 1024.38(b)(1)(vi) and, if so, how. Several consumer advocacy groups suggested that promptly for purposes of § 1024.38(b)(1)(vi) should mean within five business days. Another consumer advocacy group suggested that, for purposes of notifying successors in interest of confirmation, promptly should be defined as within 30 days. This commenter noted that delays in confirmation determinations can cause or increase delinquencies and harm prospects for loss mitigation. A consumer advocacy group suggested that the Bureau should consider the loss mitigation timetable that requires notices for an incomplete application, a complete application, and a deadline for review as a reference in defining promptly for purposes of § 1024.38(b)(1)(vi).

An industry commenter urged the Bureau not to define promptly, noting that what should be considered promptly may vary depending on the scenario. It suggested that servicers should have a reasonable amount of time, not less than 30 days, to make confirmation decisions. Another industry commenter suggested 60 days, while a trade association suggested that the final rule should provide a reasonable time of up to 90 calendar days, unless a dispute is being litigated. Another industry commenter suggested that 10 business days from determination of confirmation would suffice.[165]

The Bureau agrees with the various commenters that emphasized the need for greater specificity regarding the policies and procedures that servicers need to implement with regard to successors in interest. In light of the comments received, the Bureau has made adjustments to the proposed regulation text and commentary and has added additional commentary in the final rule. As finalized, § 1024.38(b)(1)(vi)(A) requires servicers to maintain policies and procedures reasonably designed to ensure that, upon receiving notice of the death of a borrower or of any transfer of the property securing a mortgage loan, the servicer can promptly facilitate communication with any potential or confirmed successors in interest regarding the property. Section 1024.38(b)(1)(vi)(B) requires servicers to maintain policies and procedures reasonably designed to ensure that, upon receiving notice of the existence of a potential successor in interest, the servicer can promptly determine the documents it reasonably requires to confirm that person's identity and ownership interest in the property and promptly provide to the potential successor in interest a description of those documents and how the person may submit a written request under § 1024.36(i) (including the appropriate address). Section 1024.38(b)(1)(vi)(C) requires servicers to maintain policies and procedures reasonably designed to ensure that, upon the receipt of such documents, the servicer can promptly make a confirmation determination and promptly notify the person, as applicable, that the servicer has confirmed the person's status, has determined that additional documents are required (and what those documents are), or has determined that the person is not a successor in interest.

In light of the other requirements that it is finalizing in § 1024.38(b)(1)(vi), the Bureau has concluded that there is no need to finalize the aspect of proposed § 1024.38(b)(1)(vi)(A) that would have required a servicer to have policies and procedures in place reasonably designed to identify promptly any potential successors in interest upon notification of the death of a borrower or of any transfer of the property securing a mortgage loan. In lieu of finalizing the proposed requirement to identify potential successors in interest that raised concerns for many industry commenters, the Bureau has provided illustrative examples in new comment 38(b)(1)(vi)–1 of how a servicer may be notified of the existence of a potential successor in interest. The Bureau believes that these revisions clarify servicers' responsibilities under § 1024.38(b)(1)(vi) without undermining the protections provided for potential successors in interest.

The Bureau recognizes, as it did at the proposal stage, that the policies and procedures requirement must apply to a broader category of persons than the definition of successor in interest under the final rule. As many consumer advocacy groups and other commenters noted, a potential successor in interest may come to the attention of the servicer in a variety of ways. The policies and procedures requirements in § 1024.38(b)(1)(vi) are triggered as soon as a servicer receives notice of the existence of a potential successor in interest, even if the servicer does not know at the time of initial contact whether a potential successor in interest in fact meets the Regulation X definition of successor in interest. A servicer may not wait until it has reason to believe that the transfer falls within the scope of the definition to engage in the communications required by § 1024.38(b)(1)(vi). Thus, for example, a servicer's policies and procedures should require the servicer to facilitate communication regarding the proof required to establish successor in interest status with any person who indicates that a borrower has died, even if the servicer is not certain whether the person is in fact a successor in interest.

The final rule, like the proposal, does not require servicers to provide legal advice to successors in interest. As explained in part V.A., the final rule does, however, require a servicer to have policies and procedures in place that are reasonably designed to ensure that the servicer can promptly describe to the successor in interest the documents that the servicer will accept to confirm the potential successor in interest's identity and ownership interest in the property. The types of determinations necessary for a confirmation decision are ones that servicers routinely make for a variety of purposes—for example, in identifying who to serve in a foreclosure action and who should receive other notices required by State law.

As some industry commenters indicated, there may be circumstances where it is not possible for a servicer to make a confirmation determination based on the information submitted, due to competing successorship claims or other reasons. In light of concerns raised by commenters, the Bureau has added commentary to § 1024.38(b)(1)(vi) addressing circumstances where additional documentation is required for confirmation, as discussed below.[166]

Although a number of consumer advocacy group commenters urged the Bureau to require servicers to provide written confirmation decisions, the final rule follows the proposal in leaving the means of communication to servicers' discretion. Servicers will likely find it beneficial to communicate their decisions in writing in many cases to prevent ambiguity and memorialize decisions. However, as industry commenters noted, there may be circumstances where oral notification is advantageous due to time constraints, and the Bureau has concluded that the best approach is to allow the servicer to choose the appropriate mode of communication based on the particular facts and circumstances of each case.

The Bureau has decided not to adopt a definition of promptly for purposes of

[165] As discussed below, both consumer advocacy groups and industry commenters criticized the requirement in proposed comment 38(b)(1)(vi)–3 that, in general, a servicer's policies and procedures would have to be reasonably designed to ensure that the servicer confirms a successor in interest's status and notifies the person of the servicer's confirmation at least 30 days before the next applicable milestone provided in comment 41(b)(2)(ii)–2.

[166] The Bureau has also made adjustments to § 1024.36(i). If a written request under § 1024.36(i) does not provide sufficient information to enable the servicer to identify the documents the servicer reasonably requires for confirmation, § 1024.36(i)(2) allows the servicer to provide a response that includes examples of documents typically accepted to establish identity and ownership interest in a property, indicates that the person may obtain a more individualized description of required documents by providing additional information, specifies what additional information is required, and provides contact information for further assistance.

§ 1024.38(b)(1)(vi) because whether an action is prompt under § 1024.38(b)(1)(vi) will depend on the facts and circumstances of the request. In many instances, providing information promptly may require a servicer to respond more quickly than the time limits established in § 1024.36(d)(2) for responding to a request for information under § 1024.36(i). For example, if a non-borrowing spouse informs the servicer of the borrowing spouse's mortgage that the borrowing spouse has died and that the borrowing spouse and non-borrowing spouse owned the property jointly as tenants by the entirety, the Bureau expects that a servicer would respond to the non-borrowing spouse with a description of the documents required for confirmation within a significantly shorter period of time than 30 days.

The Bureau has made specific adjustments in the final rule to ensure that it is clear that servicers must act promptly both in determining the documents the servicer reasonably requires and in providing to the potential successor in interest a description of those documents and how the person may submit a written request under § 1024.36(i). Similarly, the Bureau has made adjustments to ensure that it is clear that both the servicer's confirmation determination and the notification to the potential successor in interest of that determination are to be done promptly. The Bureau recognizes that delays in the confirmation process can have significant deleterious consequences for successors in interest, including unnecessary foreclosures. The Bureau will monitor carefully how servicers implement the policies and procedures requirement to provide information promptly.

Although some industry commenters expressed concern regarding the possibility of fraud, identity theft, or similar malfeasance, the Bureau does not anticipate that the final rule will result in any significant increase in these problems. Revised § 1024.38(b)(1)(vi) lays out a process for confirmation of a potential successor in interest's identity and ownership interest. Neither § 1024.38(b)(1)(vi) nor § 1024.36 requires a servicer to provide any account-specific information to a potential successor in interest prior to confirmation, other than a description of the documents required for confirmation. Further, nothing in the final rule prevents compliance with the GLBA information security requirements or, if applicable, the Bank Secrecy Act. As discussed below, the Bureau has added a new comment clarifying that, prior to confirmation, servicers may request documents that the servicer reasonably believes are necessary to prevent fraud or other criminal activity.[167]

For the reasons stated in part V.A., the final rule does not create a private right of action for potential successors in interest relating to confirmation determinations, nor does it provide a safe harbor from UDAAP claims relating to confirmation determinations. A trade association urged the Bureau more generally to protect servicers from RESPA liability as to non-obligor successors in the final rule. However, as explained in part V.A., confirmed successors in interest are borrowers for purposes of Regulation X subpart C and § 1024.17 and, as such, should enjoy the same protections as other borrowers, including, where applicable, a right of action under 12 U.S.C. 2605.

The final rule includes a new comment 38(b)(1)(vi)–1, which explains that a servicer may be notified of the existence of a potential successor in interest in a variety of ways. Comment 38(b)(1)(vi)–1 provides a non-exclusive list of examples of ways in which a servicer could be notified of the existence of a potential successor in interest, including that a person could indicate that there has been a transfer of ownership or of an ownership interest in the property or that a borrower has been divorced, legally separated, or died, or a person other than a borrower could submit a loss mitigation application. The comment also explains that a servicer must maintain policies and procedures reasonably designed to ensure that the servicer can retain this information and promptly facilitate communication with potential successors in interest when a servicer is notified of their existence. The comment clarifies that a servicer is not required to conduct a search for potential successors in interest if the servicer has not received actual notice of their existence. This comment addresses questions that commenters raised regarding servicers' responsibilities in identifying and communicating with potential successors in interest.

Proposed comment 38(b)(1)(vi)–1 stated that the documents a servicer requires to confirm a potential successor in interest's identity and ownership interest in the property must be reasonable in light of the laws of the relevant jurisdiction, the successor in interest's specific situation, and the documents already in the servicer's possession. The proposed comment would have provided that the required documents may, where appropriate, include, for example, a death certificate, an executed will, or a court order.

The Bureau is finalizing this comment, renumbered as comment 38(b)(1)(vi)–2, with additional language to address concerns raised by commenters relating to the possibility of fraud or criminal activity. As finalized, comment 38(b)(1)(vi)–2 indicates that the documents a servicer requires to confirm that person's identity and ownership interest in the property may also include documents that the servicer reasonably believes are necessary to prevent fraud or other criminal activity (for example, if a servicer has reason to believe that documents presented are forged).

Proposed comment 38(b)(1)(vi)–2 included examples illustrating documents that a servicer may require to confirm a potential successor in interest's identity and ownership interest in the property and that generally would be reasonable, subject to the relevant law governing each situation, in four common situations involving potential successors in interests. The Bureau is finalizing this proposed comment with a number of clarifying changes and renumbering it as comment 38(b)(1)(vi)–3.

Some industry commenters urged the Bureau not to finalize these examples and expressed concern that they might limit the information that servicers could request from potential successors in interest. Some trade associations stated that the type of documents required to prove a transfer of ownership depends on State law and urged the Bureau not to finalize a regulation that could interfere or conflict with State law. These trade associations also suggested that servicers might need to request additional documents not described in the examples listed to protect against the possibility that the claimant is engaging in fraud, that a third party may claim an ownership interest in the property through adverse possession or an undisclosed transfer, that tenants by the entirety may have divorced, or that there has been a probate proceeding not required by applicable law.

Other commenters indicated that they found the examples identified in the proposed comment helpful. Several consumer advocacy groups stated in their comments that servicers continue to request documentation to prove the successor in interest's identity and ownership interest in the property that is unreasonable in the successor in interest's particular situation. For instance, a large number of elder

[167] Regulation X comment 38(b)(1)(vi)–2.

advocates, including legal services attorneys and housing counselors, reported to one consumer advocacy group that they had been asked for probate documents despite having provided the servicer with a right of survivorship deed.

In light of the challenges that successors in interest continue to face, as described in part V.A., the Bureau believes that it is necessary to provide guidance on the documents a servicer would generally reasonably require to confirm a potential successor in interest's identity and ownership interest in the property. However, in light of the concerns expressed regarding the proposed examples, the Bureau has made adjustments to the comment to emphasize that the relevant law governing each situation may vary from State to State, that the examples are illustrative only, and that the examples illustrate documents that it would generally be reasonable for a servicer to require to confirm a potential successor in interest's identity and ownership interest in the property under the specific circumstances described.

The Bureau appreciates commenters' concerns that there may be factual scenarios that appear similar to one of the examples listed in comment 38(b)(1)(vi)–3 where a servicer needs to request documents that are not identified in the example due to particular circumstances not discussed in the example. As comment 38(b)(1)(vi)–3 indicates, the examples are intended to provide general guidance, and a servicer may reasonably require additional or different documents when warranted by the circumstances. Any such requests must be tailored to and appropriate for the potential successor in interest's particular circumstances.

A number of industry commenters and consumer advocacy groups highlighted various ways in which the applicable law described in the examples is not consistent with the law of one or more particular States.[168] The Bureau believes that these comments reflect a misunderstanding of the purpose of the examples and how the term applicable law was used in proposed comment 38(b)(1)(vi)–2. Each of the examples in the comment discusses the law of a hypothetical jurisdiction. In using the term applicable law, the Bureau did not mean to suggest that any particular State law principle described applies universally. To clarify this point, the final commentary replaces ''applicable law'' with ''the applicable law of the relevant jurisdiction'' in each example provided.

The situations identified in comment 38(b)(1)(vi)–3 are:

1. *Tenancy by the entirety or joint tenancy.* Assume that a servicer knows that the potential successor in interest and the transferor borrower owned the property as tenants by the entirety or joint tenants and that the transferor borrower has died. Assume further that, upon the death of the transferor borrower, the applicable law of the relevant jurisdiction does not require a probate proceeding to establish that the potential successor in interest has sole interest in the property but requires only that there be a prior recorded deed listing both the potential successor in interest and the transferor borrower as tenants by the entirety (*e.g.,* married grantees) or joint tenants. Comment 38(b)(1)(vi)–3 indicates that, under these circumstances, it would be reasonable for the servicer to require the potential successor in interest to provide documentation of the recorded instrument, if the servicer does not already have it, and the death certificate of the transferor borrower. The comment also explains that it generally would not be reasonable for the servicer to require documentation of a probate proceeding because, in this situation, a probate proceeding is not required under the applicable law of the relevant jurisdiction.

2. Affidavits of heirship. Assume that a potential successor in interest indicates that an ownership interest in the property transferred to the potential successor in interest upon the death of the transferor borrower through intestate succession and offers an affidavit of heirship as confirmation. Assume further that, upon the death of the transferor borrower, the applicable law of the relevant jurisdiction does not require a probate proceeding to establish that the potential successor in interest has an interest in the property but requires only an appropriate affidavit of heirship. Comment 38(b)(1)(vi)–3 indicates that, under these circumstances, it would be reasonable for the servicer to require the potential successor in interest to provide the affidavit of heirship and the death certificate of the transferor borrower. The comment also explains that it generally would not be reasonable for the servicer to require documentation of a probate proceeding because a probate proceeding is not required under the applicable law of the relevant jurisdiction to recognize the transfer of title.

3. *Divorce or legal separation.* Assume that a potential successor in interest indicates that an ownership interest in the property transferred to the potential successor in interest from a spouse who is a borrower as a result of a property agreement incident to a divorce proceeding. Assume further that the applicable law of the relevant jurisdiction does not require a deed conveying the interest in the property but accepts a final divorce decree and accompanying separation agreement executed by both spouses to evidence transfer of title. Comment 38(b)(1)(vi)–3 indicates that, under these circumstances, it would be reasonable for the servicer to require the potential successor in interest to provide documentation of the final divorce decree and an executed separation agreement. The comment indicates that, generally, it would not be reasonable for the servicer to require a deed because the applicable law of the relevant jurisdiction does not require a deed.

4. *Living spouses or parents.* Assume that a potential successor in interest indicates that an ownership interest in the property transferred to the potential successor in interest from a living spouse or parent who is a borrower by quitclaim deed or act of donation. Comment 38(b)(1)(vi)–3 indicates that, under these circumstances, it would be reasonable for the servicer to require the potential successor in interest to provide the quitclaim deed or act of donation. The comment explains that it generally would not be reasonable, however, for the servicer to require additional documents.

Comment 38(b)(1)(vi)–3 provides specific guidance about what are reasonable documents to require from a potential successor in interest to confirm the person's status as a successor in interest in very common and straightforward situations. In those situations, the Bureau expects that servicers generally will not need potential successors in interest to produce any additional documents beyond those specified in comment 38(b)(1)(vi)–3. This comment does not cover all possible situations involving successors in interest, however, and additional documents may be required in certain less straightforward situations or due to facts or legal requirements that are not addressed in the examples. The Bureau will continue to monitor implementation of these policies and procedures requirements to see if there are further clarifications in this area that would be helpful.

[168] For example, responding to one example in proposed comment 38(b)(1)(vi)–2 that mentioned an affidavit of heirship, a trade association commenter noted that California does not use an affidavit of heirship.

The final rule also includes new comment 38(b)(1)(vi)–4, which explains that, if a servicer reasonably determines that it cannot make a determination of the potential successor in interest's status based on the documentation provided, it must specify what additional documentation is required. The comment notes, for example, that, if there is pending litigation involving the potential successor in interest and other claimants regarding who has title to the property at issue, a servicer may specify that documentation of a court determination or other resolution of the litigation is required. Servicers should not generally, however, request documentation of a court determination or other resolution of litigation absent knowledge of such litigation.

Proposed comment 38(b)(1)(vi)–3 explained proposed § 1024.38(b)(1)(vi)(C)'s requirement that servicers maintain policies and procedures reasonably designed to ensure that the servicer can, upon the receipt of the documents that the servicer reasonably requires, promptly notify the person, as applicable, that the servicer has confirmed the person's status, has determined that additional documents are required (and what those documents are), or has determined that the person is not a successor in interest. The proposed comment would have provided that, upon the receipt of the documents, the servicer's confirmation and notification must be sufficiently prompt so as not to interfere with the successor in interest's ability to apply for loss mitigation options according to the procedures provided in § 1024.41. The proposed comment also would have provided that, in general, a servicer's policies and procedures must be reasonably designed to ensure that confirmation of a successor in interest's status occurs at least 30 days before the next applicable milestone provided in proposed comment 41(b)(2)(ii)–2.[169] The Bureau proposed comment 38(b)(1)(vi)–3 because it recognized that successors in interest may have difficulty pursuing loss mitigation options to avoid foreclosure when the servicer does not promptly confirm the successor in interest's identity and ownership interest in the property. Miscommunication and delay in the process of confirming successors in interest's identity and ownership interest in the property can prevent successors in interest from successfully applying for loss mitigation.

Various commenters objected to the linkage of confirmation in proposed comment 38(b)(1)(vi)–3 with the milestones in proposed comment 41(b)(2)(ii)–2. Some of these commenters noted that tying promptness to the next milestone could either result in an unreasonably long period or an unreasonably short one and predicted that it would lead to errors and confusion.

The final rule addresses these issues in comment 38(b)(1)(vi)–5, which clarifies servicers' obligations under § 1024.38(b)(1)(vi)(C) to maintain policies and procedures that are reasonably designed to ensure that the servicer can promptly notify the potential successor in interest that the servicer has confirmed the potential successor in interest's status. In light of the concerns raised by commenters, comment 38(b)(1)(vi)–5 omits any reference to the milestones. Instead, comment 38(b)(1)(vi)–5 clarifies that notification is not prompt for purposes of the requirement in § 1024.38(b)(1)(vi)(C) if it unreasonably interferes with a successor in interest's ability to apply for loss mitigation options according to the procedures provided in § 1024.41.

Legal Authority

The Bureau is issuing these amendments to § 1024.38 pursuant to its authority under section 19(a) of RESPA. As explained above, the servicing policies, procedures, and requirements set forth in these amendments are necessary to achieve the purposes of RESPA, including to avoid unwarranted or unnecessary costs and fees, to ensure that servicers are responsive to consumer requests and complaints, to ensure that servicers provide accurate and relevant information about the mortgage loan accounts that they service, and to facilitate the review of borrowers for foreclosure avoidance options. The Bureau believes that, without sound policies and procedures and without achieving certain standard requirements, servicers will not be able to achieve those purposes.

The Bureau is also issuing these amendments to § 1024.38 pursuant to its authority under section 1022(b) of the Dodd-Frank Act to prescribe regulations necessary or appropriate to carry out the purposes and objectives of Federal consumer financial laws. Specifically, these amendments to § 1024.38 are necessary and appropriate to carry out the purposes under section 1021(a) of the Dodd-Frank Act of ensuring that markets for consumer financial products and services operate transparently and efficiently to facilitate access and innovation. The Bureau additionally is relying on its authority under section 1032(a) of the Dodd-Frank Act, which authorizes the Bureau to prescribe rules to ensure that the features of any consumer financial product or service, both initially and over the term of the product or service, are fully, accurately, and effectively disclosed to consumers in a manner that permits consumers to understand the costs, benefits, and risks associated with the product or service, in light of the facts and circumstances.

38(b)(2) Properly Evaluating Loss Mitigation Applications

38(b)(2)(vi)

Proposed § 1024.38(b)(2)(vi) provided that a servicer must maintain policies and procedures reasonably designed to ensure that the servicer can promptly identify and obtain documents or information not in the borrower's control that the servicer requires to determine which loss mitigation options, if any, to offer the borrower in accordance with the requirements of proposed § 1024.41(c)(4), discussed below.[170] The Bureau received no comments on proposed § 1024.38(b)(2)(vi) and is adopting the provision as proposed, for the reasons discussed below.

Under current § 1024.41(c)(1), if a servicer receives a complete loss mitigation application more than 37 days before a foreclosure sale, the servicer shall, within 30 days of receipt, evaluate the borrower for all loss mitigation options available to the borrower and provide the notice required under § 1024.41(c)(1)(ii). Section 1024.41(b)(1) defines a complete loss mitigation application to include information that the servicer requires from the borrower in evaluating applications for the loss mitigation options available to the borrower. Thus, a loss mitigation application can be complete even if a servicer requires additional information that is not in the control of the borrower.[171]

Through outreach efforts in advance of the proposal, the Bureau learned that servicers cannot always obtain necessary third-party information in time to evaluate a borrower's complete loss mitigation application within 30

[169] Proposed comment 41(b)(2)(ii)–2 would have provided the following milestones: (1) The date by which any document or information submitted by a borrower will be considered stale or invalid pursuant to any requirements applicable to any loss mitigation option available to the borrower; (b) The date that is the 120th day of the borrower's delinquency; (3) The date that is 90 days before a foreclosure sale; (4) The date that is 38 days before a foreclosure sale.

[170] As discussed in the section-by-section analysis of § 1024.41(c)(4) below, the Bureau is adopting § 1024.41(c)(4) with several changes from the proposal.

[171] *See* comment 41(b)(1)–5.

days of receipt, as required by § 1024.41(c)(1). Servicers and Federal agencies informed the Bureau that this can occur either because a servicer delays requesting the information, or because a third party delays providing it. Current § 1024.41 does not specifically address this circumstance—when a servicer is unable to obtain information not in the borrower's control by a date that will enable the servicer to make a determination as to which loss mitigation options, if any, to offer the borrower within 30 days of receiving a complete application as required by § 1024.41(c)(1).

As explained in the section-by-section analysis of new § 1024.41(c)(4), the Bureau is addressing these issues by adding requirements with respect to the servicer's obligation to pursue necessary information not in the borrower's control and the servicer's responsibilities if unable to obtain such information within 30 days of receiving a complete loss mitigation application. Servicers often need to access information from parties other than the borrower at different points during a loss mitigation application process, and § 1024.41(c)(4) (among other things) ensures that they pursue that information timely. Servicers' efficiency in obtaining such information will benefit borrowers by facilitating compliance with § 1024.41(c)(1)'s requirement to evaluate complete loss mitigation applications within 30 days.

The policies and procedures requirements in § 1024.38(b)(2)(vi) will facilitate compliance with the requirements for gathering information not in the borrower's control under § 1024.41(c)(4). Maintaining such policies and procedures will ensure that servicers have appropriate mechanisms in place to identify and obtain such information efficiently. Section 1024.38(b)(2)(vi) also contributes to the goals of § 1024.38(b)(2) more generally. Section 1024.38(b)(2) requires servicers to maintain policies and procedures regarding various aspects of evaluation of loss mitigation applications, including (among others) document collection and proper evaluation. The Bureau believes that these and other requirements of § 1024.38(b)(2) facilitate servicer compliance with § 1024.41 and lead to loss mitigation processes that better protect consumers.[172] Requiring servicers to maintain policies and procedures regarding the identification and collection of information not in the borrower's control under § 1024.38(b)(2)(vi) similarly protects borrowers by facilitating compliance with § 1024.41(c)(4) and the evaluation timelines provided under § 1024.41(c)(1).

38(b)(3) Facilitating Oversight of, and Compliance by, Service Providers

38(b)(3)(iii)

The Bureau proposed and is adopting a new comment to § 1024.38(b)(3)(iii) to clarify the requirements for policies and procedures regarding servicers' communications with service provider personnel, including foreclosure counsel, as they relate to the prohibition in § 1024.41(g). As discussed in the section-by-section analysis of § 1024.41(g) below, the Bureau received no comments that raised concerns about the proposed comment.

Section 1024.39 Early Intervention Requirements for Certain Borrowers

39(a) Live Contact

The Bureau proposed several clarifications, revisions, and amendments to § 1024.39(a) and its commentary. The proposed changes were intended to clarify that a servicer's early intervention live contact obligations recur in each billing cycle while a borrower is delinquent, and to provide additional examples illustrating how the live contact requirements apply in certain circumstances, such as when a borrower is unresponsive or is in the process of applying for loss mitigation pursuant to § 1024.41. The Bureau is finalizing § 1024.39(a) substantially as proposed, with a change to clarify its applicability. The Bureau is finalizing comments 39(a)–1, –2, and –3 substantially as proposed, with certain revisions for clarity. The Bureau is finalizing comments 39(a)–4 and –5 with minor revisions for clarity.

Repeated Attempts to Establish Live Contact

Section 1024.39(a) currently requires a servicer to establish or make good faith efforts to establish live contact with a delinquent borrower not later than the 36th day of the borrower's delinquency. Current comment 39(a)–1 states that a borrower's delinquency begins ''on the day a payment sufficient to cover principal, interest, and, if applicable, escrow for a given billing cycle is due and unpaid . . . .''[173] The Bureau has always understood these provisions to require servicers to make repeated attempts to contact a borrower who remains delinquent for more than one billing cycle. The Bureau proposed to revise § 1024.39(a) to codify this interpretation and expressly require servicers to establish or make good faith efforts to establish live contact with a delinquent borrower no later than the 36th day after each payment due date for the duration of the borrower's delinquency.

As stated in the 2012 RESPA Servicing Proposal, the Bureau intended the live contact provisions to create an ongoing obligation for a servicer to attempt to communicate with a delinquent borrower. In its discussion of the decision to limit a servicer's obligation to provide written notice under § 1024.39(b)(1) to once every 180 days, the Bureau noted that it was not including a similar limitation in § 1024.39(a) because it expected a servicer to contact a borrower during each period of delinquency.[174] In the 2013 RESPA Servicing Final Rule, the Bureau confirmed that it expected servicers to attempt to make live contact on a recurring basis and stated that servicers must establish live contact or make good faith efforts to do so, ''even with borrowers who are regularly delinquent, by the 36th day of a borrower's delinquency.''[175] In the October 2013 Servicing Bulletin, the Bureau again clarified that servicers have an obligation to make good faith efforts to contact a borrower within 36 days of when a borrower first becomes delinquent ''and for each of any subsequent billing periods for which the borrower's obligation is due and unpaid.''[176] The Bureau still believes that borrowers who remain delinquent for more than one billing cycle benefit from receiving repeated live contact and that relieving a servicer of its obligations to establish live contact after the initial delinquent billing cycle would undermine the intent of § 1024.39(a).

To provide additional guidance, the Bureau proposed to revise and re-order comment 39(a)–1 and its subsections. First, the Bureau proposed to remove the language in current comment 39(a)–1.i. As discussed in the section-by-section analysis of § 1024.31, the Bureau proposed a new definition of delinquency applicable to all of subpart C, which would make the language in current comment 39(a)–1.i superfluous. Second, the Bureau proposed to revise current comment 39(a)–1 and 39(a)–1.i and add comment 39(a)–1.i.A and 39(a)–1.i.B with examples to illustrate how a servicer may comply with the recurring live contact obligation when a borrower is delinquent for one or more billing cycles. The Bureau also proposed to revise comment 39(a)–2 to codify

[172] 77 FR 57199, 57248 (Sept. 17, 2012).

[173] Current Comment 39(a)–1.

[174] 77 FR 57199, 57256 (Sept. 17, 2012).

[175] 78 FR 10696, 10795 (Feb. 14, 2013).

[176] October 2013 Servicing Bulletin at 5.

guidance from the October 2013 Servicing Bulletin, which clarified that servicers are permitted to combine their live contact attempts with their attempts to contact borrowers for other purposes, including, for example, by providing a borrower with information about available loss mitigation options when contacting the borrower for purposes of collection.[177]

Finally, the Bureau proposed to add comment 39(a)–3 to clarify that, while the Bureau expects servicers to continue to attempt to make live contact with borrowers who are regularly delinquent, a borrower's failure to respond to such attempts, as well as the length of the borrower's delinquency, are relevant circumstances to consider when evaluating a servicer's good faith. To this end, the Bureau proposed to add an example it first provided in the October 2013 Servicing Bulletin. The example would have provided that, in the case of a borrower with six or more consecutive delinquencies, good faith efforts to establish live contact might include adding a sentence in the borrower's periodic statement or another communication encouraging the borrower to contact the servicer. The Bureau proposed to re-designate current comments 39(a)–3 and 39(a)–4 as, respectively, comments 39(a)–4 and 39(a)–5 to accommodate the addition of proposed comment 39(a)–3.

The Bureau received several comments from industry and consumer advocacy group commenters expressing general support for the proposed revisions to § 1024.39(a). Two industry commenters stated that the proposed revisions would clarify the current requirements for early intervention and generally reflect common practices among credit unions.

A few industry commenters stated that the proposal would impose burdensome requirements on servicers because it would require them to comply with the live contact requirements under § 1024.39(a) every 36 days. These commenters expressed concern that the proposal could require such live contact efforts to continue even after a loan has been referred to foreclosure, and they noted that the foreclosure process can continue for years in judicial foreclosure States. One commenter expressed concern that the proposed revisions would not define what constitutes good faith efforts to establish live contact. Another industry commenter said that the proposal could require servicers to make live contact with borrowers in bankruptcy, which would be inconsistent with the goals of bankruptcy protection and could cause borrower confusion. This commenter also suggested that the live contact requirements could cause confusion for borrowers who are receiving State-mandated pre-foreclosure notices or the first notice or filing for foreclosure. This commenter urged the Bureau to restrict the live contact requirements of proposed § 1024.39(a) to the first 120 days of the borrower's delinquency.

The Bureau is finalizing § 1024.39(a) substantially as proposed, with a change to clarify its applicability. The Bureau is finalizing comments 39(a)–1,–2, and –3 substantially as proposed, with certain revisions for clarity. The Bureau is finalizing comments 39(a)–4 and –5 with minor revisions for clarity.

Section 1024.39(a) explains that, except as otherwise provided in § 1024.39, a servicer shall establish or make good faith efforts to establish live contact with a delinquent borrower no later than the 36th day of a borrower's delinquency and again no later than 36 days after each payment due date so long as the borrower remains delinquent. It further provides that, promptly after establishing live contact with a borrower, the servicer shall inform the borrower about the availability of loss mitigation options, if appropriate.

Some commenters expressed specific concern over the burden associated with the live contact requirements in situations where a loan has been referred to foreclosure, noting that the foreclosure process may take several years. As discussed in more detail below, comment 39(a)–3 accounts for the burden associated with § 1024.39(a) where there is a prolonged delinquency. It clarifies that the length of a borrower's delinquency may be a factor to consider in the determination of what constitutes good faith efforts to establish live contact.

The Bureau declines to adopt additional exemptions to the live contact requirements based on the length of a borrower's delinquency, as requested by one commenter. Additional exemptions could harm borrowers by limiting their communications with servicers and their awareness of possible alternatives to foreclosure. The Bureau continues to believe that borrowers at all stages of delinquency benefit from live contact.

The Bureau notes that one commenter expressed concern over the live contact requirements in proposed § 1024.39(a) when a borrower is in bankruptcy. Section 1024.39 includes an exemption from the live contact requirements for borrowers in bankruptcy in § 1024.39(c). To clarify the applicability of the live contact requirements in § 1024.39(a) in light of the bankruptcy exemption in § 1024.39(c) and a similar one in § 1024.39(d) when a borrower has invoked certain rights under the FDCPA, the Bureau is finalizing § 1024.39(a) to explain that the live contact requirements of § 1024.39(a) apply, except as otherwise provided in § 1024.39.

The Bureau is finalizing comment 39(a)–1 substantially as proposed, with certain non-substantive revisions for clarity. Comment 39(a)–1 explains that § 1024.39 requires a servicer to establish or attempt to establish live contact no later than the 36th day of a borrower's delinquency. Comment 39(a)–1.i.A illustrates this provision through an example. Comment 39(a)–1.i.B explains that the servicer may time its attempts to establish live contact such that a single attempt will meet the requirements of § 1024.39(a) for two missed payments and provides an illustrative example.

The Bureau is finalizing comment 39(a)–2 substantially as proposed, with certain changes for clarity. Comment 39(a)–2 explains that live contact provides servicers an opportunity to discuss the circumstances of a borrower's delinquency. Live contact with a borrower includes speaking on the telephone or conducting an in-person meeting with the borrower but not leaving a recorded phone message. Comment 39(a)–2 states that a servicer may rely on live contact established at the borrower's initiative to satisfy the live contact requirement in § 1024.39(a). Finally, it provides that servicers may also combine contacts made pursuant to § 1024.39(a) with contacts made with borrowers for other reasons, for instance, by telling borrowers on collection calls that loss mitigation options may be available.

The Bureau is finalizing comment 39(a)–3 with changes. Comment 39(a)–3 explains that good faith efforts to establish live contact consist of reasonable steps, under the circumstances, to reach a borrower and may include telephoning the borrower on more than one occasion or sending written or electronic communication encouraging the borrower to establish live contact with the servicer. The length of a borrower's delinquency, as well as a borrower's failure to respond to a servicer's repeated attempts at communication pursuant to § 1024.39(a), are relevant circumstances to consider. For example, whereas "good faith efforts" to establish live contact with regard to a borrower with two consecutive missed payments might require a telephone call, "good faith

[177] *Id.*

efforts'' to establish live contact with regard to an unresponsive borrower with six or more consecutive missed payments might require no more than including a sentence requesting that the borrower contact the servicer with regard to the delinquencies in the periodic statement or in an electronic communication. The comment explains that comment 39(a)–6 discusses the relationship between live contact and the loss mitigation procedures set forth in § 1024.41.

Final comment 39(a)–3 omits language from the proposal regarding the good faith efforts that might be sufficient where there is little or no hope of home retention, such as may occur in the later stages of foreclosure. The Bureau now believes it more appropriate to calibrate good faith efforts to the duration of the delinquency rather than a subjective judgment on the possibility of home retention, regardless of the stage of foreclosure.

The Bureau is declining to adopt a specific definition of what constitutes good faith efforts in comment 39(a)–3, as requested by one commenter. What constitutes good faith efforts is based on circumstances specific to the borrower and the borrower's mortgage loan obligation. The comment provides examples demonstrating the fact-specific nature of this determination.

The Bureau is finalizing comment 39(a)–4 as proposed. The final rule renumbers current comment 39(a)–3 as 39(a)–4, with no further changes. The final rule renumbers current comment 39(a)–4 as 39(a)–5, with a technical correction to add an omitted ''to.''

Relationship Between Live Contact and Loss Mitigation Procedures

The Bureau also proposed to add comment 39(a)–6 to illustrate how a servicer could meet its early intervention live contact requirements when it is working with a borrower pursuant to the loss mitigation procedures set forth in § 1024.41. Proposed comment 39(a)–6 would have codified guidance the Bureau provided in its October 2013 Servicing Bulletin, explaining that, under current comment 39(a)–2, good faith efforts to establish live contact consist of ''reasonable steps under the circumstances to reach a borrower . . . .'' The Bureau provided several examples of reasonable steps, including the example of a servicer that has established and is maintaining live contact with a borrower ''with regard to the borrower's completion of a loss mitigation application and the servicer's evaluation of that borrower for loss mitigation options.''[178]

Proposed comment 39(a)–6 therefore would have clarified that a servicer that has established and is maintaining ongoing contact with regard to a borrower's completion of a loss mitigation application, or in connection with the servicer's evaluation of the borrower's complete loss mitigation application, would comply with the requirements of § 1024.39(a). In addition, the proposed comment would have clarified that a servicer that has evaluated and denied a borrower for all available loss mitigation options has complied with the requirements of § 1024.39(a). The Bureau explained that, once a servicer has complied with the requirements of § 1024.41 with respect to a specific borrower, and has determined that the borrower does not qualify for any available loss mitigation options, continued live contact between a borrower and a servicer no longer serves the purpose of § 1024.39(a). Indeed, at that point, continued attempts by the servicer to establish live contact may frustrate or even harass a borrower who was recently denied for loss mitigation.

The Bureau explained, however, that a borrower who cures a prior delinquency but subsequently becomes delinquent again would benefit from the servicer resuming compliance with the live contact requirement. Therefore, proposed comment 39(a)–6 also would have clarified that a servicer is again subject to the requirements of § 1024.39(a) with respect to a borrower who becomes delinquent after curing a prior delinquency.

Several consumer advocacy group commenters expressed support for proposed comment 39(a)–6. The commenters stated that live contact is unnecessary when a borrower is in contact with a servicer with regard to a loss mitigation application and expressed agreement with the Bureau's explanation that a servicer's repeated attempts to establish live contact may frustrate or even harass a borrower who was recently denied for loss mitigation. These commenters supported requiring a servicer to renew live contact for a borrower who experiences a delinquency subsequent to curing a prior delinquency.

The Bureau is finalizing comment 39(a)–6 with certain changes to improve clarity and consistency with other provisions in Regulation X. Comment 39(a)–6 explains that if the servicer has established and is maintaining ongoing contact with the borrower under the loss mitigation procedures under § 1024.41, including during the borrower's completion of a loss mitigation application or the servicer's evaluation of the borrower's complete loss mitigation application, or if the servicer has sent the borrower a notice pursuant to § 1024.41(c)(1)(ii) that the borrower is not eligible for any loss mitigation options, the servicer complies with § 1024.39(a) and need not otherwise establish or make good faith efforts to establish live contact. It further provides that a servicer must resume compliance with the requirements of § 1024.39(a) for a borrower who becomes delinquent again after curing a prior delinquency.

The Bureau is changing the last sentence of proposed comment 39(a)–6 to improve clarity in the final rule and align language in Regulation X. Unlike the proposal, which referred to a borrower's ''prior default,'' the final comment refers to a borrower's prior delinquency, as newly defined in § 1024.31.

39(b) Written Notice

39(b)(1) Notice Required

The Bureau proposed certain revisions to § 1024.39(b)(1) and its commentary to clarify the frequency with which a servicer must provide the written early intervention notice and to ensure consistency with the proposed revisions to the live contact requirements in § 1024.39(a). Under the proposed revision, a servicer would have had to send a written notice to a delinquent borrower no later than the 45th day of the borrower's delinquency, but a servicer would not have had to send such a notice more than once in any 180-day period. If the borrower remains delinquent or becomes 45 days delinquent again after the 180-day period expires, the proposed revision would have required the servicer to provide the written notice again. The Bureau is adopting § 1024.39(b)(1) with revisions. The Bureau is finalizing comment 39(b)(1)–2 with certain changes for clarity, making a technical correction to comment 39(b)(1)–3, and finalizing comment 39(b)(1)–6 but renumbering it as comment 39(b)(1)–5 and making certain changes for clarity.

Current comment 39(b)(1)–1 references the definition of delinquency in current comment 39(a)–1.i. As explained in the section-by-section analysis of § 1024.39(a), the definition of delinquency included in current comment 39(a)–1.i and referenced in comment 39(b)(1)–1 states that a borrower's delinquency begins on the day a payment sufficient to cover principal, interest, and, if applicable, escrow for a given billing cycle is due and unpaid. As with § 1024.39(a), the

[178] October 2013 Servicing Bulletin at 5.

inclusion of the phrase ''for a given billing cycle'' in the definition of delinquency for purposes of § 1024.39(b)(1) creates a recurring obligation on the part of servicers to provide a delinquent borrower with a written notice. In contrast with the recurring obligation to make live contact under § 1024.39(a), however, servicers only have to comply with the requirement to send a written notice once in a 180-day period.[179] This is because, as the Bureau explained in the 2012 RESPA Servicing Proposal, the Bureau did not believe ''that borrowers who are consistently delinquent would benefit from receiving the same written notice every month.'' [180]

As discussed in the section-by-section analysis of § 1024.31, the Bureau's proposed definition of delinquency in § 1024.31 did not use the phrase ''for a given billing cycle.'' The Bureau proposed revisions to § 1024.39(b)(1) and comment 39(b)(1)–2 to preserve the recurring nature of the written notice requirement, as well as the limitation that a servicer has to send a written notice only once during any 180-day period. Under the proposed revision, a servicer would have been required to send a written notice to a delinquent borrower no later than the 45th day of the borrower's delinquency but no more than once in any 180-day period. If the borrower either remained delinquent or became delinquent again at some point after the 180-day period expires, the proposed revision would have required the servicer to provide the borrower with another written notice 45 days from the date of the borrower's most recent missed payment.

In addition, the Bureau proposed to clarify through a revision to comment 39(b)(1)–2 that a servicer would again be required to send written notice to a borrower who remains delinquent more than 180 days after the servicer sent the first notice. The Bureau proposed to revise the example in comment 39(b)(1)–2 to illustrate this concept. The proposal also made a minor technical change to comment 39(b)(1)–2 to correct an erroneous reference to § 1024.39(a), which should instead be a reference to § 1024.39(b).

Finally, the Bureau proposed to add comment 39(b)(1)–6 to clarify the obligation of a transferee servicer to provide the written notice required by § 1024.39(b). Proposed comment 39(b)(1)–6 stated that a transferee servicer is not required to provide a second written notice to a borrower who already received a written notice from the transferor servicer on or before the borrower's 45th day of delinquency. The comment would have further clarified, however, that a servicer would be required to comply with § 1024.39(b) regardless of whether the transferor servicer sent the borrower a written notice in the preceding 180-day period. In other words, if the transferor servicer provided a first written notice after an initial missed payment and, following the transfer, the borrower remains or becomes 45 days delinquent again, the transferee servicer would have to provide a written notice again no later than 45 days after the payment due date, regardless of whether or not 180 days had passed since the date the transferor servicer provided the first written notice to the borrower.

The Bureau proposed this clarification because it believed that the rationale that justified applying the 180-day limitation to mortgage loans serviced by a single servicer may not apply in the case of a loan whose servicing rights are transferred to another servicer. In the case of a transferred loan, the Bureau believed that a transferee servicer may provide additional and different information to a delinquent borrower and that a borrower would benefit from receiving this information sooner rather than later following a transfer. Accordingly, the Bureau believed it was appropriate to clarify that the 180-day limitation in § 1024.39(b)(1) would not apply where the prior notice triggering the 180-day waiting period was provided by the transferor servicer prior to transfer.

Several commenters expressed general support for the written notice requirements set forth in proposed § 1024.41(b)(1). As with proposed § 1024.39(a), several industry commenters stated that these requirements would provide further clarity and reflected common practice in the industry. One industry commenter and several consumer advocacy group commenters recommended that the 180-day limitation should not apply when borrowers cure a delinquency following receipt of the written notice but become delinquent again during the 180-day period that follows. These commenters stated that requiring the written notice within 45 days of each delinquency would improve borrower access to timely information.

Several industry commenters suggested that that the written notice may be confusing, or provide limited benefit, when it is provided to seriously delinquent borrowers or borrowers engaged in loss mitigation. One industry commenter provided an example, stating that the proposal could result in a written notice being provided on day 225 of a borrower's delinquency, at which point a borrower may already be in foreclosure or completing a short sale or deed-in-lieu of foreclosure. This commenter recommended that a servicer only be required to provide a subsequent written notice if the borrower had been current for at least 180 days following the provision of the previous written notice. Another industry commenter requested an exemption from § 1024.39(b)(1) in situations where the scheduled foreclosure sale is within 37 days of the date a servicer would be required to provide the written notice or where no loss mitigation options are available to the borrower. This commenter stated that in such situations, provision of the written notice could cause borrower confusion. One industry commenter said that it would be unnecessary, and potentially confusing, for borrowers performing on a trial loan modification to be provided the written notice required by § 1024.39(b)(1).

Several consumer advocacy groups expressed support for proposed comment 39(b)(1)–6. They stated that borrowers would benefit if the 180-day limitation in § 1024.39(b)(1) did not apply where the prior written notice was provided by the transferor servicer. One of these commenters recommended that transferee servicers must provide the written notice within 15 days of the transfer date, stating that this would improve the borrower's ability to obtain certain foreclosure protections.

The Bureau is adopting § 1024.39(b)(1) with revisions. The Bureau is finalizing comment 39(b)(1)–2 with certain changes for clarity, making a technical correction to comment 39(b)(1)–3, and finalizing comment 39(b)(1)–6 but renumbering it as comment 39(b)(1)–5 and making certain changes for clarity.

As finalized, § 1024.39(b)(1) explains that, except as otherwise provided in § 1024.39, a servicer shall provide to a delinquent borrower a written notice with the information set forth in § 1024.39(b)(2) no later than the 45th day of the borrower's delinquency and again no later than 45 days after each payment due date so long as the borrower remains delinquent. Final § 1024.39(b)(1) further explains that a servicer is not required to provide the written notice, however, more than once during any 180-day period. It provides that if a borrower is 45 days or more delinquent at the end of any 180-day period after the servicer has provided the written notice, a servicer must provide the written notice again no later than 180 days after the provision of the

[179] 12 CFR 1024.39(b)(1).

[180] 77 FR 57199, 57257 (Sept. 17, 2012).

prior written notice. Finally, it provides that, if a borrower is less than 45 days delinquent at the end of any 180-day period after the servicer has provided the written notice, a servicer must provide the written notice again no later than 45 days after the payment due date for which the borrower remains delinquent.

The Bureau is finalizing § 1024.39(b)(1) to add more clarity regarding when the written notice must be provided. The Bureau has always understood that servicers are required to provide the written notice with the information set forth in § 1024.39(b)(2) once every 180 days to borrowers who consistently carry a short-term delinquency.[181] When a borrower is 45 days or more delinquent at the end of any 180-day period after the servicer has provided the written notice, the servicer must provide the written notice not later than 180 days after providing the prior written notice. A servicer need not provide the written notice more than once during that 180-day period, regardless of whether the borrower remains delinquent throughout the 180-day period or the borrower cures the delinquency but becomes 45 days delinquent again during the 180-day period. When a borrower is less than 45 days delinquent at the end of any 180-day period after the servicer has provided the written notice, but later becomes 45 days delinquent, the servicer must provide the written notice no later than 45 days after the payment due date for which the borrower remains delinquent.

The Bureau declines to revise the 180-day limitation in § 1024.39(b)(1), as requested by some commenters. The Bureau continues to believe that the requirement to provide the written notice once every 180 days, as well as the live contact requirements set forth in § 1024.39(a), adequately address situations where a borrower experiences multiple delinquencies.

The Bureau also declines to exempt servicers from the written notice requirements where § 1024.39(b)(1) may require the servicer to provide the written notice close in time to a scheduled foreclosure sale or where the borrower may be performing on a temporary loss mitigation program. The Bureau notes that current comment 39(b)(2)–1 clarifies that servicers may include information on the written notice relevant to the circumstances specific to the borrower. Comment 39(b)(2)–1 explains that § 1024.39(b)(2) sets forth minimum content requirements for the written notice and that a servicer may provide additional information in the written notice that would be helpful or which may be required by applicable law or the owner or assignee of the mortgage loan. Accordingly, a servicer may include in the written notice additional, relevant information that would benefit borrowers even in the later stages of foreclosure or when performing on a temporary loss mitigation program.

The Bureau is making certain changes to proposed comment 39(b)(1)–2 to clarify the requirements for providing a written notice during and after any 180-day period. As finalized, comment 39(b)(1)–2 provides that a servicer need not provide the written notice under § 1024.39(b) more than once during a 180-day period beginning on the date on which the written notice is provided. A servicer must provide the written notice under § 1024.39(b) at least once every 180 days to a borrower who is 45 days or more delinquent. Comment 39(b)(1)–2 provides an illustrative example.

The Bureau is revising final comment 39(b)(1)–3, which currently cross references comment 39(a)–4, to reflect the renumbering of the comments. Final comment 39(b)(1)–3 provides that comment 39(a)–5 explains how a servicer may satisfy the requirements under § 1024.39 with a person authorized by the borrower to communicate with the servicer on the borrower's behalf.

The Bureau is adopting proposed comment 39(b)(1)–6 but renumbering it as comment 39(b)(1)–5 and making certain changes for clarity and to correct a typographical error. Final comment 39(b)(1)–5 provides that a transferee servicer is required to comply with the requirements of § 1024.39(b) regardless of whether the transferor servicer provided a written notice to the borrower in the preceding 180-day period. Comment 39(b)(1)–5 further explains, however, that a transferee servicer is not required to provide a written notice under § 1024.39(b) if the transferor servicer provided the written notice under § 1024.39(b) within 45 days of the transfer date. It provides an example to illustrate this provision.

The Bureau declines to require, as suggested by one commenter, that transferee servicers provide the written notice within 15 days of the transfer date. Comment 39(b)(1)–5 is consistent with the timing of the notice required under § 1024.39(b)(1) for a borrower with a new delinquency, and clarifies an additional requirement on transferee servicers beyond that imposed on servicers in the absence of a transfer. The Bureau is clarifying in final comment 39(b)(1)–5 that the 180-day limitation in § 1024.39(b)(1) does not apply where the prior written notice triggering the 180-day waiting period was provided by the transferor servicer prior to transfer.

Successors in Interest

Proposed § 1024.30(d) would have provided that a confirmed successor in interest must be considered a borrower for the purposes of the Mortgage Servicing Rules in Regulation X, including the early intervention requirements of § 1024.39. Proposed comment 39(b)(1)–5 would have provided that, where a servicer has already provided a written early intervention notice to a prior borrower under § 1024.39(b) before confirming a successor in interest's status, the servicer would not be required also to provide that notice to the unconfirmed successor in interest, but the servicer would be required to provide the confirmed successor in interest with any additional written early intervention notices required after confirming the successor in interest's status.

Several consumer advocacy group commenters suggested that the Bureau eliminate proposed comment 39(b)(1)–5. They urged the Bureau to indicate instead that the 180-day limitation does not apply to a successor in interest where the prior notice triggering the 180-day waiting period was provided to the transferor borrower.

Confirmation of a successor in interest does not restart the 180-day period specified by § 1024.39(b)(1) if the prior notice triggering the 180-day waiting period was provided to a transferor borrower. Section 1024.39(b)(1) provides that a servicer is not required to provide a written notice with the information set forth in § 1024.39(b)(2) more than once during any 180-day period. The Bureau believes that it would be unnecessarily burdensome to require servicers to provide to a confirmed successor in interest an additional copy of a written early intervention notice that servicer has already provided to a transferor borrower. The Bureau also believes that, in many cases, confirmed successors in interest may have received the original notice that the servicer mailed to the transferor borrower. Further, confirmed successors in interest may obtain information from servicers using a request for information, to which servicers must respond.

The Bureau is not finalizing proposed comment 39(b)(1)–5. The Bureau is addressing in new § 1024.32(c)(4) the questions about whether servicers must provide confirmed successors in interest with duplicative copies of notices

[181] 78 FR 10695, 10800 (Feb. 14, 2013).

required by the Mortgage Servicing Rules in Regulation X, including § 1024.39(b).

39(b)(2) Content of the Written Notice

The Bureau proposed to clarify when a servicer must include the disclosures under § 1024.39(b)(2)(iii) and (iv) in the written early intervention notice. Section 1024.39(b)(2)(iii) and (iv) state that, ''if applicable,'' the written notice must include a statement providing a brief description of examples of loss mitigation options that may be available and either application instructions or a statement informing the borrower how to obtain more information about loss mitigation options from the servicer. The Bureau proposed to add a comment to clarify when such disclosures are ''applicable'' and when a servicer is therefore required to include them in the written early intervention notice. Proposed comment 39(b)(2)–4 would have provided that, if loss mitigation options are available, a servicer must include in the written notice the disclosures set forth in § 1024.39(b)(2)(iii) and (iv). Further, the proposed comment would have provided that loss mitigation options are available if the owner or assignee of a borrower's mortgage loan offers an alternative to foreclosure that is made available through the servicer. Additionally, the proposed comment would have provided that the availability of loss mitigation options does not depend upon a particular borrower's eligibility for those options but only on whether the owner or assignee of a borrower's mortgage loan generally offers loss mitigation options through the servicer. Proposed comment 39(b)(2)–4 was generally intended to assist servicers in determining when they are exempt from providing the written notice under proposed § 1024.39(d)(1)(ii) or (d)(2)(ii) for, respectively, borrowers in bankruptcy or borrowers who have invoked cease communication protections under FDCPA section 805(c).

One industry commenter requested the Bureau further clarify when loss mitigation options are available. One consumer advocacy group raised concerns with proposed comment 39(b)(2)–4 not expressly stating that it is applicable to the exemption under proposed § 1024.39(d)(2)(ii) for borrowers who have invoked cease communication protections under FDCPA section 805(c).

The Bureau is not finalizing proposed comment 39(b)(2)–4. Although proposed comment 39(b)(2)–4 would have explained when the disclosures required by § 1024.39(b)(2)(iii) and (iv) are ''applicable,'' the comment was intended to clarify whether a servicer would be exempt from providing the written notice under proposed § 1024.39(d)(1)(ii) for borrowers in bankruptcy or under proposed § 1024.39(d)(2)(ii) for borrowers who have invoked their cease communication protections pursuant to FDCPA section 805(c). The Bureau is finalizing revised explanations in comments 39(c)(1)–2 and 39(d)–1, to place the comments with the respective partial exemptions for borrowers in bankruptcy or borrowers who have invoked their cease communication rights, as detailed below in the section-by-section analyses of § 1024.39(c) and (d).

39(c) Conflicts With Other Law

Current § 1024.39(c) provides that nothing in § 1024.39 requires a servicer to communicate with a borrower in a manner otherwise prohibited by applicable law. Although the Bureau did not propose to address this paragraph in the proposal, for the reasons discussed below, the Bureau is removing current § 1024.39(c) from the final rule and renumbering the rest of § 1024.39 accordingly.

The Bureau adopted current § 1024.39(c) as part of the 2013 RESPA Servicing Rule in response to industry commenters' concerns raised in response to the 2012 RESPA Servicing Proposal related to potential conflicts between the early intervention requirements and existing law, including State law, the Bankruptcy Code, and the FDCPA.[182] Following issuance of the 2013 RESPA Servicing Rule, the Bureau determined that it was appropriate to address more specifically the interplay between the early intervention requirements and the Bankruptcy Code as well as the FDCPA. The Bureau therefore issued the IFR in October 2013 to implement current § 1024.39(d)(1) and (2), which exempt servicers from complying with the early intervention requirements when the borrower is in bankruptcy or has invoked the FDCPA's cease communications protections, respectively.[183] In providing these exemptions, the Bureau did not modify § 1024.39(c).

In response to proposed § 1024.39(d)(2) to require that servicers provide a modified written early intervention notice to borrowers who have invoked their FDCPA cease communication protections, several industry commenters noted the interplay of state debt collection laws, which they stated may prohibit servicers from providing the written early intervention notice to borrowers who have invoked their cease communication rights even if it would be permissible under Federal law. One commenter explained that at least two States, Florida and West Virginia, prohibit debt collection communication directly with borrowers who are represented by attorneys, even when the borrower has not elected to cease communication. As a result, some industry commenters requested a safe harbor from State law liability for sending the modified written early intervention notice that the Bureau proposed to require notwithstanding a borrower's invocation of the cease communication right. One industry commenter requested the Bureau provide an explicit safe harbor from the FDCPA that permits servicers to comply with all applicable State and local laws without risk of FDCPA liability.

After the close of the comment period, the Bureau conducted additional outreach to both servicers and consumer advocacy groups to further understand the scope of any such conflict between State debt collection laws and the proposal's requirement that servicers provide a modified written early intervention notice to borrowers who have provided a cease communication notification pursuant to FDCPA section 805(c).[184] The Bureau sought information related to whether the early intervention requirements under § 1024.39 conflict with State early intervention requirements, State cease communication laws, or State foreclosure laws.

Servicers generally reported not experiencing conflicts with State laws while meeting their early intervention requirements under § 1024.39. One servicer noted that West Virginia's debt collection laws require communication with counsel if a borrower is represented. Consumer advocacy groups also generally indicated that they are not encountering conflicts between State laws and the early intervention requirements under § 1024.39.

The Bureau concludes that removing current § 1024.39(c) regarding conflicts

[182] 78 FR 10695, 10806–07 (Feb. 14, 2013).

[183] 78 FR 62993 (Oct. 23, 2013).

[184] *See* Bureau of Consumer Fin. Prot., CFPB Bulletin 11–3, *CFPB Policy on Ex Parte Presentations in Rulemaking Proceedings* (Aug. 16, 2011), *available at http://files.consumerfinance.gov/f/2011/08/Bulletin_20110819_ExPartePresentationsRulemakingProceedings.pdf*. Materials pertaining to these presentations are filed in the record and are publicly available at *http://www.regulations.gov*. Summaries of the Bureau's outreach are filed in the record and are publicly available at *http://www.regulations.gov*.

with other law is appropriate. Neither commenters nor the Bureau's additional outreach indicated any specific conflict between State laws and the early intervention requirements under proposed § 1024.39(d)(2)(iii) as set forth in the proposal or as adopted in this final rule under new § 1024.39(d)(3). Industry commenters expressed concerns generally related to potential conflicts with State debt collection laws but did not point to any specific State laws posing an actual conflict with the Bureau's proposal. With respect to State laws that require that a servicer communicate with the borrower's representative instead of directly with a represented borrower, the Bureau reminds servicers that providing early intervention communications to a person authorized by the borrower to communicate with the servicer on the borrower's behalf is permitted under § 1024.39.[185]

The Bureau removes current § 1024.39(c) to provide servicers with clarity about their early intervention obligations. To the extent there may be any actual conflict between a State law and a servicer's requirements under § 1024.39, a servicer is required to comply with its obligations under § 1024.39. Additionally, as discussed in the section-by-section analyses of revised § 1024.39(c) and (d), the Bureau resolves the questions posed by the intersection of the early intervention requirements under § 1024.39 with the Bankruptcy Code and the FDCPA.

The Bureau reminds servicers of § 1024.5(c)(1), which states, in relevant part, that RESPA and Regulation X do not annul, alter, affect, or exempt any person subject to their provisions from complying with the laws of any State with respect to settlement practices, except to the extent that a State law is inconsistent with RESPA and Regulation X.[186] Comment 5(c)(1)–1 explains that State laws that are inconsistent with the requirements of RESPA or Regulation X may be preempted, while State laws that give greater protection to consumers are not inconsistent with and are not preempted by RESPA or Regulation X. The Bureau believes that early intervention provides critically important benefits to borrowers and therefore, to the extent that a State law would prevent early intervention as required under § 1024.39, that State law is preempted. The Bureau knows of no such conflicts and notes that certain State law requirements, for example requiring communication through counsel where a borrower is represented, do not conflict with the requirement to provide early intervention. Where Regulation X affords a method of complying with both the State law and with the requirements of § 1024.39, servicers should avail themselves of that opportunity. Generally, State laws that give greater protection to consumers are not inconsistent with § 1024.39 and would not be preempted.

39(c) Borrowers in Bankruptcy

Under current § 1024.39(d)(1), a servicer is exempt from the requirements of § 1024.39 for a mortgage loan while the borrower is a debtor in bankruptcy under title 11 of the United States Code. The Bureau proposed to revise current § 1024.39(d)(1) to narrow the scope of the bankruptcy exemption from the early intervention requirements. The proposed revisions would have preserved the current exemption from the live contact requirements of § 1024.39(a) as it relates to a borrower in bankruptcy but would have required live contact for a borrower who is jointly liable on the mortgage loan with someone who is a debtor in a chapter 7 or chapter 11 bankruptcy case.[187] The proposal also would have partially removed the exemption from the written notice requirements of § 1024.39(b) for a borrower in bankruptcy and would have required a servicer to provide the written notice unless no loss mitigation options are available, the borrower's confirmed plan of reorganization provides for surrendering the property or avoidance of the lien securing the mortgage loan, the borrower files a Statement of Intention in the bankruptcy case identifying an intent to surrender the mortgage loan, or a court enters an order avoiding the lien securing the mortgage loan or lifting the Bankruptcy Code's automatic stay with respect to the property securing the mortgage loan. Additionally, the proposal would have required a servicer to resume compliance with the requirements of § 1024.39 with respect to a borrower who has not discharged the mortgage debt under certain conditions.

For the reasons discussed below, the Bureau is finalizing proposed § 1024.39(d)(1), but renumbering it as new § 1024.39(c)(1), and making certain adjustments to implement the partial exemption on a loan level and for debtors in any chapter of bankruptcy to address concerns raised by commenters. The Bureau is adopting modifications regarding the frequency of the written notice required under new § 1024.39(c)(1). The Bureau is also exempting a servicer from providing the written early intervention notice with regard to a mortgage loan for which any borrower on the mortgage loan invokes the FDCPA's cease communications protections while any borrower on the mortgage loan is a debtor in bankruptcy. The Bureau is finalizing proposed comment 39(d)(1)–1 in new § 1024.39(c)(2) as proposed, with modifications to require a servicer to resume compliance with the early intervention requirements under certain conditions and subject to certain exemptions.

39(c)(1) Partial Exemption

Based upon its review of the comments received in response to the October 2013 IFR and its study of the intersection of the early intervention requirements and bankruptcy law, as stated in the proposal, the Bureau believed it would be appropriate to reinstate the early intervention requirements with respect to borrowers in bankruptcy under certain circumstances. The Bureau proposed to do so in this final rule because, as noted in the IFR, the Bureau believed that it would be preferable to use notice and comment rulemaking, rather than simply finalizing the IFR with

[185] *See* current comment 39(a)–4 (renumbered in this final rule as comment 39(a)–5) and current comment 39(b)(1)–3.

[186] Section 1024.5 implements RESPA section 18 (12 U.S.C. 2616). Section 1024.5(c)(2) and (3) provide additional information on how any person may request the Bureau to determine if inconsistencies with State law exist.

[187] ''Consumer homeowners typically seek relief under either Chapter 7 or Chapter 13 of the Bankruptcy Code. Chapter 7 requires the debtor to surrender all nonexempt property for distribution to creditors. In return, the debtor's debts are discharged, with some exceptions. Chapter 13 permits debtors with regular income to keep their property and to repay creditors in whole or in part by making monthly payments to a Chapter 13 trustee, who then distributes the payments to creditors.'' Alan M. White & Carolina Reid, *Saving Homes, Bankruptcies and Loan Modifications in the Foreclosure Crisis,* 65 Fla. L. Rev. 1713, 1717 (Dec. 2013) (citing Adam J. Levitin, *Resolving the Foreclosure Crisis: Modification of Mortgages in Bankruptcy,* 2009 Wis. L. Rev. 565, 579, 643 (2009)). Some consumer homeowners seek relief under chapter 11 of the Bankruptcy Code, usually because their debt levels exceed chapter 13's limitations, and family farmers and fishermen may file under chapter 12. *See* 11 U.S.C. 109(d)–(f) (defining who may be a debtor under chapter 11, chapter 12, and chapter 13). The discussion of early intervention focuses primarily on homeowners in chapter 7 or chapter 13 cases because relatively few consumer homeowners seek relief under chapter 11 or chapter 12 of the Bankruptcy Code. *See* Administrative Office of the U.S. Courts, *U.S. Bankruptcy Courts—Business and Nonbusiness Cases Commenced, by Chapter of the Bankruptcy Code, During the 12-Month Period Ending December 31, 2013, available at http://www.uscourts.gov/uscourts/Statistics/BankruptcyStatistics/BankruptcyFilings/2013/1213_f2.pdf (indicating that in 2013, there were only 1,320 nonbusiness chapter 11 filings and 495 chapter 12 filings nationwide).*

modifications, to reinstate the early intervention requirements with respect to such borrowers.[188] The Bureau believed that this approach would allow stakeholders a more robust opportunity to consider and comment on the Bureau's specific proposal. The Bureau addressed in the proposal comments it received on this issue in response to the IFR, including those received after the IFR's official comment period ended.[189] As discussed further below, in light of those comments as well as the comments received in response to the proposal, the Bureau is finalizing the live contact exemption as proposed, with modifications to implement the exemption at the loan level and for debtors in any chapter of bankruptcy. The Bureau is also finalizing the proposed written notice partial exemption as proposed, with similar and additional modifications. The live contact and written notice exemptions are discussed in turn below.

Live Contact

The Bureau proposed to maintain the exemption from the live contact requirements with respect to a borrower who is in bankruptcy, has discharged personal liability for the mortgage loan, or shares liability on a mortgage loan with a person who is a debtor in a chapter 12 or chapter 13 bankruptcy case. As the Bureau explained in the proposal, when a debtor files for protection under chapter 12 or chapter 13, the Bankruptcy Code implements a co-debtor stay, which prohibits creditors from engaging in collection efforts against certain of the debtor's joint obligors, such as a joint obligor on the debtor's mortgage loan, even though the joint obligor has not filed for bankruptcy.[190] Because contacting a borrower covered by the co-debtor stay raises some of the same concerns as contacting a borrower covered by the automatic stay, the Bureau explained in the proposal that it may be appropriate to exempt servicers from compliance with § 1024.39(a) with respect to non-bankrupt borrowers who are jointly liable on a mortgage loan with a debtor in a chapter 12 or chapter 13 bankruptcy case. However, the proposed exemption would have excluded borrowers who are jointly liable on a mortgage loan with a debtor in a chapter 7 or chapter 11 case because the Bankruptcy Code does not prevent collection attempts against such joint obligors, and servicers do not violate the automatic stay by contacting them.[191] This was a departure from current § 1024.39(d)(1), in which the Bureau crafted a broad exemption from § 1024.39, making the exemption applicable to any joint obligor of a debtor in bankruptcy, regardless of whether the joint obligor was in bankruptcy or protected against collection attempts by the co-debtor stay under 11 U.S.C. 1201(a) or 1301(a). The Bureau is finalizing this exemption from live contact as proposed, with modifications to apply the exemption on a loan level and for debtors in any chapter of bankruptcy.

Comments on Live Contact, Including Borrower-Specific and Chapter-Specific Exemption

The Bureau received comments from servicers, credit unions, consumer advocacy groups, trade associations, and the U.S. Trustee Program. Similar to comments received in response to the October 2013 IFR, commenters generally agreed that servicers should be exempt from the early intervention live contact requirements as to a borrower in bankruptcy or a borrower who has discharged personal liability for a mortgage loan. Industry commenters generally raised concerns with the proposed requirement that servicers provide live contact to non-debtor co-borrowers when a borrower files for chapter 7 or 11 bankruptcy, while supporting the loan-level exemption for borrowers who file under chapter 13. Numerous industry commenters strongly opposed a borrower-specific exemption in favor of a loan-level exemption, citing three major concerns. First, industry expressed concerns related to circumstances in which co-borrowers live together and only one files for bankruptcy. Servicers explained that they fear violating the automatic stay if the servicer's phone calls are answered by the debtor borrower instead of the non-debtor co-borrower. Second, servicers cited the burden of keeping track of which chapter of bankruptcy each borrower is in rather than just applying a single bankruptcy flag to the account. One commenter noted that bankruptcy cases commonly switch from one chapter to another, which under the proposal would affect whether the servicer would be required to comply with the early intervention requirements. Third, industry commenters explained that servicers' systems currently track mortgage loans at the loan level. Servicers explained that they would be required to undergo burdensome systems upgrades to change how they track mortgage loans to distinguish communications as between borrowers on the same loan. One industry commenter also stated that it would be misleading and potentially violate the automatic stay for a servicer to make live contact with the non-debtor co-borrower to discuss loss mitigation options because the property could not be disposed of without bankruptcy court permission. Therefore, the commenter stated, the risks to the servicer are high while offering no benefits to the non-debtor co-borrowers.

Consumer advocacy groups generally supported the proposal's approach to live contact for non-debtor co-borrowers and expressed their position that, under certain circumstances, live contact with a borrower in bankruptcy can be appropriate and would not violate the Bankruptcy Code's automatic stay. Consumer advocacy groups requested that the Bureau include commentary to the rule that would explain the Bureau does not take a position on whether early intervention efforts might violate the automatic stay or discharge injunction and that clarifies that the exemption from live contact with respect to borrowers in bankruptcy is permissive.

After the close of the comment period, the Bureau conducted additional outreach with servicers to gain insight into their mortgage processing systems and capabilities to implement proposed changes to the servicing of loans in bankruptcy. Servicers continued to express the same three broad concerns with the proposal's approach as outlined above.

Final Rule

The Bureau is finalizing the live contact exemption as proposed, with modifications to implement the exemption at the loan level and for debtors in any chapter of bankruptcy. The Bureau is adopting an exemption from the live contact early intervention requirements for borrowers in

[188] 78 FR 62993, 62998 (Oct. 23, 2013).

[189] *See* 79 FR 74176, 74203–05 (Dec. 15, 2014).

[190] 11 U.S.C. 1201(a) and 1301(a) (both stating that "[e]xcept as provided in subsections (b) and (c) of this section, after the order for relief under this chapter, a creditor may not act, or commence or continue any civil action, to collect all or any part of a consumer debt of the debtor from any individual that is liable on such debt with the debtor, or that secured such debt, unless—(1) such individual became liable on or secured such debt in the ordinary course of such individual's business; or (2) the case is closed, dismissed, or converted to a case under chapter 7 or 11 of this title.").

[191] *In re Chugach Forest Products, Inc.,* 23 F.3d 241, 246 (9th Cir. 1994) ("As a general rule, '[t]he automatic stay of section 362(a) protects only the debtor, property of the debtor or property of the estate. It does not protect non-debtor parties or their property. Thus, section 362(a) does not stay actions against guarantors, sureties, corporate affiliates, or other non-debtor parties liable on the debts of the debtor.' ") (quoting *Advanced Ribbons & Office Prods.* v. *U.S. Interstate Distrib. (In re Advanced Ribbons & Office Prods.),* 125 B.R. 259, 263 (B.A.P. 9th Cir. 1991)).

bankruptcy and renumbering it as new § 1024.39(c)(1)(i) instead of as proposed in § 1024.39(d)(1)(i). New § 1024.39(c)(1)(i) provides that, while any borrower on a mortgage loan is a debtor in bankruptcy under title 11 of the United States Code, a servicer, with regard to that mortgage loan, is exempt from the live contact early intervention requirements of § 1024.39(a). The Bureau has also modified the final commentary to align with and provide additional guidance on this provision.

Borrower-specific and chapter-specific exemption rationale. The Bureau considered commenters' concerns related to the difficulty of administering the proposal's borrower-specific approach. Although the proposal attempted to strike an appropriate balance by limiting the partial exemptions from § 1024.39 to only those borrowers protected by the Bankruptcy Code's automatic stay and discharge provisions, the Bureau is persuaded by the practical considerations industry commenters cited in favor of adopting a loan-level exemption. In particular, the Bureau recognizes the challenges presented by providing live or written early intervention to a non-debtor co-borrower who lives with the debtor borrower and the possibility of disputes about whether a servicer has violated the automatic stay if those communications inadvertently reach the wrong borrower. The Bureau also believes that applying the partial exemption from § 1024.39 with regard to a mortgage loan while any borrower on that loan is a debtor under any bankruptcy chapter generally simplifies the exemption, reduces servicer burden, and facilitates servicer compliance.

Therefore, the Bureau adopts a loan-level exemption from the live contact early intervention requirements rather than a borrower-specific exemption as proposed. The final rule does not draw distinctions between the chapter of bankruptcy under which the borrower filed for purposes of the partial exemption. Instead, new § 1024.39(c)(1) applies the exemption with regard to a mortgage loan while any borrower on that loan is a debtor in bankruptcy under title 11 of the United States Code generally. Additionally, because this final rule does not adopt the borrower-specific approach in the proposal, the Bureau declines to adopt proposed comment 39(d)(1)(i)–1 related to live contact and proposed comment 39(d)(1)(ii)–1 related to a borrower's plan of reorganization under chapters 11, 12, and 13 of the Bankruptcy Code. Instead, the Bureau adopts comment 39(c)(1)–1 which explains that § 1024.39(c)(1) applies once a petition is filed under title 11 of the United States Code, commencing a case in which the borrower is a debtor in bankruptcy.

Live contact exemption rationale. In addition to the issues identified in the comments, two other factors inform the Bureau's decision to maintain the exemption from the live contact early intervention requirements. First, as the Bureau explained in the proposal, live contact may be perceived as more intrusive and of less value to a borrower in bankruptcy. As discussed in the section-by-section analysis of § 1024.39(a), the live contact requirements are ongoing and generally require a servicer to make continued efforts to establish live contact with a borrower so long as a borrower remains delinquent. In addition, compliance with § 1024.39(a) is not limited to, and does not in every case require, a discussion of available loss mitigation options. Section 1024.39(a) requires a servicer to inform a borrower of loss mitigation options ''if appropriate.'' More broadly, live contact provides servicers an opportunity to discuss the circumstances of a borrower's delinquency,[192] and, based on this discussion, a servicer may determine not to inform a borrower of loss mitigation options. Current comment 39(a)–3.i.B provides an example of when a servicer makes a reasonable determination not to provide information about the availability of loss mitigation options to a borrower. In that example, the borrower has missed a January 1 payment and notified the servicer that full late payment will be transmitted to the servicer by February 15.[193] As the comment demonstrates, live contact could serve as a reminder to a borrower who inadvertently missed a payment, or it could give the servicer an opportunity to discuss when the borrower would cure a temporary delinquency; it would not necessarily involve a discussion of loss mitigation options. Borrowers who seek protection under the Bankruptcy Code, however, may do so in part to obtain a reprieve from unwelcome creditor communications about outstanding payment obligations during which the borrower can reorganize financial obligations comprehensively rather than interacting with individual creditors. For such borrowers, a servicer's repeated attempts to establish live contact, which may not lead to a discussion of available loss mitigation options between the parties, may be of diminished value to the borrower.

Second, while some courts have determined that a creditor may properly contact a borrower in bankruptcy, including by telephone, to inform the borrower about loss mitigation options or to negotiate the terms of a loss mitigation agreement,[194] other courts have found that a creditor violated the automatic stay by making live contact with a borrower to discuss loss mitigation.[195] As the Bureau noted in the proposal, these violations appear to involve extreme facts, such as creditors making dozens of phone calls, some of which threatened legal action, to borrowers who had requested that the creditor stop contacting them and either had already decided to surrender the property or were not interested in the offered loss mitigation options.[196]

The Bureau does not believe that compliance with the live contact requirement under § 1024.39(a) would generally violate the stay. The Bureau is concerned, however, that, given the interactive and potentially unscripted nature of live contact, as well as the fact that live contact does not necessarily require a discussion of loss mitigation options, borrowers or courts may view a servicer's attempts to establish live contact as a communication prohibited by the Bankruptcy Code's automatic

[192] Comment 39(a)–2.

[193] This final rule renumbers this as comment 39(a) 4.i.B.

[194] *See, e.g., In re Brown,* 481 B.R. 351, 360 (Bankr. W.D. Pa. 2012) (holding that creditor did not violate the automatic stay by making telephone calls to a borrower regarding foreclosure alternatives); *In re Silva,* No. 09–02504, 2010 WL 605578, at *1 (Bankr. D. Haw. Feb. 19, 2010) (''Nothing in the Bankruptcy Code prevents or prohibits a chapter 7 or chapter 13 debtor or its secured creditors from entering into communications or negotiations about the possibility of a loan modification.''); *In re Medina,* No. 6:12–bk–00066–ABB, 2012 WL 2090419, at *1 (Bankr. M.D. Fla. June 8, 2012) (''The automatic stay and the discharge provisions of the Bankruptcy Code do not prevent the parties from negotiating and entering into a loan modification post-petition.'').

[195] *See, e.g., In re Culpepper,* 481 B.R. 650, 659–60 (Bankr. D. Or. 2012) (stating that a creditor's reasonable contacts with a debtor regarding foreclosure alternatives may be permissible, but nonetheless finding a stay violation because the creditor made more than 100 phones calls to a borrower who had requested the creditor stop contacting her and the creditor discussed only loss mitigation options (i) for which the borrower was ineligible, (ii) in which the borrower was not interested, and (iii) which would have revived at least a portion of the borrower's discharged mortgage debt); *In re Whitmarsh,* 383 B.R. 735, 737 (Bankr. D. Neb. 2008) (stating that ''[a] phone call or two to follow up a letter regarding loss mitigation efforts is understandable,'' but finding that the creditor violated the automatic stay by making at least 22 phone calls, some of which threatened legal action, to borrowers who had already decided to surrender the property and had requested in writing on several occasions that the creditor make contact only with the borrowers' attorney).

[196] *Culpepper,* 481 B.R. at 659–60; *Whitmarsh,* 383 B.R. at 737.

stay under certain circumstances. Accordingly, the Bureau concludes that it is appropriate to exempt servicers from engaging in live contact with borrowers in bankruptcy.

Consumer advocacy groups requested that the Bureau include commentary to explain that it does not take a position on whether early intervention efforts might violate the Bankruptcy Code and to clarify that the exemption from live contact with respect to borrowers in bankruptcy is permissive. The Bureau concludes that its statements in the IFR and in this final rule are sufficient and it declines to include the commentary requested by consumer advocacy groups. As the Bureau previously explained in the IFR and in the proposal, the Bureau does not take a position as to whether early intervention efforts might violate the Bankruptcy Code's automatic stay or discharge injunction. The partial exemption set forth in the final rule is indeed permissive, not prohibitive, and the Bureau once again encourages servicers that have been communicating with borrowers in bankruptcy about loss mitigation options to continue doing so. The Bureau believes that borrowers in bankruptcy may benefit from receiving tailored loss mitigation information that is appropriate to their circumstances.

Written Notice

The Bureau proposed to revise the exemption in current § 1024.39(d)(1) from the written early intervention notice requirements with respect to a delinquent borrower who is in bankruptcy or has discharged personal liability for the mortgage loan. The proposal would have limited the exemption to instances where there are no loss mitigation options available or where the borrower is surrendering the property or avoiding the lien securing the mortgage loan. Proposed § 1024.39(d)(1)(ii)(B) through (D) would have exempted a servicer from the written early intervention notice requirement in several situations where the borrower in bankruptcy surrenders the property securing the mortgage loan or avoids (*i.e.,* renders unenforceable) the lien securing the mortgage loan. First, proposed § 1024.39(d)(1)(ii)(B) would have provided that a servicer is exempt if the borrower's confirmed plan of reorganization provides for the borrower to surrender the property, provides for the avoidance of the lien securing the mortgage loan, or otherwise does not provide for, as applicable, the payment of pre-bankruptcy arrearages or the maintenance of payments due under the mortgage loan. Second, proposed § 1024.39(d)(1)(ii)(C) would have provided that a servicer is exempt if the borrower files a statement of intention with the bankruptcy court that identifies an intent to surrender the property securing the mortgage loan. Third, proposed § 1024.39(d)(1)(ii)(D) would have provided that a servicer is exempt if the bankruptcy court enters an order providing for the avoidance of the servicer's lien or lifting the automatic stay with respect to the property securing the mortgage loan.

The Bureau is finalizing this exemption as proposed, with modifications to simplify triggering the exemption based on the availability of loss mitigation options and to apply uniformly the exemption on a loan level and for debtors in any chapter of bankruptcy. The Bureau is adopting modifications regarding the frequency of this modified written notice. The Bureau is also adding a new provision that exempts a servicer from providing the written early intervention notice with regard to a mortgage loan for which any borrower on the mortgage loan invokes the FDCPA's cease communications protections while any borrower on the mortgage loan is a debtor in bankruptcy.

Comments on Written Notice

The Bureau requested comment on the proposed partial exemption from the written early intervention notice, including the scope of the exemption, the criteria for qualifying for the exemption, and how communications could be tailored to meet the particular needs of borrowers in bankruptcy. Most industry commenters objected to the proposed requirement to provide the written early intervention notice, with certain exceptions, to a delinquent borrower who is in bankruptcy or has discharged personal liability for the mortgage loan. As explained above with respect to live contact, industry commenters raised concerns with the borrower-specific exemption and instead favored a blanket, loan-level exemption. Servicers commented that, while written communications may be more easily tailored to individual borrowers, servicers cannot avoid situations where an early intervention letter or email reaches the wrong borrower (such as where one spouse routinely opens all the mail). In addition, servicers reported that they maintain a single address for providing written notices related to the mortgage loan and, while some servicers may be able to provide duplicate copies of notices to a second borrower at another address, they generally cannot automate a process for providing only some written notices to one borrower while providing other or modified notices to another borrower at a different address. Industry commenters also explained that servicers do not always know when co-borrowers live apart or, if so, the alternative mailing addresses and that, therefore, servicers would bear the burden of researching this information.

After the close of the comment period, the Bureau conducted additional outreach to servicers to gain insight into their mortgage processing systems and capabilities to implement proposed changes to the servicing of loans in bankruptcy. Servicers reiterated the system difficulties associated with tracking additional mailing addresses as well as the manual burden that would be required to provide communications to a co-borrower at a different address.

Several industry commenters objected to the proposed exemption's complexity, citing the multiple different events during the bankruptcy case that can trigger the exemption, before assessing each factor for each co-borrower. Servicers commented that they would incur significant burden to determine correctly when the exemption applies. One servicer commented that it would be very difficult to apply the exemption correctly and consistently. Industry commenters also stated that the compliance burden is unwarranted for the few borrowers they believe would be helped by early intervention. Industry commenters said that many borrowers in bankruptcy likely would have already received multiple early intervention notices prior to the bankruptcy and exhausted all of their loss mitigation options, making additional notices of little value. Several industry commenters asserted more generally that the written early intervention notice offers minimal value to a borrower in bankruptcy and should therefore not be provided.

Several industry commenters noted the particular problems posed for borrowers in chapter 13. Delinquent borrowers may repay their arrearages over three to five years in chapter 13. Commenters explained that assessing the delinquency can be difficult because a missed payment may be due to a delay in the bankruptcy trustee forwarding funds to the servicer or the result of a dispute about how much the servicer is owed. Commenters also stated that providing the written notice at least once in every 180-day period as proposed could confuse a borrower who is making all payments due under the chapter 13 bankruptcy plan but contractually delinquent on the mortgage loan.

Additionally, numerous industry commenters stated that sending the notice could violate the automatic stay given the lack of a safe harbor and expressed concern about the prospect of litigation. One commenter noted that HUD's 2008 mortgagee letter required servicers to provide loss mitigation information to borrowers in bankruptcy only if the borrower had counsel who could receive the notice. Two other commenters explained that bankruptcy courts in Florida, for example, have adopted mortgage modification mediation procedures and prohibit written communication about the mediation outside the bankruptcy court portal. Some commenters contended that the Bureau was inappropriately attempting to interpret the Bankruptcy Code.[197]

The Bureau received comments from consumer advocacy groups, two industry members, and the U.S. Trustee Program generally supporting the proposal's requirement to provide the written notice, with certain exceptions, to a delinquent borrower who is in bankruptcy or has discharged personal liability for the mortgage loan. Consumer advocacy groups generally favored the proposed borrower-specific exemptions from the written notice requirements. Several consumer advocacy groups supported the proposal on the basis that members of a particularly at-risk population who have difficulty meeting their financial obligations would receive loss mitigation information; one consumer advocacy group stated that the availability of loss mitigation options should not determine whether a borrower in bankruptcy is provided the written early intervention notice. Another consumer advocacy group stated that the proposal is consistent with FHA loss mitigation guidance and HAMP rules. A different consumer advocacy group supported the proposal but noted that, when completing bankruptcy court filings in several jurisdictions, debtors often must check a box identifying an intent to surrender their homes even when they actually plan to keep the property; as a result, these borrowers would not receive early intervention under the proposal. One trade association said it viewed the proposal's written notice requirements for borrowers in bankruptcy as reasonable when compared against permissible bankruptcy and loss mitigation options. The U.S. Trustee Program agreed with the proposal's approach, noting that debtors in bankruptcy have difficulty meeting their financial obligations and that therefore these debtors may often benefit substantially from opportunities for loss mitigation.

Comments on Timing of Written Notice

The Bureau requested comment on whether the timing of the written early intervention notice should be different for a borrower in bankruptcy, such as whether a servicer should be required to provide the written notice to a borrower in bankruptcy within 45 days after the bankruptcy case commences, rather than by the 45th day of the borrower's delinquency. One industry commenter suggested requiring the notice within 45 days after the petition date at the point in time when the borrower is determining whether to keep the home. Another industry commenter suggested that, if the Bureau required a written early intervention notice for borrowers in bankruptcy, the Bureau should require just one written early intervention notice in bankruptcy for the life of the loan.

The Bureau conducted additional outreach on the timing of the written notice after the close of the comment period. One servicer stated that it currently provides loss mitigation information to the borrower, counsel, and bankruptcy trustee within one week of the bankruptcy filing, regardless of the period of the borrower's delinquency (if any), and considers this to be a best practice. This servicer explained that, even if the mortgage is current, it assumes a borrower who has filed for bankruptcy is experiencing some financial difficulty and wants to inform the borrower that help is available. Another servicer stated that it likely would be easier to provide a single written early intervention notice immediately following notification of a new bankruptcy. One consumer advocacy group advised that servicers subject to HUD's requirement to provide loss mitigation information appear to provide that information at different times, such that borrowers sometimes receive it months after filing for bankruptcy.

Comments on Overlap Between Borrowers in Bankruptcy and FDCPA

The Bureau proposed comment 39(d)(2)(iii)–2 to address the situation of a borrower in bankruptcy who has invoked cease communication rights under FDCPA section 805(c). The Bureau requested comment on whether it should require a servicer to provide the written early intervention notice to a borrower's representative, instead of the borrower, to the extent the FDCPA applies to a servicer's communications with a borrower in bankruptcy and the borrower has provided a notification pursuant to FDCPA section 805(c). The Bureau sought comment on whether there may be a conflict between the language of proposed model clause MS–4(D) and applicable bankruptcy laws when a borrower has exercised cease communication rights under the FDCPA and is also a borrower in bankruptcy and on the scope of any such conflict.

Industry commenters said that most borrowers file for bankruptcy as a last resort, after all loss mitigation options have been exhausted. Consequently, they said, providing another written notice will do little for the borrower and possibly subject the servicer to liability under the Bankruptcy Code. Industry commenters stated that tracking whether the borrower has a representative, along with tracking FDCPA and bankruptcy case status, would increase servicer burden and the likelihood of mistakes. Industry commenters also noted that the model language in proposed Model Clause MS–4(D) could be inaccurate because the automatic stay is a legal impediment to foreclosure.[198]

Consumer advocacy groups, including a group of consumer bankruptcy attorneys, supported the Bureau's proposal to require a written early intervention notice when a borrower has both invoked the FDCPA's cease communication protections and is a debtor in bankruptcy. However, they opposed an exemption when the borrower is not represented. They explained that unrepresented borrowers have the same need for loss mitigation information as represented borrowers. They also stated that the written notice would not violate the Bankruptcy Code's automatic stay when sent directly to the borrower. Consumer advocacy groups expressed general concern that servicers will often erroneously conclude that borrowers are not represented.

The U.S. Trustee Program commented that the modified written notice, including the proposed model language, may be seen by some bankruptcy judges or borrowers as violating the Bankruptcy Code's automatic stay even when sent to the borrower's representative. The commenter suggested that the Bureau consider modifying the proposed language in Model Clause MS–D(4) or exempting

[197] As in the IFR, in this final rule, the Bureau is not taking a position as to whether early intervention efforts might violate the Bankruptcy Code's automatic stay or discharge injunction.

[198] For a more general discussion of model clause MS–4(D), see the section-by-section analysis of Appendix MS–4 to Part 1024—Mortgage Servicing.

servicers from the requirement to provide a written early intervention notice unless the borrower requests it when the borrower has invoked the FDCPA's cease communication protections and is also a debtor in bankruptcy.[199]

Final Rule

In light of the comments received and for the reasons set forth below, the Bureau is adopting a partial exemption from the written early intervention notice for borrowers in bankruptcy and renumbering it as new § 1024.39(c)(1)(ii) and (iii) instead of as proposed in § 1024.39(d)(1)(ii), with modifications to implement the partial exemption on a loan level and for debtors in any chapter of bankruptcy and with modifications to the frequency of the written notice. As finalized, new § 1024.39(c)(1)(ii) provides that, while any borrower on a mortgage loan is a debtor in bankruptcy under title 11 of the United States Code, a servicer, with regard to that mortgage loan, is exempt from the written early intervention notice requirements if no loss mitigation option is available or if any borrower on the mortgage loan has provided a cease communication notification pursuant to FDCPA section 805(c) with respect to that mortgage loan as referenced in § 1024.39(d). As explained above in the discussion of the live contact exemption, the Bureau also adopts a loan-level exemption from the written early intervention notice requirements rather than a borrower-specific exemption as proposed. The final rule does not draw distinctions between the chapter of bankruptcy under which the borrower filed for purposes of the partial exemption. Instead, new § 1024.39(c)(1) applies the exemption with regard to a mortgage loan while any borrower on that loan is a debtor in bankruptcy under title 11 of the United States Code generally.

New § 1024.39(c)(1)(iii) provides that if the conditions of § 1024.39(c)(1)(ii) are not met, a servicer, with regard to that mortgage loan, must comply with the written early intervention notice requirements, as modified by § 1024.39(c)(1)(iii). Therefore, if any loss mitigation option is available and no borrower on the mortgage loan has invoked FDCPA section 805(c)'s cease communication protections, a servicer is required to provide the modified written early intervention notice as described in § 1024.39(c)(1)(iii). Section 1024.39(c)(1)(iii) also provides that, if a borrower is delinquent when the borrower becomes a debtor in bankruptcy, a servicer must provide the written notice not later than the 45th day after the borrower files a bankruptcy petition under title 11 of the United States Code. If the borrower is not delinquent when the borrower files a bankruptcy petition, but subsequently becomes delinquent while in bankruptcy, the servicer must provide the written notice not later than the 45th day of the borrower's delinquency. A servicer must comply with these timing requirements regardless of whether the servicer provided the written notice in the preceding 180-day period. Section 1024.39(c)(1)(iii) further provides that the written notice may not contain a request for payment and that a servicer is not required to provide the written notice more than once during a single bankruptcy case. The final commentary has also been modified.

Written notice rationale. As the Bureau explained in the proposal, a primary value of the written early intervention notice to a delinquent borrower in bankruptcy is to inform the borrower of potential loss mitigation options to avoid foreclosure. The Bureau considered comments that it should require the written early intervention notice for all borrowers in bankruptcy, regardless of whether any loss mitigation option is available. However, a notice that does not contain information related to loss mitigation options serves primarily as a payment reminder, which is of significantly diminished value to a borrower in bankruptcy and precisely the type of communication to a borrower in bankruptcy that the automatic stay is intended to prevent. Therefore, the Bureau concludes that it is not appropriate to require servicers to provide the written early intervention notice to borrowers in bankruptcy if no loss mitigation option is available. The final rule retains the exemption from § 1024.39(b) if no loss mitigation option is available or if any borrower on the mortgage loan has invoked the FDCPA's cease communication protections while requiring the provision of a modified form of the written early intervention notice to borrowers in bankruptcy if those conditions are not met.

To assist servicers in determining whether any loss mitigation option is available and thus whether the servicer is required to provide the modified written early intervention notice under new § 1024.39(c)(1)(iii), the Bureau is adopting new comment 39(c)(1)(ii)–1. New comment 39(c)(1)(ii)–1 states that in part, § 1024.39(c)(1)(ii) exempts a servicer from the requirements of § 1024.39(b) if no loss mitigation option is available. The comment then explains that a loss mitigation option is available if the owner or assignee of a mortgage loan offers an alternative to foreclosure that is made available through the servicer and for which a borrower may apply, even if the borrower ultimately does not qualify for such option. As explained in the section-by-section analysis of § 1024.39(b)(2), the Bureau is not adopting proposed comment 39(b)(2)–4, which would have explained when a loss mitigation option is available for purposes of § 1024.39(b) generally, but is instead adopting new comment 39(c)(1)(ii)–1 to explain when a loss mitigation option is available for purposes of § 1024.39(c).

The Bureau believes that delinquent borrowers in bankruptcy would benefit from receiving the written notice required under § 1024.39(b) if any loss mitigation option is available. The Bureau believes that the content of the notice, including the statement providing a brief description of loss mitigation options that may be available from the servicer and the application instructions or a statement informing the borrower how to obtain more information about loss mitigation options from the servicer, are of particular value to a delinquent borrower in bankruptcy. Borrowers who have filed for bankruptcy should not be denied an opportunity to obtain information about available loss mitigation options, as this information may be uniquely critical for borrowers in bankruptcy making decisions about how best to reduce, eliminate, or reorganize their debts. The Bureau understands that borrowers sometimes initially determine to surrender their property only to reconsider that decision upon receiving loss mitigation information.

Although industry commenters generally opposed providing a written early intervention notice to borrowers in bankruptcy, the Bureau concludes that requiring the notice, as modified in new § 1024.39(c)(1)(iii), strikes the appropriate balance for several reasons. First, the Bureau does not agree with those industry commenters who claimed that the written notice would be of little value to borrowers in bankruptcy. While it may be the case that some borrowers exhaust their loss mitigation options before bankruptcy, many borrowers file for bankruptcy precisely to avoid losing their home, and for those borrowers, continuing to receive information about available loss mitigation options is vital. Comments from consumer advocacy groups, including consumer bankruptcy

[199] This final rule modifies the language in Model Clause MS–D(4), as explained in the section-by-section analysis of Appendix MS–4 to Part 1024—Mortgage Servicing.

attorneys, and the U.S. Trustee Program all emphasized the importance of providing loss mitigation information to borrowers in bankruptcy, noting that they are, by definition, experiencing financial hardships. The Bureau believes that delinquent borrowers in bankruptcy would benefit from information about available loss mitigation options.

HUD, Treasury, and many local bankruptcy courts have similarly recognized that borrowers in bankruptcy have a need for loss mitigation assistance. In 2008, HUD issued guidance requiring servicers of FHA mortgage loans to provide loss mitigation information to bankrupt borrowers represented by counsel, while also recommending that servicers provide that information to pro se borrowers.[200] Although Treasury does not require servicers to solicit borrowers in bankruptcy actively for loss mitigation, it has made clear that such borrowers are eligible for HAMP.[201] Numerous bankruptcy courts, including in Florida, Nevada, New Jersey, New York, and Wisconsin, have adopted mortgage modification programs or procedures.

Second, the Bureau believes that this final rule appropriately addresses industry commenters' concerns that determining when the exemption applies could be particularly difficult or burdensome. The Bureau understands that servicers often review borrowers' initial court filings as part of their efforts in monitoring borrowers' bankruptcy cases, and the information servicers would have needed to determine whether or not an exemption applied, such as whether or not the borrower is represented and the chapter of bankruptcy under which relief is sought, is usually contained in those filings. Nonetheless, as explained above, the Bureau is finalizing new § 1024.39(c)(1)(iii) to take a uniform approach for borrowers in any chapter of bankruptcy under title 11 of the United States Code, thus obviating any need for servicers to distinguish the chapter of bankruptcy filed by the borrower. Moreover, as finalized, § 1024.39(c)(1)(iii) requires that a servicer provide the notice only once during a single bankruptcy case, further alleviating servicer burden. Additionally, new comment 39(c)–2 provides that § 1024.39(c) does not require a servicer to communicate with a borrower in a manner that would be inconsistent with applicable bankruptcy law or a court order in a bankruptcy case, and that, if necessary to comply with such law or court order, a servicer may adapt the requirements of § 1024.39 as appropriate.

Third, while industry commenters expressed concerns that providing the written early intervention notice to borrowers in bankruptcy would violate the automatic stay, courts have found no violation under similar circumstances. Of the handful of cases cited by industry commenters finding stay or discharge injunction violations for any reason related to a mortgage loan, all involved extreme facts and only one involved loss mitigation communications. In that case, the servicer had sent several ARM notices, two HAMP packets, and a letter offering workout options, but also engaged in collection attempts, such as making multiple phone calls requesting payment, after the borrower had long since surrendered the home and stopped making payments.[202] In finding a violation of the discharge injunction, the court noted that the totality of the servicer's collection efforts included at least 15 separate collection attempts and that the debtor had in fact vacated the home before filing for bankruptcy and moved to another address.[203] The final rule, in contrast, requires a single written notice containing information about available loss mitigation options, which may not include a request for payment. The Bureau is not aware of any reported decision in which a court sanctioned a servicer for providing a written notice about loss mitigation information with the content and frequency as adopted in this final rule. In fact, some industry commenters, consumer advocacy groups, bankruptcy attorneys, the U.S. Trustee Program, and two bankruptcy judges[204] all agreed that providing the written early intervention notice likely would not violate the automatic stay.

Additionally, the Bureau understands that, even after a borrower files for bankruptcy, a servicer is not categorically barred from communicating with the borrower.[205] Courts have found that, under appropriate circumstances, servicers may provide periodic statements, notices of change in payments, and other communications without violating the automatic stay.[206] As noted above, several courts have determined that a servicer may properly contact a borrower to inform the borrower about loss mitigation options or to negotiate the terms of a loss mitigation agreement.

The Bureau also does not believe that servicers' concerns about communicating with a borrower represented by counsel warrant a blanket exemption from providing the written early intervention notice to borrowers in bankruptcy. To the extent that a servicer is concerned about

[200] ''[T]he Department understands that . . . waiting until a bankruptcy is discharged or dismissed before offering loss mitigation may be injurious to the interests of the borrower, the mortgagee and the FHA insurance funds.'' U.S. Dep't of Housing and Urban Dev., Mortgagee Letter 2008–32, *Use of FHA Loss Mitigation During Bankruptcy* (Oct. 17, 2008) *available at http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/sfh/nsc/lmmltrs*.

[201] ''Borrowers in active Chapter 7 or Chapter 13 bankruptcy cases are eligible for [the Home Affordable Modification Program (HAMP)] at the servicer's discretion in accordance with investor guidelines, but servicers are not required to solicit these borrowers proactively for HAMP. Notwithstanding the foregoing, such borrowers must be considered for HAMP if the borrower, borrower's counsel or bankruptcy trustee submits a request to the servicer. However, if the borrower is also unemployed, the servicer must evaluate the borrower for [the Home Affordable Unemployment Program], subject to any required bankruptcy court approvals, before evaluating the borrower for HAMP.'' Making Home Affordable, *Making Home Affordable Program Handbook for Servicers of Non-GSE Mortgages,* Version 5.0 at 71 (Jan. 6, 2016), *available at https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/mhahandbook_5.pdf*.

[202] *See In re Bibolotti,* No. 4:11–CV–472, 2013 WL 2147949 (E.D. Tex. May 15, 2013). The other cases industry commenters cited did not involve loss mitigation notices or conduct that the proposal or final rule would require. *See In re Shinabeck,* No. 08–41942, 2014 WL 5325781 (Bankr. E.D. Tex. Oct. 20, 2014) (collection attempts continued even after borrower filed lawsuit alleging violations of the discharge injunction); *In re Draper,* 237 B.R. 502, 505–06 (Bankr. M.D. Fla. 1999) (debtor had asked not to receive periodic statements, which were inaccurate in any event); *In re Connor,* 366 B.R. 133, 136, 138 (Bankr. D. Haw. 2007) (debtor was surrendering his home and did not need periodic statements).

[203] *Bibolotti,* 2013 WL 2147949, at *1.

[204] As the Bureau explained, prior to the proposal, the Bureau conducted outreach to two bankruptcy judges who commented that a written notice compliant with § 1024.39(b) and containing a bankruptcy disclaimer would raise fewer concerns about the automatic stay than live contact because the notice does not contain any payment demand and because the nature of the notice is an invitation to apply for debt relief. 79 FR 74176, 74205 (Dec. 15, 2014).

[205] *See, e.g., In re Zotow,* 432 B.R. 252, 258 (B.A.P. 9th Cir. 2010) (''[T]he automatic stay does not prevent all communications between a creditor and the debtor.'') (citations omitted); *In re Duke,* 79 F.3d 43, 45 (7th Cir. 1996) (holding that creditor does not violate automatic stay by sending a ''nonthreatening and non-coercive'' offer to reaffirm a pre-petition debt and stating that ''the respite provided by § 362 'is . . . from the threat of immediate action by creditors, such as a foreclosure or a lawsuit' '') (quoting *In re Brown,* 851 F.2d 81, 86 (3d Cir. 1988)).

[206] *See* section-by-section analysis of 12 CFR 1026.41, *infra; see also Zotow,* 432 B.R. at 260 (notice of payment change due to escrow deficiency); *Duke,* 79 F.3d at 45 (offer to reaffirm debt); *In re Schatz,* 452 B.R. 544 (Bankr. M.D. Pa. 2011) (periodic statements); *In re Singh,* 457 B.R. 790 (Bankr. E.D. Cal. 2011) (notice of payment change); *see also Morgan Guaranty Trust Co. of N.Y.* v. *Am. Sav. & Loan Ass'n,* 804 F.2d 1487, 1491 (9th Cir. 1986) (''[M]ere requests for payment are not barred absent coercion or harassment by the creditor. . . .'').

communicating with a borrower represented by counsel, it may communicate with the borrower's authorized representative instead.[207] New comment 39(c)–1 provides that, if the borrower is represented by a person authorized by the borrower to communicate with the servicer on the borrower's behalf, the servicer may provide the written notice required by § 1024.39(b), as modified by § 1024.39(c)(1)(iii), to the borrower's representative. The comment explains that, in general, bankruptcy counsel is the borrower's representative and that a servicer's procedures for determining whether counsel is the borrower's representative are generally considered reasonable if they are limited to, for example, confirming that the attorney's name is listed on the borrower's bankruptcy petition or other court filing.[208]

As evidenced by the numerous jurisdictions that provide special bankruptcy court rules for loss mitigation,[209] the Bureau continues to believe that bankruptcy courts often encourage loss mitigation efforts and that bankruptcy courts are unlikely to sanction a servicer for sending notices required by Regulation X unless the servicer engaged in other, more aggressive collection attempts. To address further commenters' concerns about the automatic stay, the Bureau is finalizing § 1024.39(c)(1)(iii) to specify that the written notice may not contain a request for payment and require that a servicer provide the notice only once during a single bankruptcy case. As explained more fully in the section-by-section analysis of § 1024.39(d), the prohibition on making a payment request ensures that the written early intervention notice is purely informational and does not serve as a pretext for collection attempts. The Bureau is also revising existing comment 39(d)(1)–3 and renumbering it as comment 39(c)(1)(iii)–1 to provide that, when two or more borrowers are joint obligors with primary liability on a mortgage loan subject to § 1024.39, if any of the borrowers is a debtor in bankruptcy, a servicer may provide the written notice required by § 1024.39(b), as modified by § 1024.39(c)(1)(iii), to any borrower who is primarily liable on the obligation. This comment should clarify servicers' obligations when there are multiple borrowers on a mortgage loan and only one of them is in bankruptcy.

The Bureau also proposed comment 39(d)(1)(ii)–2 to clarify servicers' obligations when the FDCPA applies to a servicer's communications with a borrower who is a debtor in bankruptcy if that borrower has also invoked the cease communication protections of FDCPA section 805(c). The Bureau revises and renumbers proposed comment 39(d)(1)(ii)–2 as new comment 39(c)(1)(ii)–2, which illustrates application of the exemption in § 1024.39(c)(1)(ii). Final comment 39(c)(1)(ii)–2.i provides that, to the extent the FDCPA applies to a servicer's communications with a borrower in bankruptcy and any borrower on the mortgage loan has provided a notification pursuant to FDCPA section 805(c) notifying the servicer that the borrower refuses to pay a debt or that the borrower wishes the servicer to cease further communications (a cease communications notice), with regard to that mortgage loan, § 1024.39(c)(1)(ii) exempts a servicer from providing the written notice required by § 1024.39(b). New comment 39(c)(1)(ii)–2.ii provides an illustrative example of the application of this exemption.

Timing of written notice rationale. New § 1024.39(c)(1)(iii)(A) requires that a servicer provide the written notice not later than the 45th day after a delinquent borrower files a bankruptcy petition under title 11 of the United States Code. The Bureau believes that requiring servicers to provide a single notice for delinquent borrowers who file for bankruptcy without having to review the borrower's bankruptcy filings or the bankruptcy court's orders reduces servicer burdens compared to the proposed approach. The Bureau believes that delinquent borrowers will benefit by having the notice provided shortly after the bankruptcy filing when they are making decisions about whether to retain the property, even if they received a version of the early intervention notice prior to the bankruptcy filing. The final rule's approach is consistent with HUD's 2008 FHA guidance, which requires servicers to provide loss mitigation information ''upon receipt'' of a borrower's filing.[210]

Overlap between borrowers in bankruptcy and FDCPA rationale. New § 1024.39(c)(1)(ii) provides that a servicer is exempt from the written early intervention notice requirements if § 1024.39(d) also applies with respect to that borrower's loan, meaning that a servicer subject to the FDCPA is exempt from providing the written early intervention notice with regard to a mortgage loan for which any borrower on the mortgage loan invokes the FDCPA's cease communications protections while any borrower on the mortgage loan is a debtor in bankruptcy. The Bureau agrees with commenters that there is tension between, on the one hand, the Bankruptcy Code's automatic stay, which prevents the servicer from pursuing foreclosure, and, on the other hand, a statement that the servicer may or intends to invoke its specified remedy of foreclosure, as required to be included under § 1024.39(d)(3)(i) in the notice to a borrower who has invoked the FDCPA's cease communication protections.[211]

[207] As HUD has also recognized, communicating with a borrower's bankruptcy counsel about available loss mitigation does not raise concerns about violating the automatic stay. HUD Mortgagee Letter 2008–32 (''As a result of these discussions [with bankruptcy experts], the Department understands that contact with debtor's counsel or a bankruptcy trustee does not constitute a violation of the automatic stay and that waiting until a bankruptcy is discharged or dismissed before offering loss mitigation may be injurious to the interests of the borrower, the mortgagee and the FHA insurance funds.''); *see also Henry* v. *Assocs. Home Equity Servs., Inc. (In re Henry),* 266 B.R. 457 (Bankr. C.D. Cal. 2001) (''If a debtor is represented by counsel, any creditor may communicate with counsel for the debtor without violating the automatic stay. Counsel has no need to be shielded from a client's creditors. It is part of the job of counsel for a debtor to deal with the client's creditors.''); *United States* v. *Nelson,* 969 F.2d 626, 628 (8th Cir. 1992) (holding that creditor did not violate the stay by sending a letter to debtor's counsel); *Cash Am. Pawn, L.P.* v. *Murphy,* 209 B.R. 419, 424 (E.D. Tex. 1997) (similar); *In re Murray,* 89 B.R. 533, 536 (Bankr. E.D. Pa. 1988) (similar); *cf. Duke,* 79 F.3d at 45 (holding that creditor did not violate stay by copying debtor on letter it sent to debtor's counsel).

[208] *See* current comments 39(b)(1)–3 and 39(a)–4 (renumbered in this final rule as comment 39(a)–5).

[209] *See, e.g.,* Bankr. S.D.N.Y., Loss Mitigation Program Procedures, *available at http://www.nysb.uscourts.gov/pgh/lossmitigation/LossMitigationProcedures.pdf*; Bankr. E.D.N.Y., *In re Adoption of Modified Loss Mitigation Program Procedures,* Gen. Order 582 (Sept. 9, 2011), *available at http://www.nyeb.uscourts.gov/sites/nyeb/files/ord_582.pdf*; Bankr. D.R.I., *Eighth Amended Loss Mitigation Program and Procedures, available at http://www.rib.uscourts.gov/sites/default/files/programs_and_services/loss_mitigation/Appendix%20VII%20Loss%20Mitigation.pdf*; Bankr. D. Vt., L.B.R. 4001–7, Mortgage Mediation and Loss Mitigation Program, *available at http://www.vtb.uscourts.gov/sites/vtb/files/general-ordes/SO%2015-02%20-%20MM%20-%202.2.15%20FINAL%20with%20attachments.pdf*; Bankr. D.N.J., *Loss Mitigation Program and Procedures, available at http://www.njb.uscourts.gov/sites/default/files/forms/Loss_Mitigation_Program_and_Procedures.pdf*; Bankr. M.D. Fla., *In re Administrative Order Prescribing Procedures for Mortgage Modification Mediation, Admin.* Order FLM 2015–1, *available at http://pacer.flmb.uscourts.gov/administrativeorders/DataFileOrder.asp?FileID=43.*

[210] U.S. Dep't of Housing and Urban Dev., Mortgagee Letter 2008–32, Use of FHA Loss Mitigation During Bankruptcy (Oct. 17, 2008) (HUD Mortgagee Letter 2008–32), *available at http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/sfh/nsc/lmmltrs.*

[211] *See* section-by-section analysis of § 1024.39(d)(3) for further discussion of the requirement that the written early intervention

Continued

The Bureau believes that any potential borrower harm resulting from this exemption is mitigated because § 1024.39(d)(3) requires that, if any loss mitigation option is available, servicers must provide the written early intervention notice to delinquent borrowers outside of bankruptcy, even if those borrowers have invoked their cease communication rights. If any loss mitigation option is available, a servicer is exempt from providing the written early intervention notice only with respect to a mortgage loan for which any borrower on the loan has invoked the FDCPA cease communication right and while any borrower on that mortgage loan is a debtor in bankruptcy. Consequently, many borrowers among that subset of delinquent borrowers who have invoked their cease communication rights while any borrower on the mortgage loan is a debtor in bankruptcy will nonetheless receive an early intervention notice, either because they received such a notice before exercising their cease communication rights or because they received the modified written early intervention notice required to be provided to all borrowers outside of bankruptcy if any loss mitigation option is available. As commenters noted, many borrowers will be more than 45 days delinquent upon filing for bankruptcy and so will have received a written early intervention notice before entering bankruptcy, if any loss mitigation option is available.

39(c)(2) Resuming Compliance

The Bureau also proposed to revise current comment 39(d)(1)–2 and redesignate it as comment 39(d)(1)–1 (and remove existing comment 39(d)(1)–1). The proposed comment would have provided that, with respect to any borrower who has not discharged the mortgage debt, a servicer must resume compliance with § 1024.39(a) and (b), as applicable, as of the first delinquency that follows the earliest of the following outcomes in the bankruptcy case: (1) The case is dismissed, (2) the case is closed, (3) the borrower reaffirms the mortgage loan under 11 U.S.C. 524, or (4) the borrower receives a discharge under 11 U.S.C. 727, 1141, 1228, or 1328. Proposed comment 39(d)(1)–1 also clarified that the requirement to resume compliance with § 1024.39 would not require a servicer to communicate with a borrower in a manner that would be inconsistent with applicable bankruptcy law or a court order in a bankruptcy case. The proposed revisions would have provided that, to the extent necessary to comply with such law or court order, a servicer may adapt the requirements of § 1024.39 as appropriate.

In addition, proposed comment 39(d)(1)–1 would have provided that compliance with § 1024.39(a) is not required with respect to any borrower who has discharged the mortgage debt under applicable provisions of the Bankruptcy Code but continues to make mortgage payments to avoid foreclosure of the lien and retain the home. As to borrowers who use such a ride-through option, the proposal would have imposed the same requirements on a servicer both during and after the bankruptcy case: The servicer would be exempt from the live contact requirements of § 1024.39(a), but the servicer would have to continue to comply with the written notice requirements of § 1024.39(b) unless one of the conditions in proposed § 1024.39(d)(1)(ii) was satisfied. If the borrower's bankruptcy case was revived, for example, through the court's reinstating a previously dismissed case or reopening the case, the servicer would be exempt again from the requirements of proposed § 1024.39(a). As discussed further below, the Bureau is adopting clarifications to proposed comment 39(d)(1)–1 and codifying it in new § 1024.39(c)(2) and its related commentary to explain when a servicer is required to resume compliance with the early intervention requirements.

Comments on Resuming Compliance

Commenters expressed varied opinions about whether a servicer should be required to resume compliance with § 1024.39 if a borrower discharged the mortgage loan. One industry commenter explained that a bankruptcy case can remain open following the borrower's discharge, that the property securing the servicer's lien may remain property of the bankruptcy estate, and that the automatic stay could continue to apply to the property. The commenter recommended that a servicer not be required to resume compliance until the bankruptcy case is complete. Conversely, consumer advocacy groups stated that servicers should be required to resume compliance with the early intervention requirements for borrowers in chapter 7 bankruptcy who use the ride-through option referenced above. These consumer advocacy groups suggested that, for simplicity of administration, if the servicer is required to send the borrower periodic statements after a bankruptcy discharge, then the servicer should also be required to attempt live contact and provide a written early intervention notice to the borrower if the loan becomes delinquent.

In response to the Bureau's specific request for comment as to whether servicers have had difficulties receiving notices regarding the dismissal or closing of a bankruptcy case or of the debtor's discharge, one servicer stated that it encounters such problems. Another industry commenter stated that servicers incur expenses in monitoring bankruptcy cases for a case closing or for discharge of the mortgage loan. Both commenters suggested that the obligation to resume compliance be contingent on the servicer receiving notice from the bankruptcy court or the borrower.

Specifically regarding ride-through borrowers, the U.S. Trustee Program commented that the criteria for resuming compliance with early intervention should be clarified to recognize borrowers who have received a discharge of personal liability but whose homes are still subject to valid liens. The U.S. Trustee Program stated that the Bureau should make clear that servicers must comply with the written early intervention notice requirements if the servicer retains a valid security interest in the property—even if the debtor has obtained a discharge of personal liability.

The Bureau conducted additional outreach with servicers about how they monitor bankruptcy cases after the close of the comment period. Several servicers stated that they learn of new bankruptcy filings through electronic subscription monitoring services. One credit union explained that it learns of new bankruptcy filings either through mailings from the bankruptcy court or directly from the credit union member. In either case, servicers stated that they generally receive timely notice of new bankruptcy filings, in some cases within as little as one day of the filing. A number of servicers also explained that they track the status of bankruptcy cases electronically.

Final Rule

The Bureau is adopting clarifications to proposed comment 39(d)(1)–1 and codifying it in new § 1024.39(c)(2) and its related commentary. Specifically, part of proposed comment 39(d)(1)–1.i is finalized as new § 1024.39(c)(2)(i) with modifications and provides that, subject to certain exceptions in new § 1024.39(c)(2)(ii), a servicer that was exempt pursuant to § 1024.39(c)(1) must resume compliance with the early intervention requirements after the next payment due date that follows the

notice include a statement that the servicer may or intends to invoke its specified remedy of foreclosure.

earliest of the following events: The bankruptcy case is dismissed; the bankruptcy case is closed; and the borrower reaffirms personal liability for the mortgage loan. New § 1024.39(c)(2)(ii) finalizes part of proposed comment 39(d)(1)–1.ii with modifications and provides that, with respect to a mortgage loan for which the borrower has discharged personal liability pursuant to 11 U.S.C. 727, 1141, 1228, or 1328, a servicer is not required to resume compliance with the live contact early intervention requirements and must resume compliance with the written early intervention notice requirements if the borrower has made any partial or periodic payment on the mortgage loan after commencement of the borrower's bankruptcy case.

The Bureau considered whether the servicer's obligation to resume early intervention should be contingent on a servicer receiving notice that the bankruptcy case is dismissed or closed or that the borrower has reaffirmed personal liability for the mortgage loan. However, as the Bureau's outreach confirmed, servicers typically track the status of borrowers' bankruptcy cases already to ensure compliance with other Federal and State laws. Servicers generally have procedures in place to monitor outcomes in bankruptcy cases and already bear any costs associated with monitoring bankruptcy case outcomes. Additionally, a servicer that participates in the bankruptcy case, such as by filing a proof of claim or seeking relief from the automatic stay to pursue foreclosure, should receive automatic electronic notification of all case activity. Therefore, the Bureau concludes that any additional compliance burdens associated with new § 1024.39(c)(2) will be minimal and that servicers have access to timely information about the bankruptcy case.

The Bureau adopts part of proposed comment 39(d)(1)–1.ii in new comment 39(c)(2)–1, which explains that, if the borrower's bankruptcy case is revived, for example, if the court reinstates a previously dismissed case or reopens the case, § 1024.39(c)(1) once again applies. However, § 1024.39(c)(1)(iii)(C) provides that a servicer is not required to provide the written notice more than once during a single bankruptcy case. New comment 39(c)(2)–1 provides an illustrative example applying this provision.

The final rule does not include the proposed language requiring servicers to resume compliance with the early intervention provisions when the borrower receives a discharge of the mortgage loan. The Bureau believes it would be more appropriate to require servicers to resume compliance once the bankruptcy case is complete. The Bureau understands that the time between a borrower's discharge of personal liability for the mortgage loan and the closing of a bankruptcy case is typically brief and that, therefore, not requiring early intervention during this period generally should not have significant adverse consequences for borrowers. Additionally, the property securing the mortgage loan may remain property of the bankruptcy estate after the borrower discharges personal liability for the loan, and the Bureau believes it would be more appropriate for a servicer to resume providing early intervention after the bankruptcy case is complete with respect to both the borrower and the property.

The Bureau continues to believe that borrowers who exercise the ride-through option, like other borrowers who retain their homes, would benefit from early intervention. The Bureau is concerned, however, that in certain situations the borrower or bankruptcy court could view live contact as violating the discharge injunction. Therefore, with respect to a mortgage loan for which a borrower discharges personal liability, a servicer is not required to resume compliance with the live contact requirements of § 1024.39(a). The Bureau believes that, for the reasons discussed above, providing a written early intervention notice after the bankruptcy case to a borrower who has discharged personal liability for the mortgage loan is unlikely to raise similar concerns about the discharge injunction.[212] Accordingly, the final rule provides that, with respect to a borrower who has discharged personal liability for a mortgage loan, the servicer must resume compliance with § 1024.39(b) after the bankruptcy case concludes if the borrower has made any partial or periodic payment on the mortgage loan after commencement of the borrower's bankruptcy case. Consistent with comments the Bureau received from the U.S. Trustee Program regarding the ride-through option, the Bureau believes that a borrower's partial or periodic payment after commencement of the bankruptcy case indicates the borrower's desire to retain the property and therefore that the written early intervention notice may continue to be helpful under those circumstances. Even if a servicer were to return a borrower's partial payment or hold it in suspense, the servicer would still be required to resume compliance with § 1024.39(b) after the bankruptcy case concludes pursuant to § 1024.39(c)(2)(ii)(B) because the borrower made the payment.

Legal Authority

The Bureau is exercising its authority under sections 6(j)(3) and 19(a) of RESPA to exempt servicers from the early intervention live contact requirements in § 1024.39(a) for a mortgage loan while any borrower on a mortgage loan is a debtor in bankruptcy under any chapter in title 11 of the United States Code. The Bureau exercises its authority under sections 6(j)(3) and 19(a) of RESPA to exempt a servicer from the written early intervention notice requirements in § 1024.39(b) if any borrower on the mortgage loan is a debtor in bankruptcy and no loss mitigation option is available or if § 1024.39(d) also applies with respect to that borrower's loan. The Bureau also exercises its authority under sections 6(j)(3) and 19(a) of RESPA to exempt a servicer from resuming compliance with § 1024.39(a) with respect to a mortgage loan for which the borrower has discharged personal liability pursuant to 11 U.S.C. 727, 1141, 1228, or 1328, and to require a servicer to resume compliance with § 1024.39(b) if the borrower has made any partial or periodic payment on the mortgage loan after commencement of the borrower's bankruptcy case. For the reasons discussed above, the Bureau does not believe that the consumer protection purposes of RESPA are furthered by requiring servicers to comply with § 1024.39(a) or (b) under those bankruptcy-related circumstances.

The Bureau is exercising its authority under sections 6(k)(1)(E), 6(j)(3), and 19(a) of RESPA to require that a servicer provide the written early intervention notice as set forth in § 1024.39(c)(1)(iii) not later than the 45th day after the borrower files a bankruptcy petition under title 11 of the United States Code or not later than the 45th day of the borrower's delinquency, as applicable. The Bureau also exercises its authority under sections 6(k)(1)(E), 6(j)(3), and 19(a) of RESPA to require that a servicer resume compliance with § 1024.39(a) and (b) after the next payment due date that follows the earliest of the following

[212] In addition to the reasons discussed above, the Bureau notes that the written early intervention notice may fall within the exception to the discharge injunction set forth in section 524(j) of the Bankruptcy Code. See 11 U.S.C. 524(j) (''[A discharge injunction] does not operate as an injunction against an act by a creditor that is the holder of a secured claim, if—(1) such creditor retains a security interest in real property that is the principal residence of the debtor; (2) such act is in the ordinary course of business between the creditor and the debtor; and (3) such act is limited to seeking or obtaining periodic payments associated with a valid security interest in lieu of pursuit of in rem relief to enforce the lien.'').

events: The bankruptcy case is dismissed; the bankruptcy case is closed; or the borrower reaffirms personal liability for the mortgage loan. The Bureau believes that the early intervention rules under § 1024.39 provide necessary consumer protections and that servicers are capable of providing such protections without negative consequences for borrowers, including borrowers in bankruptcy. The Bureau finds, consistent with RESPA section 6(k)(1)(E), that § 1024.39(c)(1)(iii) and (c)(2) is appropriate to achieve the consumer protection purposes of RESPA, including to help borrowers avoid unwarranted or unnecessary costs and fees and to facilitate review of borrowers for foreclosure avoidance options. For the same reasons, § 1024.39(c)(1)(iii) and (c)(2) is authorized under section 6(j)(3) of RESPA as necessary to carry out section 6 of RESPA and under section 19(a) of RESPA as necessary to achieve the purposes of RESPA, including borrowers' avoidance of unwarranted or unnecessary costs and fees and the facilitation of review of borrowers for foreclosure avoidance options. For the reasons discussed above, the Bureau concludes that the consumer protection purposes of RESPA are furthered by requiring servicers to provide the written early intervention notice as set forth in § 1024.39(c)(1)(iii) and to resume compliance with § 1024.39(a) and (b) for borrowers in bankruptcy under the circumstances set forth in § 1024.39(c)(2).

39(d) Fair Debt Collection Practices Act—Partial Exemption

The Bureau proposed to revise the scope of the existing exemption from the early intervention requirements for servicers subject to the FDCPA with respect to a borrower who has sent a notification pursuant to FDCPA section 805(c), as set forth in current § 1024.39(d)(2).[213] The proposal would have maintained the current exemption from the live contact requirements of § 1024.39(a) while partially removing the exemption from the written early intervention notice requirements of § 1024.39(b). The latter exemption would have been only partially removed in that it would remain in place for certain cases but would have added a requirement that a servicer provide a modified written notice if loss mitigation options are available. To the extent proposed § 1024.39(d)(2)(iii) would have required a servicer to provide a modified written notice, the proposal contemplated a safe harbor for the servicer from liability under the FDCPA. FDCPA section 805 provides limitations on communications with borrowers, including the cease communication provision under which a borrower may notify a debt collector that the borrower refuses to pay a debt or that the borrower wishes the debt collector to cease further communication with the consumer.

For the reasons discussed below, the Bureau is adopting proposed § 1024.39(d)(2) generally as proposed, renumbered as § 1024.39(d), with technical corrections and modifications to adopt it on a loan level. The Bureau is adopting these modifications to ease servicer burden and to facilitate servicer compliance, in a manner and for several reasons that parallel those explained in the section-by-section analysis of § 1024.39(c). The Bureau is also adding a new provision that exempts a servicer that is a debt collector from providing the written early intervention notice with regard to a mortgage loan for which any borrower invokes the FDCPA's cease communication protections while any borrower on the mortgage loan is a debtor in bankruptcy.

Consistent with the discussion in this section-by-section analysis, the Bureau is issuing concurrently with this final rule an interpretive rule interpreting the FDCPA cease communication requirement in relation to the mortgage servicing rules. This interpretation constitutes an advisory opinion under FDCPA section 813(e) (15 U.S.C. 1692k(e)).[214] For the reasons discussed below, the Bureau is providing a safe harbor from liability under the FDCPA for the written notice that servicers that are debt collectors are required to provide under § 1024.39(d)(3), notwithstanding a borrower's invocation of the cease communication right. Additionally, the Bureau is providing a safe harbor from liability under the FDCPA for certain communications by a servicer to a borrower notwithstanding a borrower's invocation of the cease communication right.

Comments on Partially Removing Exemption Generally

The Bureau received comments on the proposed partial exemption from servicers, consumer advocacy groups, trade associations, credit unions, and the U.S. Trustee Program. Some industry commenters expressed concern with the Bureau's proposed approach, stating that it would be inconsistent to require that a servicer provide early intervention after receiving a borrower's cease communication notice. Two industry commenters stated that the better approach would be for the FDCPA not to apply to mortgage loans at all and for early intervention requirements to apply equally to all mortgage borrowers. Another industry commenter explained that, to ease operational burdens, the exemption should apply to any loans that a servicer chooses to treat as subject to the FDCPA and for which the borrower has provided a cease communication notification.

Consumer advocacy groups generally supported the proposal, commenting that borrowers need and are interested in loss mitigation information notwithstanding invocation of their cease communication rights. Consumer advocacy groups explained that borrowers should not be forced to make a choice between exercising their rights under the FDCPA and receiving information about potential loss mitigation options.

Comments on Live Contact

Industry commenters generally supported the exemption from live contact for a borrower who has provided a cease communication notification. Consumer advocacy groups stated that the Bureau should clarify that the exemption does not apply if the borrower has initiated contact with the servicer and has sought assistance with a delinquency or requested information about potential loss mitigation options.

Comments on Written Notice

Industry commenters generally objected to the burden of providing a modified written early intervention notice on a modified schedule to a narrow subset of borrowers. They noted their difficulty in determining when the FDCPA applies to a mortgage loan and thus the difficulty they would have in

[213] This section-by-section analysis discusses final § 1024.39(d) generally in terms of a borrower's cease communication notification and its effect on a servicer's obligations under the early intervention requirements, but the provision applies equally to a borrower's notice to the servicer that the borrower refuses to pay a debt. *See* FDCPA section 805(c) (''If a consumer notifies a debt collector in writing that the consumer refuses to pay a debt or that the consumer wishes the debt collector to cease further communication with the consumer, the debt collector shall not communicate further with the consumer with respect to such debt . . . .'').

[214] *See* Bureau of Consumer Fin. Prot., Official Bureau Interpretations: Safe Harbors from Liability under the Fair Debt Collection Practices Act for Certain Actions Taken in Compliance with Mortgage Servicing Rules under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z) (Aug. 4, 2016), *available at http://www.consumerfinance.gov/policy-compliance/rulemaking/final-rules/safe-harbors-liability-under-fair-debt-collection-practices-act-certain-actions-taken-compliance-mortgage-servicing-rules-under-real-estate-settlement-procedures-act-regulation-x-and-truth-lending-act-regulation-z*.

determining when to send the modified notice.

Consumer advocacy groups generally supported a requirement that borrowers who invoke cease communication protections receive a written notice. However, consumer advocacy groups commented that the availability of loss mitigation options should not be the condition that determines whether a borrower receives the written notice. They stated that a servicer may make a mistake in its determination as to whether a borrower who has provided a servicer a cease communication notification would be eligible for some loss mitigation options. Therefore, consumer advocacy groups supported requiring that servicers provide a written notice to all borrowers who have invoked cease communication rights, regardless of whether loss mitigation options are available.

Comments on Frequency of Written Notice

With respect to the frequency of the written early intervention notice, two industry group commenters indicated that, despite the option under the current rule to provide the early intervention notice no more than once in a 180-day period, servicers find it easier to provide the notice more frequently, sometimes monthly. The commenters suggested that the rule should allow servicers to provide a written notice monthly or once in connection with two missed payments during a calendar year to tie the notice requirement to a late payment rather than to the time between notices. The same commenters also said that a servicer should be permitted to provide a written notice upon the borrower's request.

On the other hand, consumer advocacy groups suggested that, in limited circumstances, the Bureau should permit a servicer to provide a written early intervention notice more than once during a 180-day period. They stated that a servicer should be required to provide a written notice more than once during any 180-day period if there has been a cure of a default and subsequent re-default by the borrower within the 180-day period.

Comments on Safe Harbor and Advisory Opinion

Industry commenters stated that the Bureau's overall proposed safe harbor approach failed to take into account the fluid nature of discussions between servicers and borrowers in the loss mitigation context. These commenters stated that assessing a borrower's eligibility for loss mitigation may require asking the borrower to pay a reinstatement amount or otherwise make an immediate payment. One industry commenter stated that loss mitigation is itself a form of debt collection and that servicing personnel are trained to explore options for collection. This commenter suggested that, with respect to any specific borrower-initiated communication, the cease communication notice should be deemed temporarily or permanently withdrawn. Accordingly, industry commenters suggested the Bureau modify the safe harbor to cover more discussions of loss mitigation options.

Although consumer advocacy groups generally supported the proposal to require that a servicer provide a written early intervention notice to a borrower who has provided the servicer a cease communication notification, they opposed the proposed safe harbor from liability under the FDCPA. They stated that the proposal appeared to provide servicers with blanket FDCPA protection any time they provide a written notice required by proposed § 1024.39(d)(2)(iii), under all circumstances, regardless of what is contained in the notice. Consumer advocacy groups also expressed concern with the proposal's discussion of borrower-initiated communications in a separate advisory opinion interpreting the FDCPA cease communication requirement. Rather than issue a separate advisory opinion interpreting the FDCPA cease communication requirement, consumer advocacy groups requested that the Bureau issue guidance in Regulation X itself, either as an amendment to proposed § 1024.39(d)(2)(i) or in a comment. These consumer advocacy groups also opposed the Bureau's plan to provide servicers with a safe harbor from liability under the FDCPA for an act done or omitted in good faith in conformity with the advisory opinion.

Final Rule

For the reasons set forth below and in light of the comments received, the Bureau is adopting a partial exemption from the early intervention requirements for borrowers who have invoked their FDCPA cease communication protections as proposed in § 1024.39(d)(2), renumbered as § 1024.39(d), with technical corrections and modifications to adopt it on a loan level instead of a borrower-specific level. The Bureau is also adding a new provision that exempts a servicer that is a debt collector from providing the written early intervention notice with regard to a mortgage loan for which any borrower invokes the FDCPA's cease communication protections while any borrower on the mortgage loan is a debtor in bankruptcy.

As finalized, § 1024.39(d) provides that, with regard to a mortgage loan for which any borrower has provided a notification pursuant to FDCPA section 805(c), a servicer subject to the FDCPA with respect to that borrower's loan: (1) Is exempt from the live contact requirements of § 1024.39(a); (2) is exempt from the written notice requirements of § 1024.39(b) if no loss mitigation option is available or while any borrower on that mortgage loan is a debtor in bankruptcy under title 11 of the United States Code as referenced in § 1024.39(c); and (3) if those conditions are not met (meaning that any loss mitigation option is available and no borrower on the mortgage loan is a debtor in bankruptcy), must comply with the written notice requirements of § 1024.39(b), as modified by new § 1024.39(d)(3). Section 1024.39(d)(3) modifies the requirements of § 1024.39(b) under these circumstances to provide that, in addition to the information required pursuant to § 1024.39(b)(2), the written notice must include a statement that the servicer may or intends to invoke its specified remedy of foreclosure. Model clause MS–4(D) in appendix MS–4 may be used to comply with this requirement.[215] Revised § 1024.39(d)(3) also finalizes two other aspects of the proposed rule: (1) The written notice may not contain a request for payment, and (2) a servicer is prohibited from providing the written notice more than once during any 180-day period.

While many mortgage servicers are not subject to the FDCPA, mortgage servicers that acquired a mortgage loan at the time that it was in default are subject to the FDCPA with respect to that mortgage loan. The FDCPA generally grants consumers the right to bar debt collectors from communicating with them regarding a debt by sending a written cease communication notification pursuant to FDCPA section 805(c). Section 805(c) of the FDCPA provides that if a consumer refuses in writing to pay a debt or requests that a debt collector cease communicating with the consumer about the debt, the debt collector must discontinue communicating with the consumer, subject to enumerated exceptions. However, even after a borrower sends a

[215] To assist servicers that are debt collectors in complying with the requirements of new § 1024.39(d)(3), the Bureau is adopting model clause MS–4(D), contained in appendix MS–4 to part 1024. A more detailed discussion of the model clause is contained in the section-by-section analysis of appendix MS.

servicer a cease communication notification, a servicer that is a debt collector is not categorically barred under the FDCPA from all communication with the borrower. FDCPA section 805(c) contains specific exceptions that allow further communications with the borrower with respect to a debt. As relevant here, the prohibition does not apply where a debt collector communicates with a consumer who has invoked the cease communication right to notify the consumer that the debt collector or creditor may invoke specified remedies which are ordinarily invoked by such debt collector or creditor [216] or, where applicable, to notify the consumer that the debt collector or creditor intends to invoke a specified remedy.[217]

The Bureau provisionally adopted the exemption in current § 1024.39(d)(2) in the IFR and indicated that the Bureau expected to explore the potential utility and application of such requirements in comparison to the FDCPA protections in the future.[218] The Bureau now partially removes the exemption to require that a servicer that is a debt collector provide a modified written early intervention notice if any loss mitigation option is available and no borrower on the mortgage loan is a debtor in bankruptcy. The Bureau is issuing simultaneously with this final rule an interpretive rule that constitutes an advisory opinion under FDCPA section 813(e) interpreting the section 805(c)(2) and (3) exceptions to the cease communication right. No liability arises under the FDCPA for an act done or omitted in good faith in conformity with an advisory opinion of the Bureau while that advisory opinion is in effect.[219] After careful consideration, the Bureau concludes that, because failure to provide the written early intervention notice required by § 1024.39(d)(3) is closely linked to a servicer's ability to invoke its specified remedy of foreclosure, the notice falls within the exceptions in FDCPA sections 805(c)(2) and (3).

39(d)(1)

The Bureau is adopting proposed § 1024.39(d)(2)(i) generally as proposed, renumbered as § 1024.39(d)(1), with modifications to adopt the exemption on a loan level. Accordingly, new § 1024.39(d)(1) maintains the current exemption from the live contact requirements of § 1024.39(a) for a servicer subject to the FDCPA with respect to a borrower's mortgage loan for which any borrower has provided a cease communication notification under FDCPA section 805(c). For reasons similar to those explained in the section-by-section analysis of § 1024.39(c), the Bureau is adopting this partial exemption on a loan level to ease servicer burden and facilitate servicer compliance.

As the Bureau explained in the proposal, the Bureau understands that the nature of live contact and the information conveyed may be highly variable. The information conveyed, the manner for conveying that information, and whether any loss mitigation information is conveyed depends on the borrower's circumstances, the servicer's perception of those circumstances, and the servicer's exercise of reasonable discretion.[220] The servicer may contact the borrower in person, by telephone, or not at all, if the servicer's good faith efforts to reach the borrower fail.[221] By their nature, discussions or conversations resulting from live contact are not and cannot be closely prescribed.[222] Such variability is inconsistent with the narrow exceptions in FDCPA section 805(c)(2) and (3), which permit a debt collector to communicate further with a borrower for extremely limited purposes after a borrower has provided a servicer a cease communication notification. Because the information conveyed and the manner for conveying such information may be highly variable in the context of live contact, the Bureau concludes that requiring a servicer that is a debt collector to comply with the live contact requirements with regard to a mortgage loan for which a borrower has provided a notification pursuant to FDCPA section 805(c) is inappropriate and may put a servicer subject to the FDCPA with respect to that borrower's loan at risk of violating the FDCPA. The Bureau adopts no general rule about whether oral versus written communications are more likely to violate the FDCPA but notes only that the live contact requirements of § 1024.39(a) are less susceptible to standard, uniform delivery in compliance with the cease communication exceptions in FDCPA section 805(c)(2) and (3) than are the modified written early intervention notice requirements required under this final rule.

The Bureau also concludes that live contact may be of less value to a delinquent borrower who has properly invoked the FDCPA's cease communication protections. Compliance with the live contact requirements in § 1024.39(a) is not limited to, and does not in every case require, a discussion of available loss mitigation options. Section 1024.39(a) requires that a servicer inform the borrower about the availability of loss mitigation options, ''if appropriate.'' More broadly, comment 39(a)–2 states that live contact provides servicers an opportunity to discuss the circumstances of a borrower's delinquency, and, based on this discussion, a servicer may determine not to inform a borrower of loss mitigation options. As current comment 39(a)–3.i explains, servicers have discretion to determine whether informing a borrower about the availability of loss mitigation options is appropriate under the circumstances. A servicer may determine that promptly informing the borrower about the availability of loss mitigation options is not appropriate under certain circumstances. Current comment 39(a)–3.i.B provides an example of a servicer's reasonable determination not to provide information about the availability of loss mitigation options to a borrower who has missed a January 1 payment and notified the servicer that full late payment will be transmitted to the servicer by February 15.[223] The purpose of such a conversation could be to remind a borrower who perhaps inadvertently missed a payment of a past due amount, or to give the servicer an opportunity to discuss when the borrower may cure a temporary delinquency, but the conversation need not involve a discussion of loss mitigation options.

The early intervention live contact requirement is a recurring obligation that generally requires servicers to make continued efforts to establish live contact with a borrower so long as a borrower remains delinquent.[224] A

[216] FDCPA section 805(c)(2).

[217] FDCPA section 805(c)(3).

[218] 78 FR 62993, 62998–99 (Oct. 23, 2013). As in the IFR, the Bureau is not making a determination as to the legal status of the requirements under § 1026.20(c) following receipt of proper cease communication requests at this time. Therefore, the Bureau continues to encourage servicers to provide ARM payment adjustment notices to the extent that the FDCPA permits. *See* 78 FR 62993, 62999 (Oct. 23, 2013).

[219] FDCPA section 813(e).

[220] *See* current comment 39(a)–3.i, which this final rule renumbers as comment 39(a)–4.i.

[221] *See* current comment 39(a)–2 (''Good faith efforts to establish live contact consist of reasonable steps under the circumstances to reach a borrower and may include telephoning the borrower on more than one occasion or sending written or electronic communication encouraging the borrower to establish live contact with the servicer.''). This final rule moves this language into comment 39(a)–3.

[222] *See* 78 FR 10695, 10793 (Feb. 14, 2013).

[223] This final rule renumbers current comment 39(a)–3.iB as comment 39(a)–4.i.B.

[224] *See* Bureau of Consumer Fin. Prot., CFPB Bulletin 2013–12, *Implementation Guidance for Certain Mortgage Servicing Rules* (Oct. 15, 2013), *available at http://files.consumerfinance.gov/f/*

borrower who has provided a servicer a cease communication notification may perceive a servicer's early intervention live contact under § 1024.39(a) as an intrusive and unwanted communication. The Bureau concludes that repeated attempts to establish live contact, which may not lead to a discussion of available loss mitigation options, with a borrower who has instructed a servicer that is a debt collector to stop communicating with the borrower about the debt pursuant to the FDCPA may be unwanted and in contravention of the purposes of the FDCPA's cease communication protections. Therefore, the Bureau is finalizing proposed § 1024.39(d)(2)(i) in new § 1024.39(d)(1) to maintain the current exemption from the live contact requirements of § 1024.39(a) for a servicer subject to the FDCPA with respect to a borrower's mortgage loan for which any borrower has provided a cease communication notification under FDCPA section 805(c) with regard to that mortgage loan.

39(d)(2)

The Bureau is adopting proposed § 1024.39(d)(2)(ii), renumbered as § 1024.39(d)(2), to exempt a servicer from the written notice requirements of § 1024.39(b) with regard to a mortgage loan for which any borrower has provided a notification pursuant to FDCPA section 805(c) if no loss mitigation option is available, or while any borrower on that mortgage loan is a debtor in bankruptcy under title 11 of the United States Code as referenced in § 1024.39(c). In the limited circumstances where no loss mitigation option is available, the Bureau believes that the written notice may be of significantly less value to a borrower and is not as closely tied to the servicer's right to invoke foreclosure due to the limited impact of the dual tracking restrictions in the absence of loss mitigation options. The Bureau considered comments that it should require the written early intervention notice for all borrowers who have exercised cease communication rights under the FDCPA, regardless of whether any loss mitigation option is available. However, the Bureau concludes that it is not appropriate to require servicers that are debt collectors to provide the written early intervention notice to borrowers who have exercised their FDCPA cease communication rights if no loss mitigation option is available. In light of these considerations, if no loss mitigation option is available, the Bureau retains the exemption from the requirements of § 1024.39(b) for a servicer subject to the FDCPA with respect to a mortgage loan for which any borrower has provided a cease communication notification with regard to that mortgage loan. The Bureau adopts this exemption on a loan level to ease servicer burden and further facilitate servicer compliance as explained in the section-by-section analysis of § 1024.39(c).

Overlap Between Borrowers in Bankruptcy and FDCPA Rationale

Additionally, revised § 1024.39(d)(2) exempts a servicer from the written notice requirements of § 1024.39(b) with regard to a mortgage loan for which any borrower has provided a notification pursuant to FDCPA section 805(c) while any borrower on the mortgage loan is a debtor in bankruptcy under title 11 of the United States Code as referenced in § 1024.39(c). Based on the comments received and for the reasons set forth in the section-by-section analysis of § 1024.39(c), the Bureau declines to finalize proposed comment 39(d)(2)(iii)–2, which would have explained that a servicer subject to the FDCPA with respect to a borrower who invokes the FDCPA's cease communication protections and is also a debtor in bankruptcy would only be required to provide the modified written early intervention notice if the borrower is represented by a person authorized to communicate with the servicer on the borrower's behalf. Comment 39(d)(2)–1 explains that to the extent the FDCPA applies to a servicer's communications with a borrower and the borrower has provided a notification pursuant to FDCPA section 805(c) notifying the servicer that the borrower refuses to pay a debt or that the borrower wishes the servicer to cease further communications, with regard to that mortgage loan, § 1024.39(d)(2) exempts a servicer from providing the written notice required by § 1024.39(b) while any borrower on the mortgage loan is also a debtor in bankruptcy under title 11 of the United States Code. Comment 39(d)(2)–1 also cites the illustrative example in comment 39(c)(1)(ii)–1.ii for further guidance.

39(d)(3)

New § 1024.39(d)(3) provides that with regard to a mortgage loan for which any borrower has provided a notification pursuant to FDCPA section 805(c), a servicer subject to the FDCPA with respect to that borrower's loan must comply with the requirements of § 1024.39(b), as modified by new § 1024.39(d)(3), if the conditions of § 1024.39(d)(2) are not met. Therefore, if any loss mitigation option is available and no borrower on the mortgage loan is a debtor in bankruptcy, a servicer that is a debt collector is required to provide the modified written early intervention notice described in § 1024.39(d)(3). Section 1024.39(d)(3) modifies the requirements of § 1024.39(b) under these circumstances to provide that, in addition to the information required pursuant to § 1024.39(b)(2), the written notice must include a statement that the servicer may or intends to invoke its specified remedy of foreclosure. Model clause MS–4(D) in appendix MS–4 to this part may be used to comply with this requirement.[225] Revised § 1024.39(d)(3) also finalizes two other aspects from the proposed rule: (1) The written notice may not contain a request for payment, and (2) a servicer is prohibited from providing the written notice more than once during any 180-day period.

The Bureau concludes that, because failure to provide the written early intervention notice required by § 1024.39(d)(3) is closely linked to a servicer's ability to invoke its specified remedy of foreclosure, the notice falls within the exceptions to FDCPA section 805(c)(2) and (3). A servicer is legally required to provide a delinquent borrower with the written notice not later than the 45th day of the borrower's delinquency under current § 1024.39(b). As a general matter, this written notice must be provided well before the servicer may initiate foreclosure: In most cases, the servicer is legally required to wait until a borrower's mortgage loan obligation is more than 120 days delinquent, after the written notice has been sent, to make the first notice or filing to initiate the foreclosure process.[226] As the Bureau explained in the 2013 RESPA Servicing Final Rule, the purpose of the written notice is to provide more information to a borrower who has not cured by the 45th day of delinquency. Additionally, the written notice generally provides more information than likely would have been provided through live contact and provides the borrower with information that may be reviewed and discussed

201310_cfpb_mortgage-servicing_bulletin.pdf; section-by-section analysis of § 1024.39(a), *supra.*

[225] To assist servicers that are debt collectors in complying with the requirements of new § 1024.39(d)(3), the Bureau is adopting model clause MS–4(D), contained in appendix MS–4 to part 1024. A more detailed discussion of the model clause is contained in the section-by-section analysis of appendix MS.

[226] *See* § 1024.41(f)(1)(i); *but see* § 1024.41(f)(1)(ii) and (iii) (''The foreclosure is based on a borrower's violation of a due-on-sale clause; or The servicer is joining the foreclosure action of a subordinate lienholder.'').

with a housing counselor or other advisor.[227]

The Bureau understands that, in most cases, there may be some loss mitigation option available. Therefore, in most cases, a borrower who exercised the cease communication right will receive the written early intervention notice and will have an opportunity to respond to the written notice by applying for loss mitigation, should the borrower so choose. Where a borrower responds to the written notice by applying for loss mitigation, the dual tracking restrictions of the 2013 RESPA Servicing Final Rule apply, further limiting the servicer's ability to invoke the remedy of foreclosure. Pursuant to § 1024.41(f)(2) and (g), respectively, a servicer may not make the first notice or filing for foreclosure if a borrower submits a complete loss mitigation application before foreclosure referral and cannot move for foreclosure judgment or order of sale or conduct a foreclosure sale if a borrower submits a complete loss mitigation application more than 37 days before a foreclosure sale.

The failure to provide a borrower with the written early intervention notice may impede a servicer's ability to invoke foreclosure, particularly if any loss mitigation option is available. For example, because failure to provide a borrower with the written early intervention notice may result in borrowers submitting requests for loss mitigation at a later point in time and presumably closer to the foreclosure sale, failure to provide the written early intervention notice may delay or otherwise interfere with the servicer's exercise of its specified remedy of foreclosure (for example, when the servicer is required to forego making a motion for judgment of sale or conducting the sale after receiving the borrower's complete loss mitigation application). In addition, the Bureau understands that some States require documentation of a servicer's efforts to modify the loan or require a servicer to provide the borrower with information substantially similar to the written early intervention notice prior to initiating foreclosure or conducting a foreclosure sale (*e.g.,* California, Illinois). Therefore, when any loss mitigation option is available, the Bureau concludes that the written early intervention notice falls within the exceptions to FDCPA section 805(c)(2) and (3) because failure to provide the notice required by § 1024.39(d)(3) is closely linked to a servicer's ability to invoke its specified remedy of foreclosure. As discussed below, the Bureau is concurrently issuing an interpretive rule that explains that this interpretation is limited to the specific situation where a servicer that is a debt collector is required by § 1024.39(d)(3) to provide a modified written early intervention notice to a borrower who has invoked the cease communication right under FDCPA section 805(c). It is a narrow safe harbor, based only upon the interplay between these two specific Federal consumer protections—the early intervention requirements of § 1024.39 of Regulation X and the cease communication provision and statutory exceptions of section 805(c) of the FDCPA. All other provisions of the FDCPA, including the prohibitions contained in FDCPA sections 805 through 808, are unaffected by this interpretation and a servicer remains liable to the extent that anything in the notice violates any other provision of the FDCPA.[228]

If any loss mitigation option is available, as will generally be the case, the written early intervention notice may also be of significant value to borrowers, in addition to being closely linked to a servicer's ability to invoke its specified remedy of foreclosure. The Bureau has stated that the early intervention notice requirements were designed primarily to encourage delinquent borrowers to work with their servicers to identify options for avoiding foreclosure.[229] Specifically, the content of the written early intervention notice, including the statement providing a brief description of examples of loss mitigation options that may be available from the servicer and the application instructions or a statement informing the borrower how to obtain more information about loss mitigation options from the servicer, may be of particular value and relevance to a delinquent borrower facing debt collection in informing the borrower of potentially available loss mitigation options.

Given its broad experience with consumers in debt, facing foreclosure, or dealing with other financial difficulties, the Bureau is issuing an interpretive rule that constitutes an advisory opinion under FDCPA section 813(e) explaining that, because failure to provide the written early intervention notice required by § 1024.39(d)(3) is closely linked to a servicer's ability to invoke its specified remedy of foreclosure, the Bureau concludes that the notice falls within the exceptions to FDCPA section 805(c)(2) and (3). The Bureau concludes that, in the limited circumstances where a servicer is subject to the FDCPA with respect to a borrower's mortgage loan and the borrower has invoked the cease communication right pursuant to FDCPA section 805(c) with regard to that mortgage loan, and where the servicer complies with the requirements of the modified written early intervention notice under § 1024.39(d)(3) of Regulation X, the modified written early intervention notice required under § 1024.39(d)(3) is within the statutory exceptions of FDCPA section 805(c)(2) and (3) and thus does not violate section 805(c) with respect to the mortgage loan.

The Bureau has also learned that consumer advocates, in some cases, may be advising borrowers to refrain from providing servicers cease communication notifications pursuant to FDCPA section 805(c) in order to preserve access to information about loss mitigation and to continue to receive early intervention communications from servicers. Borrowers should not have to choose between exercising their cease communication rights to be free from debt collection communications and obtaining information about potential loss mitigation options that could allow them to resolve the underlying delinquency.

The Bureau believes that servicers should be able to determine when the FDCPA applies to a mortgage loan. Regardless of the requirement in new § 1024.39(d)(3), servicers that are debt collectors must make this determination in order to comply with the FDCPA, including, for example, to provide the borrower a validation notice.[230] Additionally, the Bureau's servicer outreach confirmed that servicers are able to designate whether accounts in their systems are subject to the FDCPA. Identifying mortgage loans to which the FDCPA applies imposes no burdens beyond those required by existing law.

Servicers that are debt collectors may use model clause MS–4(D) in appendix MS–4 for the required statement that a servicer may or intends to invoke its specified remedy of foreclosure. As discussed in the section-by-section analysis of appendix MS–4 and in the FDCPA interpretive rule accompanying this final rule, use of this model clause or another statement in compliance with § 1024.39(d)(3)(i), on a written notice as required by and in compliance with the

[227] *See* 78 FR 10695, 10796–97 (Feb. 14, 2013).

[228] For example, servicers that are debt collectors must not: Engage in conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt; use any false, deceptive, or misleading representation or means in connection with the collection of a debt; or use unfair or unconscionable means to collect or attempt to collect any debt.

[229] *Id.* at 10787.

[230] *See* FDCPA section 809(a).

other requirements of § 1024.39(d)(3), provides a safe harbor from FDCPA liability under section 805(c) for providing the required statement.[231] The Bureau believes that any operational burdens associated with including this statement on the written notice will be minimal.

The Bureau intends this interpretation for a servicer subject to the FDCPA with respect to a borrower who has invoked the FDCPA's cease communication protections to be limited to the precise parameters of the legal and factual situation described by the Bureau. Accordingly, the Bureau intends this interpretation to be narrow and based only upon the interplay between two specific Federal consumer protections—the early intervention requirements of § 1024.39 of Regulation X and the cease communication provision and statutory exceptions of section 805(c) of the FDCPA. The Bureau concludes that, in the limited circumstance where a mortgage servicer is subject to the FDCPA with respect to a borrower's mortgage loan, and the borrower has provided the servicer a cease communication notification with regard to that mortgage loan, the written early intervention notice falls within the exceptions to FDCPA section 805(c)(2) and (3) because failure to provide the notice required by § 1024.39(d)(3) is closely linked to a servicer's ability to invoke its specified remedy of foreclosure.

The Bureau reminds servicers that they may only rely on the exemptions in new § 1024.39(d)(1) and (2) if both the servicer is subject to the FDCPA with respect to a borrower, meaning that the servicer of a defaulted mortgage loan is also acting as a debt collector under section 803(6) of the FDCPA (*i.e.,* the servicer acquired the mortgage at the time that it was in default), and the borrower has properly provided the servicer a timely, written cease communication notification under section 805(c) of the FDCPA. Therefore, even if a servicer receives a written cease communication notification from a borrower, if the servicer is not also acting as a debt collector for purposes of the FDCPA with respect to that borrower's mortgage loan, the servicer must continue to comply with all of the early intervention requirements under § 1024.39 for that loan.

The Bureau has narrowly tailored this final rule and the accompanying interpretation to reduce the risk that servicers will circumvent a borrower's cease communication rights. Additionally, this final rule relates only to the modified written early intervention notice, while maintaining the exemption for early intervention live contact and the exemption for the written notice if no loss mitigation option is available. If no loss mitigation option is available or while any borrower on a mortgage loan is a debtor in bankruptcy if any borrower has invoked the cease communication right with respect to that loan, this final rule leaves the current exemption in place. Furthermore, this final rule requires that the modified written early intervention notice include a statement that the servicer may or intends to invoke its specified remedy of foreclosure, provides the written notice may not contain a request for payment, and prohibits a servicer from providing the written notice more than once during any 180-day period.

The Bureau considered comments that the Bureau should permit a servicer to provide the written notice more than once during any 180-day period for a borrower that cures and subsequently redefaults or that a servicer should be permitted to provide the written notice as often as monthly. However, the Bureau is concerned that a frequent, repeated notice may undermine a borrower's cease communication right. Limiting the final rule in this manner reduces the risk that the modified written early intervention notice will be used to undermine a borrower's cease communication right under FDCPA section 805(c). In response to one commenter's suggestion that servicers should be permitted to provide the written notice upon a borrower's request even if that were to result in providing more than one notice in any 180-day period, the Bureau notes that under the final rule, a servicer is not prohibited from providing the written notice at the borrower's request and must do so under § 1024.36 if the borrower properly submits a request for information regarding the notice.

The Bureau also considered a commenter's request that the Bureau issue guidance in Regulation X itself interpreting the FDCPA cease communication requirement rather than issue a separate advisory opinion. In addition to issuing the interpretive rule, the Bureau is also providing guidance in Regulation X comment 39(d)–2. The same commenter opposed the Bureau's proposed advisory opinion that would have provided a safe harbor from liability under the FDCPA for an act done or omitted in good faith in conformity with that advisory opinion. The Bureau notes, as further discussed above, that the safe harbor is limited to the precise factual and legal situation described and that the safe harbor is only granted to the extent the communication is required by and in compliance with § 1024.39(d)(3). Moreover, the safe harbor is limited to the cease communication provision in FDCPA section 805(c) and does not extend to other sections of the FDCPA. The Bureau determines that the safe harbor is necessary to facilitate servicer compliance with this provision and ensure that borrowers receive information about potentially available loss mitigation options.

Final § 1024.39(d)(3) requires that servicers that are debt collectors provide a modified form of the written early intervention notice to borrowers who have exercised their cease communication rights. To assist servicers in determining whether any loss mitigation option is available, the Bureau is adopting new comment 39(d)–1. New comment 39(d)–1 explains that § 1024.39(d)(2) exempts a servicer that is a debt collector from providing the written notice required by § 1024.39(b) if no loss mitigation option is available. New comment 39(d)–1 further provides that a loss mitigation option is available if the owner or assignee of a mortgage loan offers an alternative to foreclosure that is made available through the servicer and for which a borrower may apply, even if the borrower ultimately does not qualify for such option. As explained in the section-by-section analysis of § 1024.39(b)(2), the Bureau is adopting new comment 39(d)–1 instead of proposed comment 39(b)(2)–4.

The Bureau is finalizing proposed comment 39(d)(2)(iii)–1 in new comment 39(d)–2 with additional clarifications related to borrower-initiated communications as well as the restrictions contained in FDCPA sections 805 through 808. Revised comment 39(d)–2 offers servicers additional guidance on compliance with the modified written early intervention notice required by new § 1024.39(d)(3). As finalized, the comment explains that, to the extent the FDCPA applies to a servicer's communications with a borrower, a servicer does not violate FDCPA section 805(c) by providing the written notice required by § 1024.39(b) as modified by § 1024.39(d)(3) after a borrower has provided a notification pursuant to FDCPA section 805(c) with respect to that borrower's loan. New comment 39(d)–2 also provides that a servicer does not violate FDCPA section 805(c) by providing loss mitigation information or assistance in response to a borrower-initiated communication after the borrower has invoked the cease

[231] *See* comment appendix MS to part 1024–2 (describing permissible changes to the model forms and clauses in appendix MS to part 1024).

communication right under FDCPA section 805(c). Finally, new comment 39(d)–2 notes that a servicer subject to the FDCPA must continue to comply with all other applicable provisions of the FDCPA, including other restrictions on communications and prohibitions on harassment or abuse, false or misleading representations, and unfair practices as contained in FDCPA sections 805 through 808 (15 U.S.C. 1692c through 1692f).

Borrower-initiated communications for purposes of loss mitigation after invocation of cease communication rights. The Bureau is also issuing concurrently with this final rule an interpretive rule that constitutes an advisory opinion under FDCPA section 813(e) interpreting the cease communication provision of section 805(c) of the FDCPA in relation to the early intervention requirements of § 1024.39 of Regulation X. No liability arises under the FDCPA for an act done or omitted in good faith in conformity with an advisory opinion of the Bureau while that advisory opinion is in effect.[232]

Section 805(c) of the FDCPA empowers borrowers to direct debt collectors to cease contacting them with respect to a debt and thereby frees borrowers from the burden of being subject to unwanted communications regarding collection of a debt. Even after a borrower has invoked the cease communication right under section 805(c) of the FDCPA, the borrower may contact the servicer to discuss or apply for loss mitigation. For instance, as noted above, § 1024.39(d)(3) requires servicers that are debt collectors to provide a written early intervention notice to borrowers who have invoked the FDCPA's cease communication right if any loss mitigation option is available and no borrower on the mortgage loan is a debtor in bankruptcy under title 11 of the United States Code. The written notice must include a statement encouraging borrowers to contact the servicer.[233] The Bureau believes that, when borrowers respond to such a notice by contacting the servicer to discuss available loss mitigation options or otherwise initiate communication with the servicer concerning loss mitigation, such a borrower-initiated communication should not be understood as within the category of communication that borrowers generally preclude by invoking the cease communication right under FDCPA section 805(c). The Bureau therefore concludes that a borrower's invocation of the FDCPA's cease communication right does not prevent a servicer that is a debt collector from responding to borrower-initiated communications concerning loss mitigation.

Borrower-initiated communications are by their nature wanted communications. Moreover, borrower-initiated communications about loss mitigation options do not give rise to the burden of unwanted communications that FDCPA section 805(c) protects against and may provide valuable information to borrowers. Rather they are sought out by borrowers for this narrow purpose. Under the Bureau's interpretation, a borrower's cease communication notification pursuant to FDCPA section 805(c) should ordinarily be understood to exclude borrower-initiated communications with a servicer that is a debt collector concerning loss mitigation because the borrower has specifically requested the communication at issue to discuss available loss mitigation options. Accordingly, when a servicer that is a debt collector responds to a borrower-initiated communication concerning loss mitigation after the borrower's invocation of FDCPA section 805(c)'s cease communication protection, the servicer does not violate FDCPA section 805(c) with respect to such communications as long as the servicer's response is limited to a discussion of any potentially available loss mitigation option. For example, a servicer may discuss with a borrower any available loss mitigation option that the owner or assignee of the borrower's mortgage loan offers, instructions on how the borrower can apply for loss mitigation, what documents and information the borrower would need to provide to complete a loss mitigation application, and the potential terms or details of a loan modification program, including the monthly payment and duration of the program. These borrower-initiated communications, although variable, are unlikely to be perceived as within the scope of the cease communication request given the borrower's initiation of communications concerning loss mitigation information.

However, the Bureau's interpretation does not protect a servicer that is a debt collector from using such borrower-initiated communications concerning loss mitigation as a pretext for debt collection in circumvention of a borrower's invoked cease communication right under FDCPA section 805(c). Seeking to collect a debt under the guise of a loss mitigation conversation is not exempt from liability under FDCPA section 805(c) under the Bureau's interpretation. Thus, in subsequently communicating with a borrower concerning loss mitigation, a servicer that is a debt collector is strictly prohibited from making a request for payment or a suggestion of payment that is not immediately related to any specific loss mitigation option. Some examples of impermissible communications include initiating conversations with the borrower related to repayment of the debt that are not for the purpose of loss mitigation, demanding that the borrower make a payment, requesting that the borrower bring the account current or make a partial payment on the account, or attempting to collect the outstanding balance or arrearage, unless such communications are immediately related to a specific loss mitigation option.[234] The Bureau reiterates that servicers that are debt collectors may not misuse borrower-initiated communications concerning loss mitigation as an opportunity or pretext to direct or steer borrowers to a discussion of repayment or collection of the debt in circumvention of a borrower's cease communication protection. Additionally, a servicer that is a debt collector may not begin or resume contacting the borrower in contravention of the cease communication notification, unless the borrower consents to limit a prior cease communication request. As discussed above, all other provisions of the FDCPA, including restrictions on communications and prohibitions on harassment or abuse, false or misleading representations, and unfair practices as contained in sections 805 through 808 of the FDCPA, remain intact.

The Bureau considered concerns expressed by commenters related to the fluid nature of loss mitigation discussions with borrowers. The Bureau notes that this interpretation provides a safe harbor from FDCPA section 805(c) for servicers that are debt collectors communicating with the borrower in connection with a borrower's initiation of communications concerning loss mitigation. Preceding a borrower's loss mitigation application and during the evaluation process, a servicer that is a debt collector may respond to borrower inquiries about potentially available loss mitigation options and provide information regarding any available option. Similarly, if that borrower

[232] FDCPA section 813(e).

[233] *See* 12 CFR 1024.39(b)(2)(i).

[234] *See* 53 FR 50097, 50103 (Dec. 13, 1988) (Section 805(c)–2 of the Federal Trade Commission's (FTC) Official Staff Commentary on FDCPA section 805(c)) (''A debt collector's response to a 'cease communication' notice from a consumer may not include a demand for payment, but is limited to the three statutory exceptions [under FDCPA section 805(c)(1) through (3)].'').

submits a loss mitigation application, the servicer's reasonable diligence obligations under § 1024.41(b)(1) require the servicer to request additional information from the borrower, including by contacting the borrower, and these communications by the servicer to complete a loss mitigation application do not fall within the cease communication prohibition. The servicer may also seek information that will be necessary to evaluate that borrower for loss mitigation, though the servicer may not seek a payment unrelated to the purpose of loss mitigation. Additionally, once the borrower's loss mitigation application is complete, a servicer's communications with a borrower in accordance with the procedures in § 1024.41 are not subject to liability under FDCPA section 805(c) because they arise from the borrower's application for loss mitigation. These communications include, for example, notifying the borrower of the servicer's determination of which loss mitigation options, if any, it will offer to the borrower, notifying the borrower of a denial for any trial or permanent loan modification option available, and notifying the borrower of whether the servicer will offer the borrower a loss mitigation option based upon an appeal.

The Bureau considered one commenter's suggestion that, with respect to any specific borrower-initiated communication, the borrower's cease communication request should be considered temporarily or permanently withdrawn during this period. The Bureau declines to adopt this approach. Instead, as the Bureau explained in the proposal, the Bureau believes that a borrower's cease communication notification pursuant to the FDCPA should ordinarily be understood to exclude borrower-initiated communications with a servicer for the purposes of loss mitigation, because the borrower has specifically requested the communication at issue. As the Bureau explained in the October 2013 Servicing Bulletin, even if the borrower provides a cease communication notification during the loss mitigation application and evaluation process under § 1024.41, the borrower usually should be understood to have excluded the loss mitigation application and evaluation process under § 1024.41 from the general request to cease communication, and therefore a servicer that is a debt collector should continue to comply with the procedures under § 1024.41. Thus, only if the borrower provides a communication to the servicer specifically withdrawing the request for loss mitigation does the cease communication prohibition apply to communicating about the specific loss mitigation action.[235]

Commenters requested clarity regarding a servicer's request that a borrower make a payment as a requirement or condition of a loss mitigation program and whether those requests would be covered under the safe harbor from FDCPA liability. One commenter explained that a servicer may request that a borrower make a payment as part of a loss mitigation program, including, for example, a reinstatement amount towards a repayment, forbearance, or trial modification plan. The Bureau understands that a servicer's discussions of an available loss mitigation option with a borrower may often require the servicer to assess a borrower's eligibility for a specific program and determine whether the borrower can afford to make a payment. The Bureau emphasizes, however, that the cease communication prohibition continues to apply to a servicer's communications with a borrower about payment of the mortgage loan that are outside the scope of loss mitigation conversations. The Bureau recognizes that in order for a borrower to engage in meaningful loss mitigation discussions with a servicer, the servicer may discuss repayment options, the borrower's ability to make a payment, and how much the borrower can afford to pay as part of a loss mitigation option for which the servicer is considering the borrower. Furthermore, the Bureau understands that any offer for a loan modification or repayment plan is likely to include a specific payment amount the borrower must pay under the terms of the loss mitigation agreement. Such communications, as long as for the purpose of loss mitigation, are permissible because they should not be understood as within the scope of the cease communication request.

Legal Authority

The Bureau is exercising its authority under sections 6(j)(3) and 19(a) of RESPA to exempt from the early intervention live contact requirements in § 1024.39(a) a servicer that is subject to the FDCPA with respect to a mortgage loan for which any borrower has exercised the FDCPA's cease communication right with regard to that mortgage loan. For the reasons discussed above, the Bureau concludes that the consumer protection purposes of RESPA would not be furthered by requiring compliance with § 1024.39(a) at a time when a borrower has specifically requested that the servicer stop communicating with the borrower about the debt. Accordingly, the Bureau implements new § 1024.39(d)(1) pursuant to its authority under sections 6(j)(3) and 19(a) of RESPA.

The Bureau is also exercising its authority under sections 6(j)(3) and 19(a) of RESPA to exempt from the written early intervention notice requirements in § 1024.39(b) a servicer that is subject to the FDCPA with respect to a mortgage loan for which any borrower has exercised the FDCPA's cease communication right with regard to that mortgage loan if no loss mitigation option is available or while any borrower on the mortgage loan is a debtor in bankruptcy. For the reasons discussed above, the Bureau concludes that the consumer protection purposes of RESPA would not be furthered by requiring compliance with § 1024.39(b) at a time when a borrower has specifically requested that the servicer stop communicating with the borrower about the debt and no loss mitigation option is available, or while any borrower on the mortgage loan is a debtor in bankruptcy. Accordingly, the Bureau implements new § 1024.39(d)(2) pursuant to its authority under sections 6(j)(3) and 19(a) of RESPA.

The Bureau is exercising its authority under section 6(k)(1)(E) of RESPA to add new § 1024.39(d)(3). The Bureau has authority to implement requirements for servicers to provide information about borrower options pursuant to section 6(k)(1)(E) of RESPA. In order for borrowers to have a meaningful opportunity to avoid foreclosure, they must timely receive information about loss mitigation options and the foreclosure process, housing counselors and State housing finance authorities, and disclosures encouraging servicers to work with borrowers to identify any appropriate loss mitigation options.[236]

The Bureau also exercises its authority to prescribe rules with respect to the collection of debts by debt collectors pursuant to section 814(d) of the FDCPA, 15 U.S.C. 1692l(d). Pursuant to this authority, the Bureau is clarifying a borrower's cease communication protections under the FDCPA. Section 805(c) of the FDCPA sets forth both the cease communication requirement and its exceptions. Under section 805(c)(2) and (3) of the FDCPA, a borrower's cease communication request does not prohibit a debt

[235] *See* Implementation Guidance for Certain Mortgage Servicing Rules, CFPB Bulletin 2013–12 (Oct. 15, 2013), *available at http://files.consumerfinance.gov/f/201310_cfpb_mortgage-servicing_bulletin.pdf.*

[236] *See* 77 FR 57199, 57260 (Sept. 17, 2012).

collector from communicating with the borrower to notify the consumer that the debt collector or creditor may invoke specified remedies which are ordinarily invoked by such debt collector or creditor or, where applicable, to notify the consumer that the debt collector or creditor intends to invoke a specified remedy. For the reasons given above, the Bureau is interpreting section 805(c)(2) and (3) of the FDCPA to require a servicer to provide the written early intervention notice if any loss mitigation option is available and no borrower on the mortgage loan is a debtor in bankruptcy. The Bureau concludes that because the written early intervention notice will generally be closely linked to the invocation of foreclosure, such a notice informs a borrower that the servicer may invoke or intends to invoke the specified remedy of foreclosure and thus falls within the scope of the exceptions under section 805(c)(2) and (3) of the FDCPA. Accordingly, the Bureau implements new § 1024.39(d)(3) pursuant to its authority under section 6(k)(1)(E) of RESPA and section 814(d) of the FDCPA.

Section 1024.40 Continuity of Contact

40(a) In General

As explained in the section-by-section analysis of § 1024.31, the Bureau is adopting a single definition of delinquency that will apply to all provisions in subpart C of Regulation X. The proposal explained that the Bureau was removing the definitions of delinquency from the commentary to §§ 1024.39(a) and (b) and 1024.40(a). The Bureau omitted from its proposal any specific amendments to current comment 40(a)–3. The Bureau is revising comment 40(a)–3 to replace the current definition of delinquency in comment 40(a)–3 with a cross-reference to § 1024.31.

Section 1024.41 Loss Mitigation Procedures

41(b) Receipt of a Loss Mitigation Application

Successors in Interest

Proposed comment 41(b)–1.i stated that, if a servicer receives a loss mitigation application, including a complete loss mitigation application, from a potential successor in interest before confirming that person's identity and ownership interest in the property, the servicer may, but need not, review and evaluate the loss mitigation application in accordance with the procedures set forth in § 1024.41. The proposed comment also would have provided that, if a servicer complies with the requirements of § 1024.41 for a complete loss mitigation application submitted by a potential successor in interest before confirming that person's identity and ownership interest in the property, § 1024.41(i)'s limitation on duplicative requests applies to that person, provided that confirmation of the successor in interest's status would not affect the servicer's evaluation of the application. The Bureau is finalizing comment 41(b)–1.i as proposed with non-substantive changes for clarity.

A number of consumer advocacy groups suggested that the Bureau should eliminate the option to review loss mitigation applications prior to confirmation. These groups noted that loan modification rules imposed by the Making Home Affordable Program, the Federal Housing Administration, Fannie Mae, and Freddie Mac require a showing of proof of ownership of the home for a simultaneous modification and assumption.[237] A trade association also stated that the vast majority of servicers do not have loss mitigation options available for successors in interest. The Bureau notes that the loss mitigation requirements referenced by these commenters may change over time. Further, even if the review process set forth in comment 41(b)–1.i is not used often, the comment confirms that Regulation X does not prohibit servicers from considering successors in interest for loss mitigation prior to confirmation when appropriate. In some circumstances, consideration of potential successors in interest for loss mitigation options prior to confirmation may expedite full formal evaluation of those successors in interest upon confirmation. Comment 41(b)–1.i clarifies that Regulation X allows servicers to review and evaluate loss mitigation applications from potential successors in interest prior to confirmation in accordance with the procedures set forth in § 1024.41, even though servicers are not required to do so.

Comment 41(b)–1.i also explains how an evaluation of a potential successor in interest's loss mitigation application is treated for purposes of the duplicative request limitation in § 1024.41(i). If a servicer complies with the requirements of § 1024.41 for a complete loss mitigation application submitted by a potential successor in interest before confirming that person's identity and ownership interest in the property, § 1024.41(i)'s limitation on duplicative requests applies to that person, provided the servicer's evaluation of loss mitigation options available to the person would not have resulted in a different determination due to the person's confirmation as a successor in interest if it had been conducted after the servicer confirmed the person's status as a successor in interest. This provision is an exception to the general rule that servicers may only invoke § 1024.41(i)'s limitation on duplicative requests with respect to borrowers who have had a complete loss mitigation application reviewed by that servicer in compliance with the requirements of § 1024.41. Ordinarily, as a potential successor in interest is not yet treated as a borrower for all purposes of § 1024.41, the potential successor in interest's loss mitigation application would not count as a duplicative request. If the servicer's evaluation of loss mitigation options available to the person would have resulted in a different determination due to the person's confirmation as a successor in interest if it had been conducted after the servicer confirmed the person's status as a successor in interest, however, § 1024.41(i)'s limitation on duplicative requests does not apply to that application, and the servicer would consequently have to comply with § 1024.41's procedures for any subsequent loss mitigation application submitted by the potential successor in interest upon confirmation.

A number of consumer advocacy groups asked the Bureau to clarify that a previous loss mitigation application submitted by the transferor borrower rather than the successor in interest should not make a successor in interest's request duplicative for purposes of § 1024.41(i). Under the final rule, each confirmed successor in interest is a borrower for purposes of § 1024.41(i) and is not the same borrower as the transferor borrower. Except as specified in comment 41(b)–1, the duplicative request limitation applies to confirmed successors in interest in the same way that it applies to other borrowers under § 1024.41(i), as amended by this final rule.

Proposed comment 41(b)–1.ii stated that, if a servicer receives a loss mitigation application from a potential successor in interest and elects not to review and evaluate it before confirming

[237] These commenters also advocated that the servicer's 30-day timeframe to review the complete application should start to run from the date the successor in interest provides the necessary proof of successor status, rather than from the date a servicer confirms this status. As comment 41(b)–1.ii explains, the final rule instead requires servicers, for purposes of § 1024.41, to treat loss mitigation applications from potential successors in interest that the servicer elects not to review and evaluate prior to confirmation as if the application had been received on the date that the servicer confirmed the successor in interest's status. This ensures that servicers have adequate time to review the loss mitigation application once they have confirmed the applicant's status as a successor in interest.

that person's status, upon such confirmation the servicer must review and evaluate the loss mitigation application in accordance with the procedures set forth in § 1024.41. The proposed comment indicated that, for purposes of § 1024.41, the servicer must treat the loss mitigation application as if it had been received on the date that the servicer confirmed the successor in interest's status. For the reasons that follow, the Bureau is finalizing comment 41(b)–1.ii with this commentary as proposed and additional commentary to clarify the operation of the loss mitigation procedures with respect to successors in interest.

Several industry commenters requested clarification regarding whether the principal residence requirement applicable to § 1024.41 applies to confirmed successors in interest. In proposing the rule, the Bureau indicated that the exemptions and scope limitations in the Mortgage Servicing Rules in Regulation X, including the principal residence requirement in § 1024.30(c), would also apply to the servicing of a mortgage loan with respect to a confirmed successor in interest. As finalized, comment 41(b)–1.ii explains that the procedures set forth in § 1024.41 apply only if the property is the confirmed successor in interest's principal residence and § 1024.41 is otherwise applicable.

As finalized, comment 41(b)–1.ii also indicates that the servicer must preserve the loss mitigation application and all documents submitted in connection with the application. Although some industry commenters expressed concern about the burden of having to preserve loss mitigation applications during the confirmation process, the Bureau concludes that it would be much more burdensome to require successors in interest to resubmit an entire loss mitigation application upon confirmation. As the Bureau indicated in the proposal, successors in interest may be unduly burdened if required to resubmit identical documents simply because the servicer has confirmed the successor in interest's status. The Bureau continues to believe that requiring servicers to preserve loss mitigation applications received from potential successors in interest is preferable, so that servicers can review and evaluate those loss mitigation applications expeditiously upon confirming the successor in interest's status.

Comment 41(b)–1.ii clarifies that servicers must preserve any loss mitigation application received from a potential successor in interest in order to facilitate the servicer's timely review and evaluation of the application upon confirmation of the successor in interest's status in accordance with the procedures of § 1024.41 and to ensure that the confirmed successor in interest does not have to resubmit the same loss mitigation application. For purposes of § 1024.41, the servicer must treat the loss mitigation application as if it had been received on the date that the servicer confirmed the successor in interest's status.

Another industry commenter asked the Bureau to confirm that servicers can request updated documents if they receive loss mitigation documents prior to confirming a successor in interest and those documents are expired or near expiration on the date of confirmation. As finalized, comment 41(b)–1.ii explains that, if the loss mitigation application is incomplete at the time of confirmation because documents submitted by the successor in interest became stale or invalid after they were submitted and confirmation is 45 days or more before a foreclosure sale, the servicer must identify the stale or invalid documents that need to be updated in a notice pursuant to § 1024.41(b)(2). This comment clarifies servicers' obligations with respect to loss mitigation applications received during the confirmation process that the servicer elects not to review or evaluate until confirmation.

41(b)(1) Complete Loss Mitigation Application

The Bureau proposed to revise two comments under § 1024.41(b)(1). First, the Bureau proposed to revise comment 41(b)(1)–1 to clarify that, in the course of gathering documents and information from a borrower to complete a loss mitigation application, a servicer may stop collecting documents and information pertaining to a particular loss mitigation option after receiving information confirming that the borrower is ineligible for that option. Second, the Bureau proposed to revise comment 41(b)(1)–4.iii, which relates to a servicer's obligation to exercise reasonable diligence in obtaining documents and information to complete a loss mitigation application when a servicer offers a borrower a short-term loss mitigation option based on an evaluation of an incomplete loss mitigation application.

For the reasons set forth below, the Bureau is adopting both comment 41(b)(1)–1 and comment 41(b)(1)–4.iii with revisions to the proposal. The Bureau is also adopting minor revisions to the introductory text to comment 41(b)(1)–4 for clarity. This section-by-section analysis discusses comment 41(b)(1)–1. Comment 41(b)(1)–4, including the revisions to comment 41(b)(1)–4.iii, is addressed in the section-by-section analysis of § 1024.41(c)(2)(iii) within the discussion of reasonable diligence in the context of short-term loss mitigation options offered based upon an evaluation of an incomplete loss mitigation application.

Existing § 1024.41(b)(1) requires a servicer to exercise reasonable diligence in obtaining documents and information to complete a loss mitigation application. The provision defines a complete application as an application for which a servicer has received all the information the servicer requires from a borrower in evaluating applications for the loss mitigation options available to the borrower. Current comment 41(b)(1)–1 explains that a servicer has the flexibility to establish the type and amount of information that it will require from borrowers applying for loss mitigation options. The Bureau explained in the 2013 RESPA Servicing Final Rule that servicers have the flexibility to determine application requirements consistent with the variety of borrower circumstances or owner or assignee requirements that servicers must evaluate and to ensure that individual borrowers are not obligated to provide information or documents that are unnecessary and inappropriate for a loss mitigation evaluation.[238] In exercising reasonable diligence to obtain a complete application under § 1024.41(b)(1), therefore, a servicer may determine that an application is complete even when the borrower has not submitted certain information, so long as that information is irrelevant with respect to that particular borrower.

In advance of the proposal, the Bureau learned from servicers and consumer advocacy groups that some servicers have been attempting to collect a large number of documents from borrowers, including many documents that may be required for some borrowers but are irrelevant to determining whether a particular borrower is eligible for any loss mitigation option. The Bureau explained in the proposal that the good faith exercise of reasonable diligence under § 1024.41(b)(1) does not require the collection of unnecessary documents. Collection of documents or information after the servicer has confirmed that such documents cannot affect the outcome of an evaluation unnecessarily burdens both the servicer and the borrower and hinders efforts to complete the loss mitigation application.

[238] *See* 78 FR 10695, 10824 (Feb. 14, 2013).

Therefore, the Bureau proposed to amend comment 41(b)(1)–1. As proposed, the comment would have clarified that (1) a servicer may stop collecting a borrower's application materials for a particular loss mitigation option upon receiving information confirming that the borrower is ineligible for that option, (2) the servicer must continue its efforts to obtain documents and information that pertain to all other available options, and (3) a servicer may not stop collecting documents for a particular loss mitigation option based solely on the borrower's stated preference for a different option.

The Bureau received comments from industry stakeholders and consumer advocacy groups on the proposed amendments. Additionally, the Bureau conducted outreach with several servicers to learn more about how the proposed revisions would affect borrowers and servicers.

No commenters opposed the first two elements of the proposal—that a servicer may stop collecting application materials for a loss mitigation option upon learning that the borrower is ineligible for that option, and that the servicer must continue to pursue materials relating to all other available options. Several industry commenters and consumer advocacy groups opined that those elements would reduce unnecessary burden by clarifying that servicers do not need to collect application materials relating to loss mitigation options for which a borrower is ineligible. A trade association stated that the proposal would work in conjunction with the new written notice of complete application, under proposed § 1024.41(c)(3), to encourage best efforts from servicers in obtaining application materials from borrowers to complete an application.

Commenters' views on the third element of the proposal, that a servicer may not stop collecting application materials for a particular loss mitigation option based solely on the borrower's stated preference for a different option, were more diverse. Industry commenters generally objected to the third element of the proposal. For example, a servicer and a trade association stated that the proposal could conflict with FHA's loss mitigation waterfall, which the commenters stated requires a borrower to express interest in certain loss mitigation options to be eligible. The commenters suggested that requiring servicers to collect application materials relating to all available loss mitigation options would be burdensome, would cause borrowers to disengage, or would complicate the working relationship between borrowers and servicers. One servicer stated during outreach that doing so when a borrower already has a purchase contract could jeopardize the sale. Several servicers the Bureau spoke with during outreach reported that some of their borrowers have a purchase contract at the outset of the loss mitigation application process, although one servicer stated that its borrowers rarely do.

Industry commenters also stated that this third element of the proposal appeared to conflict with statements by the Bureau in a webinar in 2013. In that webinar, the Bureau explained that the mortgage servicing rules permit investors to set their own loss mitigation eligibility criteria, such that a servicer may deny a borrower for a loan modification if the investor provides that a borrower must be interested in remaining in the home to be eligible for a modification and the borrower has indicated that there is no such interest.

Some commenters made specific recommendations for amending the rule. For example, some industry trade associations recommended that servicers should be permitted to stop collecting application materials for a loan modification if the borrower indicates a need to sell the property, saying that such a borrower essentially has rejected a loan modification. A government-sponsored enterprise recommended allowing servicers greater flexibility when borrowers express a preference for a short sale and said the rule should allow borrowers to move toward a short sale while concurrently working to complete an application for retention options. The commenter suggested that, because the short sale process is lengthy, additional delay that stems from the requirement to complete an application may harm such borrowers.

Servicers informed the Bureau that relatively few borrowers request a short sale at the outset of a loss mitigation application. One servicer stated that borrowers who request short sales are typically significantly delinquent. Servicers said that most borrowers who do make such a request are approved for a short sale. However, the percentage of borrowers seeking a short sale who ultimately sell the property through a short sale varied greatly from servicer to servicer—estimates ranged from approximately 28% to approximately 85%.

During outreach, the Bureau asked several servicers about borrowers' ability to access other loss mitigation options if they pursue a short sale from the outset. Most of those servicers indicated that they discuss other loss mitigation options with borrowers who request a short sale at the outset of the application process. One suggested that it does not describe in detail all available options if the borrower states the intent not to retain the home. Most of the servicers stated that they process the application according to the borrower's preference, that they continue to work with these borrowers to pursue other loss mitigation solutions when a short sale is unsuccessful, and that, when borrowers change their minds during the loss mitigation application process, the servicer will process their applications accordingly. No servicers said that they did not work with borrowers when a short sale falls through or when borrowers change their minds. One servicer stated that, the longer a delinquency lasts, the less likely borrowers generally are able to obtain loss mitigation.

The Bureau also asked servicers about the documentation requirements for different loss mitigation options. Most servicers stated that they generally collect application materials sufficient to evaluate the borrower for both retention options and non-retention options, but servicers varied in how diligently they pursue documents supporting home retention options when the borrower requests a short sale. Among the reasons servicers gave for collecting documents for retention and non-retention options were investor requirements and a concern that borrowers may not understand their options. Some servicers explained that their collection of documents for home retention options when a borrower has requested a short sale may be more *pro forma.* One servicer indicated that, when a borrower requests a short sale, the servicer's collection of documents for home retention options is limited to providing the borrower with a list of all such documents; the servicer does not continue to make active attempts to collect documents to support a review for retention options if the borrower wants a short sale. Another servicer stated that it collects a complete application package when the borrower requests loss mitigation but, if the borrower provides a short sale contract, the servicer evaluates only for a short sale. One servicer stated that it does not collect application materials for home retention options at all if the borrower is uninterested in those options.

Consumer advocacy groups strongly supported the third element of the proposal, stating that reviewing a borrower for all available loss mitigation options would limit steering, address uneven access to information between borrowers and servicers, and provide borrowers with better access to home retention options.

The Bureau is revising comment 41(b)(1)–1 to clarify the prohibition against a servicer ceasing efforts to collect documents and information based upon a borrower's stated preference. The comment retains the key elements of the proposal but is restructured and edited for clarity. As revised, comment 41(b)(1)–1 provides that a servicer has flexibility to establish its own application requirements and to decide the type and amount of information it will require from borrowers applying for loss mitigation options. The comment provides that, in the course of gathering documents and information from a borrower to complete a loss mitigation application, a servicer may stop collecting documents and information for a particular loss mitigation option after receiving information confirming that, pursuant to any requirements established by the owner or assignee of the borrower's mortgage loan, the borrower is ineligible for that option. The comment clarifies that a servicer may not stop collecting documents and information for any loss mitigation option based solely upon the borrower's stated preference but may stop collecting documents and information for any loss mitigation option based on the borrower's stated preference in conjunction with other information, as prescribed by any requirements established by the owner or assignee. The comment then states that a servicer must continue to exercise reasonable diligence to obtain documents and information from the borrower that the servicer requires to evaluate the borrower as to all other loss mitigation options available to the borrower.

Comment 41(b)(1)–1 provides two examples for further clarity. The first example, slightly revised from the proposal, assumes that a particular loss mitigation option is only available for borrowers whose mortgage loans were originated before a specific date. The example explains that, once a servicer receives documents or information confirming that a mortgage loan was originated after that date, the servicer may stop collecting documents or information from the borrower that the servicer would use to evaluate the borrower for that loss mitigation option, but the servicer must continue its efforts to obtain documents and information from the borrower that the servicer requires to evaluate the borrower for all other available loss mitigation options.

The new second example in comment 41(b)(1)–1 clarifies how a borrower's stated preference might affect a loss mitigation application. The example assumes that applicable requirements established by the owner or assignee of the mortgage loan provide that a borrower is ineligible for home retention loss mitigation options if the borrower states a preference for a short sale and provides evidence of another applicable hardship, such as military Permanent Change of Station orders or an employment transfer more than 50 miles away. The example then explains that, if the borrower indicates a preference for a short sale or, more generally, not to retain the property, the servicer may not stop collecting documents and information from the borrower pertaining to available home retention options solely because the borrower has indicated such preference, but the servicer may stop collecting such documents and information once the servicer receives information confirming that the borrower has an applicable hardship under requirements established by the owner or assignee, such as military Permanent Change of Station orders or employment transfer. The example in comment 41(b)(1)–1.ii is intended to clarify how borrower preference can affect the way in which the servicer might exercise reasonable diligence in obtaining documents and information to complete a loss mitigation application as required under § 10241.41(b)(1). The Bureau believes that guidelines established by owners or assignees of mortgage loans similarly generally do not allow borrower preference alone to drive the servicer's conduct but generally require both the borrower's expressed preference and the borrower's submission of additional information. The Bureau notes that the comment merely offers an example and does not create a new standard for compliance.

As revised, comment 41(b)(1)–1 does not alter a servicer's overall obligation to collect application materials it requires to evaluate a borrower for all available loss mitigation options before conducting the evaluation. It is, however, intended to clarify that a servicer has flexibility to determine which documents and information it needs to evaluate a borrower for each option. Servicers must exercise reasonable diligence to obtain a complete application, which includes all the information that the servicer requires from the borrower in evaluating the application for all options available to the borrower. The documents and information that satisfy this requirement for a given option may change depending on the information a servicer receives during the application process. If a servicer receives documents and information that render a borrower ineligible for a given option regardless of any additional information, the servicer is not required to continue collecting application materials for that option. For example, if a servicer receives information confirming that a borrower is ineligible for a loan modification, the servicer may no longer need to collect detailed information about the borrower's income if it does not require income information to evaluate the application for any other available loss mitigation option, such as a short sale. Within the confines of the rule, servicers may organize the collection of application materials accordingly, in a way that minimizes unnecessary burden.

Notwithstanding the above, the borrower's stated preference, without more, may not be the basis on which a servicer stops collecting application materials. In exercising reasonable diligence to obtain a complete application, a servicer may not stop collecting application materials relating to a home retention option, for example, solely because a borrower states a preference for a short sale or states a more general preference not to retain the property. Revised comment 41(b)(1)–1 is intended to clarify that servicers have sufficient flexibility under § 1024.41 to stop collecting documents or information after confirming that such application materials cannot affect the outcome of an evaluation, but that this determination cannot be based on a borrower's stated preference alone.

In finalizing these revisions, the Bureau sought to balance the ability of a borrower to indicate a preference for or against a loss mitigation option early in the process, thus allowing servicers the opportunity to collect application materials more efficiently during the application process, with the overarching goals of the 2013 Mortgage Servicing Final Rules to prevent unnecessary foreclosures.

The Bureau recognizes that, under final comment 41(b)(1)–1, some borrowers may be required to submit some additional documentation relating to loss mitigation options that they have indicated they do not want before the servicer can evaluate the application for the borrowers' preferred option under the rule. Nonetheless, the Bureau believes that the additional documentation that some borrowers may need to submit as a result of the rule, which the Bureau understands from outreach to be minimal in many instances, is justified. While the Bureau realizes that this approach may present some additional burden to both borrowers and servicers, the Bureau believes, for the reasons below, that it will produce the most efficient and optimal outcomes for borrowers and servicers alike in the long run.

Borrowers applying for loss mitigation are often operating under substantial financial distress and with limited information, and they may not be situated to make an optimal choice at the outset of the application process. Permitting servicers to stop collecting documents on the basis of a borrower's preference alone might allow servicers to influence inappropriately the borrower's preference during communications with the borrower toward the option that most benefits the servicer, even if it is not optimal for the borrower. Moreover, the Bureau notes that, even in situations in which borrowers are making fully informed, independent choices as to which options they prefer, borrowers sometimes do not ultimately obtain that option.

For example, the Bureau understands that the short sale process frequently takes months to complete. Over this time, a borrower's preferences may change, whether because the borrower comes to a better understanding of other available loss mitigation options or otherwise decides against seeking a short sale. Moreover, an attempted short sale may ultimately be unsuccessful, for a variety of reasons. As noted above, servicers report widely varying rates of successful short sales, in some cases less than one in three. If a borrower ultimately is not successful in securing a short sale, the delinquency will have increased in the meantime, possibly making any alternate loss mitigation option more difficult to achieve. If the servicer has also stopped collecting documents or information to support an evaluation of other loss mitigation options, the borrower could be left with a greater delinquency and greater need for evaluation for all available loss mitigation options but without the protections of § 1024.41.

As noted above, some commenters asserted that proposed comment 41(b)(1)–1 was in conflict with statements the Bureau made during a webinar in 2013. In the webinar, the Bureau explained that the mortgage servicing rules permit investors to set their own loss mitigation eligibility criteria, such that a servicer may deny a borrower for a loan modification if the investor criteria provide that a borrower must be interested in remaining in the home to be eligible for a modification and the borrower has indicated that there is no such interest. The Bureau believes that any perceived conflict between final comment 41(b)(1)–1's provision that servicers may not stop collecting documents based solely on the borrower's preference and the webinar's indication that investor criteria may include the borrower's preference, is theoretical. The Bureau is not aware of owner or assignee guidelines that render borrowers ineligible for a loss mitigation option solely because of the borrower's stated preference. Although some such guidelines may use a borrower's preference in addition to some other factor as an eligibility criterion, borrower preference alone generally does not appear to be the basis for determining that a borrower is ineligible.

41(b)(2) Review of Loss Mitigation Application Submission

41(b)(2)(i) Requirements

Proposed comment 41(b)(2)(i)–1 would have clarified the timelines on which a servicer must review and acknowledge a borrower's loss mitigation application when no foreclosure sale has been scheduled as of the date the loss mitigation application is received. For the reasons discussed below, the Bureau is adopting comment 41(b)(2)(i)–1 with minor revisions to improve clarity.

Under § 1024.41(b)(2)(i), if a servicer receives a loss mitigation application 45 days or more before a foreclosure sale, the servicer must: (1) Promptly review the application to determine if it is complete; and (2) within five days (excluding legal public holidays, Saturdays, and Sundays) of receiving the application, notify the borrower in writing that the application was received, state whether it is complete or incomplete, and if the application is incomplete, state the additional documents and information needed to complete the application.

Section 1024.41(b)(2)(i) does not expressly address whether this requirement applies when an application is received before a foreclosure sale is scheduled.[239] As the Bureau explained in the proposal, the Bureau believes that, in that scenario, the application was still received ''45 days or more before a foreclosure sale,'' and the requirements of § 1024.41(b)(2)(i) still apply. To codify this interpretation, the Bureau proposed to add new comment 41(b)(2)(i)–1 to clarify that, for purposes of § 1024.41(b)(2)(i), if a foreclosure sale has not been scheduled as of the date an application is received, the application shall be treated as if it were received at least 45 days before a foreclosure sale. The proposal would have clarified that servicers must comply with all of the requirements of § 1024.41(b)(2)(i) even when no foreclosure sale has been scheduled as of the date a servicer receives a borrower's loss mitigation application.

The Bureau received several comments supporting proposed comment 41(b)(2)(i)–1. For example, a national trade association commented that the proposal adds clarity for both servicers and borrowers. A consumer advocacy group was similarly supportive.

The Bureau is adopting comment 41(b)(2)(i)–1 substantially as proposed, with minor, non-substantive revisions for clarity. As the Bureau explained in the proposal, the comment is intended to provide certainty to servicers and borrowers.

41(b)(2)(ii) Time Period Disclosure

Section 1024.41(b)(2)(ii) requires a servicer to include on the loss mitigation application acknowledgment notice required under § 1024.41(b)(2)(i)(B) a reasonable date by which the borrower should submit additional documents and information necessary to make the loan application complete. Current comment 41(b)(2)(ii)–1 clarifies how servicers should set that date, taking into consideration specific milestones that correspond to specific protections under § 1024.41. Proposed comments 41(b)(2)(ii)–1 through –3 would have further clarified that servicers have significant flexibility in selecting the reasonable date. Generally stated, the proposal would have clarified that servicers may select any date that it determines both maximizes borrower rights under § 1024.41 and allows the borrower a reasonable period of time to obtain and submit the documents and information. Although the proposed comments would have provided that a servicer should not select a reasonable date that is later than the nearest of the four milestones associated with the specified protections of § 1024.41, they also would have clarified that a servicer may select a reasonable date that is earlier than the nearest remaining milestone. For the reasons discussed below, the

[239] In the September 2013 Mortgage Final Rule, the Bureau adopted new § 1024.41(b)(3) and related commentary to address borrowers' rights where no foreclosure sale has been scheduled as of the date a complete loss mitigation application is received. The final rule clarified that, if a foreclosure sale has not yet been scheduled as of the date a complete loss mitigation application is received, the application shall be treated as if it were received at least 90 days before a foreclosure sale. *See* 78 FR 60381, 60397 (Oct. 1, 2013).

Bureau is adopting comments 41(b)(2)(ii)–1 through –3 with substantial revisions. As revised, the comments provide more specific guidance about how a servicer selects a reasonable date in compliance with § 1024.41(b)(2)(ii).

The Bureau sought comment on three aspects of the proposal: Whether the proposal would provide servicers with sufficient guidance under § 1024.41(b)(2)(ii) in setting a reasonable date for the return of documents and information that maximizes borrower protections; whether to address those situations where the nearest remaining milestone will not occur for several months based on the date of a scheduled foreclosure sale and the documents the borrower has already submitted at the time the servicer selects the reasonable date under § 1024.41(b)(2)(ii); and whether to adopt a less flexible standard that would leave servicers with little or no discretion in setting a reasonable date under § 1024.41(b)(2)(ii) and, if so, what would constitute an appropriate standard under such an approach.

Several commenters supported the proposal. A credit union stated that the proposal would provide clear and transparent procedures beneficial to credit unions and borrowers. An industry trade association stated that the flexibility that the proposal would afford servicers in selecting a reasonable date would benefit both servicers and borrowers, particularly because each borrower's application is unique.

Some industry commenters supported an even more flexible approach. One servicer said that a reasonable date that is later than the nearest milestone could provide borrowers with even greater protections. Another cautioned that setting a return date as little as eight days away could create borrower confusion and panic and argued that servicers should have complete flexibility to select the date. This commenter also requested that the Bureau create a safe harbor for compliance with § 1024.41(b)(2)(i)(B), through the use of a model form with language describing the milestones.

In contrast, other industry commenters and some consumer advocacy groups recommended limiting servicer discretion in selecting a reasonable date. These industry commenters stated that a flexible approach would be difficult to apply and would open servicers to various risks, such as litigation, monetary penalties, or reputational harm. Industry commenters also expressed concern that borrowers are less likely to be responsive if they have too much time to submit documents and that a longer time to completion can increase the delinquency, thereby decreasing the likelihood of successful loss mitigation. Industry commenters expressed varying opinions about the right length of time to afford borrowers, ranging from 14 days to 45 days. One servicer recommended that the final rule allow servicers limited discretion to select a reasonable date between 30 and 45 days away. Another servicer recommended a two-tiered approach, with borrowers permitted 30 days to submit documents and then an additional 30 days to complete the application as long as the borrower has submitted some of the outstanding documents that the servicer requested by the end of the first 30-day period.

Consumer advocacy groups that recommended limiting servicer discretion suggested different approaches. One consumer advocacy group recommended selecting a reasonable date that is between seven and 30 days away. Other consumer advocacy groups recommended requiring the reasonable date to be no more than 30 days away if the nearest milestone is 45 days or more in the future. These commenters suggested that these timeframes would, for example, reduce processing times, borrower discouragement, and documents going stale and that borrowers would rarely, if ever, need more than 30 days to provide the requested information.

Several industry commenters expressed concern with tracking the milestones and maximizing borrower rights in the selection of a reasonable date. Industry commenters cited litigation risk and the operational difficulties in tracking when documents go stale, among other matters. One industry commenter stated that servicers must manually track when documents will go stale to comply with the first milestone in the list, the date by which any document or information that a borrower submitted will be considered stale or invalid pursuant to any requirements applicable to any available loss mitigation option.

The Bureau is adopting comments 41(b)(2)(ii)–1 through –3 with substantial revisions to the proposal. The final rule provides servicers with more specific guidance on how to select a reasonable date than the proposal would have provided. As explained in more detail below, the commentary explains that 30 days from the date the servicer provides the notice under § 1024.41(b)(2)(i)(B) is generally a reasonable date. If a milestone will occur within 30 days, however, the commentary specifies that the reasonable date must be no later than the earliest of the milestones, subject to a minimum of seven days, so that borrowers can return application materials. The Bureau believes that these clearer guidelines should aid compliance and improve borrower protections.

Comment 41(b)(2)(ii)–1 provides that, in general and subject to the restrictions described in comments 41(b)(2)(ii)–2 and –3, a servicer complies with the requirement to include a reasonable date in the written notice required under § 1024.41(b)(2)(i)(B) by including a date that is 30 days after the date the servicer provides the written notice. Comment 41(b)(2)(ii)–2 states that, for purposes of § 1024.41(b)(2)(ii), subject to the restriction described in comment 41(b)(2)(ii)–3, the reasonable date must be no later than the earliest of four milestone dates. The dates are the same as the milestones in the proposal and in existing comment 41(b)(2)(ii)–1: (1) The date by which any document or information submitted by a borrower will be considered stale or invalid pursuant to any requirements applicable to any loss mitigation option available to the borrower; (2) the date that is the 120th day of the borrower's delinquency; (3) the date that is 90 days before a foreclosure sale; and (4) the date that is 38 days before a foreclosure sale. Comment 41(b)(2)(ii)–3 clarifies that a reasonable date for purposes of § 1024.41(b)(2)(ii) must never be less than seven days from the date on which the servicer provides the written notice pursuant to § 1024.41(b)(2)(i)(B).

As explained above, the proposal would have expressly stated that a servicer may select any date that it determines both maximizes borrower rights under § 1024.41 (in consideration of the milestones) and allows the borrower a reasonable period of time to obtain and submit the applicable documents and information. The final rule commentary, in contrast, states that a date that is 30 days after the date the servicer provides the written notice is generally compliant. The reasonable date must be no later than the nearest remaining milestone even if it will occur earlier than 30 days, subject to a minimum of seven days after the servicer provides the borrower with the notice. This increased specificity should afford borrowers sufficient time to obtain and submit application materials while reducing lengthy timelines for returning documents, which can lead to borrower disengagement, increased delinquency, or a diminished likelihood that the borrower will obtain a loss mitigation option. The Bureau believes that borrowers will rarely need more than 30 days to obtain and submit application materials. Further, as revised, the commentary to § 1024.41(b)(2)(ii) still preserves borrower protections under § 1024.41 by expressly prohibiting servicers from selecting a reasonable date that is later than the four milestone dates after which various protections end under the rule, subject to the seven-day minimum. In general, as each milestone passes before an application is complete, borrowers enjoy fewer protections under § 1024.41. A reasonable date too close to the next milestone would place consumers at risk of losing those protections. The Bureau believes this provision should increase borrowers' opportunity to complete their applications before any future milestones have passed. The Bureau also notes that servicers already must track the upcoming milestones to comply with § 1024.41.

The Bureau declines to adopt a more flexible standard than proposed, as some commenters suggested. As the Bureau explained in the proposal, and as both industry and consumer advocacy group commenters noted, servicers could select a date that is too far in the future under a more flexible standard. A date that is too far in the future would not be reasonable, and borrowers might be discouraged from promptly providing the requested documents and information.

Based on the comments received, the Bureau believes that the revisions may reduce industry burden, litigation risk, and the possibility of reputational harm associated with determining on a case-by-case basis what constitutes a reasonable date. Also, the Bureau understands that some servicers already provide a 30-day period for borrowers to obtain and submit documents and information necessary to complete a loss mitigation application, so the burden of amending business practices to comply with the final rule should be limited for these servicers. Although servicers may have to incur some costs to program their systems to ensure that the date selected complies with the revised comment, the Bureau believes the final rule will substantially benefit borrowers.

The Bureau is not adopting one commenter's suggestion to require a servicer to describe the milestones on the written notice under § 1024.41(b)(2)(i)(B). The Bureau believes this information would introduce significant burden for servicers. The Bureau also believes the additional information would not provide borrowers any significant benefit and could risk distracting borrowers from focusing on the critical information.

Finally, the Bureau reiterates that, pursuant to § 1024.41(b)(2)(ii), the reasonable date is not a hard deadline for the borrower to return the documents to the servicer.[240] As the Bureau explained in the 2013 RESPA Servicing Final Rule, servicers may still accept documents after the reasonable date, and the borrower may still be able to submit a complete loss mitigation application, even if the borrower does not submit the requested information by the reasonable date.[241]

41(c) Evaluation of Loss Mitigation Applications

41(c)(1) Complete Loss Mitigation Application

The Bureau proposed and is adopting a minor technical revision to § 1024.41(c)(1) to facilitate the addition of § 1024.41(c)(4), discussed below. The Bureau also sought comment as to whether the applicable timelines set forth in § 1024.41 allow borrowers sufficient time to accept or reject a loss mitigation offer if they complete a loss mitigation application near the foreclosure sale date. The Bureau did not make any specific proposal to address those concerns. The Bureau is not adopting any further revisions to § 1024.41(c)(1) to address those concerns at this time.

In response to the Bureau's request for comment, several commenters expressed concerns about the timing requirements in § 1024.41. A trade association suggested that a borrower may have little time to respond to a loss mitigation offer if the borrower submitted a complete loss mitigation application 38 days before a foreclosure sale and the servicer responds 30 days later notifying the borrower of which options the servicer will offer. A consumer advocacy group expressed concern that the amount of time the rule allows a borrower to respond to a loss mitigation offer or to exercise appeal rights is shortened by the amount of time it takes the borrower to receive the determination letter. Other consumer advocacy groups stated that the timing and method of communicating offers and appeals present problems for borrowers, including sometimes facing shorter response and appeal timeframes than intended, in part because of the delay in receiving a decision by standard (not first class) mail or because servicers sometimes backdate documents.

[240] *See* 78 FR 10695, 10826 (Feb. 14, 2013).

[241] 78 FR 10695, 10826 (Feb. 14, 2013).

Commenters recommended different approaches for addressing their concerns about the timing requirements discussed above. A consumer advocacy group said that the Bureau should require servicers to mail notices promptly and should carve out additional time in the loss mitigation timeline for a servicer to mail the notices to the borrower. A trade association recommended that the Bureau consider allowing the borrower less time to decide whether to accept a loss mitigation offer or increasing the number of days before a foreclosure sale a servicer must receive a complete loss mitigation application and still be required to evaluate the application. A servicer requested a separate, 10-day timeframe to mail the determination letter, arguing that the additional time would permit servicers to obtain third-party information and ensure that the borrower receives the most accurate determination possible. The commenter also stated that a 10-day delay in mailing the determination letter would not harm the borrower because the servicer already contacts the borrower at the end of the existing 30-day evaluation period to inform the borrower of its determination.

Consumer advocacy groups recommended that the Bureau address timing problems by prohibiting servicers from backdating documents and regulating further the manner in which notices are delivered. For example, these commenters suggested requiring servicers to provide notices via first class mail; adding three days to certain timing deadlines if a notice is not sent by first class mail; providing that the time a borrower has to respond to a loss mitigation offer begins only when the borrower receives the decision notice; setting forth specific mailing requirements and deadlines; specifying how servicers must construe timing requirements under applicable deadlines; or requiring that notices display the same date as the date the notice is placed in the mail, even if a vendor sends the notice.

Consumer advocacy groups also advocated requiring servicers to postpone a foreclosure sale when they offer a borrower a loss mitigation option after receiving the complete loss mitigation application on or near the 38th day before the sale. They said that servicers can simply conduct the sale later if the borrower rejects the offer and that the slight inconvenience that this would cause does not justify denying the borrower's application simply because the offer and acceptance might be communicated by mail. Some industry commenters suggested that the rule's current structure may not pose timing problems in some cases. One state trade association stated that the 30-day evaluation timeline does not cause problems for its members because evaluations typically take less than 30 days. A servicer generally endorsed the timing and method of communicating loss mitigation offers and appeals and stated that servicers will take measures to provide borrowers with foreclosure protections when they receive a complete loss mitigation application more than 37 days before a scheduled foreclosure sale. However, one servicer stated that, although servicers take measures to provide foreclosure protections upon receiving a complete loss mitigation application more than 37 days before a foreclosure sale, the servicer cannot guarantee that the sale will be postponed.

The Bureau is not taking action on these issues at this time. The comments received suggest that, when servicers comply with the existing timing requirements, borrowers are protected from the most serious harms and that servicers are, in the main, able to comply with those timing requirements. The Bureau notes that, under § 1024.38(b)(1)(i), a servicer must maintain policies and procedures that are reasonably designed to ensure that the servicer can provide accurate and timely disclosures to a borrower as required by Regulation X's mortgage servicing rules, including § 1024.41, or other applicable law. Particularly when a scheduled foreclosure sale places pressure on a loss mitigation application timeline, the Bureau encourages servicers to provide borrowers with notices in the most efficient and effective manner possible to maximize the likelihood that the borrower can obtain loss mitigation and avoid foreclosure and unnecessary fees. Servicers must ensure that their policies and procedures are reasonably designed to provide accurate and timely disclosures to borrowers in all circumstances, even when a foreclosure sale has been scheduled. The Bureau will continue monitoring the market for these and related issues.

The Bureau is making a technical correction that redesignates a comment to § 1024.41(d) as new comment 41(c)(1)–4. The 2013 Mortgage Servicing Final Rules added a comment to § 1024.41(d) that provides that a servicer may combine other notices required by applicable law, including, without limitation, a notice with respect to an adverse action required by Regulation B, 12 CFR part 1002, or a notice required pursuant to the Fair Credit Reporting Act, with the notice required pursuant to § 1024.41(d), unless otherwise prohibited by applicable law.[242] Because § 1024.41(d) requires that certain disclosures be made in a notice sent pursuant to § 1024.41(c)(1), the Bureau sought to redesignate this comment as comment 41(c)(1)–4 in the September 2013 Mortgage Final Rule but inadvertently redesignated it instead as comment 41(d)–(c)(1)(4).[243] The Bureau is now removing comment 41(d)–(c)(1)(4) and replacing it with new comment 41(c)(1)–4. New comment 41(c)(1)–4 is identical to the comment that it replaces, except that the Bureau is making a technical, clarifying change that substitutes ''notice required under § 1024.41(c)(1)'' for ''notice required under § 1024.41(d).''

41(c)(2) Incomplete Loss Mitigation Application Evaluation

41(c)(2)(iii) Payment Forbearance

Proposed § 1024.41(c)(2)(iii) would have allowed servicers to offer borrowers short-term repayment plans, as described in the proposal, based upon an evaluation of an incomplete loss mitigation application. This would have been an exception to the general rule under § 1024.41(c)(2), which generally prohibits a servicer from evading the requirement to evaluate a complete loss mitigation application by offering a loss mitigation option based upon an evaluation of any information provided by a borrower in connection with an incomplete application. Section 1024.41(c)(2)(iii) currently allows such an exception for short-term forbearance programs but does not specifically address short-term repayment plans. The proposal also would have set forth certain protections for borrowers with either or both of these short-term loss mitigation options, including limitations on dual tracking and a requirement that the servicer clearly specify the payment terms and duration of the program or plan in writing and provide that information to the borrower before the program or plan begins. Finally, the proposal would have described in commentary to § 1024.41(b)(1) a servicer's obligation to collect a borrower's application materials in the context of a short-term program or plan offered pursuant to § 1024.41(c)(2)(iii).

The Bureau received numerous comments on the proposal. Many consumer advocacy group and industry commenters expressed support for the proposal generally but expressed concern with specific elements of the proposal, as discussed below. Comments on most aspects of the proposal are summarized here, but comments relating to the proposed description of a servicer's reasonable diligence obligations under comment 41(b)(1)–4 are addressed below in this section-by-section analysis, under the heading Reasonable Diligence.

Consumer advocacy groups generally stated that the final rule should extend borrowers protections in addition to those existing for short-term forbearance plans. They recommended (1) tolling, during a borrower's short-term repayment plan, the 120-day pre-foreclosure period under § 1024.41(f)(1)(i) during which servicers must not make the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process; (2) prohibiting servicers from scheduling a foreclosure sale while the borrower is performing pursuant to a short-term repayment plan offered under § 1024.41(c)(2)(iii); and (3) requiring servicers to provide borrowers information necessary to understand that more affordable loss mitigation options may be available if the borrower completes the application.

Many comments addressed the proposed requirement that servicers clearly specify the payment terms and duration of the program or plan in writing and provide that information to the borrower before the program or plan begins. Consumer advocacy groups stated that providing this information in writing would be important because the agreements sometimes suggest that they are an initial step to a loan modification and borrowers sometimes believe erroneously that the short-term forbearance program or short-term repayment plan is a loan modification. The commenters said that, as a result, borrowers sometimes believe either that they need not apply for loss mitigation or that defaulting on the short-term option would render them ineligible for a loan modification. Consumer advocacy groups therefore recommended requiring servicers additionally to state in writing that the offer is being made based on a limited application and that, regardless of the outcome of the short-term program or plan, the borrower may seek a full loss mitigation review in the future.

Some industry commenters, including servicers and national trade associations, expressed concerns about the proposed requirement to clearly specify the terms and duration of the program or plan in writing before the program or plan begins. They recommended allowing the program or plan to begin before servicers must

[242] 78 FR 10696, 10897 (Feb. 14, 2013).

[243] 78 FR 60381, 60438 (Oct. 1, 2013).

provide written information about the program or plan, as is common industry practice. Commenters stated that requiring servicers to provide written information before the program or plan begins could create ambiguity as to when a program or plan begins and delay the start of the program or plan. One servicer noted that some borrowers can make their first plan payment over the phone upon accepting the offer and that prohibiting a servicer from accepting such payment before providing the written information could lead to additional costs to the borrower. One servicer requested that the Bureau address how servicers would clearly specify the payment terms and duration when there may be a change in payment during the short-term repayment plan. The servicer stated that this could occur, for example, when the interest rate may change during the plan or when there may be an increase to the borrower's escrow payment during the plan.

The proposal also would have required that the short-term repayment plans permitted under § 1024.41(c)(2)(iii) must bring the loan current. One trade association expressly supported the proposal to require that such a plan cure the delinquency.

Many commenters discussed the proposed limitations on the maximum arrearage and maximum repayment period for such short-term repayment plans. Several industry commenters and consumer advocacy groups supported the proposed limitations from both a borrower protection and an operational vantage point. A credit union stated that the proposed limitations on arrearage and repayment period would not create operational difficulties for its affiliate lenders. A trade association stated that the most effective short-term repayment plans last between three and six months. During outreach, some servicers similarly stated that their repayment plans typically last no more than six months, depending on the borrower's circumstance or investor requirements. A servicer supported the six-month maximum repayment period for short-term repayment plans and noted that servicers can offer longer repayment plans, lasting up to 12 months, based on a complete application. Other industry commenters opposed the proposed limitations. Some industry commenters suggested that borrowers should have unlimited time to repay an arrearage under a short-term repayment plan and noted that borrowers may need more than six months to pay off the arrearage. Several industry commenters recommended allowing a repayment period of up to 12 months, suggesting that repayment plans of 12 months would be consistent with guidelines established by owners or assignees. A servicer suggested the Bureau leave it to investors to define repayment plan limitations, given that this involves an assessment of the risk of ultimate repayment. A government-sponsored enterprise stated that the Bureau should not limit the size of the arrearage or the repayment period, as long as the servicer discloses to the borrower that the plan would eliminate the delinquency upon completion and that the borrower may submit a complete application and as long as the servicer resumes efforts to obtain a complete application if the borrower defaults on the short-term repayment plan. Several industry commenters suggested aligning the maximum repayment durations for short-term repayment plans and short-term payment forbearance programs, noting that short-term payment forbearance programs currently may be offered regardless of the amount of time a servicer allows the borrower to make up the missing payments.[244] One servicer requested clarification that, in accordance with informal guidance the Bureau issued in 2013, a servicer may offer a short-term repayment plan and a short-term payment forbearance program simultaneously, as long as the combined arrangement does not incorporate more than six months of payments past due.

Servicers the Bureau spoke with during outreach reported varying cure rates for borrowers in their repayment plans. None of these servicers estimated a cure rate significantly higher than 50%. Two servicers stated that a significant proportion of their borrowers who do not complete a repayment plan fail within the first month or two. Servicers participating in the Bureau's outreach indicated that they encourage borrowers who fail to complete a repayment plan to apply for other loss mitigation options.

Industry commenters expressed other miscellaneous concerns about the proposal. For example, a trade association stated that a short-term repayment plan offered under § 1024.41(c)(2)(iii) might be considered a troubled-debt restructuring and could therefore result in increased burden and expense. A trade association cautioned against the Bureau expanding the proposal to require a servicer to provide a short-term solution if the borrower fails to complete a loss mitigation application.

[244] *See* comment 41(c)(2)(iii)–1.

The Bureau is adopting § 1024.41(c)(2)(iii) generally as proposed to permit explicitly servicers to offer short-term repayment plans based upon an evaluation of an incomplete loss mitigation application. The final rule includes revisions, however, as to the contents and timing of the written information that servicers must provide to borrowers. The final rule requires servicers to provide more information than the proposal and specifies that a servicer must provide a written notice promptly after offering the program or plan. The Bureau is also adopting commentary that describes what constitutes a short-term payment forbearance program and a short-term repayment plan for purposes of § 1024.41(c)(2)(iii), clarifies the application of § 1024.41 to such programs or plans, and clarifies various aspects of the written notice requirement. The Bureau is also adopting revisions to comment 41(b)(1)–4.iii, which clarifies a servicer's obligation under § 1024.41(b)(1) to exercise reasonable diligence when a servicer offers a borrower a short-term payment forbearance program or a short-term repayment plan based on an evaluation of an incomplete loss mitigation application. Among other things, these revisions to comment 41(b)(1)–4.iii clarify that a servicer must immediately resume exercising reasonable diligence to obtain a complete application if a borrower defaults on a short-term repayment plan.

The Bureau continues to believe that allowing servicers to offer short-term repayment plans based on an evaluation of an incomplete loss mitigation application can substantially benefit borrowers and servicers. It offers a relatively efficient way for borrowers to address temporary hardships without exhausting those protections under § 1024.41 determined as of the date a complete loss mitigation application is received. The same rationale underpins the existing exception for short-term forbearance programs under § 1024.41(c)(2)(iii). Although nothing in § 1024.41 requires a servicer to offer such forbearance programs or repayment plans based upon an incomplete application, § 1024.41(c)(2)(iii) permits servicers to offer temporary assistance to qualifying borrowers who may need only to address short-term financial difficulty.

However, the Bureau also notes that, without appropriate safeguards, permitting a servicer to offer loss mitigation based upon an evaluation of an incomplete application could have adverse consequences for a borrower. If a servicer inappropriately diverts a borrower into a loss mitigation program based upon an incomplete application, it could exacerbate the borrower's delinquency and put the borrower at risk of losing the opportunity to complete the application and receive the full protections of § 1024.41. A borrower who is offered a short-term payment forbearance program or short-term repayment plan may be experiencing a hardship for which other, longer-term loss mitigation solutions might be more appropriate for a particular borrower's circumstance.

As revised and adopted in final form, § 1024.41(c)(2)(iii) contains three key elements. First, it provides that, notwithstanding the rule's general prohibition against offering a loss mitigation option based upon an evaluation of an incomplete application, a servicer may offer a short-term payment forbearance program or a short-term repayment plan to a borrower based upon an evaluation of an incomplete loss mitigation application. Second, it provides that, promptly after offering a payment forbearance program or a repayment plan under § 1024.41(c)(2)(iii), unless the borrower has rejected the offer, the servicer must provide the borrower a written notice stating the specific payment terms and duration of the program or plan, that the servicer offered the program or plan based on an evaluation of an incomplete application, that other loss mitigation options may be available, and that the borrower has the option to submit a complete loss mitigation application to receive an evaluation for all loss mitigation options available to the borrower regardless of whether the borrower accepts the offered program or plan.[245] Third, it prohibits a servicer from making the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process, or moving for foreclosure judgment or order of sale or conducting a foreclosure sale, if a borrower is performing pursuant to the terms of a payment forbearance program or repayment plan offered pursuant to § 1024.41(c)(2)(iii). The final rule also specifies that a servicer may offer a short-term payment forbearance program in conjunction with a short-term repayment plan pursuant to § 1024.41(c)(2)(iii).

The final rule retains the proposed disclosures relating to the payment terms and duration of the program or plan, which the Bureau believes should reduce misunderstandings between servicers and borrowers, including those that may result in borrowers making incorrect payments. Comment 41(c)(2)(iii)–5, discussed below, clarifies these requirements.

The final rule also requires several additional disclosures that were not proposed. Many of these disclosures are specified in current comment 41(b)(1)–4.iii as part of a servicer's obligation to exercise reasonable diligence. The Bureau is removing those specific disclosures from final comment 41(b)(1)–4.iii, as they would be duplicative of the new written notice requirements in final § 1024.41(c)(2)(iii). Final § 1024.41(c)(2)(iii) also introduces a new disclosure, that other loss mitigation options may be available.

After considering the comments, the Bureau believes that allowing a short-term payment forbearance program or short-term repayment plan to begin immediately following an oral offer is appropriate. The Bureau understands that some servicers already allow a short-term payment forbearance program or repayment plan to begin upon offer. Allowing commencement of the program or plan immediately upon an oral offer may benefit some borrowers by reducing the accrual of late fees, negative credit reporting, and the accumulation of further delinquency. Entering the short-term repayment plan also triggers the protections of § 1024.41(c)(2)(iii), which forbids the servicer from making the first notice or filing required under applicable law for any judicial or non-judicial foreclosure process, moving for foreclosure judgment or order of sale, or conducting a foreclosure sale.

The Bureau continues to believe, however, that borrowers will benefit from receiving a written notice describing the program or plan. The final rule therefore requires servicers to provide a written notice promptly after offering a payment forbearance program or a repayment plan under § 1024.41(c)(2)(iii), unless the borrower has rejected the offer. The Bureau continues to believe that receiving the written notice promptly will assist borrowers in understanding the terms and consequences of the program or plan and will allow borrowers to address any discrepancies more quickly. The Bureau notes that § 1024.41(c)(2)(iii) does not require servicers to provide the written notice if the borrower has rejected the offer. A notice after the borrower has rejected the offer would provide little benefit to the borrower and could introduce unnecessary burden for the servicer.

The Bureau is not adopting some commenters' suggestions to toll the loss mitigation timelines under § 1024.41 or to prohibit servicers from scheduling a foreclosure sale while a borrower is performing under a short-term repayment plan offered under § 1024.41(c)(2)(iii). The Bureau believes that the protections extended under § 1024.41(c)(2)(iii) and (b)(1) are sufficient. As detailed below, a short-term repayment plan for purposes of § 1024.41(c)(2)(iii) must have terms under which a borrower would be able to repay all past due payments over a specified period of time to cure the delinquency; and while a borrower is performing under such a plan, servicers may not make the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process, move for foreclosure judgment or order of sale, or conduct a foreclosure sale. Further, if the borrower fails to comply with the plan, servicers must immediately resume exercising reasonable diligence to obtain a complete application, as described in revised comment 41(b)(1)–4.iii. The Bureau will continue to monitor the marketplace regarding the sufficiency of these protections. The Bureau also is not addressing, as one commenter suggested, whether short-term repayment plans offered under § 1024.41(c)(2)(iii) might be considered troubled-debt restructurings.

The Bureau is adopting comments 41(c)(2)(iii)–1 through –4 substantially as proposed, with non-substantive revisions to improve clarity. Comment 41(c)(2)(iii)–1 clarifies what constitutes a short-term payment forbearance program for purposes of § 1024.41(c)(2)(iii). Comments 41(c)(2)(iii)–2 and –3 clarify that various protections under § 1024.41 apply notwithstanding a servicer's offer of a short-term payment forbearance program or short-term repayment plan under § 1024.41(c)(2)(iii). Comment 41(c)(2)(iii)–2 explains that, although § 1024.41(c)(2)(iii) allows a servicer to offer a borrower a short-term payment forbearance program or a short-term repayment plan based on an evaluation of an incomplete loss mitigation application, the servicer must still comply with the other requirements of § 1024.41 with respect to the incomplete loss mitigation application. The comment includes several examples of the protections. Comment 41(c)(2)(iii)–3

[245] In the 2013 RESPA–TILA Servicing Amendments, the Bureau declined to require servicers to include similar disclosures in the written notification required under § 1024.41(b)(2)(i)(B), stating that servicers should have flexibility to provide the disclosures at the appropriate time. 78 FR 60381, 60400 (Sept. 12, 2013). The Bureau believes that it is appropriate for borrowers to receive these disclosures in the written notice provided at the time a borrower receives an offer for a short-term forbearance program or short-term repayment plan under § 1024.41(c)(2)(iii).

clarifies that the servicer must still comply with all applicable requirements in § 1024.41 if the borrower completes a loss mitigation application.

As finalized, comment 41(c)(2)(iii)–4 clarifies that repayment plans for purposes of § 1024.41(c)(4)(iii) have terms under which a borrower would repay all past due payments over a specified period of time to bring the mortgage loan account current. Repayment plans that are not intended to cure the delinquency risk merely prolonging the delinquency with consequent borrower harm, including negative credit reporting and a diminished ability to qualify for other loss mitigation options. Comment 41(c)(2)(iii)–4 explains that a short-term repayment plan for purposes of § 1024.41(c)(2)(iii) is one that allows for the repayment of no more than three months of past due payments and allows a borrower to repay the arrearage over a period lasting no more than six months.

The Bureau also believes that these specific limitations, to three months of past due payments and a repayment period of six months, reduce the risk of borrower harm. Allowing more than three months of past due payments or longer repayment periods could result in a higher default rate, and borrowers' prospects for loss mitigation may be diminished by a default on a short-term repayment plan. As noted above, servicers that the Bureau spoke with during outreach informed the Bureau that their borrowers in repayment plans frequently do not result in a cure; none of these servicers reported cure rates higher than approximately 50%.

Moreover, borrowers in short-term repayment plans under § 1024.41(c)(2)(iii) are at risk of losing various protections under § 1024.41. In general, the longer a delinquency exists without the borrower completing an application, the fewer borrower protections § 1024.41 is likely to provide if the borrower later completes the application. For example, certain protections apply only if the borrower completes a loss mitigation application more than a certain number of days before a scheduled foreclosure sale. As a result, a borrower could exit an unsuccessful short-term repayment plan to face a scheduled foreclosure sale with no right under § 1024.41 to have a complete loss mitigation application evaluated or to have the denial of loan modification options subject to appeal.

Given these potentially serious consequences for borrowers who are in short-term repayment plans based on an evaluation of an incomplete loss mitigation application, the Bureau believes that the limitations in the final rule, as explained by comment 41(c)(2)(iii)–4, are necessary. The final rule affords servicers sufficient flexibility to address borrowers' temporary hardships, while also ensuring that borrowers facing more substantial hardship will not lose time and protections under § 1024.41 by agreeing to a repayment plan that they may have little chance of completing.

The Bureau notes that nothing in § 1024.41 prevents a servicer from offering a repayment plan that exceeds the durational limitations set forth in comment 41(c)(2)(iii)–4. Rather, the rule simply prohibits a servicer from doing so without obtaining a complete loss mitigation application and evaluating the borrower for all available options. As discussed below, the Bureau is also revising comment 41(b)(1)–4.iii, which clarifies a servicer's obligation under § 1024.41(b)(1) to act with reasonable diligence in obtaining documents and information to complete a loss mitigation application when the servicer offers the borrower a short-term payment forbearance program or short-term repayment plan under § 1024.41(c)(2)(iii).

The Bureau is also adopting new comment 41(c)(2)(iii)–5 to clarify the written notice requirement for short-term loss mitigation options under § 1024.41(c)(2)(iii). Comment 41(c)(2)(iii)–5.i notes that § 1024.41(c)(2)(iii) requires a servicer to provide the borrower a written notice stating, among other things, the specific payment terms and duration of a short-term payment forbearance program or a short-term repayment plan offered based on an evaluation of an incomplete application. The comment explains that, generally, a servicer complies with these requirements if the written notice states the amount of each payment due during the program or plan, the date by which the borrower must make each payment, and whether the mortgage loan will be current at the end of the program or plan if the borrower complies with the program or plan. The Bureau believes that these guidelines clarify a servicer's obligations under § 1024.41(c)(2)(iii) and may help borrowers better understand short-term programs or plans offered based upon incomplete applications.

One commenter noted that servicers will not always know precisely how a borrower's payments will change during a short-term payment forbearance program or short-term repayment plan. New comment 41(c)(2)(iii)–5.ii clarifies how a servicer may comply with the requirement in this circumstance. The comment describes how a servicer complies when, at the time a servicer provides the written notice, the servicer lacks information necessary to determine the amount of a specific payment due during the program or plan (for example, because the borrower's interest rate will change to an unknown rate based on an index or because an escrow account computation year as defined in § 1024.17(b) will end and the borrower's escrow payment may change). The comment states that, in such circumstances the servicer complies with the requirement to disclose the specific payment terms and duration of a short-term payment forbearance program or short-term repayment plan if the disclosures are based on the best information reasonably available to the servicer at the time the notice is provided and the written notice identifies which payment amounts may change, states that such payment amounts are estimates, and states the general reason that such payment amounts might change. The comment provides an illustrative example.

The Bureau is also adopting new comment 41(c)(2)(iii)–6 to clarify the requirement that a servicer must provide the written notice promptly after offering a short-term payment forbearance program or short-term repayment plan. The comment explains that, generally, a servicer acts promptly to provide the written notice if the servicer provides it no later than five days (excluding legal public holidays, Saturdays, and Sundays) after offering the borrower a short-term payment forbearance program or short-term repayment plan. The comment also clarifies that a servicer may provide the written notice at the same time the servicer offers the borrower the program or plan. Finally, the comment states that a written offer that contains all the required elements of the written notice also satisfies § 1024.41(c)(2)(iii).

Reasonable Diligence

The Bureau is also revising the introductory text to comment 41(b)(1)–4 and the substance of comment 41(b)(1)–4iii to clarify a servicer's obligation under § 1024.41(b)(1) to act with reasonable diligence in obtaining documents and information to complete a loss mitigation application when the servicer offers the borrower a short-term payment forbearance program or short-term repayment plan under § 1024.41(c)(2)(iii). Current comment 41(b)(1)–4 describes the reasonable diligence obligation generally. The comment states that a servicer must request information necessary to make a loss mitigation application complete promptly after receiving the loss mitigation application. Comments 41(b)(1)–4.i through –4.iii clarify reasonable diligence for purposes of § 1024.41(b)(1) in specific circumstances. Comment 41(b)(1)–4.iii clarifies the standard when a servicer offers a short-term payment forbearance programs under § 1024.41(c)(2)(iii). Proposed revisions would have extended the comment to include short-term repayment plans.

The Bureau received many comments discussing the proposed amendments to a servicer's reasonable diligence obligations with respect to short-term loss mitigation options offered under § 1024.41(c)(2)(iii). Some consumer advocacy groups said that the Bureau should strengthen the applicable reasonable diligence standard a servicer must employ to obtain a complete application from the borrower. Under the proposal, servicers generally would have been allowed to suspend such efforts until near the end of the program or plan. The commenters recommended a rule that more clearly states that a servicer's reasonable diligence obligations resume if a borrower defaults on a short-term repayment plan and requires servicers to provide the borrower with a written notice stating that the borrower may submit a complete application and be considered for all loss mitigation options. These consumer advocacy groups stated that these protections are critical because a borrower might default on a repayment plan months before the plan will terminate under the terms of the agreement. They also suggested that additional protections are essential because the consequences of default for these borrowers could be severe.

Some industry commenters suggested, conversely, that the Bureau limit the applicable reasonable diligence requirements. For example, a trade association said that a full loss mitigation review under § 1024.41 is not necessary for all borrowers and that requiring servicers nonetheless to continue reasonable diligence and other applicable communication requirements under § 1024.41 assumes that borrowers are uninformed, would frustrate some borrowers, and would lead to negative perceptions of customer service. One servicer recommended suspending reasonable diligence requirements for borrowers in short-term repayment plans while continuing to require reasonable diligence for borrowers in short-term forbearance programs. This servicer suggested that reasonable diligence should be suspended for short-term repayment plans because, unlike short-term forbearance programs, short-term repayment plans are expected to bring the loans current. Another servicer advocated against requiring servicers to provide borrowers who receive a short-term repayment plan with information about remaining items needed to complete the application, reasoning that the plans are designed to cure delinquencies and borrowers would receive necessary information if they default on the plan.

As finalized, comment 41(b)(1)–4 contains minor revisions to the introductory text to improve clarity. Revised comment 41(b)(1)–4.iii contains several elements, which provide non-exhaustive descriptions of a servicer's reasonable diligence obligations during different phases of a short-term loss mitigation option offered under § 1024.41(c)(2)(iii).

First, comment 41(b)(1)–4.iii explains that a servicer exercises reasonable diligence by providing the borrower the written notice pursuant to § 1024.41(c)(2)(iii). The Bureau is not adopting proposed language that would have directed the servicer to inform the borrower, as part of its reasonable diligence obligations, that the offer of a payment forbearance program or repayment plan was based on an evaluation of an incomplete application, as the final rule incorporates that information as an express requirement in the written notice setting forth the terms and duration of the program or plan under § 1024.41(c)(2)(iii).

Second, as revised, comment 41(b)(1)–4.iii provides that, if the borrower remains in compliance with the short-term payment forbearance program or short-term repayment plan, and the borrower does not request further assistance, the servicer may suspend reasonable diligence efforts until near the end of the payment forbearance program or repayment plan. However, if the borrower fails to comply with the program or plan or requests further assistance, the servicer must immediately resume reasonable diligence efforts. Suspending reasonable diligence efforts to complete an application during a performing short-term payment forbearance program or short-term repayment plan may avoid borrower frustration and unnecessary burden, but servicers must resume those efforts immediately in the specified circumstances because of the substantial consequences borrowers may face in the absence of a complete application. Many of § 1024.41's protections do not apply until a borrower completes an application, and borrowers are generally at risk of losing additional protections under § 1024.41 the longer a delinquency lasts while an application remains incomplete. Borrowers who default on short-term loss mitigation option under § 1024.41(c)(2)(iii) may be particularly at risk. While § 1024.41(c)(2)(iii) prohibits servicers from making the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process, moving for foreclosure judgment or order of sale, or conducting a foreclosure sale, those protections may no longer apply once a borrower is not performing under a short-term loss mitigation option. Borrowers do not receive the similar protections available under § 1024.41(f)(2) or (g) until they complete an application and, by the time of default on the short-term loss mitigation option, they may have lost the possibility of obtaining those protections if they completed the application within 37 days of a scheduled foreclosure sale. The Bureau therefore believes it is vital that servicers not delay in resuming efforts to assist the borrower in completing an application, upon either the borrower's request or the borrower's failure of compliance with the short-term loss mitigation option.

Third, as revised, comment 41(b)(1)–4.iii makes more explicit that, near the end of a short-term payment forbearance program offered based on an evaluation of an incomplete loss mitigation application pursuant to § 1024.41(c)(2)(iii), and prior to the end of the forbearance period, if the borrower remains delinquent, a servicer must contact the borrower to determine if the borrower wishes to complete the loss mitigation application and proceed with a full loss mitigation evaluation. This aspect of the comment applies only to a short-term payment forbearance program and not to a short-term repayment plan as proposed because short-term repayment plans must be designed to cure the delinquency under comment 41(c)(2)(iii)–4. Consequently, as some commenters noted, as long as a borrower is performing under such a plan and does not request further assistance, requiring a servicer to engage in efforts to collect a complete loss mitigation application could create unnecessary burden and frustrate the borrower.

41(c)(2)(iv) Facially Complete Application

Current § 1024.41(c)(2)(iv) provides that, among other things, if a borrower submits all the missing documents and information as stated in the notice required pursuant to § 1026.41(b)(2)(i)(B), or no additional information is requested in such notice, an application shall be considered facially complete. If a servicer later discovers additional information or corrections to a previously submitted document are required to complete the application, certain protections under § 1024.41 that apply as of the date on which a servicer receives a complete application continue to run from the date the application became facially complete and continue until the borrower is given a reasonable opportunity to complete the application. If the borrower completes the application during this period, the servicer must treat the application as complete as of the date it was facially complete, for purposes of certain provisions under § 1024.41 and as of the date the application was actually complete for the purposes § 1024.41(c).

The Bureau proposed three revisions to § 1024.41(c)(2)(iv). First, the Bureau proposed a minor technical change to correct the erroneous reference to § 1026.41(b)(2)(i)(B), which should refer to § 1024.41(b)(2)(i)(B). Second, the Bureau proposed to provide that an application becomes facially complete when, in addition to the conditions described above, a servicer is required, under proposed § 1024.41(c)(3)(i), to send the borrower a notice of complete application. Section 1024.41(c)(3) requires servicers to provide a written notice informing the borrower, among other things, when the loss mitigation application becomes complete. However, the Bureau recognizes that, in certain circumstances, servicers might require additional documents or information from a borrower after sending a notice of complete application under § 1024.41(c)(3)(i). To clarify the status of an application in this circumstance, the Bureau proposed to extend expressly the facially complete application status described in § 1024.41(c)(2)(iv) to an application when the servicer is required to provide the notice of complete application under proposed § 1024.41(c)(3).

Third, the Bureau proposed to provide that, if a servicer requests the required additional information or corrections to a previously submitted document, and the borrower timely submits those materials to complete the application as described in 1024.41(c)(2)(iv), the application shall be considered complete as of the date it first became facially complete for purposes of specified provisions in § 1024.41, and as of the date the application was actually complete for the purposes § 1024.41(c). In proposing this revision, the Bureau recognized that an application may become complete more than once during a single cycle.

The Bureau received several comments on the proposed amendments. Consumer advocacy groups supported maintaining the initial date of completion as the date on which dual tracking protections under § 1024.41 begin to apply, saying that doing so should limit incentives for servicers to promote delay and seek additional fees from borrowers. They also expressed concern about ongoing servicer delays in the loss mitigation application and evaluation processes. One trade association commented that the proposal could harm servicers by providing borrowers with additional time to submit application materials without affording servicers a similar extension. The group suggested that the Bureau lengthen the amount of time a servicer has to evaluate a complete loss mitigation application.

The Bureau is finalizing § 1024.41(c)(2)(iv) substantially as proposed, with minor revisions. Under the revisions to § 1024.41(c)(2)(iv), a loss mitigation application is facially complete once the servicer receives the complete application, regardless of when the servicer determines that the application is complete. As a result, the protections under § 1024.41 that begin when an application becomes facially complete are in effect when a borrower submits all the missing documents and information as stated in the notice required under § 1024.41(b)(2)(i)(B), when no additional information is requested in such notice, or once the servicer is required to provide the borrower a written notice of complete application pursuant to § 1024.41(c)(3)(i).

Revised § 1024.41(c)(2)(iv) also requires that, if a servicer later discovers that additional information or corrections to a previously submitted document are required to complete the application, the servicer must promptly request the missing information or corrected documents and treat the application as complete for purposes of § 1024.41(f)(2) and (g) until the borrower is given a reasonable opportunity to complete the application. Further, if the borrower timely submits those materials to complete the application, the servicer must treat the application as complete as of the date it first became facially complete for the purposes of § 1024.41(d), (e), (f)(2), (g), and (h), and as of the date the application was actually complete for the purposes of § 1024.41(c). Finally, a servicer that complies with § 1024.41(c)(2)(iv) will be deemed in the final rule to have fulfilled its obligation to provide an accurate notice under § 1024.41(b)(2)(i)(B).

Various protections under § 1024.41 depend on the timing of a complete application. For example, evaluation requirements, certain dual tracking protections, and appeal rights apply only if the servicer received a complete application a certain number of days before a foreclosure sale. Tying the date of completion to the date an application first became facially complete for purposes of specified provisions in § 1024.41 ensures that borrowers do not lose the protections associated with those provisions because a servicer has requested additional information. The protections apply as though the application was complete as of the original date it became facially complete.

As the Bureau explained in the proposal, the amendments to § 1024.41(c)(2)(iv) are intended to provide both borrowers and servicers with certainty about whether and when various protections apply under § 1024.41 when a servicer requires additional information for an application that the borrower previously completed. Also, continuing borrower protections under § 1024.41 encourages servicers to process loss mitigation applications efficiently.

To the extent that § 1024.41(c)(2)(iv) allows borrowers additional time to complete an application without providing corresponding extensions for servicers, as one commenter suggested, the Bureau believes that this is appropriate. The Bureau believes that borrowers have strong incentives not to delay the provision of application materials and expects servicers to be actively engaged with borrowers in all stages of the loss mitigation application process. If a borrower is actively engaged in the loss mitigation application process and has completed an application, the servicer should not be permitted to make the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process or to move for foreclosure judgment or order of sale or conduct a foreclosure sale, as applicable, until the servicer evaluates the borrower for loss mitigation. The Bureau continues to believe that the loss mitigation rules afford servicers sufficient time to evaluate a complete application and does not believe that an extension is justified.

Nothing in § 1024.41(c)(2)(iv) alters the servicer's ability to request additional information or corrections to a previously submitted document that are required to complete the application. The Bureau recognizes that there are circumstances where servicers may need to request additional information or corrections to a previously submitted document when required to evaluate the borrower pursuant to § 1024.41(c)(1) and owner or assignee requirements. When they do so unnecessarily, however, it can prolong application timelines, increase costs for borrowers, and leave borrowers unsure of their application status. Repeated requests for additional documents and information by servicers could impede borrower protections under the rules. The Bureau will continue to monitor the market in this area.

41(c)(3) Notice of Complete Application

The Bureau proposed to require a servicer to provide a written notice of complete loss mitigation application under new § 1024.41(c)(3). The Bureau is adopting § 1024.41(c)(3) largely as proposed but with several revisions to the contents and timing of the written notice.

In advance of the proposal, the Bureau learned from consumer advocacy groups that, during the loss mitigation application process, borrowers are frequently uncertain about whether an application was complete. Current § 1024.41 requires a servicer to notify a borrower that an application is complete only if the application is complete when the servicer provides the notice acknowledging receipt of an application under § 1024.41(b)(2)(i)(B). The Bureau learned from pre-proposal outreach efforts that applications are rarely complete at that stage. Many borrowers who completed an application might not receive any notice specifying that the application was complete. Because the foreclosure protections under § 1024.41(f)(2) and (g) [246] are triggered based on when the borrower submits a complete loss mitigation application, clarity as to when the application is complete is vital.

Proposed § 1024.41(c)(3)(i) would have required a servicer to provide a borrower a written notice, including specific information, promptly upon receiving the borrower's complete application. As proposed, the notice would have informed the borrower of: The application's completion; the date the servicer received the complete application; whether a foreclosure sale was scheduled as of the date the servicer received the complete application and, if so, the date of that scheduled sale; and the date the borrower's foreclosure protections began under § 1024.41(f)(2) and (g), as applicable, with a concise description of those protections. The notice also would have included a statement that the servicer expects to complete its evaluation within 30 days of the date it received the complete application and a statement that, although the application is complete, the borrower may need to submit additional information at a later date if the servicer determines that it is necessary. Finally, the notice would have informed the borrower, if applicable, of the borrower's rights to appeal the servicer's determination to deny the borrower for any trial or permanent loan modification under § 1024.41(h).

Proposed § 1024.41(c)(3)(ii) stated that a servicer need not provide the notice of complete application in three circumstances: If the servicer has already notified the borrower under § 1024.41(b)(2)(i)(B) that the application is complete and the servicer has not subsequently requested additional information or a corrected version of a previously submitted document from the borrower to complete the application, the application was not complete or facially complete more than 37 days before a foreclosure sale, or the servicer has already provided a notice approving or denying the application under § 1024.41(c)(1)(ii). These exceptions were intended to avoid unnecessary burden on servicers and prevent borrower confusion due to the receipt of conflicting or redundant information.

The Bureau also proposed commentary to explain certain aspects of the notice requirement under proposed § 1024.41(c)(3). Proposed comment 41(c)(3)(i)–1 would have explained that, generally, a servicer complies with the requirement to provide a borrower with written notice promptly by providing the notice within five days of receiving a complete application. However, the Bureau recognized that servicers might sometimes require more than five days to determine whether a loss mitigation application is complete. In the proposal, the Bureau explained its belief that the general five day standard would provide servicers with sufficient flexibility to make an accurate determination but prevent undue delay. Proposed comment 41(c)(3)(i)–2 would have provided that the date the borrower's protections began under § 1024.41(f)(2) and (g) must be the date on which the application became either complete or facially complete, as applicable.

Proposed comment 41(c)(3)(i)–3 would have explained that § 1024.41(c)(3)(i) requires a servicer to send a notification, subject to the exceptions under § 1024.41(c)(3)(ii), every time a loss mitigation application becomes complete. The proposed comment further would have clarified that, if after providing a notice under § 1024.41(c)(3)(i) a servicer requests additional information or corrections to a previously submitted document required to complete the application in accordance with § 1024.41(c)(2)(iv), the servicer might have to provide an additional notice under § 1024.41(c)(3)(i) if the borrower submits the additional information or corrected documents to complete the application. The Bureau explained in the proposal that requiring a servicer to send an additional notice under these circumstances would help ensure that a borrower has accurate and current information about the status of the loan and when to expect a servicer to complete the evaluation.

The Bureau explained in the proposal that requiring servicers to provide borrowers with the information in the notice of complete application under proposed § 1024.41(c)(3)(i) would ensure that borrowers are informed of the next steps in the evaluation process. The Bureau explained its belief that receiving notice of when to expect an offer or denial would permit the borrower to make better-informed decisions. Additionally, the Bureau stated that requiring the notice of complete application to indicate the date that the servicer received a complete application would help both servicers and borrowers in determining which protections apply under § 1024.41. The Bureau also indicated that the proposed disclosure that the servicer may need additional or updated information from the borrower after determining that the application was complete would reduce borrower confusion when and if the servicer requests such additional information.

The Bureau sought comment on whether the notice of complete application required under proposed § 1024.41(c)(3) should include additional or different disclosures than those listed above. The Bureau also sought comment on whether it should finalize a stricter timing requirement for

[246] Subject to certain limitations, § 1024.41(f)(2) prohibits a servicer from making the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process if a borrower submits a complete application during the pre-foreclosure review period set forth in § 1024.41(f)(1) or before the servicer has made the first notice or filing, and § 1024.41(g) prohibits a servicer from moving for foreclosure judgment or order of sale, or conducting a foreclosure sale, if the borrower completes a loss mitigation application after the servicer has made the first notice or filing but more than 37 days before a foreclosure sale. In general, neither provision applies if the servicer has denied the application and no appeal is available; the borrower rejects all loss mitigation options offered by the servicer; or the borrower fails to perform under an agreement on a loss mitigation option.

providing the notice than proposed under § 1024.41(c)(3)(i) and, if so, what the specific number of days should be.

Numerous commenters, including servicers, trade associations, and consumer advocacy groups, expressed general support for the proposal to require servicers to provide a notice of complete application to borrowers. A trade association stated that requiring servicers to provide a notice of complete application would operate in conjunction with proposed comment 41(b)(1)–1, which, in part, would have clarified that servicers can generally stop collecting application materials for a given loss mitigation option upon learning that the consumer is ineligible for that option, to alleviate unnecessary burden on borrowers while concurrently requiring servicers to engage in best efforts to collect loss mitigation application materials from borrowers. One servicer commented that the notice of complete application as proposed would provide borrowers with more clarity about the loss mitigation process. A number of consumer advocacy groups urged the Bureau to base the onset of foreclosure protections on the submission of an initial application but stated that, if the Bureau retains the current approach to § 1024.41, it should require servicers to provide a notice of complete application to borrowers, to address borrower uncertainty and unjustified denials. One trade association stated that a notice of complete application would alert borrowers to critical protections and deadlines under State and Federal rules. Several commenters expressed general support for the notice but took issue with other elements of the proposal; those comments are addressed in the discussion of the relevant elements below.

Some commenters addressed cost-benefit considerations of requiring servicers to provide a notice of complete application. Several said that requiring the notice would not create significant additional burden for servicers, for example, because some jurisdictions already require servicers to send such notices. However, other commenters stated that the benefit to borrowers of receiving a notice of complete application would not justify the additional cost, burden, or risk for servicers. Some industry commenters suggested that the notice would not significantly benefit borrowers because they have other means to secure relevant information, they will have been in contact with servicers, or they might find the notice confusing due to the various other notices they receive relating to the delinquency and their rights. Industry commenters also stated that the new notice requirement would increase servicer cost or burden, as well as the risk of servicer liability. One trade association suggested that the additional cost of the notice requirement would make credit more expensive.

Some commenters addressed the proposed requirement to provide the written notice promptly, generally within five days of receiving the complete application. Consumer advocacy groups argued that the timing requirement should be short and inflexible because a flexible standard invites delay. Consumer advocacy groups also stated that a five-day standard would encourage servicers to evaluate complete applications earlier. They stated that it would not burden servicers or result in undue delay because the standard would align with the standard in § 1024.41(b)(2)(i)(B). One consumer advocacy group noted that, because servicers may need additional time in some cases, the Bureau should finalize a maximum time limit to reduce confusion and delay.

Numerous industry commenters requested that servicers have more than five days to provide the notice. Some said that a five-day standard would not leave servicers with sufficient time to review the application and determine whether it is complete, with one industry trade association saying that the standard would suffice only if the disclosures were generic and requesting 10 or 15 days to provide the notice. One servicer said that the notice should not state whether the application is complete but that servicers should be required to send a notice each time a borrower submits application materials to acknowledge receipt and specify which items remain outstanding.

Commenters also addressed the content of the written notice. Consumer advocacy groups stated that requiring the notice to contain the disclosures proposed under § 1024.41(c)(3)(i)(A) through (F) would create a bright-line, written record of when dual tracking protections begin and when other requirements under § 1024.41 apply. Several industry commenters recommended that the notice contain only standard disclosures that servicers do not need to adjust for each individual borrower, to reduce compliance burdens. For example, several servicers said that the notice should focus on informing the borrower of the application status, as borrowers can obtain the other information elsewhere. One of these servicers stated that the notice should include the following generic disclosures: That the application is complete; that the servicer expects to complete its evaluation within 30 days; that additional information may later be required; that, if additional information is required, the servicer will complete its evaluation within 30 days of receiving that additional information; and that the servicer will take measures to provide foreclosure protections.

A trade association expressed concern that the proposed contents of the written notice could potentially mislead some borrowers and result in FDCPA litigation. The association stated that: (1) State laws sometimes offer protections that the written notice under proposed § 1024.41(c)(3)(i) would not disclose, so the written notice could suggest that borrowers have fewer protections than they actually have; (2) the proposed disclosures might mislead borrowers into believing that a servicer cannot execute a foreclosure sale even after denying the application, particularly when a servicer is statutorily required to send a separate notice of sale; (3) borrowers could be misled by a notice containing both foreclosure-related disclosures and a statement that the application is complete; and (4) the Bureau could alleviate these concerns by drafting specific language for the notice under § 1024.41(c)(3)(i) and by introducing a safe harbor for the notices under the FDCPA.

Several commenters took issue with proposed § 1024.41(c)(3)(i)(C) in particular, which would have required servicers to disclose the date of a scheduled foreclosure sale as of when the servicer received the complete application. A servicer argued that disclosing the sale date is unnecessary because the borrower receives notification of the sale date when the sale is scheduled and postponed. Several trade associations suggested that the sale date disclosure might create difficulties when servicers are not in control of the sale date, such as when the servicer has filed a motion in court to postpone the sale but the court has yet to respond, when the sheriff responsible for delivering the notice of sale schedules the sale shortly after the servicer issues the notice under § 1024.41(c)(3), or when the sheriff has already scheduled the sale but delays informing the servicer. In these circumstances, the notice under § 1024.41(c)(3)(i) could be misleading or incorrect. A trade association further opposed disclosing a scheduled foreclosure sale date on the notice because State law may control how the delivery of sale date information must be displayed, although the association was unaware of specific conflicts with

State law. The trade association also stated that, more generally, determining the foreclosure sale date at a particular point in time is often not straightforward, and it expressed concern that an incorrect statement of sale date could invalidate the sale and lead to attorney and trustee liability. Consumer advocacy groups suggested that a final rule adopting the notice requirement should require a statement whether a scheduled foreclosure sale has been canceled or postponed.

Other commenters raised miscellaneous other issues relating to specific proposed disclosures. A trade association recommended that the Bureau clarify how servicers must describe the borrower's foreclosure protections under proposed § 1024.41(c)(3)(i)(D), saying it would be difficult for servicers to determine which protections apply at a given moment and how to describe those protections, particularly given the various protections that State law may provide. Several commenters expressed concerns about the disclosure proposed under § 1024.41(c)(3)(i)(G) relating to a borrower's appeal rights. One servicer said that the proposed disclosure would be particularly confusing to borrowers. Another servicer stated that information about a borrower's appeal rights is more appropriate in a loss mitigation determination letter provided under § 1024.41(c)(1)(ii) than at the time the servicer receives the complete application.

One consumer advocacy group supported proposed comment 41(c)(3)(i)–3, which would have clarified that servicers must provide a notice of complete application to borrowers each time an application becomes complete. The commenter stated that this requirement would avoid borrower uncertainty that occurs when a servicer fails to inform the borrower when the application is complete. Several industry commenters supported the requirement of a notice of complete application while opposing the proposal to require the servicer to send additional notices every time the borrower's application becomes complete. A servicer said that additional notices after the first notice would be unnecessary because a borrower's foreclosure protections under § 1024.41 begin when the application becomes facially complete and last through any appeal. A credit union suggested that receiving additional notices would confuse borrowers and result in unnecessary inquiries.

Commenters made other recommendations relating to the proposed notice of complete application. Consumer advocacy groups and a trade association recommended requiring servicers to provide the notice of complete application to the servicer's foreclosure counsel where applicable to prevent improper foreclosure filings. A trade association requested that the Bureau issue a model form for the notice. One consumer advocacy group argued that servicers should provide a list of borrower rights and protections under Regulation X. Consumer advocacy groups recommended that the Bureau require servicers to document the need for additional information after the application becomes complete or facially complete to curb dilatory tactics.

The Bureau is adopting § 1024.41(c)(3) and related commentary with several revisions to the content and timing of the written notice. First, the Bureau is revising the disclosures that a written notice must contain pursuant to § 1024.41(c)(3)(i). As revised, § 1024.41(c)(3)(i) requires that the written notice set forth the following information: (1) That the loss mitigation application is complete; (2) the date the servicer received the complete application; (3) that the servicer expects to complete its evaluation within 30 days of the date it received the complete application; (4) that the borrower is entitled to certain foreclosure protections because the servicer has received the complete application and, if the servicer has not made the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process, that the servicer cannot make the first notice or filing required to commence or initiate the foreclosure process under applicable law before evaluating the borrower's complete application, or, if the servicer has made such first notice or filing, that the servicer has begun the foreclosure process, and that the servicer cannot conduct a foreclosure sale before evaluating the borrower's complete application; (5) that the servicer may need additional information at a later date to evaluate the application, in which case the servicer will request that information from the borrower and give the borrower a reasonable opportunity to submit it, the evaluation process may take longer, and the foreclosure protections could end if the servicer does not receive the information as requested; and (6) that the borrower may be entitled to additional protections under State or Federal law. Although these disclosures do not contain exclusively generic disclosures as some commenters requested, the Bureau has minimized the degree to which servicers will need to tailor the disclosures to individual borrowers or make complex determinations about a borrower's protections or application status.

The first three of these disclosures were included in the proposal, although the Bureau has made several non-substantive revisions to improve clarity. The remaining disclosures have been substantially revised or are new. First, for example, the disclosures relating to a borrower's foreclosure protections now consist of one of two standardized disclosures, depending on the foreclosure status. The proposal would have required servicers to state the date on which the borrower's protections began under § 1024.41(f)(2) and (g) and to describe those protections concisely. As one commenter noted, servicers may have had difficulty determining which protections apply at a given moment and how to describe those protections, particularly given the various protections that State law may provide. As revised (and as clarified in comment 41(c)(3)(i)–2, discussed further below), the disclosures provide borrowers with sufficient information about the status of the foreclosure and their foreclosure protections under Regulation X but eliminate much of the burden and risk that the proposal may have introduced. The Bureau believes that receiving these disclosures will help borrowers understand their rights. Although the revised disclosures do not restate verbatim the protections of § 1024.41(f)(2) and (g), the Bureau believes that they alert borrowers to the main contours of the foreclosure protections. While commenters expressed concern that disclosing these dual tracking protections would lead borrowers to believe that a servicer cannot execute a foreclosure sale even after denying the application, the Bureau believes that this is unlikely. The notice must expressly state that the servicer cannot take the applicable actions with respect to foreclosure before evaluating the application. The Bureau believes the notice will effectively communicate to the borrower that the dual tracking protections may end.

The Bureau is also revising the proposed disclosure relating to a servicer's potential need for additional information notwithstanding the complete application. Under § 1024.41(c)(3)(i)(E) as adopted, the written notice must disclose that the servicer may need additional information at a later date to evaluate the application, in which case the servicer will request that information from the borrower and give the borrower a reasonable opportunity to submit it, the evaluation process may take longer, and the foreclosure protections could end if the servicer does not receive the information as requested. Servicers sometimes request additional application materials from borrowers after an application becomes complete, and pursuant to § 1024.41(c)(2)(iv) a borrower might lose protections under § 1024.41 if the borrower fails to respond timely to such requests. Borrowers should be alerted to the possibility that servicers may require them to submit additional documents even after notifying them that an application is complete and that they will need to respond in a timely way to those requests for additional documents.

The Bureau also has decided, in response to concerns raised by commenters, to require an additional disclosure in § 1024.41(c)(3)(i)(F), stating that the borrower may be entitled to additional protections under State or Federal law. Disclosing only the foreclosure protections described above could suggest that borrowers have fewer protections than they in fact have under all applicable laws. This could discourage borrowers from researching or enforcing those other protections. Thus, the Bureau is adopting the new disclosure under § 1024.41(c)(3)(i)(F) to ensure that borrowers are aware that protections set forth on the written notice may not be an exhaustive enumeration of their legal rights and protections.

The Bureau has decided not to adopt two other proposed disclosures. The first of these is whether a foreclosure sale was scheduled as of the date the servicer received the complete application and, if so, the date of that scheduled sale. The second is the proposed disclosure that, if applicable, the borrower will have the opportunity to appeal the servicer's determination to deny the borrower for any trial or permanent loan modification pursuant to § 1024.41(h).

The Bureau is not requiring the first of these disclosures because, although the disclosure may have benefited some borrowers and enhanced servicers' ability to track borrowers' protections under § 1024.41, the Bureau believes that the operational complexities, costs of compliance, and resulting potential legal risks do not justify its inclusion. The Bureau understands that third parties sometimes schedule the foreclosure sale date, and that the date is sometimes subject to change. In these circumstances, servicers may have difficulty timely determining and disclosing the date accurately. The Bureau believes that borrowers generally receive the sale date disclosure on other notices and are often able to confirm the sale date through third parties or public records. The Bureau also expects that servicers, in the course of their loss mitigation communications with borrowers, ordinarily communicate the foreclosure sale date to borrowers. The Bureau may revisit requiring disclosure of the foreclosure sale date at a later time if the Bureau learns that borrowers in fact have difficulty ascertaining the scheduled foreclosure sale date. As the Bureau is not requiring servicers to disclose the date of a scheduled foreclosure sale, it also is not requiring servicers to disclose whether the sale date has been canceled or postponed, as consumer advocacy groups recommended. Again, the Bureau expects that this is information that servicers do ordinarily communicate to borrowers, and the Bureau will continue to monitor this area for consumer harm.

The second disclosure the Bureau is not requiring, as noted above, is the proposed language relating to a borrower's appeal rights. The Bureau has concluded that disclosing whether a borrower will have appeal rights under § 1024.41(h) on a notice of complete application would be premature. Borrowers will have just completed the application at this stage, and they may not have the opportunity to exercise their appeal rights for more than a month in some instances; they also in some cases never have any need to exercise their appeal rights and thus will not need the information at all. Borrowers still will learn of their appeal rights when the information is more salient: If and when an evaluation leads to a denial of a loan modification option and the servicer provides the written notice of determination pursuant to § 1024.41(c)(1)(ii).

The Bureau is also revising the amount of time a servicer has after receiving a complete application to provide a written notice to provide servicers with greater clarity and (in most cases) slightly more time for compliance. Proposed § 1024.41(c)(3)(i) would have required servicers to provide the notice promptly upon receiving a complete loss mitigation application, and proposed comment 41(c)(3)(i)–1 would have clarified that providing the notice within five calendar days would generally satisfy the requirement. Some commenters said that servicers should have more than five calendar days to provide the notice under § 1024.41(c)(3)(i) because it would be difficult to comply with the proposed requirements within that timeframe. As adopted in final form, the section requires servicers to provide the notice within five days, excluding legal public holidays, Saturdays, and Sundays. To ensure that servicers do not delay, this bright-line standard is more prescriptive than the proposal, but it should allow servicers in most cases slightly longer to comply with the requirement than the proposal would have allowed. In conjunction with limiting the complexity of the disclosures as described above, the Bureau believes that this new standard of five days (excluding legal public holidays, Saturdays, and Sundays) should afford servicers sufficient time to review a borrower's application for completion and produce an accurate written notice of complete application. Additionally, the Bureau notes that this timeframe aligns with the timeframe afforded to servicers to provide written notification of a borrower's application status under § 1024.41(b)(2)(i)(B).

At the same time, the Bureau does not believe that it would be appropriate to extend the time frame further. Some borrowers may need evidence that their loss mitigation application is complete to forestall a foreclosure action that would violate § 1024.41(g). As consumer advocacy groups noted in comments to the proposal, a more flexible standard could result in delay and the consequent reduction of borrower protections. Therefore, the Bureau declines to adopt the longer timelines for providing the notice that some commenters suggested.

The Bureau is adopting § 1024.41(c)(3)(ii) substantially as proposed, with minor revisions to improve clarity. Section 1024.41(c)(3)(ii) provides that a servicer is not required to provide a notice pursuant to § 1024.41(c)(3)(i) under three circumstances: (1) The servicer has already provided the borrower a notice under § 1024.41(b)(2)(i)(B) informing the borrower that the application is complete and the servicer has not subsequently requested additional information or a corrected version of a previously submitted document from the borrower pursuant to § 1024.41(c)(2)(iv); (2) the application was not complete or facially complete more than 37 days before a foreclosure sale; or (3) the servicer has already provided the borrower a notice regarding the application under § 1024.41(c)(1)(ii). As the Bureau explained in the proposal, these exceptions are intended to avoid unnecessary burden on servicers and prevent borrower confusion due to the receipt of conflicting or redundant information. The Bureau received no comments on this aspect of the proposal.

Proposed comment 41(c)(3)(i)–1 is no longer necessary, as it would have clarified the requirement that servicers must provide the notice under § 1024.41(c)(3)(i) promptly. As explained above, § 1024.41(c)(3)(i), as adopted, requires the servicer to provide the notice within five days (excluding Saturdays, Sundays, and legal holidays) after receiving a complete loss mitigation application. Thus, the Bureau is adopting entirely different content in new comment 41(c)(3)(i)–1. New comment 41(c)(3)(i)–1 clarifies that a servicer complies with § 1024.41(c)(3)(i)(B) (which requires the servicer to disclose on the written notice of complete application the date the servicer received the complete loss mitigation application) by disclosing the most recent date the servicer received the complete loss mitigation application. The comment provides an example illustrating this principle. The comment also includes a cross-reference to comment 41(c)(3)(i)–3, which discusses a servicer's obligation to provide additional notices.

The Bureau is adopting new comment 41(c)(3)(i)–1 to ensure that servicers understand that the section requires them to disclose the most recent date an application became complete, not the date the application initially became complete or facially complete. Consumer advocacy groups and servicers have informed the Bureau that servicers frequently require borrowers to submit additional information or corrected versions of previously submitted documents several times during the application process, both before and after an application becomes complete. Requiring the disclosure of the most recent date of completion will ensure that borrowers receive current information about the status of an application.

The Bureau is also significantly revising comment 41(c)(3)(i)–2. Proposed comment 41(c)(3)(i)–2 would have clarified proposed disclosures relating to the date on which a borrower's protections began under § 1024.42(f) and (g). As described above, the Bureau is not adopting those disclosures and is therefore replacing the substance of proposed comment 41(c)(3)(i)–2 in its entirety. New comment 41(c)(3)(i)–2 instead clarifies that the two disclosures in § 1024.41(c)(3)(i)(D)(*1*) and (*2*) sets forth different requirements depending on whether the servicer has made the first notice or filing under applicable law for any judicial or non-judicial foreclosure process, as described in § 1024.41(f). The comment also includes a cross-reference to comment 41(f)–1 for a description of whether a document is considered the first notice or filing under applicable law.

The Bureau is adopting comment 41(c)(3)(i)–3 substantially as proposed, with minor revisions to improve clarity. It explains that, except as provided in § 1024.41(c)(3)(ii), § 1024.41(c)(3)(i) requires a servicer to provide a written notice every time a loss mitigation application becomes complete. The comment provides an example illustrating this requirement. The comment also includes a cross-reference to comment 41(c)(3)(i)–1, which clarifies that a servicer complies with § 1024.41(c)(3)(i)(B) (which requires the servicer to disclose on the written notice of complete application the date the servicer received the complete loss mitigation application) by disclosing the most recent date the servicer received the complete loss mitigation application.

Although commenters disagreed as to the merits of providing additional notices of complete application after the servicer receives additional information or corrected documents, the Bureau continues to believe that such notices are warranted to ensure that borrowers receive information regarding the current status of their applications and when their dual tracking protections begin. Particularly given that the notices will suggest to borrowers that failure to respond to follow-up requests could cause the consumer to lose certain foreclosure protections, the Bureau believes that it is important for borrowers to receive further updates about application status. In addition, because some servicers already provide a written notice of complete application to borrowers, they should incur only limited increases in their costs of compliance. The Bureau has also minimized the degree to which servicers will need to tailor the disclosures to individual borrowers or make complex determinations about a borrower's protections or application status.

The Bureau is not adopting a requirement that servicers provide a notice of complete application to servicers' foreclosure counsel. Some commenters recommended this requirement as a means to reduce improper foreclosure filings that harm all parties. As discussed in the section-by-section analyses of § 1024.41(g), servicers must provide prompt instruction to foreclosure counsel upon receipt of a complete loss mitigation application. Similarly, as discussed in the section-by-section analysis of § 1024.38(b)(3)(iii), servicers must have policies and procedures reasonably designed to ensure that servicer personnel promptly inform foreclosure counsel that the servicer has received a complete application, among other things. The Bureau notes that the rule does not prohibit a servicer from voluntarily providing the notice of complete application required under § 1024.41(c)(3) to foreclosure counsel. Doing so may be part of an effective procedure for informing foreclosure counsel about a borrower's loss mitigation application status as part of servicers' efforts to comply with § 1024.41(g). The Bureau believes, however, that it is appropriate to permit servicers discretion in determining alternative means for compliance with §§ 1024.38(b)(3)(iii) and 1024.41(g) and therefore is not requiring servicers to provide the notice of complete application to foreclosure counsel. Whatever method a servicer chooses to instruct foreclosure counsel how to comply with § 1024.41(g), the servicer remains responsible for ensuring compliance with § 1024.41(g).

The Bureau is also not providing a safe harbor under the FDCPA for the written notice. The Bureau believes that the specific required disclosures in the notice, particularly as they have been further tailored in the final rule, should not prompt the filing of baseless FDCPA cases.

41(c)(4) Information Not in the Borrower's Control

The Bureau proposed to amend § 1024.41(c)(1) and to add § 1024.41(c)(4) to address a servicer's obligations with respect to information not in the borrower's control that the servicer requires to determine which loss mitigation options, if any, it will offer a borrower. Among other things, the proposal would have introduced standards governing a servicer's attempts to collect information not in the borrower's control, prohibited a servicer from denying the application because it lacks such information, and required servicers to provide a written notice if a delay in receiving third-party information precludes the servicer from making the determination within 30 days of receiving the complete application. Certain aspects of the proposal would have addressed third-party information, that is, information from a party other than the borrower or servicer, while other aspects would have addressed information not in the borrower's control, which could include third-party information or information within the servicer's control. For the reasons set forth below, the Bureau is adopting § 1024.41(c)(1) as proposed and is adopting § 1024.41(c)(4) largely as proposed but with revisions to the denial prohibition and the written notice requirement.

Under existing § 1024.41(c)(1), a servicer generally must evaluate a borrower's timely complete loss mitigation application within 30 days of receipt. A complete loss mitigation application includes all the information the servicer requires from a borrower in evaluating applications for the loss mitigation options available to the borrower.[247] Thus, a loss mitigation application is considered complete under the current rule notwithstanding whether a servicer requires additional information that is within the control of the servicer or a third-party and not in the control of the borrower, such as investor approval, property tax information, or homeowner association payoff information.[248] While the rule is clear that servicers generally must exercise reasonable diligence in obtaining documents and information from a borrower to complete the application,[249] the rule currently does not address a servicer's obligations with respect to obtaining required information from other parties, including the servicer itself or third-parties.

Delay in obtaining non-borrower information that the servicer requires to determine which loss mitigation options, if any, it will offer a borrower could result in increased fees and negative credit reporting for borrowers and could increase a borrower's delinquency, thereby decreasing the likelihood of successful loss mitigation. It also could disrupt servicers' payments to investors. Servicers can obtain information within their own control at will, but the Bureau learned during pre-proposal outreach that they do not always timely receive third-party information, sometimes because the servicer did not request the information promptly, and sometimes because the party with the information delays in providing it. The Bureau understands that servicers sometimes do not receive necessary third-party information for 15 or 30 days after the initial 30-day evaluation period.

Servicers informed the Bureau before the proposal that they were unsure how to remain in compliance with § 1024.41 when lacking necessary third-party information at the end of the 30-day evaluation period. According to servicers, they have adopted different approaches. In pre-proposal outreach, the Bureau learned that some wait until the third-party provides the information before making any decision on the application, even if it results in a delay beyond the 30 days provided for in § 1024.41(c)(1). One servicer told the Bureau it sends denial notices to borrowers in these circumstances but also informs borrowers that it will reevaluate the application upon receipt of the third-party information. The Bureau explained in the proposal that, although neither of these solutions appears to preclude a borrower from receiving loss mitigation, neither provides borrowers with clear information about the status of the application, and the latter practice may erode borrower protections under § 1024.41. The Bureau expressed concern in the proposal that the absence of clear information about the status of the loss mitigation application may cause borrowers to abandon their pursuit of loss mitigation, or to be uncertain about their loss mitigation options and how they may pursue their rights under § 1024.41.

To address these concerns, the Bureau proposed amendments to § 1024.41 that would have required servicers to exercise reasonable diligence to gather necessary information not in the borrower's control and would have introduced requirements for when third-party delay prevents a servicer from completing the loss mitigation evaluation within 30 days of receiving a complete application. First, the Bureau proposed to amend § 1024.41(c)(1) to provide an exception to the general requirement that a servicer must evaluate a complete loss mitigation application received more than 37 days before a foreclosure sale within 30 days of receiving it from the borrower. Second, under proposed § 1024.41(c)(4)(i), if a servicer required documents or information not in the borrower's control, a servicer would have had to exercise reasonable diligence in obtaining such documents or information. Third, proposed § 1024.41(c)(4)(ii)(A) would have prohibited a servicer from denying a borrower's complete application solely because the servicer had not received documents or information not in the borrower's control. And proposed § 1024.41(c)(ii)(B) would have required that, if 30 days after a complete loss mitigation application is received a servicer is unable to determine which loss mitigation options, if any, it will offer the borrower because it lacks documents or information from a party other than the borrower or the servicer, the servicer must promptly provide the borrower a written notice stating: (1) That the servicer has not received documents or information not in the borrower's control that the servicer requires to determine which loss mitigation options, if any, the servicer will offer on behalf of the owner or assignee of the mortgage; (2) the specific documents or information that the servicer lacks; (3) the date on which the servicer first requested that documentation or information during the current loss mitigation application process; and (4) that the servicer will complete its evaluation of the borrower for all available loss mitigation options promptly upon receiving the documentation or information.

Finally, proposed § 1024.41(c)(4)(ii)(C) would have required that, if a servicer is unable to determine which loss mitigation options, if any, to offer a borrower within 30 days of receiving a complete application due to lack of documents or information from a party other than the borrower or the servicer, upon receiving such documents or information, the servicer must promptly provide the borrower a written notice stating the servicer's determination in accordance with § 1024.41(c)(1)(ii). Proposed comment 41(c)(4)(ii)(C)–1 would have clarified that, in this circumstance, the servicer should not provide the borrower a written notice stating the servicer's determination until the servicer receives the documentation or information.

The Bureau also proposed comments 41(c)(4)(i)–1 and –2 to explain a servicer's obligations under proposed § 1024.41(c)(4)(i)'s reasonable diligence standard with respect to gathering information not in the borrower's control. The proposed comments would have described a servicer's reasonable diligence obligations upon receipt of a complete loss mitigation application and provided for a heightened standard where a servicer has not received third-party information within 30 days of a complete application.

The Bureau sought comment on proposed § 1024.41(c)(4) to understand better the cause of delay in servicers receiving non-borrower information necessary to determine which loss mitigation options, if any, to offer a borrower. This information could include information within the servicer's control or third-party information. The Bureau sought comment on how servicers and third-parties contribute to the delay, as well as which categories of non-borrower information most frequently result in delay. Finally, the Bureau sought comment on whether to limit the amount of time that a servicer must exercise reasonable diligence in

[247] 12 CFR 1024.41(b)(1).

[248] *See* comment 41(b)(1)–5.

[249] *See* 1024.41(b)(1) and comment 41(b)(1)–4.

attempting to obtain information not in the borrower's control.

The Bureau received comments on various elements of proposed § 1024.41(c)(4) and engaged in additional outreach. Among other things, as described in greater detail below, commenters addressed the nature of the delay in obtaining necessary third-party information, the proposed requirement that servicers exercise reasonable diligence in obtaining information not in the borrower's control, the proposed prohibition on denying an application solely due to missing non-borrower information, and the proposal to require a written notice if the servicer cannot make a determination on the application within 30 days.

Several servicers reported that they request information from third parties at different stages of the application process, depending on the type of information. For example, some servicers stated that they wait to receive a complete application from the borrower before requesting certain information from a third party, such as valuation information, a title report, or investor approval. Some servicers reported that they request necessary third-party information shortly after receiving a borrower's application or complete application. One servicer stated that it may request some third-party information, such as title information or a credit report, upon receipt of a borrower's initial application, but that it typically waits to request other information, such as valuation information or real estate tax information, until it receives a complete application.

Several servicers stated that significant delay in obtaining necessary third-party information generally is rare. Several servicers stated that they sometimes find it difficult to obtain timely information from the local taxing authority in certain jurisdictions, timely approval from the mortgage insurance company or investor on the loan, or timely appraisal or valuation information. One servicer expressed difficulty in obtaining information about State loss mitigation programs, tax return information from the IRS, or approval from bankruptcy courts or trustees. Another servicer stated that it has had difficulty obtaining information from local taxing authorities but was still able to proceed in the review process by using estimates based on information from its escrow department. Some servicers noted that, although third parties sometimes delay the provision of necessary information, they always ultimately provide it.

Several commenters discussed the proposed requirement that servicers must exercise reasonable diligence in obtaining documents or information not in the borrower's control that the servicer requires to determine which loss mitigation options, if any, it will offer to the borrower. Consumer advocacy groups supported this element of the proposal, stating that it, in conjunction with the written notice requirement under proposed § 1024.41(c)(4)(i), would enhance transparency and accountability. However, a trade association stated that the requirement that a servicer must seek missing third-party information as quickly as possible after the first 30 days lacked clarity.

Some commenters addressed the prohibition in proposed § 1024.41(c)(4)(ii)(A) on denying a complete loss mitigation application solely because the servicer has not received documents or information not in the borrower's control. Several industry and consumer advocacy groups supported the prohibition. One servicer said that a denial at this stage would disadvantage otherwise engaged borrowers and could lead to ongoing requests for loss mitigation from borrowers that already should have received a loss mitigation determination. A consumer advocacy group stated that borrowers could misunderstand the denial as a denial on the merits of the application, which they said could lead to avoidable foreclosures. Another servicer recommended that the Bureau not limit the amount of time a servicer must exercise reasonable diligence in attempting to obtain third-party information.

Several industry commenters expressed concern that the denial prohibition would conflict with ECOA, which requires creditors to send notification of action taken within 30 days of receiving a completed application. Some of those commenters recommended that the Bureau either clarify that complying with the denial prohibition under proposed § 1024.41(c)(4) does not violate ECOA or allow servicers to deny the complete loss mitigation application due to a lack of third-party information, provided that they later make an offer, if appropriate, upon receipt of the third-party information. Another commenter requested that the Bureau clarify what constitutes a reasonable time for servicers to wait for third-party information.

Consumer advocacy groups and one servicer expressed support for the written notice under § 1024.41(c)(4)(ii)(B). The servicer argued that the notice would provide greater clarity for borrowers in loss mitigation. Some consumer advocacy groups maintained that the proposed written notice requirement would prompt the servicer to seek third-party information more quickly and keep a written record of its efforts to obtain the third-party information, help borrowers understand the application process, and perhaps help expedite the return of the third-party information where appropriate.

Several servicers stated, however, that the proposed written notice requirement would be costly. One servicer stated that one-time costs related to implementing the new notice requirement would be around $2,000 for its third-party vendor, in addition to internal costs for legal services, business process, and technology, and that the necessary implementation would take approximately 60 to 90 days. This commenter also asserted that the proposed content requirements of the written notice would be unlikely to be of much use to borrowers. Other servicers suggested that the benefits of the notice would not outweigh the costs because, for example, borrowers would have other means to secure relevant information. Servicers also expressed other concerns, including that the written notice would confuse or overwhelm a borrower or negatively affect credit availability generally by increasing the cost of servicing. One servicer opposed the notice on the grounds that it would increase the number of inquiries borrowers submit.

Several commenters opposed specific disclosure elements of the proposed notice. One servicer stated that disclosing the specific documents or information that the servicer lacks, as proposed under § 1024.41(c)(4)(ii)(B)(*2*), may prompt borrowers to contact the third-party to obtain the information. A servicer recommended not requiring disclosure of the name of the third party because such disclosure would sometimes not expedite the process and could cause consternation among all stakeholders. Two industry commenters opposed requiring disclosure of the date on which the servicer first requested the missing third-party information, as proposed under § 1024.41(c)(4)(ii)(B)(*3*). One stated that the disclosure would be of little use to borrowers and would increase burden, and the other maintained that it would introduce operational complexities because servicers' systems do not capture that information.

A consumer advocacy group recommended that the notice state whether a scheduled foreclosure sale will be postponed. Several industry commenters said that the notice should contain only generic disclosures, such as the following: That the servicer has received the information it requires from the borrower and is prepared to evaluate the application, that the servicer needs additional information from a third-party, that the servicer has requested such additional information, and that the borrower can contact the servicer for more information. One trade association said that a generic disclosure would prevent unnecessary costs and stated that servicers' systems do not necessarily capture the date a servicer requests the information from the third party. Another trade association stated that a notice containing more specific disclosures would not be of much use to borrowers and would expose servicers to the risk of making mistakes, some of which could cause borrowers undue anxiety.

Two industry commenters opposed the proposed requirement in comment 41(c)(4)(ii)–1 that, notwithstanding delay in receiving information from any third party, servicers must complete all possible steps in the evaluation process within 30 days of receiving a complete application, including by taking all steps mandated by mortgage insurance companies, guarantors, owners, and assignees. A servicer stated that the proposed comment appeared to require servicers to make conditional approvals or piecemeal determinations, which it said would be impractical. A government-sponsored enterprise said that it is not clear what steps a servicer would have to take before receiving the missing third-party information, especially given that such information is often necessary to evaluate the application.

Various industry commenters expressed more general concerns about proposed § 1024.41(c)(4). A credit union opposed what it referred to as the expansion of consumer rights relating to third-party information. A trade association expressed concern that, in the future, the Bureau will attempt to regulate when a bank may make a determination on a loss mitigation application absent third-party information, instead of allowing banks to determine whether such third-party information is necessary. One commenter requested clarification of what constitutes documents or information not in the borrower's control.

Several commenters made specific recommendations about how to accommodate a delay in receiving necessary third-party information. One consumer advocacy group recommended that the Bureau require servicers to postpone a foreclosure sale when a complete application is received more than 37 days before the sale but where necessary third-party information remains outstanding. One servicer requested 10 additional days to provide borrowers with the determination letter pursuant to § 1024.41(c)(1)(ii), saying this additional period would permit the servicer to obtain third-party information and would not harm the borrower because, once the underwriting process is complete, a representative of that servicer already calls to update the borrower as to the determination and appeal rights.

The Bureau is adopting § 1024.41(c)(1) as proposed and is adopting § 1024.41(c)(4) and associated commentary with the revisions described below. As revised, the final rule provides guidance for servicers and protections for borrowers when a servicer lacks required non-borrower information under certain circumstances. As revised, § 1024.41(c)(4)(i) sets forth a servicer's reasonable diligence requirements with respect to information not in the borrower's control, that is, third-party information or information within the servicer's control. It provides that, if a servicer requires documents or information not in the borrower's control to determine which loss mitigation options, if any, it will offer to the borrower, the servicer must exercise reasonable diligence in obtaining such documents or information.

Revised comments 41(c)(4)(i)–1 and –2 clarify the reasonable diligence requirements at different stages of the application process. The Bureau is finalizing comment 41(c)(4)(i)–1 largely as proposed, with minor revisions to improve clarity and accuracy. The comment reiterates the reasonable diligence requirements set forth in § 1024.41(c)(4)(i) and provides that, at a minimum and without limitation, a servicer must request such documents or information from the appropriate party promptly upon determining that the servicer requires the documents or information to determine which loss mitigation options, if any, the servicer will offer the borrower and, to the extent practicable, by a date that will enable the servicer to complete the evaluation within 30 days of receiving the complete loss mitigation application, as set forth in § 1024.41(c)(1). The Bureau notes that some servicers already take steps to do this by, for example, requesting certain information not in the borrower's control as soon as the borrower submits the initial application and requesting other such information within a week of the borrower's submission of all information and documents within the borrower's control.

The Bureau is making more substantive revisions to comment 41(c)(4)(i)–2, which clarifies the reasonable diligence standard when the servicer lacks required third-party information 30 days after receiving a complete application. The Bureau continues to believe that it is appropriate to require servicers to intensify efforts to obtain outstanding third-party information at this stage but believes that the proposed standard, requiring servicers to attempt to obtain documents or information from the appropriate person as quickly as possible, may not have provided servicers sufficient guidance. Thus, revised comment 41(c)(4)(i)–2 provides that, if a servicer has not received the required documents or information from a party other than the borrower or the servicer within 30 days of receiving a complete loss mitigation application, the servicer acts with reasonable diligence pursuant to § 1024.41(c)(4)(i) by heightening efforts to obtain the documents or information promptly, to minimize delay in making a determination of which loss mitigation options, if any, it will offer to the borrower. Such heightened efforts include, for example, promptly verifying that it has contacted the appropriate party and determining whether it should obtain the required documents or information from a different party. The Bureau believes that this standard is clearer for servicers than the proposed standard would have been and prompts servicers to complete the application process as close as possible to the 30-day evaluation period set forth in § 1024.41(c)(1).

The Bureau also notes that comment 41(c)(4)(i)–1 applies with respect to any type of non-borrower information, including third-party information or information within the servicer's control, whereas comment 41(c)(4)(i)–2 applies only when the servicer lacks third-party information. The reason for this distinction is that comment 41(c)(4)(i)–2 applies only after 30 days have passed since the servicer received the complete application, and § 1024.41(c)(4)(ii) (described below) contemplates servicers exceeding the 30-day mark only when the servicer lacks information from a third-party, not the servicer. Servicers should not exceed the 30-day timeline for lack of accessing information within their own control.

As noted above, the Bureau is limiting the prohibition on denying an application due to a servicer lacking required third-party information. Like the proposal, § 1024.41(c)(4)(ii)(A)(*1*) provides that a servicer must not deny a complete loss mitigation application solely because the servicer lacks required documents or information not in the borrower's control. However, unlike the proposal, the Bureau is adopting an exception to this prohibition under § 1024.41(c)(4)(ii)(A)(*2*). Section 1024.41(c)(4)(ii)(A)(*2*) provides that, if a servicer has exercised reasonable diligence to obtain required documents or information from a party other than the borrower or the servicer, but the servicer has been unable to obtain such documents or information for a significant period of time following the 30-day period identified in § 1024.41(c)(1), and the servicer, in accordance with applicable requirements established by the owner or assignee of the borrower's mortgage loan, is unable to determine which loss mitigation options, if any, it will offer the borrower without such documents or information, the servicer may deny the application and provide the borrower with a written notice in accordance with § 1024.41(c)(1)(ii). The provision also states that, when providing the written notice, the servicer must provide the borrower with a copy of the written notice required by § 1024.41(c)(4)(ii)(B). As described below, that notice includes disclosures about the cause of the delay.

The Bureau stresses that the reasonable diligence standard that a servicer must satisfy before denying an application under § 1024.41(c)(4)(ii)(A)(*2*) is the heightened standard in comment 41(c)(4)(ii)–2, described above. Borrowers should not lose the opportunity for loss mitigation at this stage due to missing third-party information unless a servicer is absolutely unable to obtain the information. Due to the significant harm of denial, the Bureau expects servicers to redouble efforts to obtain such information.

Nonetheless, the Bureau is adopting this exception because, in the highly unlikely event that a servicer is unable to obtain third-party information, it would be harmful to borrowers, servicers, and investors if the servicer was never able to deny the complete loss mitigation application. In this circumstance, borrowers would remain in uncertain status while waiting on a decision for an indefinite amount of time, and § 1024.41(g) may prohibit a servicer from ever foreclosing on the loan, even if the borrower did not resume making payments.

The Bureau expects that this exception will apply in exceedingly rare circumstances. Based on its outreach to servicers and government-sponsored enterprises, the Bureau is unaware of any instance in which a servicer has been unable to obtain information from a third-party that it requires to make a determination as to which loss mitigation options, if any, to offer the borrower after receiving a complete loss mitigation application from the borrower. As several commenters noted, and as the Bureau explained in the proposal, it would be unjust and significantly harmful to deny an engaged borrower who has completed a loss mitigation application solely because of a third party's delay. The Bureau continues to believe that, whenever possible, the borrower should not lose the opportunity for loss mitigation solely because of such delay. Among other harms, a borrower in this circumstance might lose the opportunity to obtain loss mitigation and thereby avoid foreclosure; and such a borrower may not have another opportunity to apply for loss mitigation with the protections of § 1024.41, pursuant to § 1024.41(i). Further, as one commenter pointed out, some borrowers may attempt to re-apply for loss mitigation following a denial due to the servicer lacking required third-party information, which could produce additional, unnecessary burden for borrowers and servicers.

The Bureau believes that two aspects of the denial prohibition exception provided in § 1024.41(c)(4)(ii)(A)(*2*) should mitigate the risks to borrowers associated with allowing servicers to deny an application due solely to the servicer lacking required third-party information. First, the exception applies only if, in accordance with requirements established by the owner or assignee of the mortgage loan, a servicer cannot evaluate the borrower without the information. For example, there may be instances in which investors may be willing to waive requirements for specific third-party information that servicers must otherwise obtain, in which case servicers should promptly pursue such waivers and evaluate the borrower upon receipt. Second, when sending a denial letter, the servicer must also send a copy of the written notice under § 1024.41(c)(4)(ii)(B), which describes generally the missing information and the servicer's efforts to obtain it. Receiving this information may enable borrowers to better protect their rights, including when filing an appeal after a denial, if appropriate. Also, upon receiving the notice of the missing information, some borrowers may be able to help acquire the information. The Bureau will monitor the industry to ensure that servicers do not inappropriately exploit this exception to the denial prohibition.

The Bureau declines to provide more specific guidance, as one commenter requested, as to how long a servicer must exercise reasonable diligence to attempt to obtain required third-party information before the servicer may deny the application. Reasonable diligence depends on the facts and circumstances of a particular loss mitigation application, and the Bureau is concerned that any specific deadline could negatively affect a servicer's efforts to obtain outstanding third-party information. The Bureau understands that, although § 1024.41(c)(4)(ii)(A)(*2*) will rarely apply, the response time of third parties will vary depending on the type of information or the identity of the third party, among other factors. However, the Bureau reiterates that servicers must intensify reasonable diligence efforts when lacking required third-party information after 30 days have passed, pursuant to comment 41(c)(4)(ii)–2, described above.

The Bureau notes that the denial prohibition does not prevent a servicer from complying with Regulation B § 1002.9(a)(1)(i), as some commenters suggested. Although servicers may be required to provide Regulation B § 1002.9(a)(1) notices relating to a borrower's loss mitigation application in certain circumstances, the denial prohibition under final § 1024.41(c)(4)(ii)(A) will not prevent a servicer from complying with the requirement in Regulation B § 1002.9(a)(1)(i) to provide such notices within 30 days after receiving a completed application because compliance with Regulation B and Regulation X requirements may operate on different timelines. Under Regulation B § 1002.2(f), a completed application means an application in connection with which a creditor has received all the information that the creditor regularly obtains and considers in evaluating applications for the amount and type of credit requested. Regulation B's definition of application permits flexibility in determining what type and amount of information are required from applicants for different types of credit, and the information requirements for a completed application for different types of credit, including information from third parties.[250] Although a loss mitigation application may be considered complete under § 1024.41(b)(1) notwithstanding whether a servicer requires additional information that is not in control of the borrower, such an application may not yet be a completed application under Regulation B § 1002.2(f) if the creditor regularly obtains and considers information from third parties for that type of credit requested, and therefore a creditor would not yet be required to comply with Regulation B § 1002.9(a)(1)(i) for such an application.[251]

The Bureau is also adopting § 1024.41(c)(4)(ii)(B) with certain revisions. In addition to adopting revisions to improve clarity, the Bureau is amending the contents of the written notice that a servicer must provide a borrower if a servicer is unable to make a determination within the 30-day evaluation period under § 1024.41(c)(1) because the servicer lacks required documents or information from a party other than the borrower or the servicer. Under § 1024.41(c)(4)(ii)(B), the written notice must inform the borrower that the servicer has not received documents or information not in the borrower's control that the servicer requires to determine which loss mitigation options, if any, it will offer to the borrower on behalf of the owner or assignee of the mortgage; of the specific documents or information that the servicer lacks; that the servicer has requested such documents or information; and that the servicer will complete its evaluation of the borrower for all available loss mitigation options promptly upon receiving the documents or information. These disclosures inform borrowers of their application status.

Section 1024.41(c)(4)(ii)(B) retains the proposed requirement that the written notice disclose the specific documents or information that the servicer lacks and therefore does not contain entirely generic disclosures as recommended by some commenters. The Bureau believes providing this information in the notice may increase borrower understanding of the notice. The Bureau also believes that requiring this disclosure may limit the need for borrowers to make additional requests for information of the servicer prompted by uncertainty or lack of information about the status of an application. By providing borrowers timely, accurate information about the status of their applications, the notice could result in fewer inquiries to the servicer as to the status of a borrower's loss mitigation application. Finalizing an entirely generic notice would have inappropriately placed the onus on the borrower to obtain the relevant information from the servicer. Borrowers are unlikely to know what third-party information a servicer requires unless the servicer affirmatively tells them.

The Bureau acknowledges commenters' concerns about borrowers contacting third parties. The Bureau believes that, if borrowers can easily contact a third-party, such as a homeowner's association or their local taxing authority, they may be able to make their own attempts to obtain the missing information and could help expedite the process. The Bureau further notes that § 1024.41(c)(4)(ii)(B) does not require servicers to disclose the specific third-party from which they lack information, but only the specific information they lack. This should insulate many third-parties that may not be prepared for borrower communications, such as title companies or investors, from receiving them. Although some borrowers may contact their servicers to determine the specific identity of the third-party, on balance, these requests should not result in a significantly greater number of requests for information, as one commenter suggested, given that the Bureau expects that the provision of the written notice should reduce borrowers' overall need to make such requests.

The final rule does not require that the written notice disclose the date on which the servicer first requested the documentation or information during the current loss mitigation application, as proposed § 1024.41(c)(4)(ii)(B)(*3*) would have required. The Bureau believes that such a disclosure may have promoted compliance by making it easier for servicers and borrowers to determine whether the servicer exercised reasonable diligence in obtaining third-party information as § 1024.41(c)(4)(i) requires. However, upon consideration of the comments received, the Bureau is eliminating the proposed requirement because it may offer limited value for borrowers while imposing burden on servicers.

The Bureau declines to adopt other disclosures for the written notice as some commenters recommended. For example, the Bureau is not adopting a consumer advocacy group's recommendation that the notice state whether a foreclosure sale date will be postponed. Servicers may include such a disclosure, but the Bureau declines to mandate it. The Bureau believes that requiring this disclosure would add significant operational complexity for servicers with limited benefit to borrowers. The Bureau believes that borrowers who are concerned about the timing of the foreclosure sale may contact their servicers to obtain the information and notes that affected borrowers will already have certain foreclosure protections and are likely to have received notification of those protections. Among other protections, if § 1024.41(g) applies with respect to the complete application, a servicer is prohibited from moving for foreclosure judgment or order of sale, or conducting a foreclosure sale, unless certain conditions apply.[252] In addition, if a servicer must provide the notice of complete application to the borrower pursuant to § 1024.41(c)(3)(i), that notice will already have informed the borrower generally about these foreclosure protections. Although servicers are not required to inform borrowers in the notice under § 1024.41(c)(4)(ii)(B) whether they will postpone a foreclosure sale, this lack of disclosure should not significantly affect borrowers' ability to protect their interests.

The Bureau is also not adopting commenters' recommendation that the Bureau include a disclosure prompting the borrower to contact the servicer for more information. Commenters recommended this disclosure as part of a written notice that would contain only generic disclosures. Servicers may include such a disclosure, but the Bureau declines to mandate it. The Bureau believes that borrowers generally already know how to contact their servicers and notes that many servicers include contact information on all correspondence.

As revised, § 1024.41(c)(4)(ii)(B) requires servicers to provide the written notice (when required under the rule) within the 30-day determination period identified in § 1024.41(c)(1) or promptly thereafter. This timing requirement differs from the proposal, which would have required servicers to provide the written notice promptly if, 30 days after a complete application is received, the

[250] *See* 12 CFR 1002.2(f), comments 2(f)–1, –2, and –6.

[251] See 12 CFR 1024.41(b)(1), comment 41(b)(1)–5; 12 CFR 1002.9(a)(1)(i), comment 9(a)(1)–1.

[252] Specifically, the servicer is prohibited from moving for foreclosure judgment or order of sale or conducting a foreclosure sale unless: (1) The servicer has sent the borrower a notice pursuant to § 1024.41(c)(1)(ii) that the borrower is not eligible for any loss mitigation option and the appeal process under § 1024.41(h) is not applicable, the borrower has not requested an appeal within 14 days, or the servicer has denied the borrower's appeal; (2) the borrower rejects all loss mitigation options offered by the servicer; or (3) the borrower fails to perform under an agreement on a loss mitigation option.

servicer is unable to make a determination on the application because the servicer lacks documents or information from a third party. Requiring servicers to provide the written notice within this 30-day period or promptly thereafter should more timely apprise borrowers of their application status.

Although servicers will incur costs to provide a notice to borrowers under § 1024.41(c)(4)(ii)(B), the Bureau is requiring it because it will provide substantial benefit to affected borrowers, as described above. To the extent that any additional cost may negatively affect the cost or availability of credit, as one commenter suggested, the Bureau believes that such impact will be negligible, in part because servicers have reported that inability to evaluate a loss mitigation application because of the lack of third party data is extremely uncommon. The incremental cost of providing the notice should be small.

The Bureau is not adopting one commenter's recommendation to allow servicers 10 additional days to obtain required third-party information and to provide the written notice of which loss mitigation options, if any, to offer to a borrower as required under § 1024.41(c)(1)(ii). As the Bureau explained when adopting § 1024.41(c)(1), a 30-day evaluation timeline is an industry standard.[253] In most cases, servicers should be able to complete the evaluation within this timeframe. Adding 10 days could lead to unnecessary delay, which could increase costs for the borrower during the application process. Further, even if the Bureau were to add 10 days, the extension still may not suffice. As described above, the Bureau understands that servicers sometimes do not receive necessary third-party information for 15 or 30 days after the initial 30-day evaluation period.

The Bureau is revising § 1024.41(c)(4)(ii)(C) to specify that, if a servicer must provide a notice required by § 1024.41(c)(4)(ii)(B), the servicer must not provide the borrower a written notice stating the servicer's determination pursuant to § 1024.41(c)(1)(ii) until the servicer receives the required documents or information referenced in § 1024.41(c)(4)(ii)(B)(*2*), except as provided under § 1024.41(c)(4)(ii)(A)(*2*). As described above, § 1024.41(c)(4)(ii)(A)(*2*) allows a servicer to deny an application for lack of third-party information in certain circumstances.

Section 1024.41(c)(4)(ii)(C) further provides that, upon receiving such third-party documents or information, the servicer must promptly provide the borrower with the written determination notice required under § 1024.41(c)(1)(ii). The provision is intended to ensure that servicers do not delay providing the determination notice. The Bureau also understands that servicers generally already provide the determination notice promptly upon receiving the third-party information that the servicers required. The Bureau proposed this provision as comment 41(c)(4)(ii)(C)–1 but is incorporating it into the regulatory text of § 1024.41(c)(4)(ii)(C) and eliminating the comment.

The Bureau is adopting comment 41(c)(4)(ii)–1 with certain revisions to improve clarity. That comment provides that, notwithstanding delay in receiving required documents or information from any party other than the borrower or the servicer, § 1024.41(c)(1)(i) requires a servicer to complete all possible steps in the process of evaluating a complete loss mitigation application within 30 days of receiving the complete loss mitigation application. The comment further provides that such steps may include requirements imposed on the servicer by third parties, such as mortgage insurance companies, guarantors, owners, and assignees. The comment also provides an example explaining that, if a servicer can determine a borrower's eligibility for all available loss mitigation options based on an evaluation of the borrower's complete loss mitigation application subject only to approval from the mortgage insurance company, § 1024.41(c)(1)(i) requires the servicer to do so within 30 days of receiving the complete loss mitigation application notwithstanding the need to obtain such approval before offering the borrower any loss mitigation options.

In other words, a servicer should not rely on the fact that it lacks third-party information as a reason to delay its evaluation. The Bureau believes that a servicer should be prepared to make a determination on a complete loss mitigation application upon receipt of the missing third-party information and make its determination as possible to the 30-day evaluation period set forth in § 1024.41(c)(1). As the Bureau explained in the proposal, any unnecessary delay of the evaluation process because of delayed third-party information increases the risk of harm to borrowers. For example, such delay increases the risk that a borrower's documents would go stale, possibly deferring the evaluation further while the hardship worsens, thereby reducing the likelihood that the servicer will offer the borrower a loss mitigation option. It also increases the likelihood that a borrower will incur additional fees or negative credit reporting or become disengaged from the loss mitigation process. To the extent that this comment results in servicers determining internally that a borrower is conditionally approved for loss mitigation pending receipt of the third-party information, or results in servicers making piecemeal determinations, as one commenter suggested, the Bureau believes that this is could result in improved outcomes for borrowers and is appropriate.

In response to one commenter's concern that comment 41(c)(4)(ii)–1 will not provide sufficient clarity as to the steps that a servicer must take before receiving the third-party information, the Bureau notes that the rule sets forth no standard list of steps that a servicer must take to evaluate any application. Servicers must take whatever steps they can in the evaluation process without having the missing third-party information. This is a fact-specific determination dependent on, among other things, investor requirements and what information the servicer is lacking. For example, when a servicer is waiting to receive investor approval, the Bureau expects the servicer to complete its evaluation subject only to investor approval.

The Bureau is also adopting new comment 41(c)(4)(ii)–2, which provides that § 1024.41(c)(4)(ii)(A)(*2*) permits a servicer to deny a complete loss mitigation application (in accordance with applicable investor requirements) if, after exercising reasonable diligence to obtain the required documents or information from a party other than the borrower or the servicer, the servicer has been unable to obtain such documents or information for a significant period of time and the servicer cannot complete its determination without the required documents or information. The comment further clarifies that § 1024.41(c)(4)(ii)(A)(*2*) does not require a servicer to deny a complete loss mitigation application and permits a servicer to offer a borrower a loss mitigation option, even if the servicer does not obtain the requested documents or information. This comment clarifies that § 1024.41(c)(4)(ii)(A)(*2*) addresses only whether a servicer is permitted to deny a complete loss mitigation application due to a lack of necessary third-party information and that the rule does not speak to when a servicer is permitted to

[253] 78 FR 10695, 10826.

make an offer after receiving a complete loss mitigation application.

The Bureau declines to define further what constitutes documents or information not in the borrower's control, as one commenter requested. A servicer must already determine what documents and information it requires from a borrower to complete a loss mitigation application. Whether documents and information are outside of the borrower's control will depend on the facts and circumstances of each case.

41(f) Prohibition on Foreclosure Referral

41(f)(1) Pre-Foreclosure Review Period

Section 1024.41(f)(1) generally prohibits a servicer from making the first notice or filing required by applicable law to begin the foreclosure process unless a borrower's mortgage loan obligation is more than 120 days delinquent, but it includes an exception in § 1024.41(f)(1)(iii) allowing a servicer to make the first notice or filing when the servicer is joining the foreclosure action of a subordinate lienholder. The Bureau proposed to revise § 1024.41(f)(1)(iii) to provide a parallel exception when a servicer is joining the foreclosure action of a superior lienholder. The Bureau is adopting § 1024.41(f)(1)(iii) as proposed.

In the September 2013 Mortgage Final Rule, the Bureau explained that, if a borrower is current on a mortgage secured by a senior lien but is being foreclosed on by a subordinate lienholder, it would be appropriate for the servicer of the mortgage secured by the superior lien to join the foreclosure action, even though the borrower may not be delinquent on the mortgage secured by the superior lien, because the first notice or filing would not be based upon a borrower's delinquency in this circumstance.[254]

The Bureau did not then consider the situation in which the servicer is joining the foreclosure action of a superior lienholder. After the issuance of the September 2013 Mortgage Final Rule, servicers asked the Bureau why the same rule does not apply to a foreclosure initiated by both a junior and a senior lienholder. In the proposal, the Bureau stated its belief that the same rationale justifies expanding the current exemption to circumstances in which the servicer is joining the foreclosure action of a superior lienholder. The Bureau explained that it would be appropriate for the servicer of the mortgage secured by the subordinate lien to join the foreclosure action, even though the borrower may not be delinquent on the mortgage secured by the subordinate lien, because the first notice or filing would not be based upon a borrower's delinquency with respect to the serviced loan. Further, the Bureau explained that expanding the exemption seems to present only minimal borrower protection concerns because the borrower would already be facing a foreclosure action on the property.

The proposed rule aimed to help servicers by making clear that the servicer of a subordinate lien may participate in the existing foreclosure action on a superior lien. The servicer's participation in the foreclosure action of a superior lienholder may allow the servicer to represent its interests in the existing foreclosure action more fully under some circumstances. Additionally, it may sometimes be necessary, when the same servicer is responsible for both the superior and subordinate liens, for the servicer to initiate foreclosure on the subordinate lien as part of the foreclosure action on the superior lien, to clear title to the property for the subsequent owner.[255]

The Bureau received numerous comments on proposed § 1024.41(f)(1)(iii). Commenters included servicers, trade associations, and credit unions. All commenters supported the proposal.

The Bureau is adopting § 1024.41(f)(1)(iii) as proposed to allow a servicer to make the first notice or filing before the loan obligation is 120 days delinquent when the servicer is joining the foreclosure action of a superior lienholder.

41(g) Prohibition on Foreclosure Sale

Under § 1024.41(g), if a borrower submits a complete loss mitigation application after a servicer has made the first notice or filing, but more than 37 days before a foreclosure sale, the servicer is prohibited from moving for foreclosure judgment or order of sale, or conducting a foreclosure sale, unless the borrower's loss mitigation application is properly denied, withdrawn, or the borrower fails to perform on a loss mitigation agreement.[256] Servicers and consumer advocacy groups had both expressed a desire for clarification of the prohibition on the conduct of a sale and whether a servicer was ever excused from the prohibition while a loss mitigation application was pending. To clarify the prohibition on the conduct of a foreclosure sale, the Bureau proposed to revise existing comments 41(g)–1 and –3 and add new comment 41(g)–5, as well as commentary to clarify the requirements for policies and procedures regarding communications with service provider personnel, including foreclosure counsel, under § 1024.38(b)(3)(iii) as they relate to the prohibition under § 1024.41(g).

For the reasons discussed below, the Bureau has substantially revised the proposed provisions. The Bureau believes that its final language is consonant with both the original rule and the proposal in affirming the absolute nature of the prohibition on conduct of a foreclosure sale. The Bureau is (1) not adopting the proposed revision to existing comment 41(g)–1 that would have required dismissal in certain circumstances, but instead is leaving the comment in its existing form; (2) adopting a revised comment 41(g)–3 clarifying servicers' responsibilities when acting through foreclosure counsel, with modifications to the proposal; (3) adopting new comment 41(g)–5 clarifying the prohibition on conduct of a foreclosure sale, with modifications to the proposal; and (4) adopting new comment 38(b)(3)(iii)–1 regarding communications with service providers, including foreclosure counsel, during the pendency of a foreclosure, with minor changes to the proposal. The Bureau is clarifying that the prohibition on conduct of a sale during the pendency of a loss mitigation application is absolute and that the servicer is not excused from compliance because it acts through a service provider, including foreclosure counsel. The Bureau recognizes that, to avoid the illegal conduct of a sale, servicers may

[254] *See* 78 FR 60381, 60406 (Oct. 1, 2013).

[255] If the servicer in this circumstance does not initiate foreclosure on the subordinate lien, the servicer may be deemed not to have joined the subordinate lienholder in the foreclosure action, causing the subordinate lien to remain on the property after foreclosure. *See, e.g., Deutsche Bank Natl. Trust Co.* v. *Mark Dill Plumbing Co.,* 903 N.E.2d 166, 169 (Ind. Ct. App. 2009), *aff'd on rehearing,* 908 N.E.2d 1273 (Ind. Ct. App. 2009) (''Foreclosure by a senior mortgagee does not affect the rights of a junior lienholder who was not made a party to the foreclosure action.''); *Portland Mort. Co.* v. *Creditors Protective Ass'n,* 262 P.2d 918, 922 (Or. 1953) (''The omitted junior lienholder is in the same position as if no foreclosure had ever taken place, and he has the same rights, no more and no less, which he had before the foreclosure suit was commenced.'').

[256] Specifically, the servicer is prohibited from moving for foreclosure judgment or order of sale or conducting a foreclosure sale unless: (1) The servicer has sent the borrower a notice pursuant to § 1024.41(c)(1)(ii) that the borrower is not eligible for any loss mitigation option and the appeal process under § 1024.41(h) is not applicable, the borrower has not requested an appeal within 14 days, or the servicer has denied the borrower's appeal; (2) the borrower rejects all loss mitigation options offered by the servicer; or (3) the borrower fails to perform under an agreement on a loss mitigation option.

need to dismiss foreclosure proceedings in some circumstances. As discussed below, the Bureau believes that dismissals to avoid conduct of an illegal foreclosure sale are rare. The Bureau believes that these clarifications will substantially assist servicers and their service providers in compliance with the rule.

Background

As noted above, § 1024.41(g)'s prohibition applies to two distinct types of actions in the foreclosure process: Moving for judgment or an order of sale and *conducting* a foreclosure sale. A servicer's obligations under § 1024.41(g) will vary depending on whether the foreclosure is non-judicial (requires no court action) or judicial (requires court action or order). If the applicable foreclosure procedure is non-judicial and does not require any court proceeding or order, then § 1024.41(g)'s prohibition on moving for judgment or order of sale is inapposite. Thus, in a non-judicial proceeding, when there is no court action, where § 1024.41(g) applies, it addresses only the conduct of a sale and not a non-existent court proceeding. However, where the foreclosure process requires court action or a court order and § 1024.41(g) is applicable, a servicer must comply with both the prohibition against moving for judgment or order of sale and the prohibition against conducting a foreclosure sale.

Existing comment 41(g)–1 addresses the servicer's obligation, where the foreclosure process requires such court action, with respect to the moving for judgment or order of sale and prior to the actual conduct of the sale. Existing comment 41(g)–1 explains that the prohibition on a servicer moving for judgment or order of sale includes making a dispositive motion for foreclosure judgment, such as a motion for default judgment, judgment on the pleadings, or summary judgment, which may directly result in a judgment of foreclosure or order of sale. The comment further explains that a servicer that has made a dispositive motion before receiving a complete loss mitigation application has not moved for a foreclosure judgment or order of sale in violation of the rule if the servicer takes reasonable steps to avoid a ruling on such motion or issuance of such order prior to completing the procedures required by § 1024.41, notwithstanding whether any such step successfully avoids a ruling on a dispositive motion or issuance of an order of sale. Existing comment 41(g)–2 provides that § 1024.41(g) does not prevent a servicer from proceeding with any steps in the foreclosure process, so long as any such steps do not cause or directly result in the issuance of a foreclosure judgment or order of sale, or the conduct of a foreclosure sale, in violation of § 1024.41(g). Existing comment 41(g)–3 explains that a servicer is responsible for promptly instructing foreclosure counsel retained by the servicer not to proceed with filing for foreclosure judgment or order of sale, or to conduct a foreclosure sale, in violation of § 1024.41(g), when a servicer has received a complete loss mitigation application. Such instructions may include instructing counsel to move for continuance with respect to the deadline for filing a dispositive motion.

As the Bureau noted in the proposal, since the Mortgage Servicing Rules went into effect, borrowers have not always received the benefits of the protections intended by § 1024.41(g), specifically, that borrowers who timely submit a complete loss mitigation application would not lose their homes at a foreclosure sale while evaluation of that application was pending with the servicer. These instances of foreclosure proceedings continuing in spite of § 1024.41(g)'s prohibitions may occur for several reasons, including impeded communications between servicers and their counsel, confusion about the reasonable steps framework, and difficulties managing judicial expectations.

The Bureau has received reports that counsel retained by servicers to conduct the foreclosure proceeding sometimes have lacked current and accurate information about whether borrowers' loss mitigation applications are complete. Foreclosure counsel in some situations may not be taking adequate steps to avoid a judgment or order of sale and may fail to seek the delay or continuance of a sale when necessary to provide adequate time for the servicer to evaluate the loss mitigation application. The Bureau has also received reports that, in some cases, foreclosure counsel may not represent accurately to the court the status of the loss mitigation application. Some reports indicated that even when servicers, through their foreclosure counsel, took some steps to avoid a judgment or sale, they may not have been impressing sufficiently upon the courts the significance of § 1024.41(g)'s prohibition on sale. Consequently, some borrowers lost their homes at foreclosure sales despite their timely submission of complete loss mitigation applications to the servicer.

The Bureau also has received a substantial number of inquiries concerning what steps a servicer must take to comply with § 1024.41(g) where a court orders a foreclosure sale date that does not afford sufficient time for the servicer to complete the evaluation process required by § 1024.41. Some inquirers suggested that the ''reasonable steps'' framework in comment 41(g)–1, applicable only to pre-sale activities in a judicial proceeding, such as a motion for judgment or order of sale, might apply to the conduct of the sale, in spite of the absolute prohibition on conduct of a sale contained in § 1024.41(g).

The Bureau had learned that some courts have ruled on a pending dispositive motion and set a date for the foreclosure sale despite the servicer's attempts through counsel to delay the ruling or order as required under § 1024.41(g). In many cases, the initially scheduled foreclosure sale date set by the court may not have provided the servicer adequate time to complete the loss mitigation evaluation and appeals process. Servicers indicated that, in some instances, courts have required that the foreclosure continue to a sale even when the servicer needs additional time to complete the loss mitigation process. Media accounts as well as reports from consumer advocacy groups suggested that some courts might have been refusing to continue cases when presented with a motion to do so, although the Bureau was not able to confirm the extent of that practice or distinguish between its prevalence when the servicer, as distinct from the borrower, was the moving party.[257]

Based upon the reports and information received, the Bureau was concerned that the absence of express commentary requiring a servicer to take affirmative steps to delay the sale may have encouraged some servicers to fail to instruct foreclosure counsel appropriately and, further, might have led courts to discount servicer obligations under the rule, depriving borrowers of the important consumer protections against dual tracking that are provided under § 1024.41. Accordingly, the Bureau proposed several revisions to commentary to address servicers' obligations in instructing foreclosure counsel, the general nature of the reasonable steps obligation, and the absolute prohibition on conducting a foreclosure sale pending review of a complete loss mitigation application, even if a motion for judgment or order of sale was excused as a violation of the rule

[257] *See, e.g.,* Alison Fitzgerald, *Homeowners steamrolled as Florida courts clear foreclosure backlog,* The Ctr. for Pub. Integrity, Sept. 10, 2014, *available at http://www.publicintegrity.org/2014/09/10/15463/homeowners-steamrolled-florida-courts-clear-foreclosure-backlog.*

because of the servicer's reasonable steps to prevent entry of such a motion.

Proposed Rule

The Bureau proposed to revise two existing comments and add two comments to clarify the operation of § 1024.41(g). As proposed, revised comment 41(g)–1 generally retained the existing comment with regard to the nature of servicers' duty to avoid moving for judgment or order of sale. Revised comment 41(g)–1 would have added new language clarifying that, if, upon receipt of a complete loss mitigation application, a servicer or its foreclosure counsel failed to take reasonable steps to avoid a ruling on a pending motion for judgment or the issuance of an order of sale, the servicer would have to dismiss the foreclosure proceeding if necessary to avoid the sale. Proposed new comment 41(g)–5 would have clarified that § 1024.41(g) prohibits a servicer from conducting a foreclosure sale, even if a person other than the servicer administers or conducts the foreclosure sale proceedings, and that servicers must take reasonable steps to delay the sale until one of the conditions under § 1024.41(g)(1) through (3) is met.

The Bureau also proposed to revise existing comment 41(g)–3 to clarify servicers' obligations under § 1024.41(g) when acting through foreclosure counsel. And the Bureau proposed related comment 38(b)(3)(iii)–1 to clarify that policies and procedures required under § 1024.38(b)(3)(iii) to facilitate sharing of information with service provider personnel responsible for handling foreclosure proceedings must be reasonably designed to ensure that servicer personnel promptly inform service provider personnel handling foreclosure proceedings that the servicer has received a complete loss mitigation application.

Thus, under the proposal, where a servicer failed to take reasonable steps to avoid a ruling on a dispositive motion to avoid issuance of a judgment or an order of sale, or to delay the foreclosure sale, or where the servicer's foreclosure counsel fails to take such steps, the § 1024.41(g) commentary specified that the servicer would have to dismiss the foreclosure proceeding if necessary to avoid completing the foreclosure during the pendency of the loss mitigation evaluation.

In the proposal, the Bureau stated its belief that the proposed revisions to the commentary would aid servicers in complying with § 1024.41(g)'s prohibition and assist courts in applying the prohibition in foreclosure proceedings. The Bureau also stated its belief that clarifying that a servicer must take affirmative reasonable steps, not only to delay issuance of a judgment or order, but also to delay the sale, would ensure that borrowers are protected from foreclosure during pending evaluations of complete loss mitigation applications. Further, the Bureau stated its belief that it would be appropriate to require a servicer to dismiss a foreclosure if necessary to permit completion of the loss mitigation evaluation procedures where the servicer or its foreclosure counsel has failed to take such reasonable steps. The Bureau explained its belief that clarifying that dismissal is required if a servicer has failed to take reasonable steps, on its own or through foreclosure counsel, to avoid a ruling or to delay a foreclosure sale during a pending loss mitigation evaluation would create incentives for servicers to develop more effective procedures to carry out the requirements of § 1024.41(g). The Bureau estimated that dismissal should rarely be necessary, given that servicers have it within their power to take all such reasonable steps to avoid a ruling on a dispositive motion, issuance of a judgment or an order of sale, or the conduct of a foreclosure sale.

Under existing comment 41(g)–1, a servicer that fails to take reasonable steps to avoid a ruling on a motion pending at the time the servicer receives a complete loss mitigation application violates § 1024.41(g)'s prohibition against moving for judgment or order of sale. In proposing to revise comment 41(g)–1, the Bureau explained that, where a servicer fails to take reasonable steps to avoid a ruling on or issuance resulting from a dispositive motion, as postulated in current comment 41(g)–1, the servicer must still comply with the prohibition against conducting a sale. The Bureau explained that a servicer's failure to comply with one element of § 1024.41(g), the prohibition against proceeding on a dispositive motion, does not justify disregard of the prohibition against conducting a sale and that the completion of a foreclosure sale during the evaluation of a borrower's complete loss mitigation application is precisely the harm that the Bureau crafted § 1024.41(g) to avoid. Consequently, to emphasize that a servicer must take reasonable steps to avoid a ruling or issuance of an order for sale when there is a pending loss mitigation evaluation, proposed comment 41(g)–1 would have provided explicitly that failure to take such steps at the pre-sale stage requires dismissal if necessary to avoid the foreclosure sale.

Proposed comment 41(g)–5 would have clarified that a servicer must seek to delay a foreclosure sale, even if a third party, such as a sheriff, trustee, or other public official, administers or conducts the sale proceedings, as is the case under foreclosure procedure in many States. The Bureau stated that any interpretation of § 1024.41(g)'s prohibition against conducting a foreclosure sale that relieves servicers of the responsibility to act to prevent a foreclosure simply because the foreclosure procedure does not require the servicer itself to conduct or administer the sale is inconsistent with the purpose of § 1024.41(g). The Bureau explained that servicers already have an obligation to prevent a foreclosure sale under § 1024.41(g)'s prohibition against the conduct of a foreclosure sale. The Bureau proposed comment 41(g)–5 to clarify a servicer's obligations under the prohibition and indicated that it was not proposing a new requirement or interpretation.

The Bureau noted in proposing these clarifications that, in some jurisdictions, it may be difficult for a servicer to delay a foreclosure sale after entry of foreclosure judgment or issuance of an order of sale and that courts may be reluctant to delay foreclosure proceedings when lengthy foreclosure backlogs create added pressure to expedite dockets. The Bureau stated its belief that, even in these situations, reasonable steps to delay the sale are available to servicers and to courts administering foreclosure proceedings. Proposed comment 41(g)–5 would have provided a non-exclusive explanation of what such reasonable steps might include: Requesting that a court or the official conducting the sale re-schedule or delay the sale or remove the sale from the docket, or place the foreclosure proceeding in any administrative status that stays the sale. The Bureau sought comment on what reasonable steps may be available to servicers to delay the conduct of a foreclosure sale under different foreclosure procedures.

Proposed comment 41(g)–3 would have explained that § 1024.41(g)'s prohibitions on moving for judgment or order of sale or conducting a sale may require a servicer to take steps through foreclosure counsel and that a servicer is not relieved of its obligations under § 1024.41(g) because the foreclosure counsel's actions or inaction cause a violation. The proposal noted that proposed revisions to comment 41(g)–3 were consistent with the Bureau's understanding of servicers' responsibilities under the Mortgage Servicing Rules whenever service providers are involved, including the policies and procedures requirements under § 1024.38(b)(3). Proposed comment 41(g)–3 further would have explained that, if a servicer has received a complete loss mitigation application, the servicer must promptly instruct counsel not to make a dispositive motion for foreclosure judgment or order of sale; to take reasonable steps, where such a dispositive motion is pending, to avoid a ruling on the motion or issuance of an order of sale; and to take reasonable steps to delay the conduct of a foreclosure sale until the servicer satisfies one of the conditions in § 1024.41(g)(1) through (3). Proposed comment 41(g)–3 would have provided the following examples of instructions that § 1024.41(g) might require: Instructing counsel to move for a continuance with respect to the deadline for filing a dispositive motion or to move for or request that the foreclosure sale be stayed, otherwise delayed, or removed from the docket, or that the foreclosure proceeding be placed in any administrative status that stays the sale. In the proposal, the Bureau noted that the list was not meant to be exhaustive and sought comment on whether there are other helpful illustrative examples.

The Bureau stated its belief in the proposal that the proposed revisions to comment 41(g)–3 would provide servicers, their foreclosure counsel, and courts with greater clarity with respect to the operation of § 1024.41(g)'s prohibition. The Bureau noted, as it had in earlier guidance regarding service providers, that the fact that an entity enters into a business relationship with a service provider does not absolve the entity of responsibility for complying with Federal consumer financial law to avoid consumer harm.[258] The Bureau stated in the proposal that codifying this principle in comment 41(g)–3 would ensure that servicers understand their obligations with respect to instructing foreclosure counsel promptly to take steps required by § 1024.41(g). The Bureau acknowledged that, when a servicer receives a loss mitigation application shortly before a court hearing or while a dispositive motion is pending, timely communication with foreclosure counsel may require expedited procedures but that timely communication in such situations would present neither a novel nor an insurmountable challenge.

The Bureau also proposed a related comment 38(b)(3)(iii)–1, which would have explained that a servicer's policies and procedures must be reasonably designed to ensure that servicer personnel promptly instruct foreclosure counsel to take any step required by § 1024.41(g) sufficiently timely to avoid violating the prohibition against moving for judgment or order of sale or conducting a foreclosure sale. The Bureau explained that proposed comment 38(b)(3)(iii)–1 was designed to help ensure that foreclosure counsel are timely informed of the status of loss mitigation applications and can more effectively seek delay from a court of the issuance of an order or a foreclosure sale. Having policies and procedures to instruct foreclosure counsel timely to take the actions required by § 1024.41(g) would help servicers efficiently handle communication with a servicer's foreclosure counsel and ensure that counsel accurately represent the status of loss mitigation applications and the obligations of servicers under § 1024.41(g) to courts handling foreclosure proceedings.[259]

In the proposal, the Bureau noted that, although the proposed commentary clarifications would not alter existing requirements under § 1024.41(g), the Bureau had considered the potential burdens for servicers in dismissing a foreclosure proceeding, in particular in jurisdictions where significant foreclosure backlogs exist or when a subsequent foreclosure brought by a servicer may encounter procedural challenges or defenses. Nonetheless, the Bureau stated its belief that dismissal would be appropriate in the limited circumstances contemplated by the proposal where a servicer fails to take reasonable steps to avoid a ruling or issuance of an order or to delay the sale to protect borrowers from the dual tracking harms that § 1024.41(g) aims to prevent. The Bureau noted that dismissal would be required only when necessary to avoid a violation of § 1024.41(g), *i.e.,* conduct of the foreclosure sale while a loss mitigation evaluation is pending, or to mitigate the harm to the borrower arising from the servicer's prior violation of § 1024.41(g) in failing to take reasonable steps to delay a foreclosure sale. Thus, only those servicers that fail to act to delay issuance of the order or judgment would incur any costs related to dismissal. The Bureau stated its belief that expressly clarifying that dismissal may be required would encourage servicers to take reasonable steps to avoid foreclosure sales. The Bureau sought comment on whether the clarification was adequate or whether additional clarification was necessary to protect borrowers from foreclosure.

The Bureau requested comment on whether all of the proposed commentary clarifications were appropriate and whether the proposed commentary provided sufficient clarity to prevent foreclosures during a pending loss mitigation evaluation. In addition, the Bureau requested comment on whether there were any specific reasonable steps to comply with § 1024.41(g) that servicers should take, beyond re-scheduling or delaying the sale, removing the sale from the docket, or placing the foreclosure proceeding in any administrative status that stays the sale, where a court has ruled on a dispositive motion. The Bureau also requested comment on whether there were situations in which a servicer should dismiss a foreclosure proceeding to stop a sale even where the servicer has taken the reasonable steps outlined in § 1024.41(g).

Finally, the Bureau requested comment on whether the incorporation into the regulation text of any elements of the proposed commentary would aid servicers in complying with § 1024.41(g). The Bureau stated that the proposed commentary would provide help in interpreting and complying with § 1024.41(g). However, the Bureau also recognized that incorporation in the regulation text itself could aid servicers, borrowers, and courts in applying the prohibition.

Comments

The Bureau received comments on the proposed revisions and additions to the commentary from several industry commenters and consumer advocacy groups. Commenters generally agreed that the conduct of a foreclosure sale during a loss mitigation evaluation causes significant consumer harm and should be avoided. However, commenters expressed a number of concerns about the Bureau's proposed clarifications.

Several commenters discussed the nature and extent of the reasonable steps required to avoid having to dismiss foreclosure proceedings under proposed comments 41(g)–1 and –5, which would have required dismissal, if necessary to avoid the sale, when a servicer fails to take reasonable steps to avoid issuance of a judgment or an order of sale, or fails to take reasonable steps to delay the foreclosure sale. Many

[258] Bureau of Consumer Fin. Prot., CFPB Bulletin 2012–03, *Service Providers* (Apr. 13, 2012), *available at http://files.consumerfinance.gov/f/201204_cfpb_bulletin_service-providers.pdf.*

[259] The Bureau notes that § 1024.38(b)(1)(v) already requires servicers to maintain policies and procedures reasonably designed to ensure that the servicer can 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.

commenters suggested that the inference taken from the proposed commentary changes was that a servicer that took reasonable steps would never be obligated to dismiss a foreclosure proceeding, even if the sale was conducted before any condition in § 1024.41(g)(1) through (3) was met. Several industry commenters requested that the Bureau expressly clarify that, if a servicer takes reasonable steps, dismissal would not be required. One industry commenter requested that the commentary further clarify that servicers would not be required to take all reasonable steps, but only some reasonable steps. This commenter expressed concern that absent such clarification, servicers would seek unnecessary dismissals of foreclosure proceedings because they believed they could not otherwise comply with § 1024.41(g).

Some commenters discussed the difficulties of determining what constitutes reasonable steps in light of the varied procedures that apply in different jurisdictions. One industry commenter recommended that the commentary make clear that any examples of reasonable steps were only illustrative and not an exhaustive list. A consumer advocacy group expressed concern that the proposal would permit a sale where servicers make only token efforts to meet the reasonable steps standard and would effectively nullify the protections under § 1024.41(g). Commenters did not provide any additional examples of reasonable steps to avoid or delay a sale that the Bureau might include in the commentary.

Several, but not all, commenters addressing this issue indicated that servicers are able to obtain delays of foreclosure proceedings and comply with § 1024.41(g). A consumer advocacy group noted that courts routinely enforce other types of delays or stays in foreclosure proceedings, such as those required by the Bankruptcy Code or the Servicemembers Civil Relief Act. This commenter suggested that it was appropriate to place upon servicers the burden of educating courts about the requirements of § 1024.41(g) rather than borrowers, who often appear pro se in foreclosure proceedings. One industry commenter suggested that, following judgment or issuance of an order in a foreclosure proceeding, servicers have the ability to comply with § 1024.41(g) by either not scheduling the foreclosure sale or cancelling an already scheduled sale. Another trade association recommended that servicers be required to provide to foreclosure counsel a copy of the written notice of complete application that proposed § 1024.41(c)(3) would have required servicers to provide to borrowers after receipt of a complete application. Some industry commenters suggested that courts may not be willing to grant motions filed by foreclosure counsel and that servicers should not be held accountable when courts refuse to honor requests to delay issuance of an order or judgment. The consumer advocacy group that noted the ease with which courts grant other types of stays in foreclosure proceedings expressed concern that the proposal appeared to condone State court refusals to enforce Federal law and suggested the Bureau adopt a policy of intervening in State court proceedings to ensure that § 1024.41(g) was properly enforced.

A number of industry commenters discussed the potential burden to servicers, investors, and borrowers that might result from any dismissal requirement. Generally, these commenters noted that dismissal may result in lengthy delays (especially in States with significant backlogs), costs, and potential procedural challenges to subsequent actions. In particular, commenters suggested that statutes of limitation might bar a subsequent action or that dismissal may affect the enforceability of the mortgage lien or note. Another industry commenter suggested that the Bureau should provide an exception to the dismissal requirement that permits the servicer, in those jurisdictions that provide for post-sale confirmation proceedings, to take steps to invoke § 1024.41(g)'s protections on behalf of the borrower.

Some industry commenters expressed concern that borrowers may face financial and emotional costs when foreclosures are dismissed and then re-filed if the borrower's loss mitigation application is ultimately denied. Some of these industry commenters also suggested that a dismissal requirement might create an incentive for borrowers to delay engagement in the loss mitigation process. One industry commenter suggested the Bureau adopt a one-year time limit for borrowers to submit a complete loss mitigation application under § 1024.41 to prevent such strategic attempts to delay foreclosure.

Consumer advocacy group commenters supported mandating dismissal broadly, suggesting it would aid enforcement of § 1024.41(g)'s prohibitions and protect borrowers from the further harms that result from conduct of a sale during the pendency of a loss mitigation evaluation.

Commenters did not raise any specific objections to the proposed revisions to comment 41(g)–3 or to proposed comment 38(b)(3)(iii)–1. One consumer advocacy group commenter supported the revisions to comment 41(g)–3, suggesting that it would clarify a servicer's responsibility for the actions of foreclosure counsel.

Final Rule

The Bureau is not adopting the proposed revisions to comment 41(g)–1 and is adopting a revised new comment 41(g)–5. The Bureau has decided to adopt the proposed commentary regarding instructions to foreclosure counsel largely as proposed in both comment 41(g)–3 and 38(b)(3)(iii)–1 concerning related policies and procedures. As discussed below, the Bureau believes that its approach in the final rule is in accord with the original final rule and the Bureau's proposal in restating the absolute prohibition on conduct of a sale.

In light of the comments received, the Bureau believes that the proposed revisions to comment 41(g)–1 would not further the purposes of § 1024.41(g). Proposed comment 41(g)–1 would have explained that, where a servicer or counsel retained by the servicer fails to take reasonable steps to avoid a ruling on or issuance of an order with respect to a dispositive motion pending at the time a complete loss mitigation application was received, the servicer must dismiss the foreclosure proceeding if necessary to avoid the sale. The Bureau believes that the uncertainty expressed by commenters concerning the extent and nature of reasonable steps and the circumstances that would require dismissal of foreclosure proceedings illustrates that the proposed revisions to comment 41(g)–1 might have harmed borrowers by appearing to allow for deviation from the absolute nature of § 1024.41(g)'s prohibition of the conduct of a foreclosure sale.

The Bureau is concerned with the inference commenters took from the proposed revision of comment 41(g)–1 and proposed comment 41(g)–5 that, where a servicer takes reasonable steps, but the sale goes forward in spite of these steps, a servicer is relieved of any responsibility for the conduct of the sale. Proposed comments 41(g)–1 and 41(g)–5 would have expressly addressed only situations where servicers fail to take reasonable steps. The purpose of both proposed comments was to emphasize that servicers must take reasonable steps to avoid conduct of the foreclosure sale absent one of the conditions under § 1024.41(g)(1) through (3) being met. By proposing to clarify that, when servicers fail to take reasonable steps to avoid a ruling on a pending dispositive motion or to delay a foreclosure sale, servicers would be required to dismiss if necessary to avoid the sale, the Bureau did not intend to permit the conduct of the sale when the servicer has not met one of the conditions under § 1024.41(g)(1) through (3). That interpretation would have been inconsistent with the text of § 1024.41(g), which imposes an absolute prohibition on the conduct of a sale. For similar reasons, the Bureau also declines to read an exception into § 1024.41(g)'s prohibition against the conduct of the sale based upon any post-sale confirmation process that may apply in certain jurisdictions.[260]

For these reasons, the Bureau is not adopting the proposed revisions to comment 41(g)–1. Similarly, comment 41(g)–5, as adopted, also does not discuss any dismissal requirement with respect to servicers that fail to take reasonable steps to delay a foreclosure sale. The Bureau is concerned that an express dismissal requirement, even if only when dismissal is necessary to avoid a sale, would be unworkable in the absence of an exhaustive list of reasonable steps that a servicer could take to prevent the sale short of dismissal. As commenters generally explained, what constitutes a reasonable step in a particular proceeding would depend on the specific facts, circumstances, and procedures of the jurisdiction. The dismissal requirement as proposed thus would have been based on an ultimately subjective test that varied based not only on the particular circumstances of the foreclosure proceeding but also the rules of an individual court. The Bureau is also concerned, as some commenters indicated, that some servicers may have believed in certain circumstances that whatever steps they may take may not have met the reasonable steps standard if finalized as proposed and that these servicers may thus have elected to dismiss the foreclosure proceeding unnecessarily to avoid a subsequent violation. The Bureau is equally concerned that without providing an exhaustive list of reasonable steps, and specifying that servicers would have to take all of those steps to comply with § 1024.41(g), the proposed commentary might have been interpreted to permit evasion of the rule and excuse a servicer from dismissal in order to prevent a sale. In either case, the Bureau is concerned that the proposed reasonable steps requirement may have led to litigation that would not further the purpose of the rule itself and may have eventually eroded borrower protections or led to uneven application of the rule across and within jurisdictions.

At the same time, the Bureau is also declining to adopt, as some commenters suggested, any interpretation that § 1024.41(g) does not require dismissal to avoid a sale if the servicer takes any or all other reasonable steps to delay a ruling on a pending dispositive motion, issuance of an order, or conduct of the sale. The Bureau believes such an interpretation would be inconsistent with the text and purpose of § 1024.41(g). As the Bureau explained in the proposal, protecting borrowers from foreclosure during the loss mitigation evaluation process is the central and fundamental protection under § 1024.41(g). The Bureau did not propose to alter the regulation text but to interpret and clarify it in commentary. While the Bureau believes, as discussed below, that servicers have many options available to them for avoiding a sale short of dismissal, dismissal may in some instances be necessary to avoid violation of § 1024.41(g), particularly if the servicer has, in fact, failed to take reasonable steps to avoid the sale in a timely way. Moreover, even if the Bureau were to adopt a standard that dismissal is not required where a servicer has taken reasonable steps, the rule would still lack clarity regarding what steps are reasonable. This uncertainty would leave servicers subject to litigation over the reasonable steps standard, and borrowers subject to different outcomes and harm, based upon different interpretations of what is reasonable.

The Bureau believes that the purposes of § 1024.41(g) will be better served by a clear, unequivocal interpretation than a vague, but still prescriptive, and fact-specific standard that in some cases might ultimately result in the very outcome that § 1024.41(g) prohibits. As adopted, final comment 41(g)–5 provides a clear interpretation of what § 1024.41(g) requires: The servicer may not permit the conduct of the sale unless one of the conditions under § 1024.41(g)(1) through (3) is met.

The Bureau believes that the means to prevent foreclosure sales should be readily available to servicers. In jurisdictions where there is no court action required, the Bureau understands that servicers exercise significant, if not entire, control over the conduct of the sale. Where courts are involved, procedures are generally available to delay proceedings and, in many jurisdictions, to delay the conduct of the sale specifically. As the plaintiff in the proceeding, a servicer generally has a determinative voice as to the timing and nature of any court-ordered remedies, including a foreclosure sale. Servicers may be able to minimize any difficulties obtaining necessary delays through timely communication with counsel and, through counsel, with the court, as to the status of the loss mitigation application and the servicer's obligations under § 1024.41. And, as consumer advocacy groups noted, such delays are not novel in court proceedings. For example, delays or stays are available in other contexts, such as when a borrower is protected by bankruptcy law.

While the reasonable steps language in the proposed revision to comment 41(g)–1 and in proposed comment 41(g)–5 would have provided some guidance to servicers about how to comply with § 1024.41(g), the Bureau believes that the reasonable steps language would not have adequately protected servicers from post hoc evaluations of whether the specific steps taken by the servicer or its foreclosure counsel were reasonable. The Bureau believes comment 41(g)–5, as adopted, will provide greater clarity and aid servicers through courts to prevent the foreclosure sale.

In addition, the Bureau believes that, because proposed comment 41(g)–5 would have addressed the prohibition against conducting the sale, retaining any reasonable steps language in that comment would have been subject to much more litigation than the existing dispositive motion reasonable steps language in comment 41(g)–1. Unlike existing comment 41(g)–1, which addresses an earlier stage in the foreclosure proceeding that is less detrimental to a borrower's ownership of the home, comment 41(g)–5 addresses the foreclosure sale, which often operates as the final step in the foreclosure process and may be difficult to overturn under State laws that do not provide that a violation of Regulation X is a basis for such a reversal.[261] As a result, the Bureau believes that borrowers may be more likely to challenge a foreclosure sale as a violation of § 1024.41(g) than an entry of judgment.

[260] In addition to being inconsistent with § 1024.41(g)'s text and purpose, the Bureau believes it would impose significant costs and risks on borrowers. Even where post-sale confirmation or other procedure might be available to cancel or reverse a sale, permitting sales to be conducted may impose significant costs on borrowers. At least one commenter suggested that borrowers themselves would have to move for the court to overturn sales. In addition, where a sale is to a third-party, there may be no recourse for the borrower.

[261] The Bureau also notes that, though some commenters suggested a post-sale remedy to alleviate servicer concerns, purchase at the sale by a third-party purchaser may make the sale irrevocable under State law.

The Bureau recognizes that there may be limited situations where servicers, despite their attempts to prevent foreclosure sales, may need to dismiss a foreclosure proceeding to avoid a violation of § 1024.41(g) and then may re-file if the borrower ultimately does not qualify for, or perform on, a loss mitigation option. The Bureau also recognizes that this approach imposes costs on servicers and borrowers. As the Bureau noted in preamble to the proposal, these costs could be significant in an individual case but are unlikely to be significant overall. The Bureau believes, as supported by many commenters, that servicers are usually able to stop the foreclosure sale by using any of several other means short of dismissal. The Bureau also believes the benefit to borrowers of providing an unequivocal explanation of § 1024.41(g) that reduces the risk of untimely foreclosure sales during pending loss mitigation evaluations outweighs the risks or costs to servicers of these atypical situations. The Bureau believes that clarifying that any conduct of the sale violates § 1024.41(g), making the ramifications of failure to prevent a sale from occurring clear to all stakeholders, including State courts, will make these scenarios less likely to occur.

The Bureau is also adopting revisions to proposed comment 41(g)–3, with changes to address issues raised by comments received. As adopted, comment 41(g)–3 explains that the prohibitions against moving for judgment or order of sale or conducting a sale may require a servicer to act through foreclosure counsel retained by the servicer in a foreclosure proceeding. The comment explains that, if a servicer has received a complete loss mitigation application, the servicer promptly must instruct counsel not to make a dispositive motion for foreclosure judgment or order of sale; where such a dispositive motion is pending, to avoid a ruling on the motion or issuance of an order of sale; and, where a sale is scheduled, to prevent conduct of a foreclosure sale, unless one of the conditions in § 1024.41(g)(1) through (3) is met. The comment further provides that a servicer is not relieved of its obligations because foreclosure counsel's action or inaction caused a violation.

The Bureau believes it is appropriate to clarify that a servicer's responsibilities under § 1024.41(g) are not relieved upon foreclosure counsel's action or inaction. The additional language that the proposal would have added to comment 41(g)–3 addressing reasonable steps is no longer necessary in light of the changes to comment 41(g)–5.

The Bureau is adopting related comment 38(b)(3)(iii)–1 as proposed, with minor revisions. The Bureau believes that comment 38(b)(3)(iii)–1 will help to ensure that servicers effectively communicate with foreclosure counsel. The Bureau received no comments that raised concerns about new comment 38(b)(3)(iii)–1.

One industry commenter suggested that the Bureau require servicers to send foreclosure counsel a copy of the notice, which proposed § 1024.41(c)(3) would have required the servicer to send to borrowers after the servicer receives a complete application. As discussed in the section-by-section analysis of § 1024.41(c)(3), the Bureau is adopting a rule that requires servicers to provide borrowers with a notice of complete application but is not requiring servicers to send a copy of the notice to foreclosure counsel. As revised, comment 41(g)–3 requires servicers to provide prompt instruction to foreclosure counsel upon the receipt of a complete loss mitigation application. Comment 38(b)(3)(iii)–1 explains that the policies and procedures of the servicer must be reasonably designed to ensure that servicer personnel promptly inform foreclosure counsel that the servicer has received a complete loss mitigation application and promptly instruct counsel to take any step required by § 1024.41(g) sufficiently timely to avoid violating the prohibition against moving for judgment or order of sale, or conducting a foreclosure sale. The Bureau believes that these comments clarify the obligation of servicers under § 1024.41(g) to ensure that foreclosure counsel is informed and has the necessary information to take appropriate steps in foreclosure proceedings to comply with § 1024.41(g). As noted in the section-by-section discussion of § 1024.41(c)(3), the Bureau is not requiring servicers to provide to foreclosure counsel the notice of complete application required by § 1024.41(c)(3). While providing a copy of the notice may be part of an effective procedure for informing foreclosure counsel about a borrower's loss mitigation application status, the notice's required contents are designed to inform borrowers about the status of their loss mitigation applications and, by themselves, may not provide sufficient instruction to foreclosure counsel for compliance purposes. Whatever method a servicer chooses to communicate with foreclosure counsel, the servicer remains responsible for ensuring compliance with § 1024.41(g). The Bureau believes that it is appropriate to permit servicers discretion in determining alternative means for compliance with §§ 1024.38(b)(3)(iii) and 1024.41(g).

41(i) Duplicative Requests

Currently, § 1024.41(i) requires a servicer to comply with the requirements of § 1024.41 for only a single complete loss mitigation application for a borrower's mortgage loan account. Section 1024.38(b)(2)(v) requires a servicer to maintain policies and procedures designed to ensure that the servicer can properly evaluate a borrower for all loss mitigation options "for which the borrower may be eligible pursuant to any requirements established by the owner or assignee of the borrower's mortgage loan. . . ." In effect, therefore, unless investor guidelines require them to do so, servicers are not required to comply with the loss mitigation provisions in § 1024.41 if they previously complied with those requirements with respect to the same borrower's prior complete loss mitigation application.

The Bureau proposed to revise § 1024.41(i) to provide that servicers are required to comply with the requirements of § 1024.41 unless (1) the servicer has previously complied with § 1024.41 for a borrower's complete loss mitigation application and (2) the borrower has been delinquent at all times since the borrower submitted that complete application. Thus, as revised, the provision would require servicers to follow the requirements of § 1024.41 again when a borrower has previously enjoyed those protections with respect to a complete loss mitigation application but since then has become current and subsequently become delinquent on the loan once again. The Bureau believed that requiring servicers to comply with § 1024.41 again in these circumstances would serve an important consumer protection purpose by extending the protections of § 1024.41 and promoting the use of uniform loss mitigation procedures for all borrowers. At the same time, the Bureau's proposed revision to § 1024.41(i) would have limited the scope of servicers' obligations to comply with § 1024.41 for a borrower's subsequent loss mitigation application and preserved servicer and borrower incentives to dedicate appropriate resources to an initial loss mitigation application. The Bureau is finalizing § 1024.41(i) substantially as proposed, with certain non-substantive changes for clarity.

When the Bureau first proposed § 1024.41 in the 2012 RESPA Servicing Proposal, it sought comment on whether a borrower should be entitled to a renewed evaluation for a loss mitigation option if an appropriate time period had passed since the initial evaluation or if there had been a material change in the borrower's financial circumstances. Industry commenters at that time generally supported the Bureau's proposal to limit a servicer's obligation to comply with § 1024.41 to once over the life of a borrower's loan. Consumer advocacy groups, however, said that the Bureau should require servicers to review a subsequent loss mitigation submission when a borrower has demonstrated a material change in the borrower's financial circumstances.[262]

In the 2013 RESPA Servicing Final Rule, the Bureau agreed that there are circumstances in which it is appropriate to reevaluate borrowers in light of a material change in financial circumstances.[263] The Bureau also acknowledged that many owners or assignees of mortgage loans already require servicers to consider material changes in a borrower's financial circumstances.[264] However, the Bureau noted that ''significant challenges exist to determine whether a material change in financial circumstances has occurred[,]'' and that, in contrast to investor guidelines, § 1024.41 gives borrowers a private right of action to enforce its procedures.[265] In addition, the Bureau believed that limiting the loss mitigation procedures of § 1024.41 to a single complete loss mitigation application would provide borrowers with appropriate incentives to submit all relevant information up front and allow servicers to dedicate resources to those applications most likely to qualify for loss mitigation options.[266] Accordingly, in the 2013 RESPA Servicing Final Rule, the Bureau required servicers to comply with the loss mitigation procedures in § 1024.41 only once over the life of a mortgage loan for any borrower.

Since the publication of the 2013 RESPA Servicing Final Rule, the Bureau has received numerous requests to revise this provision and require servicers to reevaluate borrowers who have experienced a change in financial circumstances and might therefore benefit from subsequent review of a new loss mitigation application under the requirements of § 1024.41. Industry monitoring efforts, outreach to stakeholders, and reports from consumer advocacy groups suggested that current § 1024.41(i) might unfairly disadvantage a borrower who experiences multiple hardships over the life of a loan.

In advance of the proposal, the Bureau understood that a borrower might greatly benefit from the protections of § 1024.41 for loss mitigation applications submitted in connection with subsequent hardships. Moreover, the Bureau believed that requiring servicers to reevaluate borrowers in certain circumstances under the requirements of § 1024.41, in and of itself, would not place a significant additional burden on servicers because many servicers already do so. However, the Bureau continued to have concerns with requiring reevaluations under § 1024.41 when there has been a ''material change in financial circumstances,'' because of the challenges of prescribing with sufficient clarity what may constitute such a ''material change.''

Based on this analysis, the Bureau proposed to revise the current rule to require servicers to reevaluate borrowers under § 1024.41 in certain circumstances. However, as the Bureau explained in the 2013 RESPA Servicing Final Rule, the Bureau believed that a servicer's obligation to reevaluate borrowers under § 1024.41 should be limited in scope. Accordingly, proposed § 1024.41(i) would have provided that servicers would be required to comply with § 1024.41 unless the servicer had previously complied with § 1024.41 for a borrower's complete loss mitigation application and the borrower had been delinquent at all times since the borrower submitted that complete application. In other words, a servicer would have been required to comply with § 1024.41, even if it had previously complied with § 1024.41 for a borrower's complete loss mitigation application, for a borrower who had been current on payments at any time between the borrower's prior complete loss mitigation application and a subsequent loss mitigation application. This revision was intended to preserve borrower and servicer incentives to reach a timely, efficient, and effective resolution to a borrower's hardship the first time a borrower applies for loss mitigation.

In addition, the Bureau believed that proposed § 1024.41(i) would base a servicer's obligation to reevaluate a borrower under § 1024.41 on an objective, bright-line test. One of the Bureau's concerns about the suggestions to require reevaluations under § 1024.41 when there has been a ''material change in financial circumstances'' was that the standard would be dependent upon a servicer's subjective determination. The Bureau believed that the challenges in implementing and enforcing such a standard would outweigh any intended benefit to borrowers. However, the Bureau believed that an easy-to-administer standard such as the one in proposed § 1024.41(i) could promote servicer compliance. The Bureau also believed that proposed § 1024.41(i) may encourage consistent implementation of the mortgage servicing rules by discouraging servicers from applying different loss mitigation procedures outside of the framework of § 1024.41 if a borrower has been previously evaluated under § 1024.41.

For purposes of this proposal, the Bureau assumed that a permanent modification of a borrower's mortgage loan obligation effectively cures the borrower's pre-modification delinquency. The Bureau further assumed that a borrower who is performing under a permanent modification would not meet the definition of delinquency that the Bureau proposed to add to § 1024.31. The Bureau sought comment on whether there are types of permanent loan modifications or other circumstances for which these assumptions would be inaccurate.

The Bureau also proposed to revise the current § 1024.41(i) commentary, which addresses servicers' obligations following the transfer of servicing rights, to accommodate proposed § 1024.41(k). Specifically, the Bureau proposed to preserve the portion of comment 41(i)–1 that obligates a transferee servicer to comply with § 1024.41 regardless of whether a transferor servicer previously evaluated a borrower's complete loss mitigation application. As discussed in the section-by-section analysis of § 1024.41(k), the Bureau proposed to move the balance of comment 41(i)–1, as revised, as well as comment 41(i)–2, as revised, into proposed § 1024.41(k) and proposed new commentary.

The Bureau sought comment on the proposed revision to § 1024.41(i) generally. The Bureau specifically sought comment on whether the borrower's right to a reevaluation should be contingent upon whether the borrower was current for a minimum period of time since the borrower's last-submitted complete loss mitigation application.

The Bureau received a number of comments from industry and consumer advocacy group commenters in response to proposed § 1024.41(i). Several industry commenters stated that there was no need to require servicers to comply with the loss mitigation provisions in § 1024.41 for a borrower's

[262] *See* 78 FR 10695, 10836 (Feb. 14, 2013).

[263] *Id.*

[264] *Id.*

[265] *Id.*

[266] *Id.*

subsequent loss mitigation application. They expressed the view that, if a borrower is eligible for loss mitigation, and the investor is willing to offer loss mitigation, the servicer will make loss mitigation options available to the borrower pursuant to its own policies. One industry commenter recommended that borrowers be required to demonstrate changed circumstances before a servicer would be required to comply with § 1024.41 for a borrower's subsequent loss mitigation application.

The majority of industry commenters that discussed § 1024.41(i) recommended that a borrower's right to a reevaluation under § 1024.41 should be contingent on the borrower being current for a minimum time period following the borrower's last submitted complete loss mitigation application. These commenters recommended periods that ranged from six months to five years. Many of these commenters said that requiring a borrower to be current for a minimum time period would discourage borrowers from abusing foreclosure protections and limit the burden and costs associated with the requirements set forth in the proposal. Several of these industry commenters also suggested that the rule should limit the number of times that a servicer must evaluate a borrower for loss mitigation options pursuant to § 1024.41 over the life of the loan. They stated that such a limit would provide clear expectations for borrowers and servicers. One industry commenter stated that the proposal would impose costs in the form of substantial technology changes, staffing adjustments, new training, and vendor expenses.

Numerous consumer advocacy groups supported the proposal's requirement that servicers be required to comply with the loss mitigation requirements set forth in § 1024.41 for a borrower's loss mitigation application unless the borrower had been delinquent at all times since submitting the prior complete loss mitigation application. Several consumer advocacy groups stated that the proposal provided a reasonable limitation on the applicability of § 1024.41(i). The majority of consumer advocacy groups recommended additional circumstances under which servicers should be required to comply with § 1024.41 for a borrower's subsequent loss mitigation application. For example, many consumer advocacy groups recommended that servicers be required to comply with § 1024.41 with respect to a borrower's subsequent loss mitigation application when the borrower had experienced a change in financial circumstances, or when more than a year had passed since the borrower's submission of the prior complete loss mitigation application, even if the borrower had not brought the loan current in the interim. Many of these commenters also recommended that the Bureau require any voluntary evaluation of a loss mitigation application to be completed in accordance with § 1024.41. One consumer advocacy group stated that the proposal failed to account for borrowers in temporary loss mitigation programs, and several commenters requested that the Bureau specify when a borrower is no longer delinquent for purposes of § 1024.41(i).

As noted in the section-by-section analysis of § 1024.31, one industry commenter expressed concern with the proposal's treatment of a borrower as delinquent until such time as the outstanding payment is made. The commenter stated that a borrower performing on a permanent loan modification may not have made all outstanding payments and therefore would be considered delinquent under the proposal, contrary to the Bureau's assumption that a borrower who is performing on a permanent loan modification would not meet the Bureau's proposed definition of delinquency.

The Bureau is adopting § 1024.41(i) substantially as proposed, with non-substantive changes for clarity. The Bureau is adopting comments 41(i)–1 and –2 with revisions. The Bureau understands that current § 1024.41(i) might unfairly disadvantage a borrower who experiences multiple hardships over the life of a loan. Final § 1024.41(i) serves an important consumer protection purpose by extending the protections of § 1024.41 to loss mitigation applications submitted in connection with subsequent hardships and promoting the use of uniform loss mitigation procedures for all borrowers in such circumstances. At the same time, final § 1024.41(i) limits the scope of servicers' obligations to comply with § 1024.41 for a borrower's subsequent loss mitigation application and preserves servicer and borrower incentives to dedicate appropriate resources to an initial loss mitigation application.

As finalized, § 1024.41(i) explains that a servicer must comply with the requirements of § 1024.41 for a borrower's loss mitigation application, unless the servicer has previously complied with the requirements of § 1024.41 for a complete loss mitigation application submitted by the borrower and the borrower has been delinquent at all times since submitting the prior complete application. In other words, a servicer is required to comply with § 1024.41, even if it had previously complied with § 1024.41 for a borrower's complete loss mitigation application, for a borrower who has been current on payments at any time between the borrower's prior complete loss mitigation application and a subsequent loss mitigation application.

The Bureau is finalizing § 1024.41(i) substantially as proposed to provide an objective, bright-line standard. In doing so, the Bureau weighed many of the same factors that it considered when finalizing the 2013 RESPA Servicing Final Rule. The Bureau sought to balance access to the consumer protections afforded by § 1024.41 with a recognition of the potential burden an unlimited requirement to comply with § 1024.41's requirements for any subsequent loss mitigation application could have on servicers. In particular, the Bureau continues to have concerns with requiring reevaluations under § 1024.41 when there has been a "material change in financial circumstances," given the difficulty of defining an objective standard for a "material change in financial circumstances."

Thus, final § 1024.41(i) ensures that, where a borrower receives a loss mitigation option, complies with its terms, and later experiences a new hardship, the borrower will benefit from having the protections of the § 1024.41 loss mitigation procedures for a subsequent loss mitigation application, as well as the private right to enforce them. However, § 1024.41(i) limits servicers' obligations under § 1024.41 with respect to a borrower's subsequent loss mitigation application if the borrower has not been current on the loan at any time since submitting the prior application. Section 1024.41(i) preserves borrower and servicer incentives to reach a timely, efficient, and effective resolution to a borrower's hardship. Additionally, to the extent servicers already reevaluate borrowers who submit subsequent loss mitigation applications pursuant to the procedures set forth in § 1024.41, as suggested by some commenters, final § 1024.41(i) should not impose a significant additional burden on servicers.

The Bureau has decided not to adopt a requirement that a borrower must have remained current for a specified period of time before the servicer is again required to comply with § 1024.41. Any such requirement would limit the important consumer protections of § 1024.41 with respect to certain borrowers submitting subsequent loss mitigation applications. Moreover, in the absence of a clear consensus among commenters as to how long a borrower should remain current, or consistent objective criteria for determining an appropriate period of time, the Bureau believes it is appropriate to require servicers to comply with the procedures under § 1024.41 once a borrower has come current, regardless of how long the borrower remains current.

The Bureau believes that any increase in the burden on servicers associated with final § 1024.41(i) should be limited. Current § 1024.41 requires that servicers evaluate a borrower for the loss mitigation options available to the borrower, but it does not require servicers or investors to offer any particular loss mitigation options.[267] The Bureau understands that many investor guidelines already include some form of a minimum time current requirement for some loss mitigation options. Final § 1024.41(i) does not preclude investors from continuing to apply such requirements, although it does require that the servicer comply with § 1024.41 in evaluating the borrower for any loss mitigation options that may be available.[268] Further, because servicers are not required to comply with § 1024.41 when a borrower has been delinquent at all times since submitting the previous application, the Bureau believes the risk that borrowers would repeatedly apply for loss mitigation only to delay foreclosure, as was suggested by some commenters, is de minimis.

The Bureau is declining to require that servicers comply with § 1024.41(i) for subsequent applications from borrowers who have been delinquent at all times since their last application. The Bureau notes that several commenters requested that servicers be required to comply with § 1024.41 when a borrower submits a subsequent loss mitigation application after a certain time period had passed or when conducting voluntary reviews of a loss mitigation application not otherwise subject to § 1024.41. Such additional conditions would require servicers to comply with § 1024.41 even in situations where the borrower has been delinquent at all times since submitting the prior application and could reduce servicers' willingness to undertake voluntary loss mitigation efforts. The Bureau believes final § 1024.41(i) strikes an appropriate balance between providing additional consumer protections and limiting the scope of servicers' obligations to comply with § 1024.41 for subsequent loss mitigation applications. Section 1024.41(i) preserves borrower and servicer incentives to reach a timely, efficient, and effective resolution to a borrower's hardship, thereby limiting the costs for both borrowers and servicers.

The Bureau also declines to adopt a requirement that servicers comply with § 1024.41 based on a borrower's demonstrated change in financial circumstances, as some commenters recommended. The Bureau explained in the proposal and in the 2013 RESPA Servicing Final Rule that determining whether a material change in financial circumstances has occurred could pose significant implementation and enforcement challenges that that would outweigh any intended benefit to borrowers.[269] The Bureau believes that a broader change in financial circumstances standard could also pose such challenges. This standard would be dependent upon a servicer's subjective determination of what constitutes a change in financial circumstances. It could also increase litigation risk for servicers, given that borrowers may pursue a private right of action to enforce the procedures set forth in § 1024.41. However, as the Bureau has previously explained, and as noted by industry commenters, where a borrower has experienced a positive change in circumstances investors do in some instances require servicers to evaluate the borrower for loss mitigation options.[270] Nothing in this final rule is meant to discourage or detract from those requirements.

As noted above, one commenter said the proposal did not clearly explain how proposed § 1024.41(i) would apply to a borrower performing on a temporary loss mitigation program while others requested further clarity on the determination of delinquency for purposes of § 1024.41(i). As discussed in the section-by-section analysis of § 1024.31, the revised definition of delinquency in § 1024.31 applies to all of subpart C of Regulation X and thus applies for purposes of determining the applicability § 1024.41(i). A temporary loss mitigation program does not modify the existing loan contract. A borrower may continue to accumulate a delinquency according to the loan contract for the duration of the temporary loss mitigation program. Accordingly, a borrower performing under a temporary loss mitigation program may be delinquent for purposes of § 1024.41(i). This is distinct from a borrower performing under a permanent loss mitigation agreement, which does modify the existing loan contract. When a borrower is making payments required by the terms of a permanent loss mitigation agreement and therefore performing under the modified contract, the borrower would not meet the definition of delinquency in § 1024.31 and thus would not be delinquent for purposes of § 1024.41(i). The Bureau notes that the timing of a borrower's conversion to a permanent modification from a trial modification is often a question of State contract law and investor requirements, apart from the requirements of Regulations X and Z. State contract law and investor requirements may therefore be dispositive as to whether a borrower is performing under a permanent or temporary loss mitigation agreement for purposes of § 1024.41(i). The Bureau further notes that nothing in § 1024.41(i) prevents a servicer from considering a borrower for loss mitigation after a default on a temporary loan modification. The Bureau understands that many servicers currently do so, and some investors may require such reconsideration.

The Bureau proposed to revise the current § 1024.41(i) commentary, which addresses servicers' obligations following the transfer of servicing rights, in light of proposed § 1024.41(k) addressing the same issue. As discussed in the section-by-section analysis of § 1024.41(k), the Bureau proposed to move the balance of comment 41(i)–1, as revised, as well as comment 41(i)–2, as revised, into proposed § 1024.41(k) and proposed new commentary thereto. The Bureau proposed to preserve the portion of comment 41(i)–1 that obligates a transferee servicer to comply with § 1024.41 regardless of whether a transferor servicer previously evaluated a borrower's complete loss mitigation application.

The Bureau is renumbering comment 41(i)–1 as 41(i)–2 and making certain changes, as discussed in more detail below, and is adopting comment 41(i)–1 with revisions. Final comment 41(i)–1 explains that, under § 1024.41(i), a servicer must comply with § 1024.41 with respect to a loss mitigation application unless the servicer has previously done so for a complete loss mitigation application submitted by the borrower and the borrower has been delinquent at all times since submitting the prior complete application. Thus,

[267] *See* § 1024.41(b)(1), (c)(1)(i), (c)(2)(i).

[268] For example, Fannie Mae servicing guidelines provide that a ''mortgage loan that was previously modified and that becomes 60 or more days delinquent within the first 12 months of the effective date of the mortgage loan modification is ineligible for a mortgage loan modification.'' Fannie Mae 2012 Servicing Guide at 706–17.

[269] 78 FR 10695, 10836 (Feb. 14, 2013); 79 FR 74175, 74227 (Dec. 15, 2014).

[270] *See id.*

for example, if the borrower has previously submitted a complete loss mitigation application and the servicer complied fully with § 1024.41 for that application, but the borrower then ceased to be delinquent and later became delinquent again, the servicer again must comply with § 1024.41 for any subsequent loss mitigation application submitted by the borrower. When a servicer is required to comply with the requirements of § 1024.41 for such a subsequent loss mitigation application, the servicer must comply with all applicable requirements of § 1024.41. It further explains that, for example, the servicer's provision of the notice of determination of which loss mitigation options, if any, it will offer to the borrower under § 1024.41(c)(1)(ii) regarding the borrower's prior complete loss mitigation application does not affect the servicer's obligations to provide a new notice of complete application under § 1024.41(c)(3)(i) regarding the borrower's subsequent complete loss mitigation application. The Bureau is finalizing this comment to clarify that, where § 1024.41(i) applies, a servicer must comply with the requirements of § 1024.41 anew for a subsequent application submitted by a borrower irrespective of the servicer's compliance with § 1024.41 for the borrower's prior complete application. Under § 1024.41(i), a servicer's previous compliance with § 1024.41 regarding a prior complete application submitted by the borrower does not relieve the servicer of any obligations or otherwise affect its requirement to comply with § 1024.41 regarding a subsequent application submitted by the borrower.

As finalized, comment 41(i)–2 explains that § 1024.41(i) provides that a servicer need not comply with § 1024.41 for a subsequent loss mitigation application from a borrower where certain conditions are met. It clarifies that a transferee servicer and a transferor servicer are not the same servicer. Accordingly, a transferee servicer is required to comply with the applicable requirements of § 1024.41 upon receipt of a loss mitigation application from a borrower whose servicing the transferee servicer has obtained through a servicing transfer, even if the borrower previously received an evaluation of a complete loss mitigation application from the transferor servicer. As finalized, comment 41(i)–2 clarifies that a borrower has the right to an evaluation under § 1024.41 with regard to a complete loss mitigation application received by the transferee servicer after a servicing transfer, even if the borrower would not have had this right in the absence of the transfer.

41(k) Servicing Transfers

The Bureau proposed to add new § 1024.41(k) to clarify a transferee servicer's obligations and a borrower's protections under § 1024.41 where a loss mitigation application is pending at the time of a servicing transfer. Proposed § 1024.41(k) would have provided that, subject to certain exceptions, a transferee servicer must comply with § 1024.41's requirements within the same timeframes that were applicable to the transferor servicer, based on the date the transferor servicer received the borrower's application or the date the borrower made the appeal. Specifically, the exceptions would have allowed transferee servicers additional time to comply with, for example, the otherwise applicable requirements: (1) To review promptly a loss mitigation application and provide an acknowledgment notice within five days of the transferor servicer's receipt of the loss mitigation application; (2) to evaluate the borrower for loss mitigation options and provide a notice of its determination within 30 days of the transferor servicer's receipt of a complete loss mitigation application; and (3) to evaluate the borrower's appeal and provide a notice of its determination within 30 days of the borrower making an appeal to the transferor servicer. As discussed in more detail in the section-by-section analyses of § 1024.41(k)(1) through (5), the Bureau is finalizing the proposed provisions addressing transfers with several revisions. As revised, the timeframes for transferee servicer compliance under the final rule generally are based on the transfer date, rather than on the date the transferor servicer received a loss mitigation application or the borrower made an appeal to the transferor servicer.

Currently, § 1024.41 addresses transfers through the commentary. Comment 41(i)–1 provides that, among other things, documents and information transferred to a transferee servicer may constitute a loss mitigation application to the transferee servicer and may cause the transferee servicer to be required to comply with § 1024.41 with respect to a borrower's mortgage loan account. Comment 41(i)–2 states that a transferee servicer must obtain documents and information a borrower submitted in connection with a loss mitigation application and that a transferee servicer should continue the evaluation of a complete loss mitigation application to the extent practicable. Finally, comment 41(i)–2 also states that, for purposes of specific subsections in § 1024.41, if a loss mitigation application is complete as to a transferee servicer, the transferee servicer is considered to have received the documents and information constituting the complete application as of the date the transferor servicer received the documents and information. Comment 41(i)–2 is designed to ensure that a servicing transfer does not deprive a borrower of protections to which a borrower was entitled from the transferor servicer.[271]

Existing § 1024.41 and comments 41(i)–1 and –2 generally require a transferee servicer to stand in the shoes of the transferor servicer with respect to a loss mitigation application pending at transfer. Consequently, a transferee servicer that receives a loss mitigation application as a result of a transfer should comply with § 1024.41 within the timeframes that were applicable to the transferor servicer, and, as comment 41(i)–2 states, a borrower's protections are based upon when the transferor servicer received documents and information constituting a complete application. Nonetheless, comment 41(i)–2 implies that there are times when a transferee servicer may not be able to continue the evaluation of a complete application by stating that the transferee should continue the review to the extent practicable.

In advance of the proposal, the Bureau had received questions about a transferee servicer's responsibilities in the event that continuing the evaluation of a complete loss mitigation application is not practicable. The Bureau had also received questions about the timeframes in which a transferee servicer must act and whether a transferee servicer must provide notices to a borrower if the transferor servicer already provided the same notices. The Bureau believed that servicers and borrowers would benefit from greater clarity regarding a transferee servicer's obligations and a borrower's protections under § 1024.41, including with respect to certain situations not currently addressed in § 1024.41 and comments 41(i)–1 and –2, particularly how transferee servicers should handle a pending appeal of a denial of a loan modification option, a pending offer of a loss mitigation option, and pending applications that are facially complete or become complete as of the transfer date.

Additionally, through outreach and industry monitoring efforts, the Bureau had learned from servicers that

[271] 78 FR 10695, 10837 (Feb. 14, 2013). *See also* 79 FR 63295, 63298 (Oct. 23, 2014).

complying with certain of § 1024.41's requirements could be especially difficult in the transfer context. Servicers reported that the necessary coordination between the transferee and transferor servicer to ensure timely compliance was particularly challenging for the comparatively short timeframes required by, for example, the acknowledgment notice under § 1024.41(b)(2)(i)(B). The Bureau has always believed that there is a risk of borrower harm in the context of servicing transfers. However, the Bureau also recognizes that there are many reasons for transfers, that excluding loans in active loss mitigation from transfers is logistically challenging and could impede transfers, and that transfers may sometimes result in improved borrower outcomes. The Bureau proposed limited exceptions to the general timeframe requirements of § 1024.41 for transferee servicers to balance the competing considerations of the facilitation of transfers and the prevention of borrower harm from a transfer.

The Bureau proposed § 1024.41(k) to clarify the requirements applicable to loss mitigation applications pending at the time of a servicing transfer. Proposed § 1024.41(k) would have provided that, subject to certain exceptions, a transferee servicer must comply with § 1024.41's requirements within the same timeframes that were applicable to the transferor servicer. The proposed exceptions would have included up to a five-day extension of time for a transferee servicer to provide the written notice required by § 1024.41(b)(2)(i)(B) and a provision ensuring that a transferee servicer that acquires servicing through an involuntary transfer has 30 days from the date the transferor received the complete application or 15 days after the transfer date, whichever is later, to evaluate a borrower's pending complete loss mitigation application. The proposal also would have provided that, if a borrower's appeal under § 1024.41(h) is pending as of the transfer date, a transferee servicer must evaluate the appeal pursuant to § 1024.41(h) if it is able to determine whether it should offer the borrower the loan modification options subject to the appeal; a transferee servicer that is unable to evaluate an appeal would be required to treat the appeal as a complete loss mitigation application and evaluate the borrower for all loss mitigation options available to the borrower from the transferee servicer.

Proposed comment 41(k)–1 would have provided that a loss mitigation application is considered pending if it was subject to § 1024.41 and had not been fully resolved before the transfer date. The comment also would have clarified that a pending application is considered a pending complete application if, as of the transfer date, the application was complete under the transferor servicer's criteria. Proposed comment 41(k)–1 sought to avoid ambiguity about whether a loss mitigation application that was fully resolved by a transferor servicer required new compliance with § 1024.41 by the transferee servicer.

Section 1024.38(b)(4) sets forth the Bureau's expectations of a transferor servicer: The Bureau expects transferor servicers to have policies and procedures designed to ensure the timely transfer of relevant information and to facilitate the transferee servicer's compliance with § 1024.41, among other matters. Section 1024.38(b)(4) requires a transferor servicer to have policies and procedures reasonably designed to ensure that it can timely transfer all information and documents in its possession or control related to a transferred mortgage loan to a transferee servicer in a form and manner that ensures the accuracy of the information and documents transferred. Section 1024.38(b)(4) further specifies that a transferor servicer's policies and procedures must be reasonably designed to ensure that the documents and information are transferred in a form and manner that ''enables a transferee servicer to comply with . . . applicable law.'' The Bureau explained that the transferor servicer shares responsibility for enabling a transferee servicer to comply with § 1024.41(k)'s requirements and ensuring that borrowers will not be adversely affected by a servicing transfer. The Bureau did not propose to impose any specific requirements in § 1024.41(k) with respect to transferor servicers and instead continued to rely on § 1024.38(b)(4) to ensure that transferor servicers assist transferee servicers in timely compliance with § 1024.41. The Bureau expects that policies and procedures that are designed to ensure the timely and accurate transfer of documents and information in accord with § 1024.38(b)(4) will result in such timely and accurate transfer of documents and information in the vast majority of cases.

The Bureau did not receive comments in response to proposed comment 41(k)–1 and is finalizing it as proposed. Comment 41(k)–1 provides that, for purposes of § 1024.41(k), a loss mitigation application is pending if it was subject to § 1024.41 and had not been fully resolved before the transfer date. It explains that, for example, a loss mitigation application would not be considered pending if a transferor servicer had denied a borrower for all options and the borrower's time for making an appeal, if any, had expired prior to the transfer date, such that the transferor servicer had no continuing obligations under § 1024.41 with respect to the application. It further explains that a pending application is considered a pending complete application if it was complete as of the transfer date under the transferor servicer's criteria for evaluating loss mitigation applications.

41(k)(1) In General

Proposed § 1024.41(k)(1)(i) largely incorporated and clarified existing comments 41(i)–1 and –2. It would have required a transferee servicer that acquires the servicing of a mortgage loan for which a loss mitigation application is pending as of the transfer date to comply with § 1024.41's requirements for that application. Proposed § 1024.41(k)(1)(i) would have further required that, subject to the exceptions set forth in § 1024.41(k)(2) through (4), a transferee servicer must comply with § 1024.41's requirements within the timeframes that were applicable to the transferor servicer. Finally, proposed § 1024.41(k)(1)(i) would have required that any protections under § 1024.41(e) through (h), such as prohibitions on commencing foreclosure or conducting a foreclosure sale, that applied to a borrower before a transfer continue to apply notwithstanding the transfer. The Bureau is adopting § 1024.41(k)(1)(i) substantially as proposed.

The purpose of proposed § 1024.41(k)(1)(i) was to ensure that a transfer does not adversely affect a borrower who is pursuing loss mitigation options. A borrower generally has no control over whether and when a mortgage loan is transferred to another servicer. As the Bureau has previously observed, there is heightened risk inherent in transferring mortgage loans that are in the process of loss mitigation.[272] In the proposal, the Bureau expressed its belief that holding a transferee servicer to the same standards and timelines as a transferor servicer helps mitigate the risk of consumer harm.

Proposed comment 41(k)(1)(i)–1.i incorporated a portion of existing comment 41(i)–2. It would have clarified that the regulation requires a transferee servicer to obtain from the transferor servicer documents and information a borrower submitted to a transferor servicer in connection with a

[272] *See* 79 FR 63295, 63296 (Oct. 23, 2014).

loss mitigation application, consistent with policies and procedures adopted pursuant to § 1024.38. The proposed comment also would have provided that a transferee servicer must comply with the applicable requirements of § 1024.41 with respect to a loss mitigation application received as a result of transfer, even if the transferor servicer was not required to comply with § 1024.41 (because, for example, the transferor servicer was a small servicer or the application was a duplicative request under § 1024.41(i) for the transferor servicer).

Proposed comment 41(k)(1)(i)–1.ii would have clarified that a transferee servicer must, in accordance with § 1024.41(b), exercise reasonable diligence to complete a loss mitigation application received as a result of a transfer. The proposed comment further explained that, in the transfer context, reasonable diligence includes ensuring that a borrower is informed of any changes to the application process, such as a change in the address to which the borrower should submit documents and information to complete the application, as well as ensuring that the borrower is informed about which documents and information are necessary to complete the application. Proposed comment 41(k)(1)(i)–1 was intended to avoid any ambiguity about whether and in what manner a transferee servicer is required to comply with § 1024.41 with respect to loss mitigation applications received as a result of a transfer.

Proposed comment 41(k)(1)(i)–2 mirrored the last sentence of current comment 41(i)–2. It would have clarified that, for purposes of § 1024.41(e) (borrower response), (f) and (g) (foreclosure protections), and (h) (appeal process), a transferee servicer must consider documents and information that constitute a complete application to have been received as of the date the transferor servicer received the documents and information. Proposed comment 41(k)(1)–2 would have further clarified that an application that was facially complete with respect to a transferor servicer remains facially complete under § 1024.41(c)(2)(iv) with respect to the transferee servicer as of the date it was facially complete with respect to the transferor servicer. It also would have clarified that, if an application was complete with respect to the transferor servicer but was not complete with respect to the transferee servicer, the transferee servicer must treat the application as facially complete as of the date the application was complete with respect to the transferor servicer. The purpose of this comment was to ensure that a transfer does not affect the protections to which a borrower is entitled under § 1024.41.

Finally, proposed comment 41(k)(1)(i)–3 would have clarified that a transferee servicer is not required to provide any notice required by § 1024.41 with respect to a particular loss mitigation application if the transferor servicer provided the notice to a borrower before the transfer. This comment was intended to address questions about whether a transferee servicer must resend a notice already provided by the transferor servicer as to a particular application.

Proposed § 1024.41(k)(1)(ii) provided that, for purposes of § 1024.41(k), the transfer date is the date on which the transfer of servicing responsibilities from the transferor servicer to the transferee servicer occurs. Proposed comment 41(k)(1)(ii)–1 would have provided that the transfer date corresponds to the date the transferee servicer will begin accepting payments relating to the mortgage loan, which already must be disclosed on the notice of transfer of loan servicing pursuant to § 1024.33(b)(4)(iv).[273] Proposed comment 41(k)(1)(ii)–1 further clarified that the transfer date is not necessarily the sale date for the transaction. The Bureau explained that the proposed definition was consistent with the definition Fannie Mae employs in its servicing guide[274] and reflected the industry's common understanding of the term.

The Bureau solicited comment on the treatment of loss mitigation applications pending at transfer and whether it was appropriate to require a transferee servicer to comply with § 1024.41 within the timeframes that were applicable to the transferor servicer. Additionally, the Bureau solicited comment on whether, following a transfer, a transferee servicer should be required to provide a borrower a written notice of what documents and information the transferee servicer needs to complete the application, regardless of whether the transferor servicer has provided such a notice.

The Bureau received several comments on the general requirement that the transferee servicer must comply with § 1024.41 within the timeframes that were applicable to the transferor servicer, based on the date the transferor servicer received the loss mitigation application. One industry commenter recommended that transferee servicers be permitted to restart the § 1024.41 timeframes for compliance following transfer, so long as the extension of time did not adversely affect the rights of borrowers. Another industry commenter expressed agreement that transfers should not affect a borrower's loss mitigation application or efforts to avoid foreclosure. However, it stated that it would be difficult for transferee servicers to comply with proposed § 1024.41(k)(1)(i) when a loan is transferred with a pending loss mitigation application. This commenter suggested that transferee servicers should not be required to comply with the § 1024.41 timeframes that were applicable to the transferor servicer because the transferee servicer's access to the loan level information necessary to evaluate pending loss mitigation applications is delayed while data is uploaded and loan files are imaged. One industry commenter expressed concern that requiring transferee servicers to adhere to the same § 1024.41 timeframes as transferor servicers would require transferee servicers to obtain detailed information on the loans being transferred prior to the transfer date, which may raise privacy concerns.

Most consumer advocacy group commenters expressed support for the proposal to require transferee servicers to adhere generally to the same timeframes that were applicable to transferor servicers. Several of these commenters explained that, currently, transferee servicers often require applicants to re-submit previously submitted documents, in effect starting anew with a loss mitigation application upon transfer. Numerous consumer advocacy groups also recommended that the Bureau require transferor servicers to provide transferee servicers with all documents and information that had previously been provided by a borrower to support a loss mitigation application, as well as detailed lists of loans with pending loss mitigation applications. These commenters explained that the absence of a private right of action in current § 1024.38(b)(4) renders it ineffective for consumers in addressing the problems associated with transfers where a borrower is pursuing loss mitigation. Several of these commenters also suggested that transferee servicers should be required to send borrowers written notice on the status of their loss mitigation application, regardless of whether the transferor had provided other notices pursuant to § 1024.41.

[273] Section 1024.33(b)(4)(iv) requires the notice of transfer to include ''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.''

[274] *See* Fannie Mae, Servicing Guide Announcement SVC–2014–06, at 1 (May 9, 2014), *available at https://www.fanniemae.com/content/announcement/svc1406.pdf*.

The Bureau is finalizing § 1024.41(k)(1)(i) and comments 41(k)(1)(i)–1.i, –1.ii, –2, and –3 with revisions. The Bureau is adding new comment 41(k)(1)(i)–1.iii. The Bureau is adopting § 1024.41(k)(1)(ii) and comment 41(k)(1)(ii)–1 with revisions.

Final § 1024.41(k)(1)(i) explains that, except as provided in § 1024.41(k)(2) through (4), if a transferee servicer acquires the servicing of a mortgage loan for which a loss mitigation application is pending as of the transfer date, the transferee servicer must comply with the requirements of § 1024.41 for that loss mitigation application within the timeframes that were applicable to the transferor servicer based on the date the transferor servicer received the loss mitigation application. Section 1024.41(k)(1)(i) further provides that all rights and protections under § 1024.41(c) through (h) to which a borrower was entitled before a transfer continue to apply notwithstanding the transfer. The Bureau's proposal addressed § 1024.41(e) through (h) but it did not specifically address § 1024.41(c) and (d) because a servicer must comply with § 1024.41(c), and as applicable, § 1024.41(d), to satisfy its requirements under § 1024.41(g). For additional clarity, the Bureau is specifying in the final rule that the rights and protections applicable to borrowers under § 1024.41(k)(1)(i) include those in § 1024.41(c) and (d).

Section 1024.41(k)(1)(i) is consistent with the Bureau's current interpretation of comments 41(i)–1 and –2 as generally requiring the transferee servicer to ''stand in the shoes'' of the transferor servicer. Accordingly, § 1024.41(k)(1)(i) protects borrowers who are pursuing loss mitigation options from being adversely affected when there is a servicing transfer. Borrowers will benefit from a general rule that, subject to certain exceptions, a transferee servicer must comply with the requirements of § 1024.41 within the same timeframes that were applicable to the transferor servicer.

The Bureau declines to extend the general timeframe for transferee servicers set forth in § 1024.41(k)(1)(i) in response to commenter concerns over the ability of transferee servicers to comply with § 1024.41 within the timeframes applicable to transferor servicers. The Bureau recognizes that, under certain circumstances, it may be difficult for transferee servicers to comply with timeframes that would have been applicable to transferor servicers. Servicers should prepare for and mitigate these challenges by implementing comprehensive policies and procedures to facilitate the transfer of information. To give servicers additional time where necessary, the Bureau proposed specific exceptions in § 1024.41(k)(2) through (4) to the general loss mitigation timeframes for transferee servicers established in § 1024.41(k)(1)(i). As described in greater detail in the section-by-section analyses of § 1024.41(k)(2) through (4), the Bureau is finalizing § 1024.41(k)(2) through (4) with timeframes generally based on the transfer date, rather than on the date the transferor received a loss mitigation application or the borrower made an appeal. The Bureau notes that the timeframe extensions in § 1024.41(k)(2) through (4) provided to transferee servicers apply only with respect to loans that are being transferred during the loss mitigation application, evaluation, and appeal process. Transferee servicers remain subject to all generally applicable requirements and timeframes of § 1024.41 with respect to loss mitigation applications received directly by the transferee servicer, outside of the transfer process. Because the exceptions to § 1024.41(k)(1)(i) provide servicers flexibility in situations where compliance with § 1024.41 in the timeframes applicable to the transferor servicer may be especially difficult, the Bureau is not revising the general framework set forth in § 1024.41(k)(1)(i), which requires a transferee servicer to comply with § 1024.41 for most purposes as if it were the same entity as the transferor servicer. The Bureau continues to believe that it is incumbent on both the transferor servicer and transferee servicer to ensure a smooth transition for borrowers and prevent borrower harm during servicing transfers.

The Bureau is finalizing several revisions to comment 41(k)(1)(i)–1.i. Final comment 41(k)(1)(i)–1.i explains that, in connection with a transfer, a transferor servicer must timely transfer, and a transferee servicer must obtain from the transferor servicer, documents and information submitted by a borrower in connection with a loss mitigation application, consistent with policies and procedures adopted pursuant to § 1024.38(b)(4).

Comment 41(k)(1)(i)–1.i further provides that a transferee servicer must comply with the applicable requirements of § 1024.41 with respect to a loss mitigation application received as a result of a transfer, even if the transferor servicer was not required to comply with § 1024.41 with respect to that application (for example, because § 1024.41(i) precluded applicability of § 1024.41 with respect to the transferor servicer). Comment 41(k)(1)(i)–1.i explains that, if an application was not subject to § 1024.41 prior to a transfer, then for purposes of § 1024.41(b) and (c), a transferee servicer is considered to have received the loss mitigation application on the transfer date. Finally, it states that any such application shall be subject to the timeframes for compliance set forth in § 1024.41(k).

The Bureau is finalizing comment 41(k)(1)(i)–1.i to describe more clearly the specific obligations of transferor servicers in connection with a transfer of loan servicing. The proposal did not address specific requirements for transferor servicers under § 1024.41(k). However, the Bureau believes that reiterating the specific obligation inherent in § 1024.38(b)(4) for transferor servicers under new comment 41(k)(1)(i)–1.i will address certain consumer protection concerns raised by commenters. Several consumer advocacy group commenters observed that, notwithstanding § 1024.38(b)(4), transferee servicers often require applicants to re-submit previously submitted documents, in effect starting over with a loss mitigation application upon transfer. The Bureau believes that requiring borrowers to re-submit previously submitted documents and otherwise restart the loss mitigation application process is generally inconsistent with the intended effect of § 1024.38(b)(4). Transferor servicers share responsibility under the regulation for ensuring that borrowers are not adversely affected by a servicing transfer. Comment 41(k)(1)(i)–1.i now specifies that transferor servicers must timely transfer documents and information submitted by a borrower in connection with a loss mitigation application, consistent with policies and procedures adopted pursuant to § 1024.38(b)(4).

Final comment 41(k)(1)(i)–1.i also provides further clarity on the obligations and timeframes applicable to a transferee servicer that receives a loss mitigation application as a result of a transfer when the transferor servicer was not required to comply with § 1024.41 with respect to that application. Transferee servicers have an obligation to review the documents and information that the transferor servicer provides to the transferee servicer to assess whether those documents and information constitute a loss mitigation application. If so, the transferee servicer must comply with § 1024.41, even if the transferor servicer was not required to do so for that application.

The Bureau believes that there are limited circumstances under which a transferor servicer would not have been required to comply with § 1024.41 for a particular application, for example, an application submitted to the transferor servicer but subject to the limiting provision against duplicative applications in § 1024.41(i). The comment clarifies that a transferee servicer must comply with § 1024.41 for such an application, which includes the requirement to engage in reasonable diligence to complete the application pursuant to comment 41(k)(1)(i)–1.ii. The Bureau acknowledges that this requirement means that a transferee servicer may be required to review documents and information that the borrower submitted to the transferor servicer well before the transfer date. Nonetheless, the Bureau believes that it is beneficial to borrowers if the transferee servicer treats the documents submitted to the transferor servicer as an application subject to § 1024.41. Doing so affords borrowers the protections of § 1024.41 sooner, which preserves important borrower protections. Additionally, as the investor and the loss mitigation options offered by that investor may change concurrently with the servicing transfer, borrowers could benefit by having those different loss mitigation options made available to them at an earlier date. Moreover, a transferee servicer's review of the documents and information submitted to a transferor servicer by a borrower obviates the need for the borrower to start over in the loss mitigation application process upon transfer, as many commenters allege continues to happen. The Bureau recognizes that, in some instances, the transferee servicer may still discover, upon reviewing the information and documents constituting the application, as part of its review and notice required under § 1024.41(b)(2)(i), that the application includes stale or invalid documents pursuant to any requirements applicable to any loss mitigation option available to the borrower. The Bureau acknowledges that, in those circumstances, the servicer would appropriately request that the borrower update the documents and information.

Final comment 41(k)(1)(i)–1.i explains that, if an application was not subject to § 1024.41 prior to a transfer, then for purposes of § 1024.41(b) and (c), a transferee servicer is considered to have received the loss mitigation application on the transfer date. The Bureau is adding a new sentence in the comment explaining that any such application is subject to the timeframes for compliance set forth in § 1024.41(k). This change clarifies that, for example, if a transferee servicer is required to comply with § 1024.41 but the transferor servicer was not, the transferee servicer must provide the acknowledgment notice required by § 1024.41(b)(2)(i)(B) within the timeframe set forth in § 1024.41(k)(2)(i), rather than within the timeframe required by § 1024.41(b)(2)(i)(B). This treatment allows a transferee servicer the necessary time to comply with § 1024.41 under the slightly-extended timeframes provided for transferee servicers in § 1024.41(k).

The Bureau declines to adopt a further revision to comment 41(k)(1)(i)–1.i, as requested by some commenters, to require specifically that transferor servicers provide transferee servicers a list of loans that will be transferred that have pending loss mitigation applications. Final comment 41(k)(1)(i)–1.i provides clear guidance that transferor servicers must timely transfer documents and information submitted by a borrower in connection with a loss mitigation application consistent with policies and procedures adopted pursuant to § 1024.38(b)(4). The Bureau recognizes that the provision of a list of loans with pending loss mitigation applications by the transferor servicer to the transferee servicer could help the transferee servicer comply with its obligations and mitigate the risk a servicing transfer poses to borrowers with pending loss mitigation applications. Although transferor servicers may wish to provide such a list under policies and procedures adopted pursuant § 1024.38(b)(4), the Bureau is not specifying such a requirement in this rule. The Bureau wishes to allow transferor and transferee servicers the flexibility to develop and implement the specific practices that best support compliance for their specific organizations and circumstances.[275]

The Bureau is making certain non-substantive revisions to comment 41(k)(1)(i)–1.ii to clarify transferee servicers' responsibilities when an application is facially complete. The Bureau is finalizing comment 41(k)(1)(i)–1.ii to explain that a transferee servicer must, in accordance with § 1024.41(b)(1), exercise reasonable diligence to complete a loss mitigation application, including a facially complete application, received as a result of a transfer. Comment 41(k)(1)(i)–1.ii further provides that, in the transfer context, reasonable diligence includes ensuring that a borrower is informed of any changes to the application process, such as a change in the address to which the borrower should submit documents and information to complete the application, as well as ensuring that the borrower is informed about which documents and information are necessary to complete the application. The proposal did not expressly include an obligation to exercise reasonable diligence to complete facially complete applications. The final rule clarifies that the obligation pertains to both incomplete and facially complete applications.

The Bureau is adopting new comment 41(k)(1)(i)–1.iii. This comment explains that a borrower may provide documents and information necessary to complete an application to a transferor servicer after the transfer date. It further provides that, consistent with policies and procedures maintained pursuant to § 1024.38(b)(4), the transferor servicer must timely transfer, and the transferee servicer must obtain, such documents and information. The Bureau is finalizing similar language regarding borrower appeals and borrower acceptances or rejections of pending loss mitigation offers in comments 41(k)(4)–1 and 41(k)(5)–1, respectively. The Bureau believes new comment 41(k)(1)(i)–1.iii clarifies the Bureau's expectation that a transfer should not adversely affect a borrower who is pursuing loss mitigation options, even if a borrower provides documents and information to the transferor servicer after the transfer date. This comment parallels other language in § 1024.41(k).

The Bureau is finalizing comment 41(k)(1)(i)–2 with certain revisions. Comment 41(k)(1)(i)–2 explains that, for purposes of § 1024.41(c) through (h), a transferee servicer must consider documents and information that constitute a complete loss mitigation application for the transferee servicer to have been received as of the date such documents and information were received by the transferor servicer, even if such documents and information were received by the transferor servicer after the transfer date, and includes a cross-reference to comment 41(k)(1)(i)–1.iii. It explains that an application that was facially complete under § 1024.41(c)(2)(iv) with respect to the transferor servicer remains facially complete under § 1024.41(c)(2)(iv) with respect to the transferee servicer as of the date it was facially complete with respect to the transferor servicer. Comment 41(k)(1)(i)–2 further explains that, if an application was complete with respect to the transferor servicer, but is not complete with respect to the transferee servicer, the transferee servicer must treat the application as facially complete under § 1024.41(c)(2)(iv) as of the date the

[275] *See* 79 FR 63295, 63299 (Oct. 23, 2014).

application was complete with respect to the transferor servicer.

Final comment 41(k)(1)(i)–2 clarifies the applicability of the rights and protections in § 1024.41(c) through (h) where a borrower submits documents and information that constitute a complete application for the transferee servicer to the transferor servicer after the transfer date. The Bureau seeks to ensure that a borrower who submits a complete application to the transferor servicer after the transfer date does not lose rights or protections to which the borrower would have been entitled had the borrower submitted the complete application to the transferee servicer. Comment 41(k)(1)(i)–2 also includes a cross-reference to new comment 41(k)(1)(i)–1.iii, which clarifies that a borrower may provide documents and information necessary to complete the application to the transferor servicer after the transfer date and the transferor and transferee servicer obligations regarding the transfer of such documents and information. The final rule clarifies that the rights in § 1024.41(c) and (d) apply in such situations to parallel the changes finalized in § 1024.41(k)(1)(i). The final rule also includes citations to § 1024.41(c)(2)(iv) where there is a discussion of a facially complete application. These changes to final comment 41(k)(1)(i)–2 clarify that the facially complete applications discussed in comment 41(k)(1)(i)–2 are those applications that meet the criteria of § 1024.41(c)(2)(iv).

Final comment 41(k)(1)(i)–3 provides that a transferee servicer is not required to provide notices under § 1024.41 with respect to a particular loss mitigation application that the transferor servicer provided prior to the transfer. For example, if the transferor servicer provided the notice required by § 1024.41(b)(2)(i)(B) prior to the transfer, the transferee servicer is not required to provide the notice again for that application. The Bureau is declining to require transferee servicers to provide borrowers a duplicative notice, or to provide a new notice under § 1024.41 explaining the additional documents and information necessary to complete the application, as suggested by several consumer advocacy groups. A transferee servicer's obligations under § 1024.41 generally, and § 1024.41(k) specifically, should ensure that borrowers are kept updated as to the status of their loss mitigation application. For example, under comment 41(k)(1)(i)–1.ii, transferee servicers must exercise reasonable diligence to complete a loss mitigation application, which includes keeping borrowers informed of any changes to the application process or any documents and information needed to complete the application. Additionally, § 1024.41(b)(2)(i)(B) already requires servicers that receive an incomplete application more than 45 days before a scheduled foreclosure sale to provide a notice of the additional documents and information needed to complete the application. Finally, as explained in the section-by-section analysis of § 1024.41(c)(3), servicers will be required to provide borrowers a written notice within five days (excluding legal holidays, Saturdays, and Sundays) of receipt of a complete loss mitigation application.

The Bureau is finalizing revisions to § 1024.41(k)(1)(ii), which defines transfer date for the purposes of § 1024.41(k), to incorporate language from proposed comment 41(k)(1)(ii)–1 directly in the regulation text. As finalized, § 1024.41(k)(1)(ii) defines transfer date as the date on which the transferee servicer will begin accepting payments relating to the mortgage loan, as disclosed on the notice of transfer of loan servicing pursuant to § 1024.33(b)(4)(iv).

The Bureau did not receive any comments on its proposed definition of transfer date in § 1024.41(k)(1)(ii). The Bureau believes that linking the definition of transfer date in § 1024.41(k)(1)(ii) directly to a date the servicer has already disclosed to the borrower on the notice of the transfer of loan servicing pursuant to § 1024.33(b)(4)(iv) will improve the ability of servicers and borrowers to track this date and monitor compliance with § 1024.41 generally and specifically the timeframes established in § 1024.41(k)(2) through (4).

The Bureau is finalizing revisions to comment 41(k)(1)(ii)–1 to reflect the revised definition of transfer date set forth in § 1024.41(k)(1)(ii). Comment 41(k)(1)(ii)–1 explains that the transfer date is the date on which the transferee servicer will begin accepting payments relating to the mortgage loan, as disclosed on the notice of transfer of loan servicing pursuant to § 1024.33(b)(4)(iv). It further explains that the transfer date is the same date as that on which the transfer of the servicing responsibilities from the transferor servicer to the transferee servicer occurs. As the Bureau explained in the proposal, the proposed definition of transfer date is consistent with the definition Fannie Mae employs in its servicing guide and reflects the industry's common understanding of the term.

Additionally, the Bureau is further clarifying in comment 41(k)(1)(ii)–1 that the transfer date is not necessarily the same date as either the effective date of the transfer of servicing as disclosed on the notice of transfer of loan servicing pursuant to § 1024.33(b)(4)(i) or the sale date identified in a servicing transfer agreement. The Bureau believes it is appropriate to clarify the distinction between the transfer date and the effective date of the transfer of servicing, as the date the transferee servicer begins accepting payments may be earlier than the effective date of transfer. RESPA section 6(i)(1) defines ''effective date of transfer'' as the date on which the mortgage payment of a borrower is first due to the transferee servicer of a mortgage loan pursuant to the assignment, sale, or transfer of the servicing of the mortgage loan. Accordingly, if the transfer date is June 10, but the borrower's payment is first due to the transferee servicer on July 1, the effective date of transfer would be July 1. However, the Bureau understands that transferee servicers may begin accepting payments on June 10. For purposes of § 1024.41(k)(1)(ii), therefore, June 10 is the transfer date.

41(k)(2) Acknowledgment Notices

Proposed § 1024.41(k)(2) would have provided that, if a transferee servicer acquires the servicing of a mortgage loan for which the period to provide the notice required by § 1024.41(b)(2)(i)(B) has not expired as of the transfer date, the transferee servicer must provide the notice within 10 days (excluding legal public holidays, Saturdays, or Sundays) after the date the transferor servicer received the application. As discussed below, the Bureau is adopting proposed § 1024.41(k)(2) with several substantial revisions.

Section 1024.41(b)(2)(i)(B) states that, if a servicer receives a loss mitigation application 45 days or more before a foreclosure sale, a servicer must notify the borrower in writing within five days (excluding legal public holidays, Saturdays, or Sundays) that the servicer acknowledges receipt of the application and the servicer has determined that the application is complete or incomplete. If the application is incomplete, the notice must, among other things, identify the documents or information necessary to complete the application.

The Bureau was concerned about a transferee servicer's ability to comply with § 1024.41(b)(2)(i)(B) in the scenario where a transferor servicer receives a loss mitigation application and, before the time period in which to provide the notice required by § 1024.41(b)(2)(i)(B) expires, transfers the mortgage loan to the transferee servicer without providing the notice. In that situation, a transferee servicer would be required to provide the notice within five days (excluding legal public holidays, Saturdays, or Sundays) of when the transferor servicer received the application. Depending on the timing of the transfer, a transferee servicer might have as little as one day after the transfer date to provide this notice.

Information the Bureau gathered through its outreach and industry monitoring efforts in advance of the proposal confirmed that a transferee servicer often has difficulty providing the notice required by § 1024.41(b)(2)(i)(B) within five days after the transferor servicer received a loss mitigation application. The Bureau understood that a transferee servicer typically requires several days to load a mortgage loan file and related information onto its systems and to access this information. Consequently, a transferee servicer may be unable to integrate this information and accurately review a loss mitigation application within the five-day time period specified in § 1024.41(b)(2)(i)(B), particularly for applications received several days before transfer. As a result, in this situation a transferee servicer acting diligently and in good faith may still be unable to comply timely with the requirements of § 1024.41(b)(2)(i)(B).

The Bureau proposed to allow transferee servicers up to an additional five days to comply with § 1024.41(b)(2)(i)(B) with respect to applications pending as of the transfer date. Specifically, proposed § 1024.41(k)(2) would have required a transferee servicer to provide the notice required by § 1024.41(b)(2)(i)(B) within 10 days (excluding legal public holidays, Saturdays, or Sundays) after the date the transferor servicer received a borrower's application.

The Bureau believed that establishing a specific deadline for the transferee servicer to provide the notice required by § 1024.41(b)(2)(i)(B) might encourage transferor and transferee servicers to work together to streamline the transfer of documents. In particular, a specific deadline would underscore the importance of § 1024.38(b)(4)(i), which requires a transferor servicer to have policies and procedures reasonably designed to ensure that it can timely transfer all information and documents in its possession or control 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. Thus, the Bureau expected that the proposed timeframe would lead transferor servicers to identify and transfer all loss mitigation applications, timely and accurately, to transferee servicers. Further, the Bureau believed a firm compliance deadline could avoid unnecessary delays in the loss mitigation application process, while at the same time affording transferee servicers additional time to respond properly to a borrower's application.

The Bureau also believed that this proposed extension would facilitate transferee servicers' compliance with § 1024.41(b)(2)(i)(B) while not materially affecting most borrowers. The existence and the extent of a borrower's protections under § 1024.41(e) through (h) are determined as of the date on which a servicer receives a borrower's complete application; extending the time for a transferee servicer to comply with § 1024.41(b)(2)(i)(B) could delay, but in most cases would not prevent, a borrower from obtaining those protections. Moreover, the proposed extension was for a relatively brief period of time, and the Bureau did not believe that a short delay in providing the § 1024.41(b)(2)(i)(B) notice would significantly lengthen the loss mitigation application, evaluation, and appeal process. Finally, the Bureau believed that allowing a transferee servicer some additional time to review a borrower's initial loss mitigation application might result in more accurate determinations and statements in the notice required under § 1024.41(b)(2)(i)(B) regarding the documents and information needed to complete an application, which would ultimately benefit borrowers.

Nonetheless, the Bureau recognized in the proposal that a delay in providing the § 1024.41(b)(2)(i)(B) notice could affect a borrower in certain circumstances, particularly when a servicer receives an incomplete loss mitigation application shortly before the dates tied to certain foreclosure protections, 90 and 38 days before a foreclosure sale. In that instance, a borrower has an interest in completing the application as soon as possible to preserve the maximum protections available under § 1024.41(e) through (h). Allowing a transferee servicer additional time to provide a borrower with a written notification of the documents and information required to complete an application could shorten the amount of time borrowers have to obtain and submit the documents and information necessary to complete an application, potentially reducing the ability of borrowers to complete the application in time to obtain certain foreclosure protections under § 1024.41 that are triggered by the receipt of a complete application by a specified date.

The Bureau requested comment on whether borrowers currently have difficulty in obtaining and submitting required documents and information to complete an application that the servicer received shortly before the 90th or 38th day before a foreclosure sale and whether the extension in proposed § 1024.41(k)(2) would exacerbate such difficulties. The Bureau further requested comment on whether it is reasonable to require a transferee servicer to provide the written notice required by § 1024.41(b)(2)(i)(B) within 10 days (excluding legal public holidays, Saturdays, or Sundays) from the date a transferor servicer received a loss mitigation application or whether a shorter or longer period is more appropriate. Finally, if a longer period would be appropriate, the Bureau requested comment on whether a transferee servicer that avails itself of the proposed extension should be required to give a borrower additional time to complete an application, such that a borrower would have additional time past the 90th or 38th day before a foreclosure sale to submit a complete application and obtain the applicable protections under § 1024.41(e) through (h).

The Bureau received several comments on proposed § 1024.41(k)(2). Industry commenters asserted that the proposed five-day extension would not provide enough time for servicers to provide the notice required by § 1024.41(b)(2)(i)(B) and recommended longer timeframes. One industry commenter specifically stated that the lag time between the transfer date and the date on which the transferee servicer has access to the loan level information necessary to provide the § 1024.41(b)(2)(i)(B) notice would make compliance with proposed § 1024.41(k)(2) difficult. Industry commenters recommended that transferee servicers be provided an extension of 10 or 25 days. Other industry commenters recommended that transferee servicers be permitted to comply with § 1024.41(k)(2) within 15 business days from the transfer date or 30 days from the transfer date.

Consumer advocacy group commenters expressed concern with the potential effect on borrowers resulting from the proposal's five-day extension. These commenters stated that the notice required by § 1024.41(b)(2)(i)(B) is critical for borrowers seeking to submit complete applications and meet the deadlines for certain foreclosure protections. They cautioned that the extension of the timeframe for transferee servicers to provide this notice could result in borrowers completing applications past the 90th or 38th day before a scheduled foreclosure sale, and thereby losing certain foreclosure protections under § 1024.41(e) through (h) and the right to an evaluation under § 1024.41(c). These commenters recommended limiting any extension of the timeframe for transferee servicers in § 1024.41(k)(2) to five days, as proposed.

Some consumer advocacy groups suggested that, in light of the proposed extension for transferee servicers in § 1024.41(k)(2), the Bureau should provide borrowers additional time to complete an application when § 1024.41(k)(2) applies. These commenters recommended that, when § 1024.41(k)(2) applies, all of the time periods under § 1024.41(c) and § 1024.41(e) through (h) should be extended by 10 days. One industry commenter recommended that transferee servicers should be required to continue a pending foreclosure sale if necessary to maintain the loss mitigation deadlines and borrower protections under § 1024.41, assuming an extension to the timeframe proposed in § 1024.41(k)(2).

Finally, some consumer advocacy groups expressed concern that the proposal addressed only situations where the time period to provide the § 1024.41(b)(2)(i)(B) notice had not expired as of the transfer date. These commenters recommended that the rule also require transferee servicers to send the notice required by § 1024.41(b)(2)(i)(B) if the transferor servicer was required to send this notice prior to the transfer date but failed to do so.

For the reasons explained below, the Bureau is adopting § 1024.41(k)(2) with several substantial changes to the proposal. Final § 1024.41(k)(2)(i) explains that, if a transferee servicer acquires the servicing of a mortgage loan for which the period to provide the notice required by § 1024.41(b)(2)(i)(B) has not expired as of the transfer date and the transferor servicer has not provided such notice, the transferee servicer must provide the notice within 10 days (excluding legal public holidays, Saturdays, and Sundays) of the transfer date. As discussed in more detail below, in an effort to reduce the borrower harms created by the extension in the timeframe applicable to transferee servicers, the Bureau is adding new § 1024.41(k)(2)(ii) and new comments 41(k)(2)(ii)–1 through –3 to adjust the timeframes for certain borrower rights and foreclosure protections where § 1024.41(k)(2)(i) applies.

The Bureau understands that, when a loan is transferred, it generally takes several days to board documents onto the transferee servicer's systems. During this transition period, the transferee servicer cannot access the loan level data and documents necessary to send the acknowledgment notice or to evaluate applications and appeals. Transferee servicers are also unable to assess transferor servicers' compliance during this period of time when the documents are being boarded onto transferee servicer's systems. Transferor servicers may have difficulty sending the acknowledgment notice or completing a loss mitigation evaluation when an application is received shortly before transfer. As a result, transferee servicers may experience difficulty ensuring compliance with timeframes applicable to the transferor servicer based on the date the transferor servicer received the loss mitigation application, even with the five-day extension in proposed § 1024.41(k)(2). The Bureau believes that finalizing a timeframe for compliance in § 1024.41(k)(2)(i) that is based on the transfer date, rather than on the date the transferor servicer received the application, better accounts for the transition period inherent to transfers.

The final rule, by taking into account the transition period inherent to transfers, effectively allows transferee servicers subject to § 1024.41(k)(2)(i) approximately the same time to comply as servicers subject to the general five day timeframe in § 1024.41(b)(2)(i)(B). Although servicers are generally only permitted five days to provide the notice required by § 1024.41(b)(2)(i)(B), transferee servicers must also account for the several-day transition period that occurs when there is a transfer of servicing rights. In starting the timeframe for compliance at the transfer date, and providing only an additional five days to comply, the Bureau means to ensure that transferee servicers are able to comply with the requirements of § 1024.41(b)(2)(i)(B) within the approximate timeframes generally applicable to servicers absent the complicating factors of a transfer.

The Bureau expects that the final rule will have a limited effect on most borrowers. The time extension permitted for transferee servicers is modest and should limit the number of borrowers who have difficulty obtaining the foreclosure protections because of a transferee servicer's delay. More importantly, because the existence and the extent of a borrower's rights and protections under § 1024.41(c) through (h) are determined as of the date on which a servicer receives a borrower's complete application, extending the time for a transferee servicer to comply with § 1024.41(b)(2)(i)(B) could delay, but in most cases should not prevent, a borrower from obtaining those rights and protections. Moreover, the Bureau believes that tying compliance under § 1024.41(k)(2)(i) to the transfer date will make it easier for borrowers and servicers alike to track the transferee servicer's compliance, as the transfer date is disclosed on the notice of transfer of loan servicing pursuant to § 1024.33(b)(4)(iv).

As discussed in the section-by-section analysis of § 1024.41(k)(1), comment 41(k)(1)(i)–3 clarifies that a transferee servicer is not required to provide notices under § 1024.41 with respect to a particular loss mitigation application that the transferor servicer provided prior to the transfer. Thus, the transferee servicer is not required to provide the notice required under § 1024.41(b)(2)(i)(B) if the transferor servicer has provided it. The Bureau does not believe that a duplicative notice requirement in this context would provide a significant additional benefit to borrowers because, as comment 41(k)(1)(i)–1.ii clarifies, a transferee servicer must exercise reasonable diligence to complete a loss mitigation application following the transfer, which includes ensuring that a borrower is informed of any changes to the application process and which documents and information are necessary to complete the application. Adopting this requirement would also impose an additional burden on transferee servicers. Thus, final § 1024.41(k)(2)(i) explains that the requirements of § 1024.41(k)(2)(i) apply if a transferee servicer acquires the servicing of a mortgage loan for which the period to provide the notice required by § 1024.41(b)(2)(i)(B) has not expired as of the transfer date and the transferor servicer has not provided such notice.

Similarly, the Bureau is declining to adopt a requirement that the transferee servicer provide the notice required by § 1024.41(b)(2)(i)(B), if the time period for providing that notice had expired as of the transfer date, even if the transferor servicer has not provided it. Pursuant to final comment 41(k)(1)(i)–1.ii, transferee servicers must exercise reasonable diligence to complete any incomplete applications, including those for which a transferor servicer has failed to provide the notice required by § 1024.41(b)(2)(i)(B). Similarly, as provided in § 1024.41(k)(3), a transferee servicer would be expected to evaluate any complete applications received by the transferor servicer, even if the transferor servicer had not provided the notice required by § 1024.41(b)(2)(i)(B).

The Bureau is adding new § 1024.41(k)(2)(ii) to mitigate potential borrower harm caused by the extended timeframe for transferee servicers finalized in § 1024.41(k)(2)(i). Although the Bureau believes that § 1024.41(k)(2)(i) should have a limited effect on most borrowers, it recognizes that any delay in the receipt of the notice required by § 1024.41(b)(2)(i)(B) may affect the ability of some borrowers to complete an application before certain deadlines under § 1024.41. For example, where a transferor servicer receives a borrower's application shortly before the borrower's loan becomes more than 120 days delinquent or shortly before day 90 or day 38 before a foreclosure sale, the delayed provision of the notice required by § 1024.41(b)(2)(i)(B) may make it more difficult for a borrower to obtain and submit required documents and information to complete an application prior to those milestones, which could dictate whether, among other things, a servicer is required to evaluate a borrower's application within 30 days, a borrower obtains appeal rights, or certain foreclosure protections apply. Additionally, the Bureau recognizes that borrowers generally benefit by obtaining the foreclosure protections of § 1024.41 at an earlier date. The Bureau is adding new § 1024.41(k)(2)(ii) because it believes the extended timeframe for transferee servicers under § 1024.41(k)(2)(i) should not limit a borrower's opportunity to obtain certain critical rights and foreclosure protections.

The Bureau is finalizing § 1024.41(k)(2)(ii)(A) to provide that a transferee servicer that must provide the notice required by § 1024.41(b)(2)(i)(B) under § 1024.41(k)(2) shall not make the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process until a date that is after the reasonable date disclosed to the borrower pursuant to § 1024.41(b)(2)(ii), notwithstanding § 1024.41(f)(1). Section 1024.41(k)(2)(ii)(A) further explains that, for purposes of § 1024.41(f)(2), a borrower who submits a complete loss mitigation application on or before the reasonable date disclosed to the borrower pursuant to § 1024.41(b)(2)(ii) shall be treated as having done so during the pre-foreclosure review period set forth in § 1024.41(f)(1). Section 1024.41(k)(2)(ii)(A) addresses the potential situation where a borrower might have less time to complete an application during the 120-day pre-foreclosure review period because of the extended timeline for transferee servicers to provide the notice required by § 1024.41(b)(2)(i)(B).

Generally, under § 1024.41(f)(1)(i) and (f)(2), a servicer is permitted to make the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process if a borrower's mortgage loan obligation is more than 120 days delinquent and the borrower has not submitted a complete application during this pre-foreclosure review period. Thus, absent § 1024.41(k)(2)(ii)(A), and assuming the borrower did not submit a complete application during the 120-day pre-foreclosure review period, the servicer could otherwise feasibly file for foreclosure on the day when the borrower becomes 121 days delinquent. Under § 1024.41(k)(2)(ii)(A), however, the transferee servicer may not make the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process until a date that is after the reasonable date disclosed to the borrower pursuant to § 1024.41(b)(2)(ii). If the borrower submits a complete loss mitigation application on or before the reasonable date disclosed to the borrower pursuant to § 1024.41(b)(2)(ii), then for purposes of § 1024.41(f)(2), the borrower shall be treated as having done so during the pre-foreclosure review period set forth in § 1024.41(f)(1). Accordingly, § 1024.41(k)(2)(ii)(A) prevents a borrower from losing part of the 120-day pre-foreclosure review period to complete an application because of the extended timeline for transferee servicers to provide the § 1024.41(b)(2)(i)(B) notice that is set forth in § 1024.41(k)(2)(i). The Bureau is adopting new comment 41(k)(2)(ii)–1.i to provide an illustrative example.

As discussed in more detail in the section-by-section analysis of § 1024.41(b)(2)(ii), a reasonable date is at least seven days from the date the servicer provides the § 1024.41(b)(2)(i)(B) notice and generally 30 days after the date the servicer provides the § 1024.41(b)(2)(i)(B) notice. Additionally, the reasonable date must be no later than the earliest remaining milestone,[276] subject to the minimum seven day requirement. So, for example, if the date that is the 120th day of the borrower's delinquency is the earliest remaining milestone, and that date is 15 days from the date the notice required by § 1024.41(b)(2)(i)(B) is provided, the reasonable date must be at least seven days from the date the § 1024.41(b)(2)(i)(B) notice is provided and not later than the date that is the 120th day of the borrower's delinquency. Accordingly, new § 1024.41(k)(2)(ii) requires transferee servicers to provide borrowers additional time to complete an application and obtain certain rights and protections only in situations where a milestone either occurs before the notice under § 1024.41(b)(2)(i)(B) is provided or less than seven days from when the notice is provided. The Bureau is adding new comment 41(k)(2)(ii)–3 to clarify the determination of the correct reasonable date where no milestones remain.

The Bureau is adding new § 1024.41(k)(2)(ii)(B) to address situations where borrowers who are provided the notice required under § 1024.41(b)(2)(i)(B) by transferee servicers pursuant to § 1024.41(k)(2)(i) submit a complete loss mitigation application 37 days or less before a scheduled foreclosure sale. Specifically, § 1024.41(k)(2)(ii)(B) provides that a transferee servicer that must provide the notice required by § 1024.41(b)(2)(i)(B) under § 1024.41(k)(2) shall comply with § 1024.41(c), (d), and (g) if the borrower submits a complete loss mitigation application to the transferee or transferor servicer 37 or fewer days before the foreclosure sale but on or before the reasonable date disclosed to the borrower pursuant to § 1024.41(b)(2)(ii). Section 1024.41(c) establishes requirements for a servicer's evaluation of a complete loss mitigation application received more than 37 days before a foreclosure sale, and § 1024.41(d) includes certain requirements, as applicable, for the notice a servicer must provide pursuant to § 1024.41(c). Section 1024.41(g) limits a servicer's ability to proceed with a foreclosure sale until certain conditions are met where a borrower submits a complete loss mitigation application more than 37 days before a foreclosure sale.

Thus, § 1024.41(k)(2)(ii)(B) addresses situations where the extended timeline provided to transferee servicers to provide the § 1024.41(b)(2)(i)(B) notice under § 1024.41(k)(2)(i) could limit a borrower's opportunity to complete an application and obtain the rights and protections afforded under § 1024.41(c), (d), and (g). It requires transferee servicers to comply with these provisions if the borrower submits a

[276] As revised, comment 41(b)(2)(ii)–1 sets forth the following four milestones for servicers setting the reasonable date: (i) The date by which any document or information submitted by a borrower will be considered stale or invalid pursuant to any requirements applicable to any loss mitigation option available to the borrower; (ii) the date that is the 120th day of the borrower's delinquency; (iii) the date that is 90 days before a foreclosure sale; or (iv) the date that is 38 days before a foreclosure sale.

complete application on or before the reasonable date, notwithstanding that this date is 37 days or less before a scheduled foreclosure sale. New comment 41(k)(2)(ii)–1.ii provides an illustrative example of this provision. As explained in new comment 41(k)(2)(ii)–2, discussed in more detail below, where a borrower submits a complete application more than 37 days before a scheduled foreclosure sale, a transferee servicer must comply with the otherwise applicable requirements of § 1024.41. The Bureau believes that § 1024.41(k)(2)(ii)(B) reduces potential harm from the extended timeline for transferee servicers in § 1024.41(k)(2)(i) and in particular affords a borrower a reasonable opportunity to complete an application and obtain the rights and protections of § 1024.41(c), (d), and (g).

The Bureau recognizes that § 1024.41(k)(2)(ii)(B) requires transferee servicers to provide certain borrowers rights and protections in situations where compliance with § 1024.41(c), (d), and (g) would not otherwise be required. Depending on the circumstances, § 1024.41(k)(2)(ii)(B) may provide certain borrowers more time to complete an application and obtain the rights and protections under § 1024.41(c), (d), and (g) than if the borrower's loan had not been transferred. Under § 1024.41(k)(2)(ii)(B) transferee servicers will, for example, be required to comply with § 1024.41(g) by delaying a foreclosure sale within a shorter period of time prior to a scheduled foreclosure sale than they would generally be required to do. However, the Bureau expects that such instances will be rare, as § 1024.41(k)(2)(ii)(B) applies only where a transferee servicer provides the notice required by § 1024.41(b)(2)(i)(B) to a borrower pursuant to § 1024.41(k)(2)(i) and the borrower submits a complete application 37 days or less before a foreclosure sale but on or before the reasonable date disclosed under § 1024.41(b)(2)(ii).

The Bureau believes that this approach appropriately balances mitigating consumer harm and imposing burden on transferee servicers. Requiring compliance with existing § 1024.41(c), (d), and (g), rather than establishing a separate standard for evaluating applications and providing dual tracking protections, as the Bureau considered, eases any compliance burden on transferee servicers associated with § 1024.41(k)(2)(ii)(B). Transferee servicers can further minimize any delay and associated burden by working proactively with transferor servicers to expedite the provision of the notice required under § 1024.41(b)(2)(i)(B). Because the rule currently requires that the notice under § 1024.41(b)(2)(i)(B) be provided within five days of the receipt of the loss mitigation application, without regard to transfer, the Bureau believes that some servicers may have already developed standardized data protocols to identify affected loan files and expedite delivery of the required notice. Accordingly, the Bureau believes § 1024.41(k)(2)(ii) strikes an appropriate balance to limit borrower harm associated with the extended timeline in § 1024.41(k)(2)(i) while limiting the compliance burden on transferee servicers.

As part of striking this balance, the Bureau has decided not to preserve a borrower's opportunity to obtain appeal rights under § 1024.41(h) if the 90-day milestone passes before the transferor or transferee servicer receives the borrower's complete loss mitigation application. Appeal rights afford borrowers an important safeguard against servicer error in the evaluation of complete loss mitigation applications. However, for the likely few number of borrowers who may be affected by the extended timeframe in § 1024.41(k)(2)(i), the Bureau has prioritized preventing transferee servicers from taking critical foreclosure actions to the detriment of those borrowers immediately following transfer, while limiting the effect of § 1024.41(k)(2)(ii) on the otherwise applicable timeframes set forth in the loss mitigation rules and potentially complicating compliance. The Bureau notes that, even absent appeal rights under § 1024.41(h), borrowers may still submit a notice of error under § 1024.35 relating to the loss mitigation or foreclosure process and to the servicing of the loan, and servicers must comply with the applicable provisions of § 1024.35 regarding such notices of error.

The Bureau is adding new comment 41(k)(2)(ii)–2 to address the applicability of other loss mitigation provisions in light of new § 1024.41(k)(2)(ii). Comment 41(k)(2)(ii)–2 explains that § 1024.41(k)(2)(ii)(A) prohibits a servicer from making the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process until a date that is after the reasonable date disclosed to the borrower pursuant to § 1024.41(b)(2)(ii), notwithstanding § 1024.41(f)(1). It further explains that § 1024.41(k)(2)(ii)(B) requires a servicer to comply with § 1024.41(c), (d), and (g) if a borrower submits a complete loss mitigation application on or before the reasonable date disclosed in the notice required by § 1024.41(b)(2)(i)(B), even if the servicer would otherwise not be required to comply with § 1024.41(c), (d), and (g) because the application is submitted 37 days or fewer before a foreclosure sale. Comment 41(k)(2)(ii)–2 explains that § 1024.41(k)(2)(ii) provides additional protections for borrowers but does not remove any protections, and clarifies that servicers remain subject to the requirements of § 1024.41 as applicable and so, for example, must comply with § 1024.41(h) if the servicer receives a complete loss mitigation 90 days or more before a foreclosure sale. It further explains that similarly, a servicer is prohibited from making the first notice or filing before the borrower's mortgage loan obligation is more than 120 days delinquent, even if that is after the reasonable date disclosed to the borrower pursuant to § 1024.41(b)(2)(ii). Section 1024.41(k)(2)(ii) provides certain borrowers an opportunity to obtain rights and protections under § 1024.41(c), (d), and (g) if they submit a complete loss mitigation application 37 or fewer days before a foreclosure sale but on or before the reasonable date disclosed on the notice required by § 1024.41(b)(2)(i)(B). Comment 41(k)(2)(ii)–2 clarifies that § 1024.41(k)(2)(ii)(B) does not detract from or otherwise affect any other requirements under § 1024.41.

The Bureau is also finalizing new comment 41(k)(2)(ii)–3 to address the determination of the reasonable date when no milestones remain. As explained in more detail in the section-by-section analysis of § 1024.41(b)(2)(ii), § 1024.41(b)(2)(ii) commentary explains that the reasonable date generally must be no later than the earliest milestone, that 30 days is generally reasonable, and that the reasonable date must never be less than seven days after the § 1024.41(b)(2)(i)(B) notice is provided to the borrower. As noted above, this generally means that when the nearest remaining milestone is between seven days and 30 days away from the date the notice required by § 1024.41(b)(2)(i)(B) is provided, the reasonable date must be no later than the date of that milestone. However, where a transferee servicer provides a borrower the notice required by § 1024.41(b)(2)(i)(B) 37 or fewer days before a foreclosure sale, no milestones remain. Comment 41(k)(2)(ii)–3 explains that, generally, a servicer does not provide the notice required under § 1024.41(b)(2)(i)(B) after the date that is 38 days before a foreclosure sale, so at least one milestone specified in comment 41(b)(ii)–1 always remains applicable. When § 1024.41(k)(2)(i) applies, however, the transferee servicer may sometimes provide the notice after the date that is 38 days before a foreclosure sale. When this occurs, the transferee servicer must determine the reasonable date when none of the four specified milestones remain. Comment 41(k)(2)(ii)–3 explains that the other requirements of § 1024.41(b)(2)(ii) continue to apply and clarifies that, in this circumstance, a reasonable date may occur less than 30 days, but not less than seven days, after the date the transferee servicer provides the written notice pursuant to § 1024.41(b)(2)(i)(B). Section 1024.41(k)(2)(ii) establishes additional borrower rights and protections determined in relation to the reasonable date disclosed pursuant to § 1024.41(b)(2)(ii). Thus, comment 41(k)(2)(ii)–3 clarifies that § 1024.41(k)(2)(ii) does not affect the transferee servicer's obligation to determine the reasonable date in accordance with the § 1024.41(b)(2)(ii) commentary.

41(k)(3) Complete Loss Mitigation Applications Pending at Transfer

Proposed § 1024.41(k)(3)(i) would have provided that, with two exceptions, a transferee servicer that acquires the servicing of a mortgage loan for which a complete loss mitigation application is pending as of the transfer date must comply with the applicable requirements of § 1024.41(c)(1) and (4) within 30 days of the date the transferor servicer received the complete application. Thus, unless an exception applies, a transfer would not affect the time in which a borrower should receive a notice of which loss mitigation options, if any, a servicer will offer to the borrower. The Bureau explained that this proposed requirement may be necessary to ensure that a transfer does not adversely affect a borrower's right to a prompt evaluation of a complete loss mitigation application. The Bureau is finalizing proposed § 1024.41(k)(3) with substantial revisions. Final § 1024.41(k)(3) establishes a timeframe for transferee servicer compliance that is 30 days from the transfer date and does not include the proposed exceptions.

Proposed comment 41(k)(3)(i)–1 would have clarified a transferee servicer's obligations regarding an application that was complete with respect to the transferor servicer but for which the transferee servicer needed additional documentation or corrections to a previously submitted document to evaluate the borrower for all loss mitigation options based upon the transferee servicer's criteria. Specifically, the proposed comment would have clarified that, in this scenario and consistent with proposed § 1024.41(c)(2)(iv), the application is facially complete as of the date it was first facially complete or complete, as applicable, with respect to the transferor servicer, and the borrower is entitled to all of the protections under § 1024.41(c)(2)(iv). Additionally, once the transferee servicer receives the information or corrections necessary to complete the application, § 1024.41(c)(3) requires the transferee servicer to provide a notice of complete application. Finally, the proposed comment would have clarified that an application that was complete with respect to the transferor servicer remains complete even if the transferee servicer requests that a borrower resubmit the same information in the transferee servicer's specified format or make clerical corrections to the application. The comment would have further explained that a borrower's failure to resubmit such information or make such clerical corrections does not extend the time in which the transferee servicer must complete the evaluation of the borrower's complete application.

Proposed comment 41(k)(3)(i)–2 addressed the reverse situation in which a borrower's loss mitigation application was incomplete based upon the transferor servicer's criteria prior to transfer but the transferee servicer determines that the application is complete based upon its own criteria. In that case, the proposed comment would have clarified that the application is considered a pending loss mitigation application complete as of the transfer date for purposes of § 1024.41(k)(3), but complete as of the date the transferor servicer received the documents and information constituting the complete application for purposes of § 1024.41(e) through (h). This comment was intended to avoid uncertainty about the timeframe in which the transferee servicer must evaluate a complete application and the date on which the borrower obtained protections under § 1024.41.

Proposed § 1024.41(k)(3)(ii)(A) set forth the first proposed exception to the requirement to comply with § 1024.41(c)(1) and (4) within 30 days of the date the transferor servicer received the complete application. This proposed exception addressed involuntary transfers of servicing. The Bureau understood that a servicer that acquires servicing as a result of an involuntary transfer is less likely to be able to plan properly for a transfer. Additionally, involuntary transferee servicers may be more likely to receive loans from a failing or bankrupt servicer, which in turn may be more likely to have failed to maintain adequate records regarding borrowers' mortgage loans. Therefore, proposed § 1024.41(k)(3)(ii)(A) would have allowed a servicer that acquires servicing as a result of an involuntary transfer to comply with the applicable requirements of § 1024.41(c)(1) and (4) within 30 days of the date the transferor servicer received a complete loss mitigation application, or within 15 days of the transfer date, whichever is later. Proposed § 1024.41(k)(3)(ii)(B) would have provided that a transfer is involuntary when an unaffiliated investor or a court or regulator with jurisdiction requires, with less than 30 days advance notice, the transferor servicer to transfer servicing to another servicer and the transferor servicer is in breach of, or default under, its servicing agreement for loss mitigation related-servicing performance deficiencies or is in receivership or bankruptcy.

The second proposed exception, in proposed § 1024.41(k)(3)(iii), concerned instances where a transferee servicer's completion of the evaluation within the timeframes set forth in proposed § 1024.41(k)(3)(i) or (ii)(A), as applicable, was impracticable under the circumstances. The Bureau understood that, due to the unique circumstances and complications that may arise in connection with a transfer, there may be times when, despite the transferee servicer's good faith efforts, it may be impracticable to comply with the timing requirements of § 1024.41(k)(3)(i) or (ii)(A). In that situation, proposed § 1024.41(k)(3)(iii) would have required a transferee servicer to comply with the applicable requirements of § 1024.41(c)(1) and (4) within a reasonably prompt time after expiration of the applicable time period in § 1024.41(k)(3)(i) or (ii)(A). The Bureau expected that, in most circumstances, it would be practicable for a transferee servicer to evaluate a complete application within the prescribed timeframes and that an extension would not be necessary or appropriate. The Bureau also proposed comment 41(k)(3)(iii)–1, which would have clarified that, for purposes of § 1024.41(k)(3)(iii), a servicer that complies with the applicable requirements of § 1024.41(c)(1) and (4) within five days after the expiration of the applicable timeframe in proposed § 1024.41(k)(3)(i) or (ii)(A) would generally be considered to have acted within a ''reasonably prompt time.''

The Bureau sought comment on the treatment of complete applications pending at transfer. In particular, the Bureau sought comment on whether it is ever necessary or appropriate to give transferee servicers an extension of time to evaluate complete applications. If an extension were necessary or appropriate, the Bureau sought comment on which factors and circumstances, including but not limited to involuntary transfers, might require an extension, the appropriate length of any extension, and the burden transferee servicers should have to meet to demonstrate a need for the extension. The Bureau also sought comment on what obstacles transferee servicers currently face in obtaining and evaluating pending loss mitigation applications and the problems faced by borrowers who have applications pending at the time of a servicing transfer, as well as whether an extension of time to comply with § 1024.41 following a transfer would ameliorate or exacerbate those problems.

The Bureau received a number of comments in response to proposed § 1024.41(k)(3). Many industry commenters recommended that proposed § 1024.41(k)(3)(i) be revised to provide transferee servicers an extension of time to evaluate a pending complete application, with several recommending that transferee servicers be permitted 30 days from the transfer date to comply with § 1024.41(c)(1) and (4). Several other industry commenters requested an extension of the timeframe in § 1024.41(k)(3)(i) but did not recommend a specific timeframe. A few industry commenters stated that the transition period inherent to transfers would make compliance with proposed § 1024.41(k)(3)(i) difficult. One industry commenter stated that the timeframe in the proposal was not feasible, even with the potential for a five-day extension under proposed § 1024.41(k)(3)(iii). This commenter further stated that proposed § 1024.41(k)(3) would either effectively stop the transfer of servicing for most loans with pending loss mitigation applications or greatly increase the number of errors made by transferee servicers in evaluating these applications. Another industry commenter explained that proposed § 1024.41(k)(3) would place a significant administrative and cost burden on transferee servicers.

Several industry commenters that recommended an extension of the timeframe in proposed § 1024.41(k)(3)(i) discussed the potential impact such an extension could have on borrowers. One industry commenter asserted that providing transferee servicers adequate time to evaluate an application would benefit borrowers, and noted that borrower foreclosure protections would continue to apply during the evaluation period. One commenter expressed the view that an extension to § 1024.41(k)(3)(i) would not adversely affect borrower foreclosure protections because generally a pending foreclosure proceeding is paused until the transferee servicer has evaluated the complete application. Another industry commenter suggested that the Bureau should extend the timeframe in proposed § 1024.41(k)(3)(i) and could require that servicers postpone pending foreclosure sales to maintain the current § 1024.41 loss mitigation timelines.

Several industry commenters expressed concern over transferee servicers' ability to comply with the 30-day timeframe applicable to the transferor servicer in proposed § 1024.41(k)(3)(i) where most of the 30-day period had passed prior to transfer. These commenters recommended that the Bureau revise the proposal to provide a transferee servicer an extension of time to comply with § 1024.41(c)(1) and (4) where most of the 30-day timeframe had passed prior to transfer.

Industry commenters generally supported the exception for involuntary transfers in proposed § 1024.41(k)(3)(ii). However, several of these commenters stated that an extension should be provided for all transferee servicers, not just those evaluating applications following an involuntary transfer. One industry commenter stated that requiring transferee servicers to comply within the same timeframes applicable to transferor servicers would be difficult for both voluntary and involuntary transfers.

The consumer advocacy groups that commented on the exception in proposed § 1024.41(k)(3)(iii), where compliance was not practicable, expressed concern that this proposed exception was not sufficiently definite and could create a compliance gap. These commenters recommended that the Bureau incorporate language from the proposal's preamble into comment 41(k)(3)(iii)–1, indicating that this exception would only be applicable in unusual circumstances and that generally it would be practicable for transferee servicers to evaluate an application within the otherwise applicable timeframes. These consumer advocacy groups also stated that § 1024.41(k)(3)(iii) should incorporate language from the proposed commentary into the regulation text and require compliance within five days of the expiration of the otherwise applicable timeframes. Finally, these commenters recommended that comment 41(k)(3)(iii)–1 provide examples of when it would be impracticable for transferee servicers to comply within the otherwise applicable timeframes.

Several consumer advocacy groups recommended revisions to the proposed § 1024.41(k)(3) commentary. They stated that comment 41(k)(3)(i)–1 should be revised to prohibit transferees from requesting that borrowers resubmit information in the transferee servicer's required format or make clerical corrections to an application. One consumer advocacy group recommended that proposed comment 41(k)(3)(i)–1 should require transferee servicers to treat applications considered complete by the transferor servicer as complete, rather than facially complete. This commenter suggested that, if the transferee servicer requires more information to evaluate the application, the 30-day evaluation period under § 1024.41(c)(1) should be extended and there should be a required pause in foreclosure activities under § 1024.41(f) and (g). This commenter also recommended that a transferee servicer treat the borrower as if a complete loss mitigation application was pending at transfer and should not determine it has received the full loan file following transfer until the transferor servicer has certified that it has provided the transferee servicer the entire loan file, including any loss mitigation applications or loss mitigation options offered, or 60 days have passed following the transfer date and neither the transferor servicer or borrower has indicated the existence of a pending loss mitigation application or plan. It stated that this requirement would ensure that foreclosure sales are not conducted while the transferee servicer is unaware of any pending loss mitigation applications or agreements between the borrower and the transferor servicer. Consumer advocacy groups also recommended that comment 41(k)(3)(i)–2 be revised to provide borrowers the right to an evaluation under § 1024.41(c)(1) based on the date the transferor servicer received the application, even if the application was first complete upon transfer to the transferee servicer.

For the reasons explained below, the Bureau is finalizing changes to § 1024.41(k)(3). Final § 1024.41(k)(3) establishes a timeframe for transferee servicer compliance that is 30 days from the transfer date, whether the transfer is voluntary or involuntary. Based on the timeframe finalized in § 1024.41(k)(3), the Bureau believes the exceptions proposed in § 1024.41(k)(3)(ii) and § 1024.41(k)(3)(iii) are no longer necessary. The Bureau is therefore renumbering proposed § 1024.41(k)(3)(i) as § 1024.41(k)(3), and is not adopting proposed § 1024.41(k)(3)(ii) or § 1024.41(k)(3)(iii). The Bureau is renumbering comments 41(k)(3)(i)–1 and –2 as comments 41(k)(3)–1 and –2, and is making minor changes to those comments. The Bureau is not adopting proposed comment 41(k)(3)(iii)–1.

The Bureau has concluded that proposed § 1024.41(k)(3)(i) could have posed compliance difficulties for transferee servicers. The Bureau notes that extending the evaluation date for transferee servicers does not reduce borrower rights and protections in § 1024.41(c) through (h). The existence and extent of those rights and protections are determined as of the date a complete application is received (in this case, by the transferor servicer, prior to the transfer date). The rights and protections, once determined as of the date the transferor servicer received the complete application, continue during the evaluation period and are not diminished by any delay in the conduct of the evaluation by the transferee servicer. However, the Bureau recognizes that both borrowers and servicers are generally best served by an efficient and timely evaluation of loss mitigation options and that borrowers, in particular, face increased delinquency and credit reporting harms when an evaluation is delayed. Nonetheless, balancing the difficulties faced by transferee servicers in completing the evaluation of a transferred loss mitigation application and the harm delayed evaluations occasion borrowers, the Bureau is finalizing § 1024.41(k)(3) to provide that, if a transferee servicer acquires the servicing of a mortgage loan for which a complete loss mitigation application is pending as of the transfer date, the transferee servicer must comply with the applicable requirements of § 1024.41(c)(1) and (4) within 30 days of the transfer date.

Similar to final § 1024.41(k)(2)(i) with regard to transferee servicers' provision of § 1024.41(b)(2)(i)(B) notices, final § 1024.41(k)(3) provides a bright-line standard for the applicable timeframe for transferee servicers to comply with § 1024.41(c)(1) and (4) regarding the evaluation of complete applications and applicable notice requirements. The Bureau believes that determining compliance with § 1024.41(k)(3) based on the transfer date, rather than based on the date the transferor servicer received the application, as proposed, should make it easier for borrowers and servicers alike to track compliance. As discussed in the section-by-section analysis of § 1024.41(k)(2), the transfer date is disclosed on the notice of transfer of loan servicing provided to borrowers pursuant to § 1024.33(b)(4)(iv).

In light of the expansion in timelines beyond the proposed rule, the Bureau believes that all transferee servicers should be able to comply with § 1024.41(k)(3) without reliance on the proposed exceptions for involuntary transfers or situations where compliance with the otherwise applicable timeframes would be impracticable. Accordingly, the Bureau is not finalizing the proposed exceptions in § 1024.41(k)(3)(ii) and (iii) and clarifications in proposed comment 41(k)(3)(iii)–1 and is removing references to these exceptions in § 1024.41(k)(3).

The Bureau recognizes that the transition period associated with transfers, a several-day period following transfer in which the transferee servicer may not have access to the loan-level information, may effectively shorten the actual time that transferee servicers will have following transfer to comply with the applicable requirements of § 1024.41(c)(1) and (4). Although this transition period may result in a transferee servicer having fewer days to comply with § 1024.41(c)(1) and (4) than would a servicer in the absence of a transfer, final § 1024.41(k)(3) balances transferee servicer interests in having sufficient time to comply against borrower interests in a prompt evaluation of a loss mitigation application. As explained above, even with a several-day transition period, § 1024.41(k)(3) should generally provide transferee servicers more time to evaluate a borrower's application than the proposal would have provided by triggering the evaluation timeframe based on the transfer date, rather than the date the transferor received the application. Moreover, several industry commenters recommended the adoption of a 30-day timeframe for compliance, measured from the transfer date.

The Bureau also recognizes that this delay necessarily imposes costs on borrowers, even if their rights and foreclosure protections under § 1024.41 are not curtailed. In general, the longer the borrower must wait for an evaluation, the more the borrower's outstanding delinquency increases. As discussed in the section-by-section analysis of § 1024.41(b)(2)(ii), industry commenters have stated that an increase in the delinquency can decrease the likelihood of successful loss mitigation. Borrowers may face other harms due to an extended evaluation period as well, such as continued adverse credit reporting. While the Bureau is persuaded by industry commenters that transferee servicers should have 30 days from the transfer date to evaluate a complete application, any further extension for transferee servicers could result in borrower harm and is not necessary to enable transferee servicer compliance.

As discussed in the section-by-section analysis of § 1024.41(k)(1), the Bureau is finalizing commentary to limit the impact on borrowers of any additional delays resulting from final § 1024.41(k)(3). Final comment 41(k)(1)(i)–2 provides that, for purposes of the borrower rights and protections under § 1024.41(c) through (h), a transferee servicer must consider documents and information that constitute a complete loss mitigation application for the transferee servicer to have been received as of the date such documents and information were received by the transferor servicer, even if such documents and information were received by the transferor servicer after the transfer date. The borrower rights and protections under § 1024.41(c) through (h) begin as of the date the transferor servicer receives a complete application, and extending the timeframe for transferee servicer evaluations will not affect the timing of these protections. As noted above, the Bureau recognizes that § 1024.41(k)(3) could extend the amount of time that a borrower must wait for an evaluation, that the amount of the borrower's obligation that is past due may increase during this extended timeframe, and that the borrower may suffer harm as a result. Nevertheless, the Bureau believes this approach provides an appropriate balance to limit borrower harm while facilitating transferee servicer compliance. The Bureau also believes providing transferee servicers appropriate time to comply with § 1024.41(c)(1) and (4) may improve transferee servicers' ability to evaluate applications fairly and efficiently, which would ultimately benefit borrowers.

The Bureau is renumbering proposed comments 41(k)(3)(i)–1 and –2 as 41(k)(3)–1 and –2 and is finalizing these comments with revisions. Comment 41(k)(3)–1 explains that, if a transferee servicer acquires the servicing of a mortgage loan for which a complete loss mitigation application is pending as of the transfer date and the transferee servicer determines that additional information or a correction to a previously submitted document is required based upon its criteria for evaluating loss mitigation applications, the application is considered facially complete under § 1024.41(c)(2)(iv) as of the date it was first facially complete or complete, as applicable, with respect to the transferor servicer. It further provides that once the transferee servicer receives the information or corrections necessary to complete the application, § 1024.41(c)(3) requires the transferee servicer to provide a notice of complete application.

The Bureau is finalizing comment 41(k)(3)–1 without the proposed language pertaining to a transferee servicer's request that a borrower resubmit the same information in the transferee servicer's specified format or make clerical corrections to the application and without the proposed language pertaining to the borrower's failure to do so. While the Bureau recognizes that servicers may occasionally ask for such resubmission of the same previously submitted information in certain circumstances, the Bureau does not believe that such requests should be the norm. Such requests could be burdensome to borrowers or possibly mislead them. For example, the Bureau is concerned that such requests may lead borrowers to believe erroneously that their application is incomplete as to the transferee servicer.

While the Bureau is concerned that a transferee servicer's requests that the borrower resubmit the same information in the transferee servicer's specified format or make clerical corrections to the application may be burdensome or misleading to borrowers, the Bureau is not prohibiting transferees from requesting that borrowers do so, as suggested by some consumer advocacy groups. Although the Bureau generally discourages such requests, the Bureau believes that, in the limited circumstances where, for example, a transferee servicer determines that a clerical correction to a previously submitted document is required based on its criteria for evaluating loss mitigation applications, or that resubmission in the transferee servicer's specified format would speed the evaluation based on the servicer's systems capabilities, servicers should be able to request such clerical corrections or resubmissions. The Bureau will continue to monitor whether these requests raise consumer protection concerns.

Comment 41(k)(3)–1 does not change the general requirements regarding facially complete applications under § 1024.41(c)(2)(iv), including the standard for when an application is considered complete or facially complete. For example, if a transferee servicer acquires the servicing of a mortgage loan for which a complete loss mitigation application is pending as of the transfer date, and the transferee servicer requests that the borrower resubmit the same information in the transferee servicer's specified format, such a request would not render the application facially complete, as opposed to complete, because it is not a request for additional information or corrections to a previously submitted document (reformatting does not constitute a correction). Thus, a request for previously submitted information in the transferee servicer's specified format does not justify an extension of the 30-day timeframe in § 1024.41(k)(3) for a transferee servicer's evaluation of a borrower's complete application. A transferee servicer that does not receive the same previously submitted information in its specified format still must comply timely with § 1024.41(k)(3).

The Bureau is not revising the treatment of applications as facially complete where a transferee servicer determines additional information or a correction to a previously submitted document is required, as suggested by one consumer advocate commenter. Comment 41(k)(3)–1 provides that an application is considered facially complete under § 1024.41(c)(2)(iv) as of the date it was first facially complete or complete, as applicable, to the transferor servicer. An application that is facially complete under § 1024.41(c)(2)(iv) is treated as complete for the purposes of § 1024.41(f)(2) and (g) until the borrower is given a reasonable opportunity to complete the application. Accordingly, the current foreclosure protections provided to borrowers when an application is considered facially complete address concerns about a transferee servicer taking an action otherwise prohibited by § 1024.41(f)(2) or (g) in such situations.

The Bureau also declines to adopt one commenter's suggestion to require the transferor servicer to certify that it has provided the transferee servicer the entire loan file, or to require that 60 days pass following the transfer date, before the transferee servicer may conclude that the entire loan file has been transferred. Section 1024.38(b)(4)(i) requires a transferor servicer to maintain policies and procedures reasonably designed to ensure the timely transfer of all information and documents in its possession or control relating to the transferred mortgage loan in a form and manner that ensures the accuracy of the documents and information transferred. Comment 38(b)(4)(i)–2 further clarifies that this policies and procedures requirement imposes an affirmative obligation on the transferor servicer with respect to the transfer of any information reflecting the current status of discussions with a borrower regarding loss mitigation options and any agreements entered into with a borrower on a loss mitigation option.[277] Additionally, as discussed above, comment 41(k)(1)(i)–1.i explains that a transferor servicer must timely transfer, and a transferee servicer must obtain from the transferor servicer, documents and information submitted by a borrower in connection with a loss mitigation application, consistent with policies and procedures adopted pursuant to § 1024.38(b)(4). This comment clarifies the obligation of transferor servicers to transfer timely, and transferee servicers to obtain, documents and information submitted by a borrower in connection with a loss mitigation application. Accordingly, the Bureau believes that additional requirements pertaining to a transferee servicer's determination that it has a complete loan file are not necessary to ensure borrowers are afforded the rights and protections to which they are entitled under § 1024.41.

The Bureau is adopting proposed comment 41(k)(3)(i)–2, renumbered as comment 41(k)(3)–2, with certain changes for clarity. Under comment 41(k)(3)–2, if the borrower's loss mitigation application was incomplete based on the transferor servicer's criteria prior to transfer but is complete based upon the transferee servicer's criteria, the application is considered a pending loss mitigation application complete as of the transfer date for purposes of § 1024.41(k)(3), and the transferee servicer must comply with the applicable requirements of § 1024.41(c)(1) and (4) within 30 days of the transfer date. The comment further provides that, for purposes of § 1024.41(c) through (h), the application is complete as of the date the transferor servicer received the documents and information constituting the complete application, and includes a cross-reference to comment 41(k)(1)(i)–2. In such circumstances, § 1024.41(c)(3) requires the transferee servicer to provide a notice of complete application that discloses the date the transferor servicer received the documents and information constituting the complete application.

The Bureau did not specifically address in proposed comment 41(k)(3)(i)–2 the requirements of § 1024.41(c) and (d), the compliance timeframe under § 1024.41(k)(3), or the

[277] *See* 79 FR 63295, 63295–96 (Oct. 23, 2014) (discussing policies and procedures that may contribute to meeting the requirements of § 1024.38(b)(4)).

date disclosed on the notice of complete application required under § 1024.41(c)(3). As discussed in the section-by-section analysis of § 1024.41(k)(1), the proposal did not specifically address § 1024.41(c) and (d) because a servicer must comply with § 1024.41(c), and as applicable, § 1024.41(d), to satisfy its requirements under § 1024.41(g). For additional clarity, the Bureau is finalizing comment 41(k)(3)–2 to specify the applicability of § 1024.41(c) and (d) under § 1024.41(k)(3). The Bureau is also clarifying in final comment 41(k)(3)–2 that the date disclosed on the notice of complete application under § 1024.41(c)(3) is distinct from the date on which the 30-day evaluation timeframe under § 1024.41(k)(3) begins.

The Bureau notes that some consumer advocacy groups requested that borrowers be provided the right to an evaluation under § 1024.41(c)(1) based on the date the transferor servicer received the application, even if the application was first complete upon transfer to the transferee servicer. Final § 1024.41(k)(3) establishes a 30-day evaluation timeframe from the transfer date for all complete applications, including those first complete upon transfer to the transferee servicer. Additionally, comment 41(k)(3)–2 provides that, where an application is first complete upon transfer, the application is complete as of the date the transferor servicer received the documents and information constituting the complete application for purposes of § 1024.41(c) through (h). Thus, the transferee servicer must comply with § 1024.41(c) through (h) regarding the complete application. The transferee servicer must treat those rights and protections as attaching as of the date the transferor servicer received the documents and information constituting the complete application, even if the application was incomplete based on the transferor servicer's criteria. The transferor servicer's actions regarding a loss mitigation application that was incomplete based on the transferor servicer's criteria but complete based on the transferee servicer's criteria do not affect the transferee servicer's obligations under § 1024.41(c) through (h). For example, if the transferor servicer moved for foreclosure judgment or order of sale prior to the transfer date, but the documents and information constituting a complete application to the transferee servicer were received by the transferor servicer more than 37 days before the foreclosure sale, the transferee servicer is required to comply with § 1024.41(g) regarding that complete application. As discussed in the section-by-section analysis of § 1026.41(g), comment 41(g)–5 provides that, where a foreclosure sale is scheduled and none of the conditions under § 1024.41(g)(1) through (3) are applicable, conduct of the sale violates § 1024.41(g).

Finally, the Bureau is not adopting proposed comment 41(k)(3)(iii)–1, which would have clarified the proposed exception in § 1024.41(k)(3)(iii). As the Bureau is not adopting the proposed exceptions in § 1024.41(k)(3)(iii), proposed comment 41(k)(3)(iii)–1 is not necessary.

41(k)(4) Applications Subject to Appeal Process

Proposed § 1024.41(k)(4) would have provided that, if a borrower timely appeals a transferor servicer's denial of a loan modification option under § 1024.41(h), a transferee servicer must evaluate the appeal if it is able to determine whether it should offer the borrower the loan modification options subject to the appeal. A transferee servicer that is unable to evaluate an appeal would have been required to treat the borrower's appeal as a pending complete loss mitigation application and comply with the requirements of § 1024.41 for such an application. Proposed § 1024.41(k)(4) would have applied if a borrower made an appeal before the transfer date and the appeal remained pending as of the transfer date or if the period for making an appeal under § 1024.41(h) had not expired as of the transfer date and a borrower subsequently made a timely appeal. The Bureau is finalizing proposed § 1024.41(k)(4)(i) with revisions. Final § 1024.41(k)(4)(i) provides that, if a transferee servicer is required under § 1024.41(k)(4) to make a determination on an appeal, the transferee servicer must complete its determination and provide the notice required by § 1024.41(h)(4) within 30 days of the transfer date or 30 days of the date the borrower made the appeal, whichever is later.

The Bureau believed that a transfer should not deprive a borrower of the right to appeal a servicer's denial of a loan modification option. The terms of loan modification programs are complex, and the Bureau believed that, as with any complex process, servicers may make mistakes in evaluating borrowers' complete applications. In addition, investors or guarantors may transfer servicing to a new servicer precisely because they believe the new servicer is better able to evaluate borrowers for loss mitigation options. In that case, both a borrower and an investor or guarantor might benefit from the new servicer attempting to determine whether the transferor servicer mistakenly denied the borrower for a loan modification option.

Therefore, proposed § 1024.41(k)(4) would have provided that, if a transferee servicer acquires the servicing of a mortgage loan for which, as of the transfer date, a borrower's appeal under § 1024.41(h) is pending, or a borrower's time period to appeal under § 1024.41(h) has not expired and the borrower subsequently makes a timely appeal, the transferee servicer must evaluate the appeal if it is able to determine whether it should offer the borrower the loan modification options subject to the appeal. Proposed § 1024.41(k)(4)(i) would have further provided that, if a servicer is able to evaluate an appeal but it is not practicable under the circumstances to complete the determination within 30 days of when the borrower made the appeal, the transferee servicer must complete the evaluation of the borrower's appeal and provide the notice required by § 1024.41(h)(4) within a reasonably prompt time. Proposed comment 41(k)(4)–2 would have clarified that, in general, a reasonably prompt time would be within an additional five days after the expiration of the original 30-day evaluation window. For the reasons discussed above, the Bureau explained that in some circumstances a transferee servicer may need to exceed the 30-day evaluation window to complete the evaluation of the appeal.

The Bureau also recognized, however, that a transferee servicer may not always be able to determine whether a transferor servicer incorrectly denied the borrower for a loan modification option. For example, the transferee servicer may not have sufficient information about the evaluation criteria used by the transferor servicer, in particular when the transferor servicer denied a borrower for a loan modification option that the transferee servicer does not offer, or when the transferee servicer receives the mortgage loan file through an involuntary transfer and the transferor servicer failed to maintain proper records such that the transferee servicer does not have sufficient information to evaluate the appeal. The Bureau expected that such circumstances would be rare, that transferee servicers would generally be able to evaluate borrowers' appeals, and that borrowers would not be disadvantaged as a result of transfers. In those limited circumstances, however, proposed § 1024.41(k)(4)(ii) would have required the transferee servicer to treat the appeal as a pending complete loss mitigation application and evaluate the borrower for all options available to the borrower from the transferee servicer. For purposes of § 1024.41(c) or (k)(3), as applicable, such a pending complete loss mitigation application would have been considered complete as of the date the appeal was received. For purposes of § 1024.41(e) through (h), such a pending complete loss mitigation application would have been considered facially complete as of the date the application was facially complete with respect to the transferor servicer.

The Bureau explained in the proposal its belief that, in cases where the transferee servicer cannot evaluate the appeal, requiring the transferee servicer to reevaluate the borrower for all loss mitigation options that may be available to the borrower preserves the benefits of the appeal process for borrowers. Furthermore, the Bureau believed that the proposed requirement would not impose substantial burdens on transferee servicers because a transferee servicer is already required to comply with the requirements of § 1024.41, regardless of whether the borrower received an evaluation of a complete loss mitigation application from the transferor servicer, as explained by comment 41(i)–2.

Proposed comment 41(k)(4)–1 noted that a transferee servicer may be unable to evaluate an appeal when, for example, the transferor servicer denied a borrower for a loan modification option that the transferee servicer does not offer or when the transferee servicer receives the mortgage loan file through an involuntary transfer and the transferor servicer failed to maintain proper records such that the transferee servicer lacks sufficient information to evaluate the appeal. The proposed comment would have clarified that, if a transferee servicer is required to treat the appeal as a pending complete application, the transferee servicer must permit the borrower to accept or reject any loss mitigation options offered by the transferor servicer, in addition to the loss mitigation options, if any, that the transferee servicer determined to offer the borrower based on its own evaluation of the borrower's complete loss mitigation application.

The Bureau requested comment on the treatment of appeals pending at transfer, including whether transferee servicers may need additional time to evaluate pending appeals, the extent to which transferee servicers are able to evaluate appeals of a transferor servicer's denial of a loan modification option, and whether a pending appeal should ever or always be treated as a new loss mitigation application such that a transferee servicer must evaluate the borrower for all available loss mitigation options. Additionally, the Bureau was concerned about the appropriate recourse when, if ever, a transferee servicer was unable to evaluate a borrower's appeal. The Bureau believed that treating the appeal as a pending complete application would provide benefits to borrowers, but the Bureau requested comment on whether such treatment would be in the borrower's best interests where, for example, the borrower's application documents may have gone stale, and whether such treatment is inconsistent with applicable investor requirements.

The Bureau received several comments in response to proposed § 1024.41(k)(4). Industry commenters generally requested an extension to the proposed timeframe for transferee servicers to determine appeals. Some industry commenters stated that the transition period inherent to transfers could make compliance with proposed § 1024.41(k)(4) difficult. As with proposed § 1024.41(k)(3)(i), certain industry commenters also expressed concern about situations where the transfer date occurs near the end of the 30-day determination period applicable to the transferor servicer. One industry commenter recommended that the Bureau revise proposed § 1024.41(k)(4) to provide transferee servicers 30 days from the transfer date to comply. This commenter stated that borrowers would continue to have foreclosure protections while the servicer was making its determination on an appeal.

Several industry commenters also discussed proposed § 1024.41(k)(4) in relation to borrower foreclosure timelines and protections. One industry commenter suggested that the timeframe for transferee servicer compliance in proposed § 1024.41(k)(4) should be extended and that transferee servicers could be required to postpone any pending foreclosure sales to maintain the structure of the current loss mitigation timelines. Another industry commenter expressed concern with the current borrower timelines for submitting an appeal and accepting a loss mitigation offer because of the potential for borrower confusion where there is a servicing transfer. This commenter suggested that borrowers be provided 30 days from the transfer date to make an appeal. This commenter further stated that, if the transferee servicer is able to determine an appeal, but not within 30 days of the date the borrower made the appeal to the transferor servicer, the transferor servicer should make sure that the borrower receives foreclosure protections during this extended timeframe.

The Bureau solicited comment as to whether a pending appeal should ever or always be treated as a pending loss mitigation application. One industry commenter stated that, if the transferee servicer can determine the appeal, it should be treated as an appeal to avoid any further delay. One industry commenter stated, however, that because each servicer may have different loss mitigation review criteria, it would be difficult for a transferee servicer to evaluate an appeal based on the transferor servicer's criteria. This commenter suggested that the appeal be treated as a complete loss mitigation application. One consumer advocacy group stated that, because of the time it takes for transferee servicers to obtain loan documents from the transferor servicer, it could be difficult for a transferee servicer to evaluate an appeal timely. The commenter suggested that, if the transferee servicer is unable to evaluate an appeal timely, the appeal should be treated as a complete loss mitigation application. Another consumer advocacy group expressed support for the Bureau's proposal to permit transferee servicers to treat a borrower's pending appeal as a complete loss mitigation application when they are unable to evaluate an appeal.

The Bureau is finalizing proposed § 1024.41(k)(4) with revisions. Final § 1024.41(k)(4)(i) provides that, if a transferee servicer is required under § 1024.41(k)(4) to make a determination on an appeal, the transferee servicer must complete the determination and provide the notice required by § 1024.41(h)(4) within 30 days of the transfer date or 30 days of the date the borrower made the appeal, whichever is later. Based on this finalized timeframe, the Bureau believes the exception for situations where compliance would have been impracticable in proposed § 1024.41(k)(4)(i) is no longer necessary. The Bureau is therefore not adopting this proposed exception. The Bureau is adding new comment 41(k)(4)–1 to explain that a borrower may submit an appeal of a transferor servicer's determination pursuant to § 1024.41(h) to the transferor servicer after the transfer date and to clarify transferor and transferee servicer obligations in such situations. The Bureau is renumbering proposed comment 41(k)(4)–1 as 41(k)(4)–2 and making certain revisions for clarity. The Bureau is not adopting proposed comment 41(k)(4)–2.

To improve consistency between § 1024.41(h)(4) and (k)(4), the final rule uses the term ''determination,'' rather than ''evaluation,'' when discussing appeals. Section 1024.41(h)(4) sets forth the requirements for a servicer's determination of an appeal, while § 1024.41(c)(1) sets forth the requirements for a servicer's evaluation of a complete loss mitigation application. The final rule implements this change and includes conforming changes throughout § 1024.41(k)(4).

The Bureau is finalizing § 1024.41(k)(4) with certain changes to improve clarity. Section 1024.41(k)(4) provides that, if a transferee servicer acquires the servicing of a mortgage loan for which an appeal of a transferor servicer's determination pursuant to § 1024.41(h) has not been resolved by the transferor servicer as of the transfer date or is timely filed after the transfer date, the transferee servicer must make a determination on the appeal if it is able to do so or, if it is unable to do so, must treat the appeal as a pending complete loss mitigation application. Section 1024.41(k)(4) does not prohibit the transferee servicer from evaluating the borrower for any loss mitigation options it offers in addition to determining the appeal, when it is able to determine the appeal. The Bureau believes that if the transferee servicer offers additional loss mitigation options to those offered by the transferor servicer and subject to the appeal, the transferee servicer could, in addition to determining the appeal, also evaluate for any loss mitigation options it offers. Proposed § 1024.41(k)(4) would have required a transferee servicer to evaluate the appeal if it were able to determine whether to offer the borrower the loan modification options subject to the appeal. Proposed § 1024.41(k)(4)(ii) would have required a transferee servicer that is unable to evaluate an appeal to treat the appeal as a pending complete loss mitigation application and comply with the requirements of § 1024.41 for such application. The final rule explains both of these requirements in § 1024.41(k)(4), rather than explaining them separately in § 1024.41(k)(4) and (k)(4)(ii), as proposed.

The Bureau believes that proposed § 1024.41(k)(4)(i) may have posed compliance difficulties for transferee servicers by requiring a determination on an appeal within 30 days of the date the borrower made the appeal. The Bureau is finalizing changes to § 1024.41(k)(4)(i) to explain that, if a transferee servicer is required under § 1024.41(k)(4) to make a determination on an appeal, the transferee servicer must complete the determination and provide the notice required by § 1024.41(h)(4) within 30 days of the transfer date or 30 days of the date the borrower made the appeal, whichever is later.

The Bureau notes that, as discussed in the section-by-section analysis of § 1024.41(k)(3), the existence and the extent of a borrower's rights and protections under § 1024.41(c) through (h) are established based on the date the transferor servicer receives a complete application. Extending the time for a transferee servicer to make a determination on an appeal will not affect the date these protections begin. Further, neither the transferor nor the transferee servicer may take an action prohibited by § 1024.41(f)(2) or (g) until it has made a determination on the borrower's appeal. However, the Bureau recognizes that a borrower's delinquency continues during the time when a transferee servicer is determining an appeal, and that the changes in final § 1024.41(k)(4)(i) may extend the duration of the borrower's delinquency by an additional 30 days. In general, the longer the borrower must wait for a determination, the more the borrower's outstanding delinquency increases. Nonetheless, the Bureau believes that final § 1024.41(k)(4)(i) strikes an appropriate balance to limit borrower harm caused by delayed determinations while accounting for difficulties faced by transferee servicers in determining appeals of a transferor servicer's determination of a loss mitigation application and facilitating transferee servicer compliance.

As with final § 1024.41(k)(2)(i) and (k)(3), § 1024.41(k)(4)(i) establishes a bright-line standard for transferee servicer compliance with the requirement to determine and provide notice on an appeal pursuant to § 1024.41(h). The Bureau believes borrowers and servicers can track compliance based on the transfer date, as this date is disclosed on the notice of transfer of loan servicing provided to borrowers pursuant to § 1024.33(b)(4)(iv).

Final § 1024.41(k)(4)(i) generally provides transferee servicers a greater amount of time to comply than under the proposal. Proposed § 1024.41(k)(4)(i) would have generally required transferee servicers to provide the notice required by § 1024.41(h)(4) within 30 days of the date the borrower made the appeal. The final rule establishes a longer timeframe for compliance, in most cases, by providing transferee servicers up to 30 days from the transfer date to comply with § 1024.41(h)(4). Further, in situations where the transferee servicer must treat an appeal as a pending complete loss mitigation application, a 30-day timeframe from the transfer date is consistent with the timeframe set forth in final § 1024.41(k)(3) for the evaluation of complete loss mitigation applications.

In light of the expansion in timelines beyond the proposed rule, the Bureau believes that all transferee servicers should be able to comply with § 1024.41(k)(4)(i) without reliance on the proposed exception for situations where compliance would be impracticable. Accordingly, final § 1024.41(k)(4)(i) does not include the proposed exception where compliance within 30 days of when the borrower made the appeal would have been impracticable.

The Bureau recognizes that, when transferee servicers acquire the servicing of a mortgage loan for which a borrower's appeal is pending as of the transfer date, the transition period associated with transfers of several days following transfer in which the transferee servicer may not have access to the loan-level information may effectively shorten the actual time that transferee servicers will have following transfer to determine the appeal and provide the notice required by § 1024.41(h)(4). Although this transition period may result in a transferee servicer having fewer days to comply with § 1024.41(h)(4) than would a servicer in the absence of a transfer, final § 1024.41(k)(4)(i) balances transferee servicer interests in having sufficient time to comply with borrower interests in a quick determination on an appeal. As explained above, even with this transition period, § 1024.41(k)(4)(i) should generally provide transferee servicers more time to determine a borrower's appeal than the proposal would have provided by permitting compliance within 30 days of the transfer date or 30 days of the date the borrower made the appeal, whichever is later. Moreover, one industry commenter recommended the adoption of a 30-day timeframe for compliance, measured from the transfer date. Accordingly, even accounting for the transition period inherent to transfers, the Bureau believes that final § 1024.41(k)(4)(i) provides transferee servicers appropriate time to complete a determination and provide the notice required by § 1024.41(h)(4) with respect to a borrower's appeal.

Final § 1024.41(k)(4)(i) also permits transferee servicers to comply within 30 days of the date the borrower made the appeal, as proposed. As noted above, the Bureau believes that providing transferee servicers 30 days from the transfer date to comply will generally establish a longer timeframe for compliance than would have been provided under the proposal. However, the Bureau is cognizant that, in the context of appeals, unique circumstances may arise where it would be beneficial for transferee servicers and borrowers to base the timeframe for transferee servicer compliance on the date the borrower made the appeal. Specifically, some borrowers might make an appeal to the transferor servicer after the transfer date but before the borrower's time to appeal pursuant to § 1024.41(h)(2) has expired. In such situations, a transferee servicer would have more time to make a proper determination on the appeal if the timeframe for compliance were based on the date the borrower made the appeal, rather than on the transfer date, without compromising reasonable borrower expectations. Accordingly, the Bureau is finalizing § 1024.41(k)(4)(i) to provide greater flexibility and ensure transferee servicers have sufficient time to determine appeals even where a borrower timely makes an appeal to the transferor servicer after the transfer date. Moreover, the Bureau believes that the bright-line standard in § 1024.41(k)(4)(i) will facilitate compliance.

The Bureau is finalizing § 1024.41(k)(4)(ii) to provide that a transferee servicer that is required to treat a borrower's appeal as a pending complete loss mitigation application under § 1024.41(k)(4) must comply with the requirements of § 1024.41 for such application, including evaluating the borrower for all loss mitigation options available to the borrower from the transferee servicer. Section 1024.41(k)(4)(ii) further explains that, for purposes of § 1024.41(c) or (k)(3), as applicable, such a pending complete loss mitigation application shall be considered complete as of the date the appeal was received by the transferor servicer or the transferee servicer, whichever occurs first. Finally, § 1024.41(k)(4)(ii) provides that, for purposes of § 1024.41(e) through (h), the transferee servicer must treat such a pending complete loss mitigation application as facially complete under § 1024.41(c)(2)(iv) as of the date it was first facially complete or complete, as applicable, with respect to the transferor servicer.

Final § 1024.41(k)(4)(ii) includes several changes from the proposal. Section 1024.41(k)(4)(ii) explains that a transferee servicer that is required to treat a borrower's appeal as a pending complete loss mitigation application under § 1024.41(k)(4) must comply with the requirements of § 1024.41 for such application, including evaluating the borrower for all loss mitigation options available to the borrower from the transferee servicer. Final § 1024.41(k)(4)(ii) reflects the changes finalized in § 1024.41(k)(4) and links the appeals covered by § 1024.41(k)(4)(ii) to the category of appeals treated as complete loss mitigation applications in § 1024.41(k)(4).

Additionally, final § 1024.41(k)(4)(ii) explains that, for purposes of § 1024.41(c) or (k)(3), as applicable, such a pending complete loss mitigation application shall be considered complete as of the date the appeal was received by the transferor servicer or the transferee servicer, whichever occurs first. The proposal would have explained that the application shall be considered complete as of the date the appeal was received, but without specific reference to the date it was first received either by the transferor or transferee servicer. As explained above, the Bureau recognizes that there may be situations where a borrower timely submits an appeal to a transferor servicer after the transfer date. Under these circumstances, the date the appeal was received by the transferor servicer would be different from the date the appeal was received by the transferee servicer. Accordingly, the Bureau is including additional clarifying language in in final § 1024.41(k)(4)(ii) to account for this situation.

Finally, the Bureau is finalizing § 1024.41(k)(4)(ii) to explain that, for purposes of § 1024.41(e) through (h), the transferee servicer must treat such a pending complete loss mitigation application as facially complete under § 1024.41(c)(2)(iv) as of the date it was first facially complete or complete, as applicable, with respect to the transferor servicer. The reference to § 1024.41(c)(2)(iv) in the final rule provides further clarity with regard to the treatment of facially complete loss mitigation applications. Additionally, the final rule clarifies the transferee servicer's obligations with respect to applications considered facially complete or complete, as applicable, with respect to the transferor servicer. The proposal would have addressed a transferee servicer's obligations only with respect to applications considered facially complete by the transferor servicer.

The Bureau declines to revise the circumstances under which a transferee servicer must treat an appeal as a pending complete loss mitigation application, as suggested by some commenters. The timeframe for compliance set forth in final § 1024.41(k)(4)(i), explained above, addresses commenter concerns over transferee servicers' ability to comply with the rule. The Bureau continues to believe that, where the transferee servicer cannot evaluate the appeal, requiring the transferee servicer to treat the appeal as a pending complete loss mitigation application and reevaluate the borrower for all loss mitigation options that may be available to the borrower preserves the benefits of the appeal process for borrowers, including an opportunity to receive loss mitigation when the transferor servicer has erred in its evaluation.

The Bureau is renumbering proposed comment 41(k)(4)–1 as 41(k)(4)–2, as discussed more below. The Bureau is adopting a new comment 41(k)(4)–1 to clarify transferor and transferee servicer obligations when a borrower submits an appeal of a transferor servicer's determination to the transferor servicer after the transfer date. Comment 41(k)(4)–1 provides that a borrower may submit an appeal of a transferor servicer's determination pursuant to § 1024.41(h) to the transferor servicer after the transfer date. It further explains that consistent with policies and procedures maintained pursuant to § 1024.38(b)(4), the transferor servicer must timely transfer, and the transferee servicer must obtain, documents and information regarding such appeals. By explaining the obligations of transferor and transferee servicers in such situations, comment 41(k)(4)–1 should better enable transferee servicers to comply with the requirements set forth in § 1024.41(k)(4)(i). Comment 41(k)(4)–1 parallels new comment 41(k)(1)(i)–1.iii, which explains that borrowers may provide documents and information necessary to complete an application to the transferor servicer after the transfer date and clarifies the obligations of transferor and transferee servicers when this occurs.

The Bureau declines to provide borrowers additional time beyond the timeframe in § 1024.41(h)(2) to make an appeal after the transfer date, as suggested by one commenter. The transfer itself will not shorten the timeframe for borrowers to submit an appeal. Pursuant to comment 41(k)(4)–1, borrowers may submit appeals to either the transferor or transferee servicer without jeopardizing their right to timely appeals. A borrower who timely submits an appeal to the transferor servicer following the transfer date will have the right to a determination under § 1024.41(h)(4), and no further extensions to borrower timeframes are necessary.

The Bureau is finalizing comment 41(k)(4)–1 substantially as proposed, but renumbered as comment 41(k)(4)–2 and with revisions for clarity. Comment 41(k)(4)–2 provides guidance on situations where a transferee servicer is unable to determine an appeal. Comment 41(k)(4)–2 explains that a transferee servicer may be unable to make a determination on an appeal when, for example, the transferor servicer denied a borrower for a loan modification option that the transferee servicer does not offer or when the transferee servicer receives the mortgage loan through an involuntary transfer and the transferor servicer failed to maintain proper records such that the transferee servicer lacks sufficient information to review the appeal. Comment 41(k)(4)–2 provides that, in that circumstance, the transferee servicer is required to treat the appeal as a pending complete application.

Comment 41(k)(4)–2 further provides that the transferee servicer must permit the borrower to accept or reject any loss mitigation options offered by the transferor servicer, even if it does not offer the loss mitigation options offered by the transferor servicer, in addition to the loss mitigation options, if any, that the transferee servicer determines to offer the borrower based on its own evaluation of the borrower's complete loss mitigation application. Comment 41(k)(4)–2 sets forth an example where a transferor servicer denied a borrower for all loan modification options but offered the borrower a short sale option, and the borrower's appeal of the loan modification denial was pending as of the transfer date. Comment 41(k)(4)–2 explains that, if the transferee servicer is unable to determine the borrower's appeal, the transferee servicer must evaluate the borrower for all available loss mitigation options in accordance with § 1024.41(c) and (k)(3). It further explains that, at the conclusion of such evaluation, the transferee servicer must permit the borrower to accept the short sale option offered by the transferor servicer, even if the transferee servicer does not offer the short sale option, in addition to any loss mitigation options the transferee servicer determines to offer the borrower based upon its own evaluation.

As proposed, the comment did not specifically explain a transferee servicer's obligations when the transferor servicer offers the borrower a loss mitigation option that the transferee servicer does not offer. The final comment clarifies that the transferee servicer's obligation to permit the borrower to accept or reject any loss mitigation options offered by the transferor servicer applies irrespective of whether the transferee servicer offers the particular loss mitigation option. The Bureau understands that the investor generally determines the loss mitigation options that may be available to a borrower. It further understands that a transferee servicer may not offer the same loss mitigation options as the transferor servicer when, for example, a transfer involves a change in the investor of the loan along with the transfer of servicing rights. The Bureau believes, however, that the transferee servicer, under both State contract law and investor requirements, should be able to execute any loss mitigation option offered by the transferor servicer, even if the transferee servicer does not offer the particular option. Comment 41(k)(4)–2 ensures that a transfer does not deprive a borrower of any loss mitigation options that were offered by the transferor servicer, and it is consistent with the treatment of pending loss mitigation offers in § 1024.41(k)(5).

Finally, the Bureau is not adopting proposed comment 41(k)(4)–2. Because of the changes incorporated in final § 1024.41(k)(4)(i), proposed comment 41(k)(4)–2 is not necessary.

41(k)(5) Pending Loss Mitigation Offers

Proposed § 1024.41(k)(5) would have provided that a transfer does not affect the borrower's ability to accept or reject a loss mitigation option offered under § 1024.41(c) or (h). Specifically, the proposal would have required that, if a transferor servicer offered the borrower a loss mitigation option prior to the transfer and the borrower's time to accept or reject the offer had not expired as of the transfer date, a transferee servicer must allow the borrower to accept or reject the offer. The Bureau is adopting § 1024.41(k)(5) substantially as proposed.

Proposed comment 41(k)(5)–1 would have clarified that some borrowers will provide their acceptances to the transferor servicer and that, pursuant to the policies and procedures maintained under § 1024.38(b)(4), a transferee servicer must obtain those acceptances from the transferor servicer. For example, a borrower may be able to accept a trial modification agreement by timely making an initial payment of the modified amount to the transferor servicer instead of to the transferee servicer. RESPA section 6(d) provides that, during the 60-day period beginning on the effective date of the transfer of servicing, a payment received by the transferor servicer (rather than the transferee servicer) before the due date applicable to such payment may not be treated as late for purposes of imposing a late fee on the borrower or for any other purposes.[278] Similarly, the proposed comment explained that the transferee servicer must honor an acceptance that the borrower timely sent to the transferor servicer.

The Bureau received few comments on proposed § 1024.41(k)(5). One industry commenter stated that most servicers currently operate under the principles set forth in proposed § 1024.41(k)(5). Another industry commenter recommended that the borrower be provided an additional 14 days from the transfer date to accept any offers that had not expired. One consumer advocate commenter stated that transferee servicers should allow borrowers additional time to accept or reject a loss mitigation offer from the transferor servicer.

The Bureau is adopting § 1024.41(k)(5) and comment 41(k)(5)–1 substantially as proposed. Final § 1024.41(k)(5) provides that a transfer does not affect a borrower's ability to accept or reject a loss mitigation option offered under § 1024.41(c) or (h). It further states that, if a transferee servicer acquires the servicing of a mortgage loan for which the borrower's time period under § 1024.41(e) or (h) for accepting or rejecting a loss mitigation option offered by the transferor servicer has not expired as of the transfer date, the transferee servicer must allow the borrower to accept or reject the offer during the unexpired balance of the applicable time period. The Bureau declines to extend borrower timeframes for accepting or rejecting a loss mitigation option, as suggested by some commenters. The timeframe for borrowers to accept or reject a loss mitigation option under § 1024.41(e) or (h), as applicable, is determined as of the date the servicer provides the notice of the loss mitigation option. Although a transfer may extend the timeline for transferee servicers to provide notice of a loss mitigation option offered under § 1024.41(c) or (h), it does not affect the borrower's timeframe to accept or reject a loss mitigation offer that is already pending as of the transfer date. Accordingly, a timeframe extension for borrowers to accept or reject a loss mitigation option is not necessary. Moreover, because the Bureau is providing that the borrower's acceptance is effective whether sent to the transferee or transferor servicer, the borrower does not need additional time to determine the correct address, learn of the transfer, or allow time for the forwarding of the acceptance from the transferor servicer to the transferee servicer.

[278] 12 U.S.C. 2605(d)).

The Bureau is finalizing comment 41(k)(5)–1 with certain changes for clarity and consistency with § 1024.41(k). Comment 41(k)(5)–1 explains that a borrower may provide an acceptance or rejection of a pending loss mitigation offer to the transferor servicer after the transfer date. It further explains that, consistent with policies and procedures maintained pursuant to § 1024.38(b)(4), the transferor servicer must timely transfer, and the transferee servicer must obtain, documents and information regarding such acceptances and rejections, and the transferee servicer must provide the borrower with any timely accepted loss mitigation option, even if the borrower submitted the acceptance to the transferor servicer.

Final comment 41(k)(5)–1 differs from the proposal, which would have addressed only a borrower's acceptance, but not a rejection, of a pending loss mitigation offer to the transferor servicer after the transfer date. Final comment 41(k)(5)–1 also omits superfluous language regarding the transferee servicer's expectation of where a borrower may provide such acceptance. Additionally, final comment 41(k)(5)–1 specifically explains that transferor servicers must timely transfer documents and information regarding such acceptances and rejections. The proposal did not impose specific requirements on transferor servicers in § 1024.41(k). As explained in the section-by-section analysis of § 1024.41(k)(1), however, the Bureau is clarifying the specific requirements of transferor servicers to improve the seamlessness of transfers and to facilitate transferee servicer compliance with the final rule. Additionally, final comment 41(k)(5)–1 clarifies that the transferee servicer must provide the borrower with any timely accepted loss mitigation option, even if the borrower submitted the acceptance to the transferor servicer. Final comment 41(k)(5)–1 thus makes clear that a borrower's acceptance may be timely, even if submitted to the transferor servicer.

Appendix MS to Part 1024—Mortgage Servicing

Currently, the model forms that a servicer may use to comply with the disclosure requirements of §§ 1024.33, 1024.37, and 1024.39 are provided in an appendix with the heading ''Appendix MS—Mortgage Servicing.'' The Bureau did not propose to change this heading but is revising it in this final rule to ''Appendix MS to Part 1024—Mortgage Servicing'' to conform to the other appendix headings in Regulation X.

Comment appendix MS to part 1024–2 explains that servicers may make certain changes to the format or content of the forms and clauses without losing protection from liability so long as those changes do not affect the substance, clarity, or meaningful sequence of the forms and clauses. The comment also provides examples of changes that the Bureau considers acceptable changes. For the reasons stated in part V.A. and in this discussion, the Bureau is amending comment appendix MS to part 1024–2 to allow servicers to make adjustments to these model forms to reflect the circumstances of confirmed successors in interest without losing the benefit of the protection from liability that use of the model forms affords.

The model forms in appendix MS include language that, if sent to a confirmed successor in interest, could suggest that the successor in interest is liable on the mortgage loan obligation. For example, the Notice of Servicing Transfer model form provided in appendix MS–2 refers to ''your mortgage loan'' and states: ''This means that after this date, a new servicer will be collecting your mortgage loan payments from you'' and ''Send all payments due on or after [Date] to [Name of new servicer] at this address: [New servicer address].'' Some of the model forms for force-placed insurance notices in appendix MS–3 state: ''You must pay us for any period during which the insurance we buy is in effect but you do not have insurance.'' The model clauses for the written early intervention notice in appendix MS–4 include: ''Refinance your loan with us or another lender''; ''Modify your loan terms with us''; ''Payment forbearance temporarily gives you more time to pay your monthly payment''; and ''As an alternative to foreclosure, you may be able to sell your home and use the proceeds to pay off your current loan.''

The final rule amends comment appendix MS to part 1024–2 to indicate that, except as otherwise specifically required, acceptable changes to the format or content of the forms and clauses include modifications to remove language that could suggest liability under the mortgage loan agreement if such language is not applicable. The revised comment notes, for example, that, in the case of a confirmed successor in interest who has not assumed the mortgage loan obligation under State law and is not otherwise liable on the obligation, the modifications could include: Use of ''the mortgage loan'' or ''this mortgage loan'' instead of ''your mortgage loan'' and ''the monthly payments'' instead of ''your monthly payments''; use of ''Payments due on or after [Date] may be sent to'' instead of ''Send all payments due on or after [Date] to'' in notices of servicing transfer; and use of ''We will charge the loan account'' instead of ''You must pay us'' in notices relating to force-placed insurance. As explained in part V.A., the adjustments authorized by these changes represent one of several options that servicers may use to ensure that their notices and other communications do not confuse or deceive successors in interest who have not assumed the mortgage loan obligation and are not otherwise liable on it regarding whether they are liable on the mortgage loan obligation.

Appendix MS–3 to Part 1024—Model Force-Placed Insurance Notice Forms

The Bureau proposed three sets of changes to the model forms for force-placed insurance notices, located at appendix MS–3(A) through (D). First, the Bureau proposed to amend MS–3(A) and (B) to align the model forms to the proposed amendments to § 1024.37(c)(2)(v). As discussed in the section-by-section analysis of § 1024.37(c)(2)(v), the Bureau proposed to amend that provision to require the force-placed insurance notice to state, as applicable, that the borrower's hazard insurance provides insufficient coverage and that the servicer does not have evidence that the borrower has hazard insurance that provides sufficient coverage. The Bureau therefore proposed to make a corresponding change to the language in model forms MS–3(A) and (B) so that the forms include the statement ''your [hazard] [Insurance Type] insurance [is expiring] [expired] [provides insufficient coverage], and we do not have evidence that you have obtained new coverage.''

Second, the Bureau proposed a technical change to align the model forms with the requirements of § 1024.37(c)(2)(ix)(A) and (e)(2)(viii)(A). Those provisions require the force-placed insurance initial, reminder, and renewal notices to include a statement that the insurance the servicer has purchased or purchases ''may cost significantly more than hazard insurance purchased by the borrower.'' Current model forms MS–3(A) through (D) omit the word ''significantly.'' The Bureau proposed to amend model forms MS–3(A) through (D) to add the word significantly, such that each model form would track the language of § 1024.37(c)(2)(ix)(A) and (e)(2)(viii)(A).

Third, the Bureau proposed a technical change to MS–3(D) to align the model form with the requirements of § 1024.37(e)(3), which requires servicers to provide certain information on the form in bold text.

The Bureau received one comment that recommended revisions to Model Notice MS–3(A) through (C) so that the model forms included bold text consistent with the requirements under § 1024.37.

The Bureau is finalizing the technical corrections to the model forms for force-placed insurance notices located at appendix MS–3(A) through (D) as proposed. Additionally, the Bureau is making certain technical corrections to model forms MS–3(A) through (C) that were not proposed. The Bureau recognizes, as stated by one commenter, that the model forms MS–3(A) through (C) do not align with the requirements in § 1024.37 that servicers provide certain information on the force-placed insurance notices in bold text. Accordingly, the Bureau is revising MS–3(A) through (C) to align the model forms with the applicable requirements of § 1024.37 that require certain information on the notices to be set in bold text. The Bureau is also making a technical correction to the heading for appendix MS.

Legal Authority

The Bureau is exercising its authority under section 6(k)(1)(E) of RESPA to amend the model forms in appendix MS–3(A) through (D) to part 1024 of Regulation X. The amendments to the model forms for the force-placed insurance notices align the text of the model forms with the disclosures required by § 1024.37.

Appendix MS–4 to Part 1024—Model Clauses for the Written Early Intervention Notice

Proposed model clause MS–4(D) in appendix MS–4 would have illustrated model language that servicers could use to comply with the requirement under proposed § 1024.39(d)(2)(iii)(A) that the modified written early intervention notice include a statement that the servicer may or intends to invoke its specified remedy of foreclosure. The Bureau proposed model clause MS–4(D) to assist servicers subject to the FDCPA with respect to a borrower who has invoked the FDCPA's cease communication protections in complying with the modified written early intervention notice under proposed § 1024.39(d)(2)(iii).

The Bureau sought comment on whether proposed model clause MS–4(D) was appropriate and whether alternate or additional model clauses would be helpful to borrowers and servicers in this context. Some industry commenters objected to the proposed model language on the basis that it may be considered threatening to a borrower and inconsistent with encouraging borrowers to reach out to the servicer. One servicer commented that the implied threat of foreclosure would be inaccurate in many cases because that servicer ultimately pursues foreclosure on just 15 percent of the borrowers who receive a written early intervention notice.

The Bureau is finalizing model clause MS–4(D) with modifications to the language to convey more accurately the circumstances under which a servicer may invoke its specific remedy of foreclosure. As discussed in the section-by-section analysis of new § 1024.39(d), model clause MS–4(D) may be used to comply with the requirement that the written early intervention notice include a statement that the servicer may or intends to invoke its specified remedy of foreclosure pursuant to section 805(c)(2) or (3) of the FDCPA. Use of this model clause or another statement in compliance with § 1024.39(d)(3)(i), located on a written notice as required by and in compliance with the other requirements of § 1024.39(d)(3), provides a safe harbor from FDCPA liability under section 805(c) for providing the required statement. As finalized, model clause MS–4(D) states, ''This is a legally required notice. We are sending this notice to you because you are behind on your mortgage payment. We want to notify you of possible ways to avoid losing your home. We have a right to invoke foreclosure based on the terms of your mortgage contact. Please read this letter carefully.''

Legal Authority

The Bureau adopts new model clause MS–4(D) in appendix MS–4 to part 1024 of Regulation X pursuant to its authority under section 6(k)(1)(E) of RESPA and section 814(d) of the FDCPA. For the reasons discussed in the section-by-section analysis of new § 1024.39(d) and the interpretive rule accompanying this final rule, the Bureau believes that requiring a servicer to provide the modified written early intervention notice if any loss mitigation option is available and if no borrower on the mortgage loan is a debtor in bankruptcy is a reasonable interpretation of the exceptions under section 805(c)(2) and (3) of the FDCPA, which permit a debt collector to communicate with a consumer who has invoked the cease communication protections to notify the consumer that the debt collector or creditor may or intends to invoke specified remedies which it ordinarily invokes.

C. Regulation Z

Section 1026.2 Definitions and Rules of Construction

2(a)(11)

As noted in part V.A., the Bureau proposed to apply certain mortgage servicing rules to confirmed successors in interest. Similar to the definition in proposed § 1024.30(d) with respect to the Mortgage Servicing Rules in Regulation X,[279] proposed § 1026.2(a)(11) would have revised the definition of the term consumer to include a successor in interest once a servicer confirms the successor in interest's identity and ownership interest in the dwelling for the purposes of §§ 1026.20(c) through (e), 1026.36(c), and 1026.41. For the reasons described in part V.A. and in this discussion, the Bureau is finalizing this proposed definition with a substantive change to add the mortgage transfer disclosure requirements of § 1026.39 and technical changes to incorporate the new definition of confirmed successor in interest. The final rule thus amends the definition of consumer for purposes of §§ 1026.20(c) through (e), 1026.36(c), 1026.39, and 1026.41 to include a confirmed successor in interest. As in the proposal, confirmed successors in interest covered by § 1026.2(a)(11) will not necessarily have assumed the mortgage loan obligation (*i.e.,* legal liability for the mortgage debt) under State law or otherwise be liable on it.[280]

As described in part V.A., successors in interest face many of the challenges that the Mortgage Servicing Rules in Regulation Z were designed to prevent. Because a confirmed successor in interest is a homeowner whose dwelling is subject to foreclosure if the mortgage loan obligation is not satisfied, the same reasons supporting the Bureau's adoption of the 2013 TILA Servicing Final Rule support the changes that the Bureau is making to § 1026.2(a)(11).

The Bureau has considered each of the Mortgage Servicing Rules in Regulation Z and has concluded that each rule should apply to confirmed successors in interest. The Bureau generally believes that it would add unnecessary complexity to the rules to require servicers to apply some but not all of the Mortgage Servicing Rules in Regulation Z to confirmed successors in interest. After reviewing the comments, the Bureau has not identified any

[279] *See* section-by-section analysis of § 1024.30(d), *supra.*

[280] As indicated in part V.A., *supra,* the Bureau understands that whether a successor in interest has assumed a mortgage loan obligation (*i.e.,* legal liability for the mortgage debt) under State law is a fact-specific question.

compelling reasons not to apply a particular rule and therefore concludes that it is preferable to apply all of the Mortgage Servicing Rules in Regulation Z to confirmed successors in interest.[281]

The new definition of consumer in § 1026.2(a)(11) entitles confirmed successors in interest to receive ARM disclosures under § 1026.20(c) and (d) and escrow account cancellation notices under § 1026.20(e).[282] The disclosures required by § 1026.20(c) through (e) will provide confirmed successors in interest with important information to allow the confirmed successor in interest to keep the mortgage loan current, which in turn will help the confirmed successor in interest avoid unnecessary foreclosure.

The Bureau anticipates that § 1026.36(c)'s protections will help confirmed successors in interest maintain ownership of their homes.[283] As noted in the section-by-section analysis of § 1026.36(c)(1)(iii), even in the absence of the final rule, existing § 1026.36(c) imposes certain obligations on servicers with respect to payments from successors in interest. However, consumer advocacy groups reported in their comments, as they had in earlier reports, that some servicers are refusing to accept payments from successors in interest, which in turn may lead to delinquency on the mortgage loan and, eventually, foreclosure. Applying § 1026.36(c)'s prompt crediting requirements explicitly to confirmed successors in interest may help alleviate this problem. The Bureau also believes that providing confirmed successors in interest with access to the loan's payoff balance will help keep them informed about the mortgage loan secured by the dwelling and prevent unnecessary foreclosure.[284] Access to this information could also facilitate refinancing by the confirmed successor in interest. Because successors in interest, as owners of a dwelling securing a mortgage loan, may be required to make payments on the loan to avoid foreclosure, applying the prohibition on pyramiding of late fees explicitly to confirmed successors in interest serves TILA's purpose of protecting consumers against inaccurate and unfair credit billing practices.[285]

The new definition of consumer in § 1026.2(a)(11) also ensures that confirmed successors in interest can receive ongoing periodic statements required under § 1026.41.[286] As the Bureau recognized in issuing the periodic statement requirement in the 2013 TILA Servicing Final Rule, the periodic statement serves a variety of important purposes, including informing consumers of their payment obligations, providing information about the mortgage loan, creating a record of transactions that increase or decrease the outstanding balance, providing information needed to identify and assert errors, and providing information when consumers are delinquent.[287] Receiving periodic statements serves these same purposes for confirmed successors in interest who, as homeowners of a dwelling securing a mortgage loan, may be required to make payments on the loan to avoid foreclosure.

As explained in part V.A., a trade association commenter suggested that a confirmed successor in interest should be treated as a consumer for purposes of the mortgage transfer disclosure requirement in § 1026.39. The mortgage transfer disclosure notifies consumers of valuable information regarding certain transfers of ownership of a mortgage loan, including the name and contact information for the new owner of the mortgage loan and an agent or party authorized to resolve issues concerning the consumer's payments on the loan (if the owner's information cannot be used for that purpose). Information of this nature can assist confirmed successors in interest who seek to engage in loss mitigation, to ensure that payments on the account are properly applied, or to identify who has a security interest in their property. For the reasons set forth in part V.A. and below, the final rule defines consumer in § 1026.2(a)(11) to also include confirmed successors in interest for purposes of § 1026.39.

As explained in part V.A., some industry commenters expressed concern that the proposal would require servicers to communicate about the loan with parties that are not obligated on the loan in ways. An industry commenter suggested that such communications might be considered abusive or harassing and might be found to violate FDCPA section 806, 15 U.S.C. 1692d, if done by a servicer subject to the FDCPA. The Bureau does not believe that providing this important information about the property at issue in a notice that is required by Regulation X will be abusive or harassing absent other conduct making the overall effect of the communication abusive or harassing, as explained in part V.A. Additionally, the final rule gives servicers the option not to send Mortgage Servicing Rule notices to a confirmed successor in interest who is not liable on the loan obligation until the confirmed successor in interest requests them through a written acknowledgment, as long as the servicer sends an initial written notice and acknowledgment form to the confirmed successor in interest upon confirmation in compliance with the requirements of § 1024.32(c)(1) through (3).

A number of industry commenters also expressed concern that subjecting servicers to the Mortgage Servicing Rules in Regulation Z might prove costly for servicers. However, as explained in part V.A., many of the specific cost concerns that industry commenters raised relate to requirements that are not part of the final rule. For example, many industry commenters expressed concern about the potential burden of having to provide duplicative copies of notices to confirmed successors in interest if the servicer had already provided the same notice to another consumer on the account. To address this concern, the final rule clarifies that servicers generally do not have to send Regulation Z disclosures to a confirmed successor in interest if the disclosure is provided to another consumer on the account. Because servicers already must comply with §§ 1026.20(c) through (e), 1026.36, 1026.39, and 1026.41 with respect to the transferor consumer, the Bureau believes that the additional cost to servicers to apply these requirements to confirmed successors in interest will be relatively minimal. The Bureau believes that the additional cost imposed by extending the Mortgage Servicing Rules in Regulation Z to confirmed successors in interest will largely be limited to updating servicer systems initially, adding individual successors in interest to the system on an ongoing basis, and printing and mailing costs, if any.

As discussed in more detail in part V.A., the Bureau received a variety of

[281] As explained in part V.A., *supra,* and in the section-by-section analyses of §§ 1026.20(f), 1026.39(f), and 1026.41(g), *infra,* the final rule includes additional provisions governing how the Mortgage Servicing Rules in Regulation Z apply to confirmed successors in interest.

[282] Section 1026.20(c) and (d) generally applies with respect to a closed-end consumer credit transaction secured by the consumer's principal dwelling in which the annual percentage rate may increase after consummation, and § 1026.20(e) generally applies with respect to a closed-end consumer credit transaction secured by a first lien on real property or a dwelling.

[283] Section 1026.36(c)(1) and (2) apply in connection with a closed-end consumer credit transaction secured by a consumer's principal dwelling, and § 1026.36(c)(3) applies in connection with a consumer credit transaction secured by a dwelling.

[284] For the reasons discussed in part V.A., *supra,* the Bureau believes that providing confirmed successors in interest with payoff balances does not present privacy concerns.

[285] 78 FR 10901, 10914 (Feb. 14, 2013) (quoting 15 U.S.C. 1601(a)).

[286] Section 1026.41 generally applies with respect to a closed-end consumer credit transaction secured by a dwelling.

[287] 78 FR 10901, 10959 (Feb. 14, 2013).

comments on whether mortgage servicing protections should apply with respect to successors in interest even if the servicer has not confirmed the successor in interest's identity and ownership interest in the dwelling. Industry commenters generally opposed extending such protections, asserting that doing so could violate the privacy of the transferor consumer and any other consumers on the account and could result in unauthorized persons obtaining access to loan information or taking action with respect to a loan. Some consumer advocacy groups encouraged the Bureau to apply certain servicing protections prior to confirmation. For example, consumer advocacy groups indicated that, even before a successor in interest is confirmed, a servicer should be required to credit payments promptly and refrain from improper pyramiding of late fees pursuant to § 1026.36(c).

For the reasons stated in part V.A. and in this discussion, the Bureau has decided not to add successors in interest who have not been confirmed to the Regulation Z definition of consumer in § 1026.2(a)(11).[288] Because some people representing themselves as successors in interest may not actually have an ownership interest in the dwelling, requiring servicers to apply Regulation Z's mortgage servicing communication and disclosure requirements to successors in interest before servicers have confirmed the successor in interest's identity and ownership interest in the dwelling may present privacy and other concerns, as various commenters noted. For the same reason, the Bureau also believes it is inappropriate to require servicers to incur substantial costs before confirming the successor in interest's identity and ownership interest in the dwelling. However, as discussed in the section-by-section analysis of § 1026.36(c), § 1026.36(c)(1) and (2) imposes certain obligations relating to payment crediting and processing that apply even if a payment is received from a successor in interest prior to confirmation.[289] Moreover, as discussed in the section-by-section analysis of Regulation X §§ 1024.36(i) and 1024.38(b)(1)(vi), the Bureau is creating a new request for information procedure and imposing certain policies and procedures requirements on servicers under Regulation X with respect to potential successors in interest.

The final rule includes commentary to § 1026.2(a)(11) in comment 2(a)(11)–4.i, .ii, and .iv, which was not part of the proposal. It also includes a substantially revised version of proposed comment 2(a)(11)–4 as comment 2(a)(11)–4.iii. New comment 2(a)(11)–4.i clarifies that confirmation of a successor in interest is different from assumption of the mortgage loan under State law. It explains that a servicer may not require a confirmed successor in interest to assume the mortgage loan obligation to be considered a consumer for purposes of §§ 1026.20(c) through (e), 1026.36(c), 1026.39, and 1026.41. It also explains that, if a successor in interest assumes a mortgage loan obligation under State law or is otherwise liable on the mortgage loan obligation, the protections the successor in interest enjoys under Regulation Z are not limited to §§ 1026.20(c) through (e), 1026.36(c), 1026.39, and 1026.41. The Bureau believes that this comment will help prevent confusion about the consequences of confirmation and of assumption of the loan obligation under State law.

New comment 2(a)(11)–4.ii explains that communications in compliance with Regulation Z to a confirmed successor in interest as defined in § 1026.2(a)(27)(ii) do not violate FDCPA section 805(b) because the term consumer for purposes of FDCPA section 805 includes any person who meets the definition in Regulation Z of confirmed successor in interest. As explained in parts IV.C. and V.A., this is consistent with an interpretive rule that the Bureau is issuing concurrently with this final rule.

Comment 2(a)(11)–4.iii addresses the treatment of transferor consumers, a subject that was addressed in proposed comment 2(a)(11)–4. Proposed comment 2(a)(11)–4 would have provided that, even after a servicer confirms a successor in interest's status, the servicer would still generally be required to comply with the requirements of §§ 1026.20(c) through (e), 1026.36(c), and 1026.41 with respect to the prior consumer. The proposed comment indicated, however, that a servicer would not be required to comply with the requirements of §§ 1026.20(c) through (e) and 1026.41 if the prior consumer also either had died or had been released from the obligation on the mortgage loan and a servicer would not be required to comply with the requirements of § 1026.36(c) if the prior consumer also had been released from the obligation on the mortgage loan. The proposed comment also would have provided that the prior consumer would retain any rights under §§ 1026.20(c) through (e), 1026.36(c), and 1026.41 that accrued prior to the confirmation of the successor in interest to the extent those rights would otherwise survive the prior consumer's death or release from the obligation. For the reasons stated in part V.A. and in this discussion, the Bureau has substantially revised this comment to make it clear that confirmation of a successor in interest does not strip the consumer who transferred the ownership interest to the successor in interest of any protections under Regulation Z. The revised comment appears as comment 2(a)(11)–4.iii in the final rule.

In the proposal, the Bureau solicited comment on whether a servicer should not be required to comply with §§ 1026.20(c) through (e), 1026.36(c), and 1026.41 with respect to prior consumers after a successor in interest is confirmed. The Bureau also solicited comment on whether other circumstances exist, beyond death and release of the obligation on the mortgage loan, in which some or all of the requirements of §§ 1026.20(c) through (e), 1026.36(c), and 1026.41 should not apply with respect to the prior consumer after a successor in interest is confirmed. The Bureau also solicited comment on whether § 1026.41 should provide that, in the case of consumer death, the servicer should continue providing periodic statements to the consumer's estate until a successor in interest's status has been confirmed.

As explained in part V.A., the Bureau received many comments objecting to the use of the term prior consumer. A number of commenters also expressed concern that the Bureau's proposal would not provide adequate protection to the estates of transferor consumers. Some consumer advocacy groups suggested that estates and their representatives should always be able to obtain information regarding the mortgage loan and have payments applied correctly. A trade association agreed with two caveats: It indicated that (1) the servicer needs to verify that a person purporting to act as administrator or executor is properly acting in that capacity, and (2) if the estate is released from the loan obligation, Regulation P may limit the estate's ability to access future loan information. Another trade association indicated that the executor of an estate

[288] However, a successor in interest may be a consumer under the Regulation Z definition of consumer (both currently and as amended by the final rule), even if the successor in interest has not been confirmed, if the successor in interest has assumed the mortgage loan obligation under State law or is otherwise obligated on the mortgage loan obligation.

[289] For example, the Bureau is clarifying in comment 36(c)(1)(iii)–2 that, when a servicer specifies requirements for payments, those requirements should not make it difficult for most confirmed and potential successors in interest to make conforming payments.

may ultimately be legally obligated to dispose of property and needs information in order to fulfill the executor's responsibilities.

The final rule uses the term transferor consumer rather than prior consumer because a transferor consumer typically remains a consumer for purposes of Regulation Z after the transfer. As many commenters indicated, transferor consumers may remain liable on the mortgage loan obligation and can have significant legal interests at stake even after a successor in interest is confirmed. The Bureau also recognizes that, when a consumer dies, the consumer's estate and its representative have an important role to play and that Regulation Z can provide valuable information and protections to transferor consumers and their estates even after confirmation of a successor in interest. The Bureau does not intend for the final rule to diminish any protections that TILA and Regulation Z currently provide for living transferor consumers or for estates and their representatives, and the Bureau has significantly revised proposed comment 2(a)(11)–4 accordingly. As finalized, comment 2(a)(11)–4.iii provides that, even after a servicer's confirmation of a successor in interest, the servicer is still required to comply with all applicable requirements of §§ 1026.20(c) through (e), 1026.36(c), 1026.39, and 1026.41 with respect to the consumer who transferred an ownership interest to the successor in interest.

The Bureau acknowledges that, under the final rule, servicers will sometimes be required to comply with the Mortgage Servicing Rules in Regulation Z with respect to more than one person—such as the transferor consumer or a representative of the transferor consumer's estate and the confirmed successor in interest, as well as, in some cases, multiple confirmed successors in interest who each acquire an ownership interest in a dwelling. Although some commenters expressed concern about this, the Bureau notes that, under the Mortgage Servicing Rules, the rules already may apply with respect to more than one consumer for a particular mortgage loan. It is quite common for more than one consumer (for example, spouses) to be obligated on the mortgage note, and the Mortgage Servicing Rules apply with respect to each consumer in such cases. Accordingly, the Bureau does not believe that applying the Mortgage Servicing Rules in Regulation Z to confirmed successors in interest will present novel challenges for servicers in this regard.

The final rule also includes new comment 2(a)(11)–4.iv, which makes clear that servicers generally do not need to send Regulation Z notices to confirmed successors in interest if the notices would be duplicative of notices sent to another consumer on the account. A number of commenters asked the Bureau to clarify whether servicers must send multiple copies of required servicing notices after a successor in interest is confirmed. One industry commenter explained that most servicing platforms only allow for automated delivery of correspondence to one address. It indicated that a requirement to send items to multiple addresses or through differing communication channels would create significant operational and systems challenges with concomitant costs.

For the reasons set forth in part V.A. and in this discussion, the Bureau agrees that it would be unnecessarily burdensome to require servicers to send additional copies of notices required by § 1026.20(c), (d), or (e), § 1026.39, or § 1026.41 to confirmed successors in interest if another consumer is already receiving them. Proposed comment 41(a)–5.ii addressed this issue with respect to periodic statements, but, in light of the comments received, the Bureau believes it is clearest and most efficient to address questions regarding duplication of notices for confirmed successors in interest in a uniform, centralized way in comment 2(a)(11)–4.iv for all of the Mortgage Servicing Rules in Regulation Z. Comment 2(a)(11)–4.iv clarifies that, except as required by Regulation X 12 CFR 1024.36, in response to an information request, a servicer is not required to provide to a confirmed successor in interest any written disclosure required by § 1026.20(c), (d), or (e), § 1026.39, or § 1026.41 if the servicer is providing the same specific disclosure to another consumer on the account. Comment 2(a)(11)–4.iv also explains that, if a servicer confirms more than one successor in interest, the servicer need not send any disclosure required by § 1026.20(c), (d), or (e), § 1026.39, or § 1026.41 to more than one of the confirmed successors in interest.

Requiring only one periodic statement is consistent with current comment 41(a)–1, which provides that, when two consumers are joint obligors with primary liability on a closed-end consumer credit transaction secured by a dwelling, subject to § 1026.41, the periodic statement may be sent to either one of them. New comment 2(a)(11)–4.iv is also consistent with § 1026.17(d), comment 17(d)–2, and § 1026.31(e), which generally provide that, if there is more than one consumer, the disclosures required by Regulation Z subparts C and E may be made to any consumer who is primarily liable on the obligation.

2(a)(27)

The Bureau proposed to define successor in interest in § 1026.2(a)(27) to cover all categories of persons who acquired an ownership interest in a dwelling securing a mortgage loan in a transfer protected by the Garn-St Germain Act.[290] The proposed definition stated that a successor in interest is a person to whom an ownership interest in a dwelling securing a closed-end consumer transaction is transferred from a prior consumer, provided that the transfer falls under an exemption specified in section 341(d) of the Garn-St Germain Act.[291] As explained in part V.A., the Bureau is finalizing the definition of successor in interest in § 1026.2(a)(27)(i) with several adjustments to address concerns raised by commenters. For clarity and ease of reference, the final rule also includes a definition of confirmed successor in interest in § 1026.2(a)(27)(ii).

2(a)(27)(i)

As explained in part V.A., some industry commenters objected to the use of categories from the Garn-St Germain Act, and many industry commenters urged the Bureau not to finalize the proposed successor provisions or to narrow the scope of the definition of successor in interest substantially—for example, to limit the scope to situations involving death or death or divorce. Others urged the Bureau to exclude anyone who has not assumed the mortgage loan obligation from the definition of successor in interest. Some suggested excluding certain types of transactions, such as reverse mortgages.

Some industry commenters raised questions about whether the Bureau intended to incorporate the occupancy requirements of the Garn-St Germain Act implementing regulations administered by the OCC.[292] An industry commenter suggested that the Bureau should omit reference to the Garn-St Germain Act and instead enumerate the categories of transfer of ownership that would qualify for regulatory protection, in order to avoid unintended consequences.

Consumer advocacy group commenters generally supported use of

[290] 12 U.S.C. 1701j–3(d).

[291] *Id.* As discussed in the section-by-section analysis of § 1024.31, *supra,* the Bureau proposed to add a similar definition to Regulation X.

[292] 12 CFR 191.5(b).

the Garn-St Germain Act framework and urged the Bureau to broaden the definition to include various categories that are not covered by the Garn-St Germain Act but that are similar to the Garn-St Germain Act categories. They suggested, for example, that the definition should include unmarried partners, relatives other than a spouse or child of the borrower who obtain an interest in the home through a quitclaim deed, and unrelated transferees, as well as co-homeowners who did not sign the original loan. A large number of commenters of various types expressed concern about the use of the term prior consumer because the consumer who transfers an interest may still be liable on the loan obligation and a consumer for purposes of Regulation Z.

For the reasons explained in part V.A. and in this discussion, the Bureau is finalizing the definition of successor in interest for Regulation Z in § 1026.2(a)(27)(i) using the Garn-St Germain Act framework but with two changes. First, because the consumer who transfers an ownership interest to the successor in interest may remain a consumer after the transfer, the final rule substitutes ''consumer'' for ''prior consumer'' in the definition of successor in interest.

Second, the final rule does not include a cross-reference to the Garn-St Germain Act but instead lists the specific categories of transfers that could render a transferee a successor in interest. These categories are modeled on the categories of transfers of ownership interest that section 341(d) of the Garn-St Germain Act protects. To ensure that the scope of the final rule does not change without further rulemaking by the Bureau, the Bureau has omitted the Garn-St Germain Act category that includes any other transfer or disposition described in the statute's implementing regulations.[293] Additionally, in restating the categories in the final rule, the Bureau has not incorporated certain scope limitations imposed by the Garn-St Germain Act or its implementing regulations, such as the exclusion for reverse mortgages and certain occupancy requirements in 12 CFR 191.5(b). As explained in part V.A., these adjustments to the proposal promote clarity and consistency with other aspects of Regulation Z and with the final definition of successor in interest in subpart C of Regulation X.

The final rule adds new comment 2(a)(27)(i)–1 to clarify how the definition of successor in interest applies when property is held in a joint tenancy or a tenancy by the entirety. A trade association questioned whether the proposal would protect a non-borrower owner who holds property in a tenancy by the entirety when the borrower owner dies if there is not a transfer under State law. This commenter stated that, if property is held in a tenancy by the entirety, it is not clear that there is a property transfer when one owner dies because State law may provide that the survivor continues to own an undivided interest in the entire property and that the late spouse's property interest simply terminates.

The Bureau believes it is important to extend protections to a tenant by the entirety upon the death of a borrower spouse and to a joint tenant upon the death of a borrower joint tenant. The Bureau is adding comment 2(a)(27)(i)–1 in the final rule, to clarify that, if a borrower who has an ownership interest as a joint tenant or tenant by the entirety in a dwelling securing a closed-end consumer credit transaction dies, a surviving joint tenant or tenant by the entirety with a right of survivorship in the property is a successor in interest as defined in § 1026.2(a)(27)(i).

The final rule also adds new comment 2(a)(27)(i)–2 to clarify the application of the definition of successor in interest to *inter vivos* trusts. The comment explains that, in the event of a transfer into an *inter vivos* trust in which the consumer is and remains a beneficiary and which does not relate to a transfer of rights of occupancy in the property, the beneficiaries of the *inter vivos* trust rather than the *inter vivos* trust itself are considered to be the successors in interest for purposes of § 1026.2(a)(27)(i). This clarification ensures that a trust is not a successor in interest under these circumstances. It is also consistent with comment 3(a)–10 to Regulation Z, which explains that credit extended for consumer purposes to certain trusts is considered to be credit extended to a natural person rather than credit extended to an organization.

2(a)(27)(ii)

Section 1026.2(a)(27)(ii) defines confirmed successor in interest for purposes of Regulation Z as a successor in interest once a servicer has confirmed the successor in interest's identity and ownership interest in the dwelling. This new definition was not part of the proposal but is consistent with how the Bureau used the term confirmed successor in interest in the proposal and includes language drawn from the proposed definition of consumer. Including this definition in the final rule will help to streamline the successor in interest provisions throughout Regulation Z.

Section 1026.20 Disclosure Requirements Regarding Post-Consummation Events

20(e) Escrow Account Cancellation Notice for Certain Mortgage Transactions

20(e)(4) Form of Disclosures

Section 1026.20(e) implements the requirement in TILA section 129D(j)(1)(B) that the creditor or servicer must provide an escrow account cancellation notice for certain mortgage transactions. Pursuant to § 1026.2(a)(11), as amended by the final rule, confirmed successors in interest are consumers for purposes of § 1026.20(e). Section 1026.20(e)(4) requires that the disclosures provided pursuant to § 1026.20(e) must have headings, content, order, and format substantially similar to model form H–29 in appendix H to part 1026. For the reasons stated in part V.A. and in this discussion, the Bureau is adding comment 20(e)(4)–3 to make it clear that creditors and servicers may modify the language in model form H–29 to accommodate particular consumer circumstances or transactions not addressed by the form and to tailor the model form H–29 statement of consequences for failing to pay property costs to the circumstances of the particular consumer.

Model form H–29 includes some language that may not be well suited to confirmed successors in interest who have not assumed the mortgage loan obligation under State law and are not otherwise liable on it. The model form states, for example, ''you will no longer have an escrow account,'' which could potentially be confusing for a confirmed successor in interest who is not liable on the mortgage loan obligation and therefore may not ever have been the holder of an escrow account. The model form notice refers to ''your loan'' and also states: ''[i]f you fail to pay any of your property costs, we may . . . require you to pay for property insurance that we buy on your behalf, which likely would cost more and provide fewer benefits than what you could buy on your own.'' This potential consequence may not apply to a confirmed successor in interest if the confirmed successor in interest is not a party to the loan agreement.

[293] 12 U.S.C. 1701j–3(d)(9). The Bureau has also omitted several categories in the Garn-St Germain Act that do not result in a transfer of ownership interest and that are therefore irrelevant for successor in interest status. *See* 12 U.S.C. 1701j–3(d)(1), (2), (4); *see also* 79 FR 74176, 74181 n.28 (Dec. 15, 2014) (noting that the proposal would not apply to the situations described in these categories).

The final rule adds comment 20(e)(4)–3 to indicate that the requirements of § 1026.20(e)(4) to provide the § 1026.20(e) disclosures with the headings, content, order, and format substantially similar to model form H–29 in appendix H to part 1026 do not preclude creditors and servicers from modifying the disclosures to accommodate particular consumer circumstances or transactions not addressed by the form. The requirements also do not preclude creditors and servicers from tailoring to the circumstances of the particular consumer the statement of consequences if the consumer fails to pay property costs. This new comment clarifies that servicers can adjust the language used in model form H–29 to the specific circumstances of confirmed successors in interest and others. The new comment is similar to existing Regulation Z comments 20(c)(3)(i)–1 and 20(d)(3)(i)–1, which authorize adjustments to accommodate particular consumer circumstances or transactions not addressed by the forms with respect to the ARM notices required by § 1026.20(c) and (d). As explained in part V.A., the adjustments authorized by comments 20(c)(3)(i)–1, 20(d)(3)(i)–1, and 20(e)(4)–3 represent one of several options that servicers may use to ensure that their notices and other communications do not confuse or deceive confirmed successors in interest who have not assumed the mortgage loan obligation under State law and are not otherwise liable on it as to whether they are liable on the mortgage loan obligation.

20(f) Successors in Interest

As explained in part V.A. and the section-by-section analysis of Regulation X § 1024.32, the final rule allows servicers to provide an initial explanatory written notice and acknowledgment form to confirmed successors in interest who are not liable on the mortgage loan obligation. The notice explains that the confirmed successor in interest is not liable unless and until the confirmed successor in interest assumes the mortgage loan obligation under State law. The notice also indicates that the confirmed successor in interest must return the acknowledgment to receive certain servicing notices under the Mortgage Servicing Rules. For the reasons stated in part V.A. and in this discussion, the final rule includes new § 1026.20(f), which provides that, if, upon confirmation, a servicer provides a confirmed successor in interest who is not liable on the mortgage loan obligation with such a written notice and acknowledgment form, the servicer is not required to provide to the confirmed successor in interest any written disclosure required by § 1026.20(c), (d), or (e) unless and until the confirmed successor in interest either assumes the mortgage loan obligation under State law or has provided the servicer an executed acknowledgment in accordance with Regulation X § 1024.32(c)(1)(iv) that the confirmed successor in interest has not revoked.

The final rule does not mandate that servicers send the initial written notice and acknowledgment form; instead, Regulation X § 1024.32(c)(1) gives servicers the option to do so and, if they choose to do so, § 1026.20(f) relieves them of the obligation to provide written disclosures required by § 1026.20(c), (d), or (e) until the confirmed successor in interest affirmatively indicates a desire to receive them by returning the acknowledgment or assumes the mortgage loan obligation under State law. Similar provisions in §§ 1024.32(c)(2), 1026.39(f), and 1026.41(g) address the disclosures required by, respectively, the Mortgage Servicing Rules in Regulation X and §§ 1026.39 and 1026.41. As noted in part V.A., the Bureau has decided to excuse servicers that have not received an acknowledgment back from a confirmed successor in interest from the requirement to send Mortgage Servicing Rule notices because doing so relieves servicers of the costs associated with sending notices to confirmed successors in interest who are not liable on the mortgage loan obligation and do not want notices. However, if a confirmed successor in interest assumes a mortgage loan obligation under State law, the information in the initial notice and acknowledgment form is no longer applicable, and § 1026.20(f) accordingly does not suspend the servicer's obligation to provide notices required by § 1026.20(c), (d), or (e).

Section 1026.36 Prohibited Acts or Practices and Certain Requirements for Credit Secured by a Dwelling

36(c) Servicing Practices

36(c)(1) Payment Processing

The Bureau proposed a technical change to § 1026.36(c)(1) for clarity. Section 1026.36(b) provides that § 1026.36(c)(1) applies to closed-end consumer credit transactions secured by a consumer's principal dwelling. However, current § 1026.36(c)(1) refers to consumer credit transactions secured by a consumer's principal dwelling, without referring to closed-end transactions. Proposed § 1026.36(c)(1) added language relating to closed-end consumer credit transactions.

The Bureau also proposed commentary to § 1026.36(c)(1) to clarify how servicers must treat periodic payments made by consumers who are performing under either temporary loss mitigation programs or permanent loan modifications. Proposed comment 36(c)(1)(i)–4 would have provided that, if the loan contract has not been permanently modified but the consumer has agreed to a temporary loss mitigation program, a periodic payment under § 1026.36(c)(1)(i) remains an amount sufficient to cover principal, interest, and escrow (if applicable) for a given billing cycle under the loan contract, irrespective of the payment due under the temporary loss mitigation program. Accordingly, if a consumer submits a payment under a temporary loss mitigation program that is less than an amount sufficient to cover principal, interest, and escrow (if applicable) for a given billing cycle under the loan contract, the servicer should generally treat the payment as a partial payment under § 1026.36(c)(1)(i), even though the consumer may have made the payment due under the temporary loss mitigation program.

The Bureau proposed this comment in response to several inquiries regarding payment processing for payments under temporary loss mitigation programs. In the proposal, the Bureau acknowledged that its statement in the 2013 TILA Final Servicing Rule, ''if a consumer makes a payment sufficient to cover the principal, interest, and escrow due under a trial modification plan, these funds should be applied,'' [294] may have suggested that, when a temporary loss mitigation program is in effect, the periodic payment is the payment due under the temporary loss mitigation program, rather than the amount sufficient to cover principal, interest, and escrow (if applicable) for a given billing cycle under the loan contract. In the proposal, the Bureau reiterated that the periodic payment, even under a temporary loss mitigation program, remains the amount sufficient to cover principal, interest, and escrow (if applicable) for a given billing cycle under the loan contract. A consumer may continue to accumulate a delinquency according to the loan contract during the duration of a temporary loss mitigation program. If a consumer fails to comply with the terms of a temporary loss mitigation program, the servicer will typically revert back to the terms of the loan contract, with the

[294] 78 FR 10901, 10954 (Feb. 14, 2013).

result that the consumer may be facing acceleration or an immediate demand for payment in full of the accumulated delinquency. Accordingly, the Bureau believed that it would be appropriate to require servicers to credit payments in a way that reflects the continuing contractual obligations between the parties and any accumulating delinquency. Moreover, the Bureau believed it could be burdensome for servicers to treat the payment due under a temporary loss mitigation program as the periodic payment, only to revert to the contractual payment if the consumer fails to comply with the terms of the temporary loss mitigation program.

For loans that have been permanently modified, proposed comment 36(c)(1)(i)–5 would have provided that the periodic payment under § 1026.36(c)(1)(i) is an amount sufficient to cover principal, interest, and escrow (if applicable) for a given billing cycle under the modified loan contract. The periodic payment should reflect the contractual obligation; once the loan contract has been permanently modified, the terms of the modified loan contract govern the periodic payment determination and not the terms of the contract pre-modification.

Several consumer advocacy groups commented on proposed comment 36(c)(1)(i)–4. Consumer advocacy group commenters expressed concern that the proposed comment would cause servicers to believe that payments made under a temporary loss mitigation program are treated differently than other partial payments. One consumer advocacy group stated that a temporary loss mitigation program is a contract that the consumer has the legal right to enforce. It suggested that treating payments made under a temporary plan as partial payments under proposed comment 36(c)(1)(i)–4 conflicts with this principle.

The Bureau is finalizing the technical change to § 1026.36(c)(1) and the revisions to comments 36(c)(1)(i)–4 and –5 as proposed. Accordingly, final § 1026.36(c)(1) refers directly to a closed-end consumer credit transaction secured by a consumer's principal dwelling. Comment 36(c)(1)(i)–4 explains that, if a loan contract has not been permanently modified but the consumer has agreed to a temporary loss mitigation program, a periodic payment under § 1026.36(c)(1)(i) is the amount sufficient to cover principal, interest, and escrow (if applicable) for a given billing cycle under the loan contract, regardless of the payment due under the temporary loss mitigation program. Comment 36(c)(1)(i)–5 provides that, if a loan contract has been permanently modified, a periodic payment under § 1026.36(c)(1)(i) is an amount sufficient to cover principal, interest, and escrow (if applicable) for a given billing cycle under the modified loan contract.[295]

As explained in the proposal, the servicer should generally treat a payment due under a temporary loss mitigation program as a partial payment under § 1026.36(c)(1)(i). Although a temporary loss mitigation program is a contract, as noted by one commenter, and may be enforceable as such, the temporary loss mitigation program does not remove the obligations of the existing mortgage loan contract. Servicers must credit payments in a way that reflects the continuing contractual obligations between the parties. The Bureau notes that its commentary here is confined to clarifying how servicers must credit payments received and ensuring that those payments are credited according to the terms of the loan contract; the Bureau is not addressing other legal requirements the servicer may have to the borrower relating to the temporary loss mitigation program.

36(c)(1)(iii) Non-Conforming Payments

Section 1026.36(c) includes requirements relating to prompt crediting of payments, pyramiding of late fees, and payoff statements. In the proposal, the Bureau solicited comment on whether certain parts of § 1026.36(c) should apply with respect to successors in interest even if the servicer has not confirmed the successor in interest's identity and ownership interest in the dwelling. The Bureau received a variety of comments on this issue, including some that asked the Bureau to clarify how servicers should handle payments by potential successors in interest.[296] For the reasons explained in part V.A. and in this discussion, the final rule clarifies the operation of § 1026.36(c) with respect to potential successors in interest by amending comment 36(c)(1)(iii)–2.

Several consumer advocacy groups stated that a servicer should always be required to credit payments promptly and to refrain from improper pyramiding of late fees. These groups noted that it could take potential successors in interest several months or longer to obtain and provide documentation of their status as a successor in interest. Consumer advocacy group commenters also indicated that successors in interest continue to have difficulties getting their payments credited. A local government commenter noted the importance of assisting successors in making payments on a loan if the loan is current at the time the servicer is notified of the borrower's death.

A number of industry commenters urged the Bureau not to apply protections or regulations including § 1026.36(c) to unconfirmed successors in interest. A trade association stated that successors in interest can and should make payments while successorship claims and loss mitigation applications are being prepared or pending. It indicated that servicers accept payments made prior to confirmation if the servicers have enough confirming information. This commenter suggested that it would be helpful for the Bureau to clarify the treatment of a payment that a successor in interest sends before confirmation and raised a number of questions relating to how the error resolution procedures of § 1024.35 apply to payments received from potential and confirmed successor in interest. This commenter indicated that servicers should have the ability to accept or reject payments from potential successors in interest and that servicers need to be able to reject payments in certain circumstances, citing the Patriot Act.

For the reasons stated in part V.A. and the section-by-section analysis of § 1026.2(a)(11), the Bureau has decided not to define unconfirmed successors in interest as consumers for purposes of the Mortgage Servicing Rules, including § 1026.36(c). However, the Bureau agrees with commenters that potential successors in interest should be able to make payments during the confirmation process, in order to ensure that mortgage loans do not become delinquent or, if already delinquent, do not become more delinquent while potential successors in interest await confirmation. Both industry commenters and consumer advocacy groups emphasized the importance of payments by potential successors in interest. The Bureau encourages servicers to continue to work with potential successors in interest to facilitate payments during the confirmation process in order to help prevent delinquency. The Bureau also notes that there may be circumstances where State law provides additional protections for potential successors in

[295] As described in the section-by-section analysis of § 1026.41(d), the Bureau is also finalizing commentary to § 1026.41(d) clarifying certain periodic statement disclosures relating to temporary loss mitigation programs and permanent loan modifications.

[296] Some commenters also addressed whether § 1026.36(c) and other mortgage servicing requirements should apply to confirmed successors in interest. Those comments are addressed in part V.A. and the section-by-section analysis of § 1026.2(a)(11).

interest as to payment acceptance and crediting.

Additionally, the Bureau notes that the mere fact that a payment comes from someone who is not a consumer does not obviate the servicer's obligations to handle it properly under § 1026.36(c)(1) and (2).[297] In connection with consumer credit transactions secured by a consumer's principal dwelling, section 129F(a) of TILA generally requires servicers to credit a payment to the consumer's loan account as of the date of receipt, with certain limited exceptions.[298] In establishing this requirement, Congress did not specify by whom the payment must be made. Consistent with section 129F(a), § 1026.36(c)(1)(i) provides, with specified exceptions, that, in connection with such transactions, no servicer shall fail to credit a periodic payment to the consumer's loan account as of the date of receipt, without limiting the requirement to payments received from a consumer. There may be many circumstances in which a third party makes mortgage payments on behalf of the consumer or as a successor in interest to the transferor consumer. In those cases, as well as when the consumer makes the payment directly, the Bureau expects servicers to follow the payment processing requirements in § 1026.36(c)(1) and to adhere to the prohibition on pyramiding of late fees in § 1026.36(c)(2), to the extent those provisions are otherwise applicable.

Current comment 36(c)(1)(iii)–1 explains that a servicer may specify reasonable requirements for making payments in writing, such as requiring that payments be accompanied by the account number or payment coupon. Current comment 36(c)(1)(iii)–2 also explains that it should not be difficult for most consumers to make conforming payments. Pursuant to the final rule, consumers, as used in comment 36(c)(1)(iii)–2, includes confirmed successors in interest. In light of the importance of keeping loans current, it would not be reasonable for a servicer to impose payment requirements that prevent a potential successor in interest from making payments on the account during the confirmation process. The final rule accordingly amends comment 36(c)(1)(iii)–2 to clarify that it should not be difficult for most consumers or potential successors in interest to make payments that conform to a servicer's payment requirements. The Bureau believes that this clarification serves TILA's purpose of protecting consumers against inaccurate and unfair credit billing practices by ensuring that servicers properly process payments received on an account.[299]

36(c)(2) No Pyramiding of Late Fees

The Bureau proposed a technical change to § 1026.36(c)(2). Section 1026.36(b) provides that § 1026.36(c)(2) applies to closed-end consumer credit transactions secured by a consumer's principal dwelling. However, current § 1026.36(c)(2) refers to consumer credit transactions secured by a consumer's principal dwelling without referring to closed-end transactions. Consistent with § 1026.36(b), proposed § 1026.36(c)(2) modified the existing language to refer directly to closed-end consumer credit transactions secured by a consumer's principal dwelling.

The Bureau did not receive comments addressing the proposed technical change to § 1024.36(c)(2) and is finalizing as proposed. Accordingly, final § 1024.36(c)(2) refers directly to a closed-end consumer credit transaction secured by a consumer's principal dwelling.

Section 1026.39 Mortgage Transfer Disclosures

39(f) Successors in Interest

As explained in part V.A. and the section-by-section analysis of Regulation X § 1024.32, the final rule allows servicers to provide an initial explanatory written notice and acknowledgment form to confirmed successors in interest who are not liable on the mortgage loan obligation. The notice explains that the confirmed successor in interest is not liable unless and until the confirmed successor in interest assumes the mortgage loan obligation under State law. The notice also indicates that the confirmed successor in interest must return the acknowledgment to receive certain servicing notices under the Mortgage Servicing Rules. For the reasons stated in part V.A. and in this discussion, the final rule includes new § 1026.39(f), which provides that, if, upon confirmation, a servicer provides a confirmed successor in interest who is not liable on the mortgage loan obligation with such a written notice and acknowledgment form, the servicer is not required to provide to the confirmed successor in interest any written disclosure required by § 1026.39(b) unless and until the confirmed successor in interest either assumes the mortgage loan obligation under State law or has provided the servicer an executed acknowledgment in accordance with Regulation X § 1024.32(c)(1)(iv) that the confirmed successor in interest has not revoked.

The final rule does not mandate that servicers send the initial written notice and acknowledgment form; instead, Regulation X § 1024.32(c)(1) gives servicers the option to do so and, if they choose to do so, § 1026.39(f) relieves them of the obligation to provide written disclosures required by § 1026.39(b) until the confirmed successor in interest affirmatively indicates a desire to receive them by returning the acknowledgment or assumes the mortgage loan obligation under State law. Similar provisions in §§ 1024.32(c)(2), 1026.20(f), and 1026.41(g) address the disclosures required by, respectively, the Mortgage Servicing Rules in Regulation X and §§ 1026.20(c), (d), and (e) and 1026.41. As noted in part V.A., the Bureau has decided to excuse servicers that have not received an acknowledgment back from a confirmed successor in interest from the requirement to send Mortgage Servicing Rule notices because doing so relieves servicers of the costs associated with sending notices to confirmed successors in interest who are not liable on the mortgage loan obligation and do not want notices. However, if a confirmed successor in interest assumes a mortgage loan obligation under State law, the information in the initial notice and acknowledgment form is no longer applicable, and § 1026.39(f) accordingly does not suspend the servicer's obligation to provide notices required by § 1026.39(b).

Section 1026.41 Periodic Statements for Residential Mortgage Loans

41(a) In General

Although the Bureau did not propose to amend comment 41(a)–1, the Bureau is revising the example provided in comment 41(a)–1 to substitute ''spouses'' for ''husband and wife,'' in order to align the language with other examples in Regulation Z.[300] Thus, as revised, comment 41(a)–1 explains that, if spouses jointly own a home, a servicer need not send statements to both spouses; a single statement may be sent.[301]

[297] For example, comment 36(c)(1)(i)–3 addresses how servicers should calculate the date of receipt for payments made by third-party payors such as a financial institution through a preauthorized payment or telephone bill-payment arrangement.

[298] 15 U.S.C. 1639f(a).

[299] 15 U.S.C. 1601(a).

[300] Pursuant to the Bureau's Same-Sex Married Couple Policy, *see supra* note 39, the Bureau interprets ''spouse'' to include married same-sex spouses.

[301] Section 1026.41 defines servicers to mean creditors, assignees, or servicers for the purposes of § 1026.41. The Bureau, therefore, also uses the term servicer to mean a creditor, assignee, or servicer in

Continued

Proposed comment 41(a)–5.i reiterated for clarity that a servicer must provide a confirmed successor in interest with a periodic statement meeting the requirements of § 1026.41. The Bureau proposed this comment to ensure that the effect of proposed § 1026.2(a)(11) with respect to providing periodic statements to confirmed successors in interest would be clear. However, the Bureau believes that the effect of the final version of § 1026.2(a)(11) with respect to periodic statements is clear from § 1026.2(a)(11) and its commentary and § 1026.41(g), and the Bureau therefore has not included a comment similar to proposed comment 41(a)–5.i in the final rule. Pursuant to § 1026.2(a)(11), comment 2(a)(11)–4.iv, and § 1026.41(g), a servicer must provide a confirmed successor in interest with periodic statements, unless: (1) The servicer is providing the specific periodic statements to another consumer on the account, or (2) the confirmed successor in interest is not liable on the mortgage loan obligation, the servicer has provided a written notice and acknowledgment form in accordance with Regulation X § 1024.32(c)(1)(iv), and the confirmed successor in interest has not provided the servicer an executed acknowledgment that has not been revoked.

Proposed comment 41(a)–5.ii would have provided that, if a servicer sends a periodic statement meeting the requirements of § 1026.41 to another consumer, the servicer need not also send a periodic statement to a successor in interest; a single statement may be sent. The proposed comment also would have provided that, if a servicer confirms more than one successor in interest's identity and ownership interest in the dwelling, the servicer need not send periodic statements to more than one of the successors in interest. For the reasons stated in part V.A. and the section-by-section analysis of § 1026.2(a)(11) and in this discussion, the Bureau has decided not to finalize proposed comment 41(a)–5.ii and is instead addressing in comment 2(a)(11)–4.iv whether duplicative periodic statements and other Regulation X disclosures must be sent to confirmed successors in interest.

The Bureau solicited comment on whether only one successor in interest should receive a periodic statement or whether instead each successor in interest should receive a periodic statement. A number of industry commenters stated that the rule of joint obligors should apply, such that only one periodic statement is required, and urged the Bureau not to require multiple periodic statements. Some noted that a requirement to provide periodic statements to multiple successors in interest would be extremely burdensome and require significant systems changes. As explained above, various commenters also suggested that the Bureau clarify what is expected with regard to other Mortgage Servicing Rule notices when there are multiple borrowers and suggested that only one notice should be required. In contrast, a consumer advocacy group suggested that anyone with an ownership interest should receive a copy of the periodic statement, provided they have given their contact information to the servicer.

The Bureau believes that servicers should not be required to send more than one periodic statement with respect to a mortgage loan. This is consistent with how periodic statements for multiple obligors are treated in current comment 41(a)–1, which provides that, when two consumers are joint obligors with primary liability on a closed-end consumer credit transaction secured by a dwelling, the periodic statement may be sent to either one of them. Due to the constraints of current systems platforms and other factors, the Bureau recognizes that requiring servicers to send multiple copies of the same periodic statement would impose additional costs. In light of commenters' requests for clarification regarding other notices required by the Mortgage Servicing Rules, the Bureau has decided to address this issue through a more general comment to § 1026.2(a)(11), as explained in the section-by-section analysis of that section. The Bureau is therefore not finalizing proposed comment 41(a)–5.ii.

41(c) Form of the Periodic Statement

Current section 1026.41(c) requires servicers to make periodic statement disclosures clearly and conspicuously and in a form the consumer may keep. It provides that proper use of sample forms provided in appendix H–30 complies with these requirements. For the reasons stated in part V.A. and in this discussion, the Bureau is adding new comment 41(c)–5, which explains that servicers may modify the sample forms for periodic statements provided in appendix H–30 to remove language that could suggest liability under the mortgage loan agreement if such language is not applicable.

The sample periodic statement forms in appendix H–30 include language that could suggest liability under the mortgage loan, such as: ''You are late on your mortgage payments. Failure to bring your loan current may result in fees and foreclosure—the loss of your home . . . . You must pay this amount to bring your loan current.'' Including these statements in notices sent to a confirmed successor in interest who is not liable on the loan obligation under State law could potentially result in confusion if the servicer has not otherwise clarified that the confirmed successor in interest is not in fact liable on the loan obligation.

Comment 41(c)–5 notes that, for example, in the case of a confirmed successor in interest who has not assumed the mortgage loan obligation and is not otherwise liable on it, a servicer may modify the forms to use ''this mortgage'' or ''the mortgage'' instead of ''your mortgage''; ''The payments on this mortgage are late'' instead of ''You are late on your mortgage payments''; and ''This is the amount needed to bring the loan current'' instead of ''You must pay this amount to bring your loan current.'' As explained in part V.A., the adjustments authorized by comment 41(c)–5 represent one of several options that servicers may use to ensure that their notices and other communications do not confuse or deceive successors in interest who have not assumed the mortgage loan obligation under State law and are not otherwise liable on it regarding whether they are liable on the mortgage loan obligation.

41(d) Content and Layout of the Periodic Statement

Section 1026.41(d) specifies the disclosures that must be provided on the periodic statement and requires that several of those disclosures be provided in close proximity to one another. The Bureau proposed to amend current comment 41(d)–1 and add new comments 41(d)–4 and –5 relating to the requirements in § 1024.41(d). The Bureau is finalizing comments 41(d)–1 and –4 substantially as proposed. The Bureau is finalizing comment 41(d)–5 as proposed.

The Bureau proposed to amend current comment 41(d)–1, which states that items in close proximity may 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. The proposed amendment would have relaxed this requirement for purposes of § 1026.41(d) and instead would have provided that items in close proximity may not have any unrelated text between them. This proposal mirrored the standard for open-end credit plans secured by a consumer's dwelling found

the section-by-section analysis of § 1026.41, except as otherwise noted.

in § 1026.40(a) and its corresponding comment 40(a)(1)–3, which explain that while most of the disclosures required by § 1026.40(d) must be grouped together and segregated from all unrelated information, a creditor is permitted to include information that explains or expands upon the required disclosures.

The proposed amendment to comment 41(d)–1 would have provided that items in close proximity may not have any unrelated text between them and explained that text is unrelated if it does not explain or expand upon the required disclosures. Text that explains or expands upon the required disclosures may include, for example, an additional explanation of the amount due when: A fee has been charged to the consumer but will not be collected until payoff (*e.g.*, attorney's fees); the consumer has agreed to a temporary loss mitigation program (as discussed further in the section-by-section analysis of § 1026.41(d)(2)); the consumer makes an advance payment; or the servicer reverses a fee. The Bureau believed that the proposed amendment to comment 41(d)–1 would provide servicers with additional flexibility to clarify or explain information on the periodic statement and may enable servicers to address circumstances not expressly provided for in § 1026.41(d). The Bureau sought comment generally on this proposal to amend comment 41(d)–1 to relax the prohibition on intervening text to include only related text that explains or expands upon the required disclosures.

The Bureau proposed additional § 1026.41(d) commentary clarifying certain periodic statement disclosure requirements relating to temporary loss mitigation programs. Proposed comment 41(d)–4 would have provided that, if the consumer has agreed to a temporary loss mitigation program, the disclosures required by § 1026.41(d)(2), (3), and (5) regarding how payments will be and were applied should nonetheless identify how payments are applied according to the loan contract, irrespective of the payment due under the temporary loss mitigation program. The Bureau proposed this commentary in response to several inquiries regarding how temporary loss mitigation programs affect certain disclosures on the periodic statement. Currently, the Bureau's rules and commentary do not address this issue.

As described in the section-by-section analysis of § 1024.36(c)(1), proposed comment 36(c)(1)(i)–4 would have provided that, if the consumer has agreed to a temporary loss mitigation program, a periodic payment under § 1026.36(c)(1)(i) remains an amount sufficient to cover principal, interest, and escrow (if applicable) for a given billing cycle under the loan contract, irrespective of the payment due under the temporary loss mitigation program. Accordingly, the Bureau believed that it was appropriate for the disclosures on the periodic statement required by § 1026.41(d)(2), (3), and (5) to identify how payments will be and are applied according to the loan contract, irrespective of the payment due under the temporary loss mitigation program, because this is how servicers would actually be applying the payments under proposed comment 36(c)(1)(i)–4. The Bureau believed that this treatment would have been appropriate so that the consumer is kept apprised of how payments are being applied, including being notified of any delinquency that may be accumulating during a temporary loss mitigation program.

The Bureau also proposed comment 41(d)–5 to address the disclosures that servicers must make on the first periodic statement provided to a consumer after an exemption under § 1026.41(e) terminates. Section 1026.41(d) requires that a periodic statement include three disclosures concerning account activity that occurred ''since the last statement.'' First, § 1026.41(d)(2)(ii) requires the explanation of amount due to identify the total sum of any fees or charges imposed since the last statement. Second, § 1026.41(d)(3)(i) requires the past payment breakdown to disclose all payments received since the last statement, including a breakdown showing the amount, if any, that was applied to principal, interest, escrow, fees and charges, and the amount, if any, sent to any suspense or unapplied funds account. Finally, § 1026.41(d)(4) requires the transaction activity to include a list of all transaction activity that occurred since the last statement.

In advance of the proposal, the Bureau had received inquiries regarding a servicer's disclosure obligations under § 1026.41(d)(2)(ii), (d)(3)(i), and (d)(4) for purposes of the first periodic statement provided after an exemption under § 1026.41(e) terminates. The Bureau understood that such circumstances might arise when a servicer provided periodic statements, became exempt from the requirements for one of the reasons under § 1026.41(e), and the exemption subsequently terminated, thereby requiring the servicer to resume providing statements. For example, a servicer may have been exempt from providing periodic statements for the duration of a consumer's bankruptcy case, may have provided coupon books but has now decided to begin providing periodic statements, or may have been exempt from the periodic statement requirement as a small servicer but no longer qualifies for that exemption. Alternatively, a mortgage loan might be transferred from a servicer that provides coupon books or was an exempt small servicer to a servicer that provides periodic statements.

Sections 1026.41(d)(2)(ii), (d)(3)(i), and (d)(4) could be interpreted as requiring the periodic statement to include information about account activity for the duration of the exemption period—literally ''since the last statement.'' The Bureau recognized that there may be benefits to providing a consumer with information regarding all fees and charges imposed, all payments received and applied, and all transaction activity that occurred during the exemption period. A consumer could review this information to determine if a servicer imposed any erroneous fees, failed to properly credit payments, or made other mistakes with respect to the consumer's mortgage loan while the exemption applied. The § 1026.41(d)(2)(ii), (d)(3)(i), and (d)(4) disclosures, however, generally cover a time period equivalent to a billing cycle, and the first post-exemption periodic statement should arguably cover a similar time period. The proposal would therefore have clarified that the first post-exemption periodic statement may be limited to disclosing the fees and charges imposed, payments received and applied, and transaction activity since the last payment due date that occurred while the exemption was in effect.

The Bureau believed that consumers and servicers may be better served if the first post-exemption periodic statement includes account activity only since the final payment due date that occurred while the exemption was in effect. The Bureau understood that servicers' systems are generally not equipped to provide months' or years' worth of account activity on a single periodic statement. Requiring the disclosure of all fees and charges imposed, payments received, and transaction activity during an exemption period, which could have spanned several months or years, would impose costs on servicers. Similarly, consumers could be confused or overwhelmed by the receipt of a periodic statement listing all account activity during a lengthy exemption period. For example, consumers might believe that listed fees and charges were presently due, even if the consumer had already paid them.

Moreover, including account activity for the duration of the exemption period would have undermined, in part, the rationale for the exemptions. For example, § 1026.41(e)(3) recognizes the value of a 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.[302] Requiring the first post-exemption periodic statement to include the disclosures required under § 1026.41(d)(2)(ii), (d)(3)(i), and (d)(4) for the duration of the exemption arguably would have upset the balance struck by the coupon book exemption. Servicers might be forced to maintain the functional ability to produce periodic statements to account for the possibility of a change from coupon books to periodic statements or a loss of the exemption, thus obviating any burden-reduction features of the exemption.

Consumers either receive, or have alternative methods of obtaining, much of the account information that, under the proposal, would not have been included in the first post-exemption periodic statement. For example, consumers who receive coupon books have a right to request the information set forth in § 1026.41(d)(2)(ii), (d)(3)(i), and (d)(4). Similarly, for servicers subject to Regulation X's servicing requirements, a consumer may obtain this information by submitting a written information request. In addition, even if the first post-exemption periodic statement does not include the past payment breakdown since the last pre-exemption periodic statement, § 1026.41(d) requires the statement to identify the total of all payments received since the beginning of the current calendar year. This year-to-date information, while not necessarily covering the entire exemption period, provides consumers with a broad overview of the costs of their mortgage loan and how their payments are being allocated to interest or fees as opposed to principal.[303]

Accordingly, the Bureau proposed comment 41(d)–5, which would have provided that, for purposes of the first periodic statement following termination of an exemption under § 1026.41(e), the disclosures required by § 1026.41(d)(2)(ii), (d)(3)(i), and (d)(4) may be limited to the period since the final payment due date that occurred while the exemption was in effect. Proposed comment 41(d)–5 also provided an illustrative example. The Bureau sought comment on proposed comment 41(d)–5, including whether to disclose account activity since a date other than the final payment due date that occurred while the exemption was in effect.

One industry commenter expressed support for the proposed clarifications to the periodic statement requirements generally, while another expressed concern over the costs associated with updating the periodic statements. A few consumer advocacy groups expressed support for proposed comment 41(d)–4 and stated that the proposal accurately reflects the fact that a temporary loss mitigation program does not change the terms of the loan contract.

For the reasons discussed below, the Bureau is finalizing comments 41(d)–1 through –5 substantially as proposed. Comment 41(d)–1 explains that § 1026.41(d) requires several disclosures to be provided in close proximity to one another. It provides that, to meet this requirement, the items to be provided in close proximity must be grouped together, and set off from other groupings of items. It further provides that this may 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. It clarifies that items in close proximity may not have any unrelated text between them and explains that text is unrelated if it does not explain or expand upon the required disclosures.

Comment 41(d)–4 explains that, if the consumer has agreed to a temporary loss mitigation program, the disclosures required by § 1026.41(d)(2), (3), and (5) regarding how payments were and will be applied must identify how payments are applied according to the loan contract, regardless of the temporary loss mitigation program. Final comment 41(d)–4 clarifies the proposed language by explaining that a servicer must, rather than should, identify how payments are applied according to the loan contract, regardless of the temporary loss mitigation program. The Bureau is finalizing this change because it is mandatory that the disclosures required by § 1026.41(d)(2), (3), and (5) identify how payments are applied according to the loan contract. Additionally, the Bureau is finalizing comment 41(d)–4 so that it discusses only temporary loss mitigation programs, rather than referring to both temporary loss mitigation programs and loss mitigation programs.

Comment 41(d)–5 explains that § 1026.41(d)(2)(ii), (d)(3)(i), and (d)(4) require the disclosure of the total sum of any fees or charges imposed since the last statement, the total of all payments received since the last statement, including a breakdown of how payments were applied, and a list of all transaction activity since the last statement. It explains that, for purposes of the first periodic statement provided to the consumer following termination of an exemption under § 1026.41(e), the disclosures required by § 1026.41(d)(2)(ii), (d)(3)(i), and (d)(4) may be limited to account activity since the last payment due date that occurred while the exemption was in effect. It provides an illustrative example.

41(d)(1)

Section 1026.41(d)(1)(iii) provides that the periodic statement required by § 1026.41(d) must include the amount due, shown more prominently than other disclosures on the page. The Bureau proposed § 1026.41(d)(1) commentary to clarify how acceleration, temporary loss mitigation programs, and permanent loan modification affect disclosure of the amount due on the periodic statement. Currently, the Bureau's rules and commentary do not address this issue. The Bureau is finalizing proposed comment 41(d)(1)–1 regarding acceleration with revisions. The Bureau is finalizing comment 41(d)(1)–2 regarding temporary loss mitigation programs as proposed and comment 41(d)(1)–3 regarding permanent loan modifications substantially as proposed.

Proposed comment 41(d)(1)–1 would have provided that, if the balance of a mortgage loan has been accelerated but the servicer will accept a lesser amount to reinstate the loan, the amount due disclosed on the periodic statement under § 1026.41(d)(1) should identify only the lesser amount that will be accepted to reinstate the loan, not the entire accelerated balance.

The Bureau is aware that, after accelerating a mortgage loan, a servicer may accept a lesser amount to reinstate the loan and may sometimes be required to do so by State law. The Bureau believed that receiving a periodic statement indicating that the amount due is the reinstatement amount rather than the full accelerated balance would make the consumer more likely to pay the reinstatement amount, thereby possibly preventing foreclosure. The Bureau believed it may confuse consumers to receive a periodic statement indicating that the amount due is the full accelerated balanced when, in fact, the consumer is informed elsewhere that the consumer may pay only the reinstatement amount. The consumer may be deterred from reading other disclosures or documents if the

[302] 78 FR 10901, 10973 (Feb. 14, 2013).

[303] *Id.* at 10966.

consumer sees the full accelerated balance as the amount due and believes payment of that amount is impossible. In that case, the consumer may not become aware that reinstatement is available, possibly leading to unnecessary foreclosure.

Proposed comment 41(d)(1)–2 would have provided that, if the consumer has agreed to a temporary loss mitigation program, the amount due under § 1026.41(d)(1) may identify either the payment due under the temporary loss mitigation program or the amount due according to the loan contract. The Bureau believed that it may be confusing for consumers who have agreed to a loss mitigation program to receive a periodic statement identifying the amount due under the loan contract when that amount is different from the payment due under the temporary loss mitigation program. Accordingly, the Bureau proposed that servicers may, but are not required to, identify the payment due under the temporary loss mitigation program, instead of the amount due according to the loan contract.

The Bureau did not propose to require that the payment due under the temporary loss mitigation program must be identified as the amount due for two primary reasons. First, because a temporary loss mitigation program does not change the underlying legal obligation, the Bureau believed it may be inappropriate to require a servicer to modify periodic statements whenever a consumer agrees to a temporary loss mitigation program. Second, the Bureau was concerned that imposing additional requirements on servicers when a consumer agrees to a temporary loss mitigation program could deter servicers from offering temporary loss mitigation programs.

The Bureau solicited comment on whether, if the consumer has agreed to a temporary loss mitigation program, servicers should be required, rather than permitted, to identify the amount due under § 1026.41(d)(1) as the payment due under the temporary loss mitigation program, rather than the amount due according to the loan contract.

Proposed comment 41(d)(1)–3 would have provided that, if the loan contract has been permanently modified, the amount due under § 1026.41(d)(1) should identify only the amount due under the modified loan contract. The Bureau believed that the periodic payment should reflect the contractual obligation; once the loan contract has been permanently modified, the terms of the modified loan contract govern the periodic payment determination, not the terms of the contract pre-modification.

The Bureau received a number of comments in response to the proposed § 1026.41(d)(1) commentary. The majority of industry commenters expressed concern over the explanation in proposed comment 41(d)(1)–1 that, if the balance of the mortgage loan has been accelerated but the servicer will accept a lesser amount to reinstate the loan, the amount due under § 1026.41(d)(1) must identify only the lesser amount that will be accepted to reinstate the loan. Several of these commenters stated that disclosing the reinstatement amount on the periodic statement as proposed would not be feasible, as this value changes frequently, even daily. They stated that servicers could not be expected to disclose a reinstatement amount that would remain accurate until the periodic payment due date disclosed on the periodic statement. One industry commenter stated that reinstatement amounts are often manually calculated and that the proposal would necessitate implementation of expensive, automated systems. This commenter also said that the proposal was unclear as to whether a servicer would be required to accept the disclosed reinstatement amount after it is no longer accurate. Another industry commenter expressed that the reinstatement amount depends on the expenses incurred by third parties on behalf of servicers and stated that servicers would have no cause to stop such third-party activities unless they had received an indication from the consumer that the consumer sought to reinstate the loan.

A few industry commenters recommended that the Bureau address concerns over frequent changes to the reinstatement amount by permitting servicers to disclose a reinstatement amount that is ''good through'' a specified date. These commenters stated that disclosing the good through date would clarify that the disclosed reinstatement amount may only be available for a specified period of time, and that this specified period of time may not coincide with the consumer's payment due date.

Some industry commenters urged the Bureau to require only that servicers provide a general disclosure when a loan is accelerated. One commenter expressed support for the Bureau's goal of making the periodic statement seem less daunting for delinquent consumers. It stated, however, that this goal would be more effectively carried out if servicers provided a generic clarification on the periodic statement that, although the fully accelerated balance is the total amount owed on the loan, the consumer may have the right to request a quote for a lower reinstatement amount. This commenter recommended that the periodic statement include contact information for the mortgage servicer's payoff and reinstatement departments.

Several consumer advocacy groups expressed support for proposed comment 41(d)(1)–1. These commenters stated that otherwise disclosing the amount due on the periodic statement as the fully accelerated amount may cause consumer confusion.

A few industry commenters expressed concern with proposed comment 41(d)(1)–2. These commenters stated that identifying an amount due other than what is legally required under the loan contract could lead to consumer confusion. They further expressed that disclosing this amount would provide little benefit to consumers, as consumers would already be aware of the terms of the loss mitigation program.

In contrast, several consumer advocacy groups stated that, when a consumer and servicer have entered into a contract for temporary loss mitigation, the consumer may be confused if the periodic statement discloses the contractual amount due. These commenters stated that consumers may believe the contractual amount is the amount they are required to pay and may also believe that the servicer has terminated or will not comply with the terms of the temporary loss mitigation program. Some consumer advocacy groups expressed that the costs to servicers associated with changing the amount due on the periodic statement to reflect the terms of the temporary loss mitigation program would be minimal. These commenters further stated that any such costs would not deter servicers from offering temporary loss mitigation programs to consumers, as many servicers must extend such offers pursuant to investor requirements. One consumer advocacy group suggested that servicers identify the amount due under the loan contract if the loss mitigation program is expected to be 90 days or less and otherwise identify the amount due under the temporary loss mitigation plan. It stated that the proposal may lead to consumer confusion as to the validity of the loss mitigation program.

For the reasons discussed below, the Bureau is finalizing comment 41(d)(1)–1 with changes from the proposal. It is finalizing comment 41(d)(1)–2 as proposed and is finalizing comment 41(d)(1)–3 substantially as proposed.

The Bureau understands that proposed comment 41(d)(1)–1 could have posed compliance difficulties. As noted by commenters, the reinstatement amount may frequently change, which could make it difficult to disclose a reinstatement amount on the periodic statement that will remain accurate until the consumer's payment due date. Accordingly, the Bureau is finalizing comment 41(d)(1)–1 with changes from the proposal.

Final comment 41(d)(1)–1 provides that, if the balance of a mortgage loan has been accelerated but the servicer will accept a lesser amount to reinstate the loan, the amount due under § 1026.41(d)(1) must identify only the lesser amount that will be accepted to reinstate the loan. It further explains that the periodic statement must be accurate when provided and should indicate, if applicable, that the amount due is accurate only for a specified period of time. It provides that, for example, the statement may include language such as ''as of [date]'' or ''good through [date]'' and provide an amount due that will reinstate the loan as of that date or good through that date, respectively.

Comment 41(d)(1)–1 provides a flexible standard for disclosing the reinstatement amount. Servicers may disclose that the reinstatement amount is accurate for only a specified time, thus reducing concerns about consumer confusion when a reinstatement amount changes between the date the amount is disclosed on the periodic statement and the date the consumer's payment is due. For example, if the servicer discloses that the reinstatement amount is ''good through'' a specific date, the reinstatement amount must be accepted through that date to reinstate the loan, even if that date is different from the date on which the consumer's payment is due. Additionally, consumers should benefit by having information on the statement indicating that the reinstatement amount is accurate, or will remain accurate, for only a specified time. A general disclosure, as suggested by some commenters, would be less effective in helping consumers understand the specific amount that the consumer can pay to reinstate the loan and possibly avoid unnecessary foreclosure. The Bureau understands that calculating the reinstatement amount for purposes of this disclosure may increase costs to servicers, as suggested by one commenter. However, the Bureau believes that final comment 41(d)(1)–1 may alleviate some of the costs that the proposal could have imposed, and that there are benefits to consumers associated with disclosure of the reinstatement amount. The Bureau also understands that servicers may already be required to disclose this information to consumers under State law.

Permitting servicers to disclose an ''as of [date]'' enables servicers to disclose a reinstatement amount that accurately captures the amount of fees that have actually been incurred as of the date the periodic statement is provided. It avoids servicers having to make an estimate of future fees. If servicers instead disclose a ''good through [date],'' the reinstatement amount may include an estimate of future fees that have not yet been incurred at the time the periodic statement is provided. If any information necessary for an accurate disclosure under subpart E of Regulation Z is unknown to the servicer, the servicer must make the disclosure based on the best information reasonably available at the time the disclosure is provided.[304] The disclosure shall state clearly that the disclosure is an estimate and describe the circumstances under which the disclosure may change.[305]

The Bureau recognizes that, where servicers are estimating future fees, servicers may overestimate or underestimate the actual amount of these unincurred fees. The Bureau understands that, under applicable State and Federal law, consumers would have a right to recover any fees that are paid based on the disclosed reinstatement amount but that the servicer does not actually incur during the time between when the periodic statement is provided and the ''good through'' date. Alternatively, any bona fide charges from third parties incurred during the time between when the periodic statement is provided and the ''good through'' date could still be accepted from the consumer after reinstatement, where permitted by applicable State law.

Additionally, final comment 41(d)(1)–1 explains that, if the balance of a mortgage loan has been accelerated but the servicer will accept a lesser amount to reinstate the loan, the amount due under § 1026.41(d)(1) must, rather than should, identify only the lesser amount that will be accepted to reinstate the loan. As the Bureau has explained, in these situations consumers will benefit from a periodic statement indicating that the amount due is the reinstatement amount. Additionally, the changes adopted in the final rule should facilitate servicers' compliance with comment 41(d)(1)–1.

The Bureau is adopting comment 41(d)(1)–2 as proposed. Comment 41(d)(1)–2 provides that, if the consumer has agreed to a temporary loss mitigation program, the amount due under § 1026.41(d)(1) may identify either the payment due under the temporary loss mitigation program or the amount due according to the loan contract. Industry commenters generally stated that the disclosed amount due should reflect the amount due under the loan contract, while most consumer advocacy groups stated that the disclosed amount due should reflect the amount required to be paid pursuant to the temporary loss mitigation program. The Bureau continues to believe, as explained in the proposal, that it may be confusing for consumers who have agreed to a loss mitigation program to receive a periodic statement identifying the amount due under the loan contract when that amount is different from the payment due under the temporary loss mitigation program. At the same time, requiring servicers to modify periodic statements whenever a consumer agrees to a temporary loss mitigation program may be costly for servicers. Accordingly, where a consumer has agreed to a temporary loss mitigation program, the Bureau believes that permitting, but not requiring, servicers to disclose the amount due under the temporary loss mitigation program appropriately balances consumer and servicer interests.

The Bureau did not receive any comments on proposed comment 41(d)(1)–3 and is finalizing the comment substantially as proposed. Comment 41(d)(1)–3 provides that, if the loan contract has been permanently modified, the amount due under § 1026.41(d)(1) must identify only the amount due under the modified loan contract. Comment 41(d)(1)–3 clarifies the proposed language by explaining that the amount due under § 1026.41(d)(1) must, rather than should, identify only the amount due under the modified loan contract. As the Bureau has explained, once a loan has been permanently modified, the obligation under the unmodified loan contract is not relevant to the periodic statement.

41(d)(2)

Section 1026.41(d)(2)(i) provides that the explanation of amount due on periodic statements required by § 1026.41 must include the monthly payment amount, including a breakdown showing how much, if any, will be applied to principal, interest, and escrow (if applicable) and, if a mortgage loan has multiple payment options, a breakdown of each of the payment options along with information on whether the principal balance will

[304] *See* 12 CFR 1026.17(c)(1) and 1026.31(d)(2).

[305] *Id.*

increase, decrease, or stay the same for each option listed. The Bureau proposed § 1026.41(d)(2) commentary to clarify how acceleration and temporary loss mitigation programs affect disclosure of the explanation of amount due on the periodic statement. The Bureau's rules and commentary do not currently address this issue. The Bureau proposed this § 1026.41(d)(2) commentary in conjunction with proposed § 1026.41(d)(1) commentary, as discussed in the section-by-section analysis of § 1026.41(d)(1). The Bureau is finalizing the proposed § 1026.41(d)(2) commentary with revisions.

Proposed comment 41(d)(2)–1 would have provided that, if the balance of a mortgage loan has been accelerated but the servicer will accept a lesser amount to reinstate the loan, the explanation of amount due under § 1026.41(d)(2) should omit the monthly payment amount that would generally be required under § 1026.41(d)(2)(i) and should include both the reinstatement amount and the accelerated amount. The proposed comment would have provided that the statement must also include an explanation that the reinstatement amount will be accepted to reinstate the loan. The proposed comment would have required that this explanation be on the front page of the statement or, alternatively, be included on a separate page enclosed with the periodic statement or in a separate letter.

The Bureau proposed comment 41(d)(2)–1 because, given that the amount due will reflect the reinstatement amount, the Bureau believed that the periodic statement should elsewhere identify the accelerated balance, which is the amount that the consumer technically owes under the loan contract. The Bureau believed that the explanation of amount due is where this disclosure is most appropriate. The Bureau proposed that the monthly payment amount be omitted from the explanation of amount due after acceleration because the Bureau believed that, once a loan has been accelerated, the monthly payment obligation is not relevant to the consumer, as the servicer will no longer accept this amount.

Because identification of both the reinstatement amount and the accelerated amount in the explanation of amount due may present some possibility of misleading consumers, the Bureau believed that the periodic statement should also include an explanation indicating that the reinstatement amount will be accepted to reinstate the loan. Consistent with the requirement under § 1026.41(d)(5) that partial payment information must be on the front page of the periodic statement or, alternatively, may be included on a separate page enclosed with the statement or in a separate letter, the Bureau believed it was appropriate that this explanation should be on the front page of the periodic statement or, alternatively, may be included on a separate page enclosed with the statement or in a separate letter.

Several industry commenters expressed concern with proposed comment 41(d)(2)–1. These commenters stated that including both the reinstatement amount and the accelerated loan balance in the explanation of amount due could lead to consumer confusion. Many of these industry commenters asserted that, where a servicer will accept a lesser amount to reinstate the loan, there is no need to disclose the accelerated loan balance on the periodic statement. One industry commenter stated that there is often a significant difference between the reinstatement amount and the accelerated amount, and that disclosing the accelerated amount could be overwhelming to consumers.

Several industry commenters requested that servicers not be required to disclose this amount or be permitted to disclose that this amount was an estimate. One industry commenter stated that it was unclear how the accelerated amount should be accurately disclosed on the periodic statement, and that programing systems to include the accelerated amount on the periodic statement could be complicated. Another industry commenter expressed concern that the proposal might have required servicers to provide a payoff amount in the periodic statement, and stated that payoff statements are difficult to produce because the amount required to pay off a loan can change daily. Some industry commenters requested that the final rule permit servicers to include language explaining that the payoff amount is distinct from the accelerated amount and reinstatement amount.

Several consumer advocacy groups stated that, after acceleration, many servicers have specific requirements as to how the reinstatement amount must be paid that are distinct from the requirements pertaining to periodic payments. These commenters expressed that, for example, servicers may require that the reinstatement amount be submitted in the form of a certified check to the attorney handling the foreclosure on behalf of the servicer. These commenters recommended that the rule require that the periodic statement include an explanation of any requirements the consumer must follow in paying the reinstatement amount. Another consumer advocacy group stated that information regarding the accelerated balance should be clearly located to avoid confusing the consumer, whether on the periodic statement or in the same enclosure as the periodic statement.

Proposed comment 41(d)(2)–2 would have provided that, if the consumer has agreed to a temporary loss mitigation program and the amount due on the periodic statement identifies the payment due under the temporary loss mitigation program, the explanation of amount due under § 1026.41(d)(2) should include both the amount due according to the loan contract and the payment due under the temporary loss mitigation program. The proposed comment would have provided that the statement should also include an explanation that the amount due is being disclosed as a different amount because of the temporary loss mitigation program. The proposed comment would have also provided that this explanation should be on the front page of the statement or, alternatively, may be included on a separate page enclosed with the periodic statement or in a separate letter.

The Bureau believed that, when the amount due is disclosed on the periodic statement as the payment due under the temporary loss mitigation program, the periodic statement should elsewhere identify the amount due according to the loan contract, as this amount is significant information that the consumer should have. For example, under proposed comment 36(c)(1)(i)–4, the amount due according to the loan contract would be the amount promptly credited by the servicer. The Bureau believed that the explanation of amount due under § 1026.41(d)(2) is where this disclosure is most appropriate.

Because identification of both the payment due under the temporary loss mitigation program and the amount due according to the loan contract could present some possibility of consumer confusion, the Bureau believed that the statement should also include an explanation indicating that the amount due is being disclosed as a different amount than the amount due under the loan contract because of the temporary loss mitigation program. Again, consistent with the requirement under § 1026.41(d)(5) that partial payment information must be on the front page of the statement or, alternatively, may be included on a separate page enclosed with the periodic statement or in a separate letter, the Bureau believed it was appropriate that this explanation should be on the front page of the statement or, alternatively, may be included on a separate page enclosed with the periodic statement or in a separate letter.

Comments regarding the disclosure of the amount due on the periodic statement when a consumer is participating in a temporary loss mitigation program are discussed in the section-by-section analysis of § 1026.41(d)(1).

The Bureau is finalizing comments 41(d)(2)–1 and –2 with changes from the proposal. The Bureau understands that proposed comment 41(d)(2)–1 could have caused consumer uncertainty as to the meaning of the accelerated amount or the reinstatement amount. The Bureau continues to believe that consumers will benefit if the periodic statement includes both the reinstatement amount and the accelerated amount in the explanation of amount due. However, consumers may further benefit if servicers are permitted to include additional, relevant information in the explanation of amount due. Accordingly, the Bureau is finalizing comment 41(d)(2)–1 with changes.

Final comment 41(d)(2)–1 explains that, if the balance of a mortgage loan has been accelerated but the servicer will accept a lesser amount to reinstate the loan, the explanation of amount due under § 1026.41(d)(2) must list both the reinstatement amount that is disclosed as the amount due and the accelerated amount, but not the monthly payment amount that would otherwise be required under § 1026.41(d)(2)(i). Comment 41(d)(2)–1 further provides that the periodic statement must also include an explanation that the reinstatement amount will be accepted to reinstate the loan through the ''as of [date]'' or ''good through [date],'' as applicable, along with any special instructions for submitting the payment. It provides that the explanation should be on the front page of the statement or, alternatively, may be included on a separate page enclosed with the periodic statement. Finally, comment 41(d)(2)–1 provides that the explanation may include related information, such as a statement that the amount disclosed is ''not a payoff amount.''

As the Bureau has previously explained, the accelerated amount is the amount that the consumer technically owes under the loan contract and is significant information that the consumer should have. Additionally, the Bureau believes the burden on servicers associated with providing the accelerated amount should be limited. The Bureau notes that some industry commenters requested that the final rule permit servicers to disclose an estimate of the accelerated amount because of the difficulty associated with disclosing an accurate accelerated amount. However, as discussed in the section-by-section analysis of § 1026.41(d)(1), if any information necessary for an accurate disclosure is unknown to the servicer, the servicer must make the disclosure based on the best information reasonably available at the time the disclosure is provided and shall state clearly that the disclosure is an estimate, consistent with Regulation Z's provisions for the disclosure of estimates.[306] The Bureau believes this provision accounts for situations where a servicer may not have sufficient information to calculate the accelerated amount accurately. Final comment 41(d)(2)–1 also clarifies that the reinstatement amount listed in the explanation of amount due under § 1026.41(d)(2) must be the reinstatement amount that is disclosed as the amount due.

Additionally, as discussed in the section-by-section-analysis of § 1026.41(d)(1), the Bureau understands that reinstatement amounts may change with some frequency. Consistent with final comment 41(d)(1)–1, the Bureau is finalizing comment 41(d)(2)–1 to explain that the periodic statement must include language stating that the reinstatement amount will be accepted to reinstate the loan through the ''as of [date]'' or ''good through [date],'' as applicable.

The Bureau also understands from comments received that servicers may place certain conditions on the acceptance of the reinstatement amount, for example, requiring payment by certified check or to a specific address. Final comment 41(d)(2)–1 addresses this possibility by requiring that any special instructions for submitting the payment be included in the periodic statement. This explanation should prevent consumers from missing an opportunity to reinstate the loan simply because they are unaware of the specific form or manner in which the reinstatement amount must be remitted. Additionally, consumers may benefit if the explanation of the reinstatement amount is included on the periodic statement or enclosed with the periodic statement. Accordingly, final comment 41(d)(2)–1 does not permit this explanation to be provided in a separate letter.

Final comment 41(d)(2)–1 also provides that the explanation on the periodic statement regarding the reinstatement amount may also include related information, such as a statement that the amount disclosed is ''not a payoff amount.'' This provision enables servicers to provide further clarification and relevant, additional information to consumers in the explanation of amount due required by § 1026.41(d)(2). For example, servicers could include information on the periodic statement regarding the distinction between the payoff amount and the reinstatement and accelerated amounts. Permitting this additional information addresses concerns about consumer uncertainty as to the meaning of the reinstatement or accelerated amounts as compared to the payoff amount. Additionally, servicers disclosing an estimated accelerated amount may include in the explanation of amount due relevant information regarding, for example, circumstances under which the estimate may change.

The Bureau is finalizing comment 41(d)(2)–2 substantially as proposed. Comment 41(d)(2)–2 explains that, if the consumer has agreed to a temporary loss mitigation program and the amount due identifies the payment due under the temporary loss mitigation program, the explanation of amount due under § 1026.41(d)(2) must include both the amount due according to the loan contract and the payment due under the temporary loss mitigation program. It further explains that the statement must also include an explanation that the amount due is being disclosed as a different amount because of the temporary loss mitigation program. Finally, it states that the explanation should be on the front page of the statement or, alternatively, may be included on a separate page enclosed with the periodic statement or in a separate letter.

Final comment 41(d)(2)–2 clarifies that the explanation of amount due under § 1026.41(d)(2) must, rather than should, include both the amount due according to the loan contract and the payment due under the temporary loss mitigation program. The final rule also explains that the statement must, rather than should, include an explanation that the amount due is being disclosed as a different amount because of the temporary loss mitigation program. Under these circumstances, requiring servicers to include this information in the explanation of amount due will benefit consumers. Additionally, as servicers will already know the amount due under the loan contract and be aware that the consumer is participating in a temporary loss mitigation program, requiring this additional information provides an important consumer protection without imposing a

[306] *See* §§ 1026.17(c)(1) and 1026.31(d)(2).

significant additional burden on servicers.

41(d)(8)

Section 1026.41(d)(8) requires a servicer to include a so-called ''delinquency box'' containing certain prescribed information in periodic statements sent to consumers who are more than 45 days delinquent.[307] The Bureau proposed certain revisions to § 1026.41(d)(8) to align the requirements of that section with the proposed definition of delinquency under Regulation X § 1024.31. The Bureau proposed to revise § 1026.41(d)(8) and add commentary to mirror the language in proposed § 1024.31 (Delinquency) and its related comments.

Current § 1026.41(d)(8) requires a servicer to include in each periodic statement certain information about a consumer's delinquency when the consumer is more than 45 days delinquent, including the date on which the consumer became delinquent. However, Regulation Z currently does not include an explanation of how a servicer must determine the length of a consumer's delinquency. The Bureau explained that it may confuse consumers if a servicer calculates the length of delinquency pursuant to § 1026.41(d)(8)(i) differently from the length of delinquency for purposes of the servicing requirements in subpart C of Regulation X. As such, the Bureau proposed Regulation Z comment 41(d)(8)–1, which mirrored the proposed Regulation X definition of delinquency in § 1024.31 and accompanying comment 31 (Delinquency)-1. Proposed Regulation Z comment 41(d)(8)–1 would have clarified that delinquency begins on the date a consumer misses a payment of principal, interest, and escrow (if applicable), notwithstanding any grace period the servicer affords the consumer.

In addition, the Bureau proposed to add comment 41(d)(8)–2 to address how a creditor must disclose the length of a consumer's delinquency as required by § 1026.41(d)(8) if a servicer applies a consumer's payment to the oldest outstanding delinquency first. As discussed in the section-by-section analysis of § 1024.31, the Bureau proposed a comment to the definition of delinquency to clarify that, if a servicer applies a borrower's payment to the oldest outstanding delinquency, the servicer must advance the date of the borrower's delinquency for purposes of calculating the length of a borrower's delinquency under the various applicable provisions of Regulation X's mortgage servicing rules. To ensure that a servicer's method of calculating the length of the consumer's delinquency for purposes of Regulation Z § 1026.41(d)(8)(i) was consistent with the method for doing the same under the proposed definition of delinquency in Regulation X, the Bureau proposed to include the same commentary in proposed Regulation Z comment 41(d)(8)–2.

Finally, the Bureau proposed to revise § 1026.41(d)(8)(i) to harmonize its language with the notion that the date a consumer's delinquency begins advances if the servicer applies payments to the oldest outstanding delinquency. Current § 1026.41(d)(8)(i) requires servicers to include the date on which the consumer became delinquent on a delinquent consumer's periodic statement. The Bureau believed that including that date could lead to consumer uncertainty if related proposed comment 41(d)(8)–2 was adopted. Accordingly, the Bureau proposed to revise § 1026.41(d)(8)(i) to require servicers to instead disclose the length of a consumer's delinquency as of the date of the periodic statement.

A consumer advocacy group expressed support for the proposed revisions to § 1026.41(d)(8) and stated that consumers will benefit from the disclosure of the length of the delinquency.

The Bureau is finalizing § 1026.41(d)(8)(i) and comments 41(d)(8)–1 and –2 substantially as proposed. Final § 1026.41(d)(8)(i) explains that servicers must disclose on the periodic statement the length of the consumer's delinquency. It omits proposed language regarding ''as of the date of the periodic statement,'' as the Bureau is incorporating this statement into final comment 41(d)(8)–1.

Final comment 41(d)(8)–1 explains that, for purposes of § 1026.41(d)(8), the length of a consumer's delinquency is measured as of the date of the periodic statement or the date of the written notice provided under § 1026.41(e)(3)(iv). A consumer's delinquency begins on the date an amount sufficient to cover a periodic payment of principal, interest, and escrow, if applicable, becomes due and unpaid, even if the consumer is afforded a period after the due date to pay before the servicer assesses a late fee. It further explains that a consumer is delinquent if one or more periodic payments of principal, interest, and escrow, if applicable, are due and unpaid. Final comment 41(d)(8)–1 includes a change from the proposal to address a situation where a servicer provides the consumer a coupon book under § 1026.41(e)(3) and is exempt from the periodic statement requirements under § 1026.41(a)(2). Section 1026.41(e)(3)(iv) requires the servicer to provide the consumer the information listed in § 1026.41(d)(8) in writing for any billing cycle during which the consumer is more than 45 days delinquent. Proposed § 1026.41(d)(8)(i), which would have referred to the length of the consumer's delinquency only as of the date of the periodic statement, did not account for situations where the servicer provides a coupon book under § 1026.41(e)(3). Accordingly, the Bureau is finalizing comment 41(d)(8)–1 to also clarify how the length of a consumer's delinquency is determined when a servicer provides a written notice under § 1026.41(e)(3)(iv).

Final comment 41(d)(8)–2 provides that, for purposes of § 1026.41(d)(8), if a servicer applies payments to the oldest outstanding periodic payment, a payment by a delinquent consumer advances the date the consumer's delinquency began. It provides an illustrative example.

Legal Authority

The amendments to § 1026.41(d) implement section 128(f)(1)(H) of TILA, which requires inclusion in periodic statements of any information that the Bureau may prescribe by regulation.

41(e) Exemptions

41(e)(4) Small Servicers

41(e)(4)(iii) Small Servicer Determination

The Bureau proposed to amend certain criteria for determining whether a servicer qualifies for the small servicer exemption under § 1026.41(e)(4). For purposes of determining whether a servicer qualifies as a small servicer, current § 1026.41(e)(4)(iii) excludes from consideration certain types of mortgage loans, including mortgage loans voluntarily serviced by the servicer for a creditor or assignee that is not an affiliate of the servicer and for which the servicer does not receive any compensation or fees. The proposal would have removed the requirement from § 1026.41(e)(4)(iii)(A) that the non-affiliate be a creditor or assignee and would have added a new provision § 1026.41(e)(4)(iii)(D) to exclude from the small servicer determination transactions serviced by a servicer for a seller financer that meet all of the criteria identified in § 1026.36(a)(5).[308]

[307] 12 CFR 1026.41(d)(8).

[308] Section 1026.36(a)(5) provides that, to be considered a seller financer, a person must (1) provide financing for the sale of only one property Continued

For the reasons discussed below, the Bureau is adopting, as proposed, § 1026.41(e)(4)(iii)(A) and (D).

The Bureau's mortgage servicing rules exempt small servicers from certain mortgage servicing requirements. Regulation Z exempts small servicers, defined in § 1026.41(e)(4)(ii), from the requirement to provide periodic statements for residential mortgage loans.[309] Regulation X incorporates this same definition by reference to § 1026.41(e)(4) [310] and thereby exempts small servicers from: (1) Certain requirements relating to obtaining force-placed insurance; [311] (2) the general servicing policies, procedures, and requirements; [312] and (3) certain requirements and restrictions relating to communicating with borrowers about, and evaluation of applications for, loss mitigation options.[313]

Under § 1026.41(e)(4)(ii), a small servicer is a servicer that: (1) Services, together with any affiliates,[314] 5,000 or fewer mortgage loans, for all of which the servicer (or an affiliate) is the creditor or assignee; (2) is a Housing Finance Agency, as defined in 24 CFR 266.5; or (3) is a nonprofit entity that services 5,000 or fewer mortgage loans, including any mortgage loans serviced on behalf of associated nonprofit entities, for all of which the servicer or an associated nonprofit entity is the creditor. Generally, under § 1026.41(e)(4)(ii)(A), a servicer cannot be a small servicer if it services any loan for which the servicer or its affiliate is not the creditor or assignee. As noted above, current § 1026.41(e)(4)(iii) excludes from the small servicer determination certain mortgage loans voluntarily serviced by the servicer.

In the 2012 RESPA Servicing Proposal, the Bureau proposed the exclusion from the small servicer determination for voluntarily serviced mortgage loans [315] and received one comment from a national trade association requesting guidance regarding certain depository services some of its bank members provide for depositors who ''owner-finance'' the sale of residential real estate. At that time, the Bureau did not have sufficient information about the described service.[316] Since that time, the Bureau learned that certain depository institutions, which may otherwise qualify for the small servicer exemption, service for their depository customers seller-financed sales of residential real estate.[317]

The Bureau understands that certain banks, particularly in small or remote communities, provide their customers this service when there may not be an alternative service provider in the state. The Bureau understands that, under these arrangements, depository institutions typically receive scheduled periodic payments from the purchaser of the property pursuant to the terms of the sale and deposit into the account of the seller (the depository institution's customer) the payments of principal and interest and such other payments with respect to the amounts received from the purchaser as may be required pursuant to the terms of the sale.[318] The Bureau understands that these arrangements typically involve small seller financers who are not affiliates of the servicer, do not regularly extend consumer credit, and would not qualify as a creditor [319] or an assignee in their own right. The Bureau understands that depository institutions typically charge a fee for servicing these seller-financed transactions. The Bureau further understands that in some cases, however, depository institutions may elect to service voluntarily these seller-financed sales of residential real estate on behalf of their depository customers without receiving any compensation or fees. In either scenario, under the current rule, a depository institution that services even a single seller-financed sale of residential real estate would likely no longer qualify for the small servicer exemption and would be subject to all of the applicable mortgage servicing rules for all of the mortgage loans that it services, including those that would otherwise be exempt as being owned or originated by the servicer.

To address these scenarios, in issuing the proposal, the Bureau sought comment on whether it would be appropriate to exclude from the small servicer determination mortgage loans voluntarily serviced by the servicer for a non-affiliate that is not a creditor or assignee, or transactions serviced by a servicer for a seller financer that meet all of the criteria identified in the definition of seller financer under § 1026.36(a)(5). The Bureau also sought comment on whether to exclude from the small servicer determination existing mortgage loans that meet the criteria of proposed § 1026.41(e)(4)(iii)(A) and (D).

The Bureau received several comments supporting the proposed amendments to § 1026.41(e)(4)(iii)(A) and (D). The commenters included credit union associations, trade associations, a nationwide association of State regulators, and a community bank. No commenters opposed these proposed amendments.

Some commenters recommended that the Bureau adopt additional revisions, beyond those contemplated in the proposal, to expand the reach of the small servicer exemption. Several commenters recommended including additional types of transactions that could be exempt from the small servicer determination. One trade association suggested that the small servicer

in any 12-month period, (2) not have constructed a residence on the property in the ordinary course of business, and (3) provide financing that meets certain interest rate criteria and does not result in negative amortization. See the section-by-section analysis of § 1026.41(e)(4)(iii)(D) for additional details.

[309] *See* § 1026.41(a), (e)(4). For loans serviced by a small servicer, a creditor or assignee is also exempt from the Regulation Z periodic statement requirements. *See* § 1026.41(e)(4)(i).

[310] *See* 12 CFR 1024.17(k)(5); 1024.30(b)(1); 1024.41(j).

[311] 12 CFR 1024.17(k)(5) (prohibiting purchase of force-placed insurance in certain circumstances).

[312] 12 CFR 1024.30(b)(1) (exempting small servicers from §§ 1024.38 through 1024.41, except as otherwise provided under § 1024.41(j), as discussed in note 313, *infra*). Sections 1024.38 through 1024.40 respectively impose general servicing policies, procedures, and requirements; early intervention requirements for delinquent borrowers; and policies and procedures to maintain continuity of contact with delinquent borrowers.

[313] *See* 12 CFR 1024.41 (loss mitigation procedures). Though exempt from most of the rule, small servicers are subject to the prohibition of foreclosure referral before the loan obligation is more than 120 days delinquent and may not make the first notice or filing for foreclosure if a borrower is performing pursuant to the terms of an agreement on a loss mitigation option. 12 CFR 1024.41(j).

[314] Affiliate is defined in § 1026.32(b)(5) as any company that controls, is controlled by, or is under common control with another company, as set forth in the Bank Holding Company Act of 1956, 12 U.S.C. 1841 *et seq.* (BHCA). Under the BHCA, a company has control over another company if it (i) ''directly or indirectly . . . owns, controls, or has power to vote 25 per centum or more of any class of voting securities'' of the other company; (ii) ''controls . . . the election of a majority of the directors or trustees'' of the other company; or (iii) ''directly or indirectly exercises a controlling influence over the management or policies'' of the other company (based on a determination by the Board). 12 U.S.C. 1841(a)(2).

[315] 78 FR 25638, 25644 (May 2, 2013).

[316] 78 FR 44685, 44697–98 (July 24, 2013).

[317] For ease of review, the section-by-section analyses of § 1026.41(e)(4)(iii), (e)(4)(iii)(A), and (e)(4)(iii)(D) discuss the concept of seller financing and the practice of seller-financed sales of residential real estate in general terms, except when specifying that the analyses refer directly to the term seller financer as defined under § 1026.36(a)(4) or (5).

[318] *See* 12 U.S.C. 2605(i)(3) (definition of servicing applicable to TILA, as amended by section 1401 of the Dodd-Frank Act).

[319] To be considered a creditor under TILA, a person generally must extend consumer credit for transactions secured by a dwelling more than five times in the preceding calendar year. § 1026.2(a)(17)(v). However, the Bureau notes that the threshold is lower for high-cost mortgages subject to § 1026.32; a person regularly extends credit if, in any 12-month period, the person originates more than one credit extension that is subject to § 1026.32, or one or more such credit extensions through a mortgage broker. *Id.*

exemption apply for all institutions that are community banks, a term that the rule would define. Several commenters also recommended that the Bureau raise the small servicer threshold under § 1026.41(e)(4)(ii) from 5,000 loans to 10,000 loans. One trade association recommended that the Bureau introduce a de minimis standard for servicing loans not owned or originated by the servicer. The Bureau declines to adopt these recommended approaches and considers these comments to be outside of the scope of the proposal, which did not contemplate altering the 5,000 loan threshold or exempting additional types of transactions.

One commenter suggested that the servicing rules do not apply to long-term escrow companies or contract collection companies because such companies are not considered servicers and their activities should not be considered mortgage loan servicing. In part, the commenter predicated this assertion upon the nature of these companies, arguing that they are not in control of the loan, do not represent the lender in foreclosure matters, and cannot force-place insurance. The Bureau notes that the presence or absence of these factors is not determinative as to whether an entity qualifies as a servicer. TILA section 103(cc)(7) defines servicer to have the same meaning as in RESPA section 6(i)(2), which defines a servicer as, subject to certain exceptions, the person responsible for servicing of a loan (including the person who makes or holds a loan if such person also services the loan).[320] Further, RESPA section 6(i)(3) defines servicing as receiving any scheduled periodic payments from a borrower pursuant to the terms of any loan.[321] Thus, the mortgage servicing rules apply to any person who receives scheduled periodic payments from a borrower pursuant to the terms of any loan, even a person not typically considered to be a servicer.

Two commenters recommended that the Bureau exclude from the small servicer determination existing mortgage loans that meet the criteria of proposed § 1026.41(e)(4)(iii)(A) and (D), irrespective of when the servicing relationship began. A national trade association stated that excluding existing contract collection activities would afford banks the opportunity to make an informed business decision as to how they prefer to handle this activity going forward. And a community bank stated that, without excluding existing seller-financed loans, the new exemption would lose its value, as it would be impossible to impose new parameters on existing contracts with seller-financers.

As discussed in the section-by-section analyses of § 1026.41(e)(4)(iii)(A) and (D), the final rule excludes from the small servicer determination both mortgage loans voluntarily serviced for a non-affiliate that is not a creditor or assignee and also transactions serviced for a seller financer that meet all of the criteria identified in the definition of seller financer under § 1026.36(a)(5). The Bureau believes that, to the extent servicing cost savings are passed on to consumers, consumers may benefit from having a depository institution that otherwise qualifies for the small servicer exemption service voluntarily mortgage loans for a non-affiliate that is not a creditor or assignee without losing its small servicer status. Similarly, consumers benefit from having a depository institution service transactions for a seller financer that meet all of the criteria identified in the definition of seller financer under § 1026.36(a)(5) without losing its small servicer status. Financial institutions may be better equipped than individual seller financers to service loans. The Bureau believes that consumers may benefit from a depository institution receiving their scheduled periodic payments and providing an independent accounting as a third party to the transaction, even if the servicer is exempt from some servicing regulations as a small servicer.

Under the final rule, a small servicer will now be able to service mortgage loans on behalf of certain seller financers, even if they do not meet TILA's definition of creditor, without jeopardizing the servicer's exemption. The Bureau will continue to monitor this market to determine if the small servicer exemption is being manipulated to evade TILA's requirements or otherwise cause consumer harm.

The Bureau also determines that it is appropriate to exclude from the small servicer determination all loans that meet the criteria identified in § 1026.41(e)(4)(iii)(A) and (D), regardless of whether the small servicer began servicing the loan before the effective date of this final rule. The Bureau believes that requiring servicers to review their entire portfolios to determine whether they already service such loans and, if so, how many would unnecessarily increase burden on servicers. Therefore, a servicer may continue to service existing loans that meet these criteria and exclude them from consideration in determining whether a servicer qualifies for the small servicer exemption.

41(e)(4)(iii)(A)

The Bureau is adopting the proposed revisions to § 1026.41(e)(4)(iii)(A). In determining whether a servicer qualifies for the small servicer exemption, § 1026.41(e)(4)(iii)(A) excludes from consideration mortgage loans voluntarily serviced by the servicer for a non-affiliate of the servicer and for which the servicer does not receive any compensation or fees. As revised, § 1026.41(e)(4)(iii)(A) no longer requires that the non-affiliate be a creditor or assignee.

The Bureau believes that removing the requirement that the non-affiliate be a creditor or assignee would not unduly expand the existing exception. The Bureau further believes that the rationale for the exception applies equally well to those non-affiliates who seller-finance sales of residential real estate, do not meet the definition of creditor under § 1026.2(a)(17) because they extend five or fewer mortgage loans in a year, and may or may not meet the criteria identified in the definition of seller financer under § 1026.36(a)(5). The Bureau also believes that continuing to limit the voluntarily serviced exception to mortgage loans voluntarily serviced by a servicer and for which the servicer does not receive any compensation or fees reduces the risk that the amendment to § 1026.41(e)(4)(iii)(A) will be used to circumvent the servicing rules. Because the small servicer cannot receive any fees or compensation for servicing these loans, the Bureau believes that the overall volume of such servicing, and consequent risk of harm to consumers, is likely to remain small, but the Bureau will continue to monitor this market to determine if the small servicer exemption is being manipulated to evade TILA's requirements or otherwise cause consumer harm.

Legal Authority

The Bureau is amending the voluntarily serviced exception under current § 1026.41(e)(4)(iii)(A) and exempting mortgage loans voluntarily serviced by a servicer for a non-affiliate of the servicer and for which the servicer does not receive any compensation or fees from the periodic statement requirement under section 128(f) of TILA pursuant to its authority under section 105(a) and (f) of TILA and section 1405(b) of the Dodd-Frank Act.

For the reasons discussed above, the Bureau believes that the amendment is appropriate under section 105(a) of TILA to facilitate servicer compliance.

[320] 15 U.S.C. 1602(cc)(7); *see* 12 U.S.C. 2605(i)(2).

[321] 12 U.S.C. 2605(i)(3).

The Bureau believes that the amendments to the voluntarily serviced exception to no longer require that the non-affiliate be a creditor or assignee facilitate compliance with TILA by allowing depository institutions to voluntarily service seller-financed sales of residential real estate, without losing status as a small servicer, in order to service loans cost-effectively and in compliance with applicable regulatory requirements. In addition, consistent with section 1405(b) of the Dodd-Frank Act, the Bureau believes that exempting from the requirements of section 128(f) of TILA those transactions voluntarily serviced by a servicer for a non-affiliate, without requiring the non-affiliate to be a creditor or assignee, is in the interest of consumers and in the public interest.

41(e)(4)(iii)(D)

The Bureau is adopting new § 1026.41(e)(4)(iii)(D) as proposed. Section 1026.41(e)(4)(iii)(D) excludes from the small servicer determination the new category of transactions serviced by a servicer for a seller financer that meet all of the criteria identified in the definition of seller financer under § 1026.36(a)(5). Section 1026.36(a)(5) identifies a seller financer as a natural person, estate, or trust that provides seller financing for the sale of only one property in any 12-month period to purchasers of such property, which is owned by the natural person, estate, or trust and serves as security for the financing.[322] The natural person, estate, or trust cannot have constructed, or acted as a contractor for the construction of, a residence on the property in its ordinary course of business.[323] The financing must have a repayment schedule that does not result in negative amortization and must have a fixed rate or an adjustable rate that is adjustable after five or more years, subject to reasonable annual and lifetime limitations on interest rate increases. If the financing agreement has an adjustable rate, the rate is determined by the addition of a margin to an index rate and is subject to reasonable rate adjustment limitations. The index the adjustable rate is based on is a widely available index such as indices for U.S. Treasury securities or the London Interbank Offered Rate (LIBOR).[324]

In addition to the general comments discussed in the section-by-section analysis of § 1026.41(e)(iii), the Bureau received a comment generally supportive of proposed § 1026.41(e)(4)(iii)(D) from a trade association that also said that the proposed exemption was overly restrictive in limiting seller financers to one loan per 12-month period. The commenter stated that depository institutions would need to establish internal controls to track and monitor whether a seller financer provides financing for more than one property in any 12-month period, which the commenter said may create an incentive for small banks to terminate collection contract relationships.

The Bureau has narrowly tailored this new category of transactions that are excluded when determining whether a servicer qualifies as a small servicer. Section 1026.41(e)(4)(iii)(D) relates only to transactions serviced by the servicer for a seller financer that meet all of the criteria identified in the definition of seller financer under § 1026.36(a)(5). In contrast to the criteria identified in a second definition of seller financer under § 1026.36(a)(4), which permits seller financing for the sale of up to three properties in any 12-month period, the criteria identified in the definition of seller financer under § 1026.36(a)(5) permits seller financing for the sale of only one property in any 12-month period. Limiting the seller financer criteria to the sale of only one property in any 12-month period reduces the risk that this new category of transactions excluded from the small servicer determination will be used to circumvent the servicing rules.

As the cost of servicing such transactions is likely to be relatively high, and may include costs to verify that a seller-financed transaction meets all of the criteria identified in the definition of seller financer under § 1026.36(a)(5), the Bureau believes that it is appropriate to permit servicers to charge a fee for servicing the loans described in § 1026.41(e)(4)(iii)(D). The Bureau will continue to monitor this market to determine if the small servicer exemption is being manipulated to evade TILA's requirements or otherwise cause consumer harm.

Legal Authority

The Bureau is exempting transactions serviced by a servicer for a seller financer that meet all of the criteria identified in the definition of seller financer under § 1026.36(a)(5) from the periodic statement requirement under section 128(f) of TILA pursuant to its authority under section 105(a) and (f) of TILA and section 1405(b) of the Dodd-Frank Act.

For the reasons discussed above, the Bureau believes that the exemption in § 1026.41(e)(4)(iii)(D) is appropriate under section 105(a) of TILA to facilitate servicer compliance. The Bureau believes that excluding from the small servicer determination transactions serviced by a servicer for a seller financer that meet all of the criteria identified in the definition of seller financer under § 1026.36(a)(5) facilitates compliance with TILA by allowing depository institutions to service seller-financed transactions, without losing status as a small servicer, in order to provide high-contact servicing and to service loans cost-effectively and in compliance with applicable regulatory requirements. In addition, consistent with section 1405(b) of the Dodd-Frank Act, the Bureau believes that exempting from the requirements of section 128(f) of TILA those transactions serviced by a servicer for a seller financer that meet all of the criteria identified in the definition of seller financer under § 1026.36(a)(5) is in the interest of consumers and in the public interest.

41(e)(5) Certain Consumers in Bankruptcy

Current § 1026.41(e)(5) provides that a servicer is exempt from the requirement to provide a periodic statement for a mortgage loan while the consumer is a debtor in bankruptcy. Current comment 41(e)(5)–3 states that, if there are joint obligors on the mortgage loan, the exemption applies if any of the consumers is in bankruptcy, and current comment 41(e)(5)–2.ii explains that a servicer has no obligation to resume providing a periodic statement with respect to any portion of the mortgage debt that is discharged in bankruptcy. Proposed revisions to § 1026.41(e)(5) generally would have limited the exemption to a consumer in bankruptcy whose bankruptcy plan or statement of intention provides for surrendering the property or avoiding the lien securing the mortgage loan, as well as to a consumer who has requested that a servicer cease providing a periodic statement. In cases where a mortgage loan has multiple obligors and not all of them are in bankruptcy, the exemption would have applied to a non-bankrupt obligor only when (1) one of the obligors is in chapter 12 or chapter 13 bankruptcy and (2) the non-bankrupt obligor requests that a servicer cease providing a periodic statement. The proposal also would have specified the circumstances when the exemption terminates and a servicer must resume providing a periodic statement.

The Bureau is adopting § 1026.41(e)(5) with several revisions from the proposal. As revised, § 1026.41(e)(5) and associated commentary limit the circumstances in which a servicer is exempt from the

[322] Section 1026.36(a)(5)(i).

[323] Section 1026.36(a)(5)(ii).

[324] Section 1026.36(a)(5)(iii).

periodic statement requirements with respect to a consumer who is a debtor in bankruptcy or has discharged personal liability for a mortgage loan through bankruptcy. (Except where noted specifically, this section-by-section analysis of § 1026.41(e)(5) uses the term periodic statement to refer to both a periodic statement and a coupon book that meets the requirements of § 1026.41(e)(3).) In addition to the limited exemption from the requirement to provide a periodic statement with respect to a consumer who is a debtor in bankruptcy or has discharged personal liability for a mortgage loan through bankruptcy, § 1026.41(e)(5) provides a transitional single-billing-cycle exemption under certain circumstances to enable a servicer to transition to a periodic statement modified for bankruptcy and to an unmodified periodic statement upon the conclusion of the bankruptcy case or the reaffirmation of the debt.[325] Once effective, final § 1026.41(e)(5) will apply to a mortgage loan irrespective of whether the consumer became a debtor in bankruptcy before or after the final rule's effective date.

In contrast to the proposal, the final rule applies the exemption at the loan level, such that a servicer is exempt with respect to all consumers on a mortgage loan if the exemption criteria are met with respect to any one consumer on the loan.[326] As in the proposal, the final rule generally allows a consumer in bankruptcy to opt in or out of receiving a periodic statement by making a written request to the servicer, but the final rule contains a new provision allowing a servicer to establish an exclusive address for such requests, subject to certain requirements. In addition, the final rule includes a new provision that ensures that a servicer has a period of time to transition to providing a periodic statement with the modifications set forth in § 1026.41(f) or to resume providing a periodic statement without such modifications following a consumer's bankruptcy case. The final rule also contains various technical changes from the proposal, such as use of the term bankruptcy plan instead of plan of reorganization, to improve clarity. These and other changes from the proposal are described in more detail below.

Background

Currently, § 1026.41(e)(5) provides a blanket exemption from the requirement to send a periodic statement if a consumer is in bankruptcy or has discharged personal liability for a mortgage loan through bankruptcy. The Bureau deliberated on this issue in two rulemakings prior to the proposal, each of which was based in part on the requirement in section 128(f) of TILA, as amended by section 1420 of the Dodd-Frank Act, that a creditor, assignee, or servicer must provide a periodic statement for a residential mortgage loan.

On January 17, 2013, the Bureau issued the 2013 TILA Servicing Final Rule implementing the periodic statement requirements and related exemptions in § 1026.41. In the 2013 TILA Servicing Final Rule, the Bureau acknowledged industry's concern that the Bankruptcy Code's automatic stay prevents attempts to collect a debt from a consumer in bankruptcy, but the Bureau explained that it did not believe the Bankruptcy Code would prevent a servicer from sending a consumer a statement on the status of the mortgage loan.[327] The Bureau further explained that the 2013 TILA Servicing Final Rule allowed servicers to make changes to the periodic statement when a consumer is in bankruptcy, such as including a message about the bankruptcy and presenting the amount due to reflect payment obligations determined by the individual bankruptcy proceeding.[328]

After publication of the 2013 TILA Servicing Final Rule, servicers and their representatives expressed more detailed concerns about the requirement to provide periodic statements to consumers under bankruptcy protection. The Bureau received numerous requests for clarification regarding how to reconcile the periodic statement requirements with various bankruptcy law requirements. Industry stakeholders expressed concern that bankruptcy courts, under certain circumstances, may find that a periodic statement violates the automatic stay or discharge injunction, even if a disclaimer were included. They requested guidance regarding whether and how servicers could permit consumers to opt out of receiving statements. Bankruptcy trustees explained that sending a periodic statement that fails to recognize the unique character of chapter 13's treatment of a mortgage in default arguably violates the Bankruptcy Code's automatic stay. Servicers and trustees further questioned how a periodic statement could be adapted to the specific circumstances that may arise depending on the type of bankruptcy proceeding (*i.e.,* liquidation under chapter 7, or reorganization under chapter 11, chapter 12, or chapter 13).

Consequently, the Bureau determined in 2013 that the interaction of bankruptcy law and the periodic statement requirements warranted further study and that there was insufficient time before the rule's January 10, 2014, effective date to reconcile completely the various competing requirements. Accordingly, the Bureau issued the October 2013 IFR, which added current § 1026.41(e)(5) to exempt a servicer from the periodic statement requirements with respect to a consumer in bankruptcy.[329] The Bureau explained in commentary that the exemption in § 1026.41(e)(5) applies to any consumer sharing primary liability on a mortgage loan with a debtor in bankruptcy [330] and that a servicer has no obligation to resume compliance with § 1026.41 with respect to any portion of a mortgage loan that is discharged under applicable provisions of the Bankruptcy Code.[331]

In issuing the October 2013 IFR, the Bureau did not take a position as to whether providing a periodic statement to a consumer in bankruptcy violates the automatic stay or discharge injunction. The Bureau also did not discourage servicers that send tailored periodic statements to consumers in bankruptcy from continuing to do so. Further, the Bureau expressed its belief that some consumers facing the complexities of bankruptcy may benefit from receiving a periodic statement, tailored to their circumstances.[332]

In the October 2013 IFR, the Bureau stated that it would continue to examine this issue and might reinstate the requirement to provide a consumer in bankruptcy with a periodic statement. However, the Bureau explained that it would not reinstate any such requirement without notice and comment rulemaking and an appropriate implementation period. The Bureau solicited comment on the scope of the exemption, when a servicer qualifies for the exemption and when it must resume providing a periodic statement, and how the content of a periodic statement might be tailored to

[325] Section 1026.41(f) sets forth certain modifications to a periodic statement or coupon book when a consumer on a mortgage loan is a debtor in bankruptcy under title 11 of the United States Code, or if such consumer has discharged personal liability for the mortgage loan pursuant to 11 U.S.C. 727, 1141, 1228, or 1328.

[326] The proposal used the term primary obligor. The final rule instead uses the term consumer for clarity, given that it is already a defined term under Regulation Z.

[327] 78 FR 10901, 10966 (Feb. 14, 2013).

[328] *Id.* at 10966 n.125.

[329] 78 FR 62993, 63000–02 (Oct. 23, 2013).

[330] Comment 41(e)(5)–3.

[331] Comment 41(e)(5)–2.ii.

[332] 78 FR 62993, 63001 (Oct. 23, 2013).

meet the particular needs of a consumer in bankruptcy.[333]

After issuing the October 2013 IFR, the Bureau continued to engage various stakeholders on the scope of this exemption, including hosting a roundtable discussion on June 16, 2014, with representatives of consumer advocacy groups, bankruptcy attorneys, servicers, trade groups, bankruptcy trustees, and the U.S. Trustee Program. The Bureau also sought comment from bankruptcy judges and experts and conducted its own further analysis of the intersection of the periodic statement requirements and bankruptcy law.[334]

Based upon its review of the comments received on the October 2013 IFR and its study of the intersection of the periodic statement requirements and bankruptcy law, the Bureau proposed to reinstate the periodic statement requirements with respect to a consumer in bankruptcy under certain circumstances. The Bureau proposed these modifications through notice and comment rulemaking, rather than simply finalizing the IFR with modifications, to provide the public with the opportunity to consider and comment more fully on the Bureau's specific proposal.

The Bureau proposed to limit the scope of the exemption in § 1026.41(e)(5) to a consumer in bankruptcy who has made a determination to surrender the property or avoid the lien securing the mortgage loan or who has requested that a servicer cease providing periodic statements. The Bureau believed that drawing a distinction between a consumer who intends to retain the property and one who intends to surrender the property could strike an appropriate balance between a consumer's need for information about the mortgage loan and the burden on a servicer to provide information to such a consumer while avoiding violations of bankruptcy law.

The Bureau believed that this approach, favored by many commenters, was consistent with bankruptcy case law. Courts have observed that whether periodic statements are appropriate in bankruptcy typically depends on whether ''the debtor needed the information contained in the statements when the statements were sent'' and that debtors need information about their mortgage loan when they intend to retain property, not when they intend to surrender it.[335] Some courts have found that a periodic statement was permissible when the debtor planned to retain the property but that the same form of periodic statement violated the automatic stay when the same debtor later decided to surrender the home.[336]

Courts have held that periodic statements are appropriate for a chapter 7 debtor if the statement of intention identifies an intent to retain the property [337] or if the debtor otherwise continues to make voluntary payments after the bankruptcy case.[338] Similarly, courts have found that chapter 13 debtors who have not yet proposed a plan of reorganization may benefit from periodic statements because they need information about the amount of their mortgage loan debt in order to formulate a plan of reorganization [339] and that chapter 13 debtors also benefit from periodic statements if their proposed or confirmed plan provides that they will retain the property and continue making payments.[340]

Conversely, bankruptcy courts have determined that periodic statements can constitute impermissible collection attempts in violation of the automatic stay when a consumer has identified an intent to surrender the property, either through the statement of intention in a chapter 7 case or a plan of reorganization in a chapter 13 case.[341] Similarly, courts have held that a chapter 13 consumer with a plan of reorganization that provides for avoiding a junior lien—that is, rendering the lien unenforceable and treating the mortgage debt as an unsecured claim—has no need for statements regarding the amounts due under the mortgage loan.[342] Finally, courts have found that consumers do not need statements when they have actually surrendered or vacated the property,[343] or requested that the servicer not send periodic statements.[344]

[333] *Id.* at 63002.

[334] Written or oral presentations to the Bureau imparting information or argument directed to the merits or outcome of the IFR were subject to the Bureau's policy on ex parte presentations. *See* Bureau of Consumer Fin. Prot., CFPB Bulletin 11–3, *CFPB Policy on Ex Parte Presentations in Rulemaking Proceedings* (Aug. 16, 2011), *available at http://files.consumerfinance.gov/f/2011/08/Bulletin_20110819_ExPartePresentationsRulemakingProceedings.pdf.*

[335] *Connor* v. *Countrywide Bank NA (In re Connor),* 366 B.R. 133, 136, 138 (Bankr. D. Haw. 2007)); *see also Henry* v. *Assocs. Home Equity Servs., Inc. (In re Henry),* 266 B.R. 457, 471 (Bankr. C.D. Cal. 2001) (collecting cases).

[336] *Connor,* 366 B.R. at 138 (debtor failed to state a claim for stay violation related to periodic statements received prior to chapter 13 plan confirmation, but debtor did state a claim related to statements received after conversation to chapter 7 because debtor had indicated his intent to surrender the property); *In re Joens,* No. 03–02077, 2003 WL 22839822, at *2–3 (Bankr. N.D. Iowa Nov. 21, 2003) (creditor violated automatic stay by sending collection letters and periodic statements to chapter 7 debtor who intended to surrender, but noting that it would have been proper to send statements if the debtor had intended to retain).

[337] *In re Henry,* 266 B.R. at 471 (holding that creditor did not violate the automatic stay by sending periodic statements and notice of default to debtors who retain their property by continuing to make payments without reaffirming the mortgage loan); *Kibler* v. *WFS Fin., Inc. (In re Kibler),* Case No. 97–25258–B–7, Adv. No. 00–2604, 2001 WL 388764 (Bankr. E.D. Cal. Mar. 19, 2001) (noting that borrowers who retain their property by continuing to make payments without reaffirming the mortgage loan ''need to receive normal billings to avoid a contract default and potential foreclosure'').

[338] *See* 4 Collier on Bankruptcy ¶ 524.04 (''Section 524(j) clarifies that when a debtor does not reaffirm a mortgage debt secured by real estate that is the debtor's principal residence, the creditor may continue to send statements to the debtor in the ordinary course of business and collect payments made voluntarily by the debtor.'') (citing *Jones* v. *Bac Home Loans Servicing, LP (In re Jones),* Case No. 08–05439–AJM–7, Adv. No. 09–50281, 2009 WL 5842122, at *3 (Bankr. S.D. Ind. Nov. 2009)); *cf. Ramirez* v. *Gen. Motors Acceptance Corp. (In re Ramirez),* 280 B.R. 252, 257–58 (C.D. Cal. 2002) (holding that creditor did not violate discharge injunction by sending periodic statements and a ''summary of voluntary payments'' to a debtor who his vehicle without reaffirming the loan).

[339] *Connor,* 366 B.R. at 138 (holding that debtor failed to state a claim for stay violation related to periodic statements received prior to chapter 13 plan confirmation); *Pultz* v. *NovaStar Mortg., Inc. (In re Pultz),* 400 B.R. 185, 190–92 (Bankr. D. Md. 2008) (noting that sending of single loan statement was useful to the debtor for forecasting the amount of the unsecured debt she could pay through her chapter 13 plan); *Schatz* v. *Chase Home Fin. (In re Schatz),* 452 B.R. 544 (Bankr. M.D. Pa. 2011) (''I also recognize that such information could assist a Chapter 13 debtor in drafting his Chapter 13 plan.'').

[340] *In re Henry,* 266 B.R. at 471 (''A secured creditor should be encouraged to send out payment coupons, envelopes and periodic statements if a debtor has filed a statement that the debtor plans to keep property subject to secured debt and to make payments.''); *Cousins* v. *CitiFinancial Mortg. Co. (In re Cousins),* 404 B.R. 281, 286–87 (Bankr. S.D. Ohio 2009) (stating in dicta that periodic statements can be helpful to chapter 13 debtors making direct payments to understand amounts due).

[341] *Joens,* 2003 WL 22839822, at *2–3 (holding that creditor violated automatic stay by sending several collection letters and periodic statements to chapter 7 debtor who had indicated an intent to surrender); *Connor,* 366 B.R. at 138 (holding that debtor stated a claim related to periodic statements and demand letter received after conversion to chapter 7 because he had indicated his intent to surrender the property).

[342] *Curtis* v. *LaSalle Nat'l Bank (In re Curtis),* 322 B.R. 470, 484–85 (Bankr. D. Mass. 2005) (holding that wholly unsecured junior lienholder violated automatic stay by, among other things, sending a RESPA transfer letter demanding payment to a chapter 13 debtor whose plan provided for avoiding the lien).

[343] *In re Roush,* 88 B.R. 163, 164–65 (Bankr. S.D. Ohio 1988) (holding that creditor violated the discharge injunction when it sent a collection letter to debtor three years after debtor surrendered property); *In re Bruce,* No. 00–50556 C–7, 2000 WL 33673773, at *4 (Bankr. M.D.N.C. Nov. 7, 2000) (holding that creditor violated the discharge injunction by sending periodic statements and calling the debtor at his place of employment after receiving notice that the debtor had vacated the property).

[344] *In re Draper,* 237 B.R. 502, 505–06 (Bankr. M.D. Fla. 1999) (holding that creditor violated the stay by, among other things, sending periodic

In these cases, courts finding an automatic stay or discharge injunction violation have often looked to the totality of the creditor's collection efforts, beyond the creditor's providing a periodic statement.

Therefore, the Bureau proposed to revise the scope of the exemption in § 1026.41(e)(5). Consistent with most comments the Bureau received on the IFR and the case law discussed above, proposed § 1026.41(e)(5) would have limited the scope of the exemption generally to when a consumer is no longer retaining the property, will no longer make regular payments on the mortgage loan, or has affirmatively requested not to receive a statement. Proposed § 1026.41(e)(5)(i) would have provided an exemption from the periodic statement requirements in § 1026.41 when two conditions are satisfied. First, the proposal would have required the consumer to be a debtor in a bankruptcy case, to have discharged personal liability for the mortgage loan through bankruptcy, or to be a primary obligor on a mortgage loan for which another primary obligor is a debtor in a chapter 12 or chapter 13 case. The purpose of this requirement would have been to limit the exemption to consumers who may be protected by the Bankruptcy Code's automatic stay or discharge injunction.

Second, one of the following circumstances also would have had to apply: (1) The consumer requests in writing that the servicer cease providing a periodic statement;[345] (2) the consumer's confirmed plan of reorganization provides that the consumer will surrender the property securing the mortgage loan, provides for the avoidance of the lien securing the mortgage loan, or otherwise does not provide for, as applicable, the payment of pre-bankruptcy arrearages or the maintenance of payments due under the mortgage loan; (3) a court enters an order in the consumer's bankruptcy case providing for the avoidance of the lien securing the mortgage loan, lifting the automatic stay pursuant to 11 U.S.C. 362 with respect to the property securing the mortgage loan, or requiring the servicer to cease providing a periodic statement; or (4) the consumer files with the overseeing bankruptcy court a statement of intention pursuant to 11 U.S.C. 521(a) identifying an intent to surrender the property securing the mortgage loan. As commenters on the IFR noted, in each of these situations, a consumer is no longer retaining the property, is no longer making regular periodic payments on the mortgage loan, or has affirmatively requested not to receive a statement. As a result, the Bureau believed that the periodic statement's value is diminished and there is an increased risk of a court finding that a servicer violated the automatic stay by sending a periodic statement in this circumstance.

With respect to joint obligors who are not in bankruptcy, proposed § 1026.41(e)(5)(i) would have effectively limited the exemption to those co-obligors who (i) share primary liability with a consumer who is a debtor in a chapter 12 or chapter 13 case and (ii) have requested that a servicer cease providing a periodic statement. As the Bureau noted in the proposal, a non-debtor joint obligor is protected by the Bankruptcy Code's automatic stay provisions only in chapter 12 or chapter 13 cases.[346] The Bureau understood that these joint obligors generally have a need to continue receiving periodic statements. Moreover, these joint obligors are not bound by a debtor's decision to surrender the property securing the mortgage loan. Accordingly, the Bureau believed that it was appropriate for the non-debtor joint obligors to continue receiving periodic statements unless non-debtor joint obligors have requested that the servicer cease providing them.

Proposed comment 41(e)(5)(i)–1 would have clarified the exemption's applicability with respect to joint obligors. The proposed comment stated that when two or more consumers are primarily liable on a mortgage loan, an exemption under § 1026.41(e)(5)(i) with respect to one of the primary obligors does not affect the servicer's obligations to comply with § 1026.41 with respect to the other primary obligors. The Bureau explained that the proposed comment was meant to eliminate ambiguity concerning whether a servicer must continue to provide a statement to joint obligors when an exemption under § 1026.41(e)(5)(i) applies to one of the obligors. The proposed comment also referenced proposed § 1026.41(f), explaining that, if one of the joint obligors is in bankruptcy and no exemption under § 1026.41(e)(5)(i) applies, the servicer would have been required to provide a periodic statement with certain bankruptcy-specific modifications set forth in § 1026.41(f). In that instance, the servicer could have provided a periodic statement with the bankruptcy-specific modifications to any of the primary obligors on the mortgage loan, even if not all of them are in bankruptcy.

Proposed comment 41(e)(5)(i)–2 also would have clarified that, for purposes of § 1026.41(e)(5), the term plan of reorganization referred to a consumer's plan of reorganization filed under applicable provisions of the Bankruptcy Code and confirmed by a court with jurisdiction over a consumer's bankruptcy case. The proposed comment was intended to avoid confusion about the meaning of the term plan of reorganization and whether the term refers to a proposed plan or one that has been confirmed by a court.

Finally, proposed comment 41(e)(5)(i)(B)(*4*)–1 would have further clarified that, for purposes of determining whether a servicer is exempt under § 1026.41(e)(5)(i) based on a consumer's statement of intention filed in the consumer's bankruptcy case, a servicer must rely on a consumer's most recently filed statement of intention. Thus, under the proposed rule, if a consumer originally filed a statement of intention identifying an intent to retain the property, but the consumer then filed an amended statement of intention identifying an intent to surrender the property, a servicer would have had to rely on the amended filing to determine that the exemption applies. The Bureau explained that the proposed comment was meant to avoid uncertainty about whether the exemption applied when a consumer filed multiple or amended statements of intention.

Proposed § 1026.41(e)(5)(ii) would have specified when a servicer must resume providing a periodic statement in compliance with § 1026.41. First, proposed § 1026.41(e)(5)(ii)(A) would have provided that a servicer is not exempt from the requirements of § 1026.41 with respect to a consumer who submits a written request to continue receiving a periodic statement, unless a court enters an order prohibiting the servicer from providing a periodic statement. The Bureau explained that consumers should have the right to choose to receive information regarding their mortgage loan, particularly when their intent with regard to retaining the property changes. In advance of the proposal, the Bureau understood that, for example, some chapter 7 debtors will file a statement of intention that initially identifies an intent to surrender the property but will subsequently decide to keep the property. In that case, the Bureau

statements to chapter 13 debtor who had asked not to receive them).

[345] The Bureau understands from its outreach that at least one large national servicer provides periodic statements to all of its consumers in bankruptcy who have a first-lien mortgage, except those who opt out, and that it believes its practice is consistent with the automatic stay.

[346] *See* 11 U.S.C. 1201, 1301.

believed a consumer should be able to receive a periodic statement. Proposed comment 41(e)(5)(ii)–1 would have clarified that a servicer must comply with a consumer's most recent written request to cease or to continue, as applicable, providing a periodic statement.

Second, proposed § 1026.41(e)(5)(ii)(B) would have provided that a servicer must resume compliance with § 1026.41 within a reasonably prompt time after the next payment due date that follows the earliest of the following outcomes in either the consumer's or the joint obligor's bankruptcy case, as applicable: (1) The case is dismissed; (2) the case is closed; (3) the consumer reaffirms the mortgage loan pursuant to 11 U.S.C. 524; or (4) the consumer receives a discharge pursuant to 11 U.S.C. 727, 1141, 1228, or 1328. Proposed § 1026.41(e)(5)(ii)(B) would have largely tracked current comment 41(e)(5)–2.i, and the Bureau explained its belief that an exemption would no longer be necessary once the consumer has exited bankruptcy or reaffirmed personal liability for the mortgage loan. The Bureau also thought that the proposed ''reasonably prompt'' standard would be flexible enough to account for instances in which a servicer had no reason to know that the consumer's bankruptcy case had terminated.

In combination, proposed § 1026.41(e)(5)(ii)(A) and (B) would have required a servicer to resume providing a periodic statement within a reasonably prompt time after the next payment due date following receipt of a consumer's written request, the case closing or dismissal, the consumer's reaffirmation of the mortgage loan, or the consumer receiving a discharge. Proposed comment 41(e)(5)(ii)–2 would have clarified that delivering, emailing, or placing the periodic statement in the mail within four days after the next payment due date, or within four days of the close of any applicable courtesy period, generally would be considered reasonably prompt. (With respect to coupon books, resuming compliance would have required providing a new coupon book only to the extent the servicer had not previously provided the consumer with a coupon book that covered the upcoming billing cycle.) This interpretation of reasonably prompt would have been consistent with the Bureau's interpretation currently set forth in comment 41(b)–1, which clarifies the timing requirements for a periodic statement generally.

Finally, proposed comment 41(e)(5)–1 would have clarified that, if an agent of a consumer submitted a request to cease or to continue providing a periodic statement, the request would have been deemed submitted by the consumer. The Bureau explained its understanding that attorneys or housing counselors often communicate with a servicer on a consumer's behalf and believed that it was important to clarify that a servicer must comply with a request to cease or commence providing a periodic statement by an agent of a consumer.

The Bureau sought comment on all aspects of the proposal, including the scope of the proposed exemption, the requirements for qualifying for the exemption, and when servicers must resume providing a periodic statement.

Comments on the Proposed Scope of the Exemption

The Bureau received numerous comments in response to proposed revisions to § 1026.41(e)(5). As described below, the Bureau also conducted additional outreach. The summary below generally does not address comments received in response to the IFR because the Bureau addressed those comments in the proposal.[347]

Commenters generally addressed five broad issues: (1) For mortgage loans with multiple obligors, whether the exemption should be determined at the individual consumer level or at the loan level; (2) whether and when a periodic statement should be required for a consumer who is in bankruptcy or has discharged personal liability for a mortgage loan through bankruptcy; (3) assuming a periodic statement is required with respect to a consumer in bankruptcy in some circumstances, whether a consumer's request to receive or cease receiving a periodic statement must be submitted in writing and not orally; (4) the conditions under which the exemption should terminate; and (5) whether the trustee of a consumer's bankruptcy case should receive a copy of the periodic statement.

Consumer-specific vs. *loan-level exemption.*Consumer advocacy groups and industry commenters differed on whether the periodic statement exemption should apply to a specific consumer (as proposed) or at the loan level (as in the existing rule). Several consumer advocacy groups supported without qualification the proposal's treatment of co-obligors because it would allow a co-obligor who is not in bankruptcy to continue to receive a periodic statement even when the criteria for an exemption are satisfied with respect to the obligor in bankruptcy.

Several industry commenters urged a loan-level exemption, for many of the same reasons advanced in comments on the early intervention bankruptcy exemption.[348] For example, these commenters stated that servicers' systems are set up to manage communications at the account or loan level, such that they code an entire account (rather than designate a specific consumer) as subject to bankruptcy-related communication restrictions; that many servicers cannot suppress, or cease sending, statements as to one obligor while providing them to a co-obligor; that servicers have difficulty removing names from the account without affecting other aspects of loan administration, such as notices required by State law; and that, when co-obligors live together, a servicer cannot prevent the wrong consumer from opening the periodic statement. One servicer recommended requiring co-obligors to submit a joint written request to the servicer in order to receive a periodic statement. Other industry commenters suggested that servicers be expressly allowed to include one or all obligors' names on the statement, at the servicer's discretion. One servicer said that it would require two years to update systems to provide consumer-specific periodic statements when a consumer is in bankruptcy.

The Bureau conducted additional outreach with several servicers to determine their current practices and systems capabilities. These servicers stated that they suppress or cease communications at the account or loan level; for example, when a consumer files bankruptcy, invokes the FDCPA cease communication right, or is a party to litigation against the servicer, these servicers flag the entire mortgage loan account as one for which they should not send certain communications. Some servicers stated that their systems can identify the reason for suppressing communications (*e.g.,* bankruptcy, a consumer's invocation of the FDCPA cease communication right, or ongoing litigation), and a few could identify the specific co-obligor who, for example, filed for bankruptcy. A few servicers said that they could provide duplicate notices to co-obligors at different addresses, but most servicers said that they cannot provide certain communications to one obligor while providing other communications to a co-obligor at a different address. One servicer said that it can provide unique notices to different co-obligors at different addresses upon special request but that the process is manual and

[347] *See* 79 FR 74247.

[348] *See* section-by-section analysis of § 1024.39.

would not be practical if required routinely.

A trade association recommended that the final rule clarify that a servicer must provide only one periodic statement per loan per month. The commenter also advised that servicing systems cannot remove a name from an account because servicers need to send some information to each obligor regardless of bankruptcy. The commenter further stated that sending a periodic statement to a non-bankrupt co-obligor indicating that any part of the debt has been discharged (even as to another co-obligor) may estop the servicer from collecting the debt.

Whether and when to require statements for consumers in bankruptcy. The Bureau received comments supporting and opposing the proposed requirement to provide a periodic statement under any circumstances to a consumer who is in bankruptcy or has discharged personal liability for the mortgage loan through bankruptcy. Consumer advocacy groups strongly supported providing a periodic statement to a consumer in bankruptcy, while industry commenters offered differing views. Some industry commenters were generally supportive of providing a periodic statement to a consumer in bankruptcy, subject to certain conditions, while others strongly opposed any requirement to provide a periodic statement to a consumer in bankruptcy.

Consumer advocacy groups strongly supported the proposal to limit the scope of the exemption, stating, among other things, that it would preserve the ability of consumers in bankruptcy to receive essential account information. These commenters further recommended that the exemption should not apply if a consumer has a pending loss mitigation application because such a consumer may decide to retain the property after being approved for loss mitigation. Consumer advocacy groups stated that receiving a periodic statement would help consumers understand their payment obligations, maintain mortgage payments, and make payments to the trustee on the arrearage. Both consumer advocacy groups and the U.S. Trustee Program noted that servicers sometimes misapply payments and supported the proposal in part because periodic statements might show whether servicers apply payments correctly or impose improper fees.

Consumer advocacy groups also recommended requiring a servicer to provide a notice to the consumer upon determining that the bankruptcy exemption applies to a particular loan. The recommended notice would advise that standard periodic statements will no longer be provided, the basis for the exemption, and the consumer's right to continue receiving statements modified for consumers in bankruptcy.

Some industry commenters expressed general support for requiring servicers to provide periodic statements to consumers in bankruptcy. For example, a servicer and a trade association both noted the need to provide accurate and clear information to a consumer in bankruptcy. One bank agreed that a servicer should provide a periodic statement following bankruptcy to a consumer who has discharged personal liability for a mortgage loan but retained possession of the property. The bank requested that the final rule state expressly that a periodic statement is required in this circumstance.

Some industry commenters voiced strong opposition to providing a periodic statement to a consumer in bankruptcy, either in general or under the specific circumstances set forth in the proposal. Industry commenters stressed the lack of any safe harbor from liability under the Bankruptcy Code and noted that servicers are subject to individual judges' interpretations of the Bankruptcy Code. Industry commenters expressed concern that providing a periodic statement could give rise to the risk of litigation from a consumer who alleges an automatic stay violation.

Several commenters asserted that the Bureau would be inappropriately intruding on bankruptcy law by requiring a servicer to send a periodic statement to a consumer in bankruptcy. A trade association expressed general concern that requiring a periodic statement for a consumer in bankruptcy could conflict with bankruptcy law. A credit union expressed concerns that the proposal purports to override bankruptcy law regarding communicating with a consumer in bankruptcy. Another trade association stated that some case law suggests that TILA cannot be interpreted as mandating communications that violate the automatic stay, and a different trade association commented that TILA does not apply to a mortgage loan that has been discharged through bankruptcy. Another trade association pointed to the complexity of bankruptcy law, stating that the Bureau should respect the delicate balance between creditors and debtors and should not attempt to strengthen protections for consumers in bankruptcy through amendments to Regulation Z.

Numerous industry commenters objected to the burden that servicers would face in providing a periodic statement to a consumer in bankruptcy. They explained that most of the burden would result from the need to alter a periodic statement to comply with the proposal (as discussed in more detail in the section-by-section analysis of § 1026.41(f)). In particular, numerous industry commenters strongly opposed any requirement to provide a periodic statement that is modified for a consumer in chapter 13, stating, among other things, that the proposed changes would be difficult to operationalize and manage and would likewise be difficult and resource-intensive to implement or apply consistently and correctly. Some industry commenters noted that many servicers would have to change their systems in order to comply with the proposal. Credit unions and community banks expressed concern about these systems limitations more uniformly than did large servicers and national banks. Further, some commenters stated that switching to a modified periodic statement when a consumer is in bankruptcy would increase burden because consumers may move in-and-out of bankruptcy multiple times. Industry commenters also questioned whether the burden would be justified, as any one servicer may have only a limited number of loans in bankruptcy. One trade association commented that the complex interface with bankruptcy law would require servicers to consult with legal counsel, increasing cost.

Some industry commenters stated that receiving a periodic statement could confuse or anger a consumer in bankruptcy, while others suggested that a periodic statement is less valuable or unnecessary for at least some of these consumers. Some servicers commented that statements are unnecessary for the roughly 50% of chapter 13 consumers who make mortgage payments through the trustee because the trustee is the one sending the payments to the servicer. These commenters stated the Federal Rules of Bankruptcy Procedure applicable to chapter 13 cases already require a servicer to provide the trustee and the consumer with sufficient ongoing information about the mortgage loan, in addition to providing a procedure at the end of the case to reconcile whether the consumer is current on the mortgage loan. One credit union suggested that consumers can obtain the relevant information in other ways, such as by making a request to a servicer or a trustee.

A trade association discussed some servicers' current practices with respect to consumers who are in bankruptcy or who have discharged personal liability. For example, one servicer allows a consumer to opt out but otherwise sends a modified periodic statement that shows account activity accompanied by bankruptcy disclaimers. Another sends a modified periodic statement disclosing payments received. And another sends monthly periodic statements containing disclaimers and other limited information, which allows the statement to be used for consumers in different chapters of bankruptcy. Servicers reported to the Bureau that they engage in a range of practices with respect to borrowers in bankruptcy: Some do not send periodic statements to any consumers in bankruptcy; others provide statements to consumers in only certain chapters of bankruptcy or provide statements only upon a consumer's request. Some industry commenters suggested generally that the Bureau adopt a rule that is consistent with one or more of these current practices.

Some commenters addressed specifically the criteria for the proposed exemption. One servicer generally supported the proposed two-pronged, multi-factor exemption test. Other commenters, while generally supportive, took issue with specific aspects of the proposal, as discussed more fully below. Several industry commenters suggested that the proposed exemption criteria would be difficult to implement and that determining if the exemption applied would require complex analysis.

Some industry commenters made recommendations about which consumers in bankruptcy should receive a periodic statement. Consistent with the proposal, a trade association recommended not requiring a periodic statement for a consumer in chapter 13 who files a plan identifying an intent not to make loan payments, as well as for a consumer in chapter 7 who files a statement of intention identifying an intent to surrender the property. Another trade association stated that a chapter 13 debtor does not need any statements because the plan of reorganization sets forth the consumer's payment obligation, the servicer's proof of claim discloses the arrearage, and the servicer's change-in-payment notices (required by the Bankruptcy Rules) alert the consumer to any change in the payment amount. A servicer and several trade associations requested that the exemption apply when a consumer in chapter 11, chapter 12, or chapter 13 bankruptcy has a cram-down plan—that is, a plan that reduces the mortgage debt to the value of the collateral. Alternatively, some commenters stated that a servicer should have more flexibility to modify the required disclosures for cram-down plans because they are atypical and can have unique payment requirements. Trade associations also recommended that the proposed exemption should apply not only when a consumer's confirmed plan of reorganization provides for the surrender of the property, but also when a consumer's proposed plan of reorganization provides for the surrender of the property, likening a proposed plan of reorganization to a statement of intention filed by a consumer in a chapter 7 case.

Opt-ins and opt-outs. The Bureau received various comments on whether a potential requirement to provide a periodic statement to a consumer in bankruptcy should apply only to a consumer who opts in, or affirmatively requests, to receive a periodic statement, as well as comments on whether an opt-in or opt-out should be in writing. Consumer advocacy groups and the U.S. Trustee Program strongly opposed any opt-in requirement for reasons similar to those the Bureau articulated in the proposal: Consumers may not be aware that they can opt in; some consumers will fail to opt in (particularly if a written opt-in is required), even though they want to receive a periodic statement; and an opt-in requirement would slow and perhaps impede the consumer's access to information after filing for bankruptcy. These commenters added that the proposal, as a practical matter, already incorporated an opt-in requirement because a consumer must declare in court filings whether the consumer intends to retain or surrender the property and a consumer would avoid triggering the exemption only by choosing to retain the property.

Several industry commenters advocated for an express opt-in requirement. They stated that this approach would provide greater protection from automatic stay violations and be much less burdensome than requiring servicers to review bankruptcy court filings to determine whether the exemption applies. A trade association suggested that an opt-in would simplify compliance. Another trade association suggested that an opt-in requirement would prevent consumers in chapter 13 bankruptcy from being confused as to why one creditor in the bankruptcy case continues to send periodic statements notwithstanding the bankruptcy. One trade association, however, stated that opt-ins and opt-outs cause additional burden and expense for servicers because they are another data field to track.

Some industry commenters addressed the specifics of how opt-in requests should be made. Several trade associations stated that opt-ins should be effective if sent to either a specific address designated by the servicer or the servicer's address listed on the proof of claim. One industry commenter recommended that servicers should give a notice including the following disclosures to the consumer's counsel upon receipt of bankruptcy filing: (1) That the consumer can opt in to receiving a statement, (2) that all other aspects of the automatic stay will remain in place, and (3) a request for an appropriate address in the event that the consumer wants the counsel to manage receipt of periodic statements. Several industry commenters that already provide a periodic statement to a consumer in bankruptcy, subject to the consumer's ability to opt out, requested that the final rule grandfather a consumer's previous decision to opt out of receiving periodic statements, so that such a consumer does not need to opt out again. Some commenters also suggested that all co-obligors on a mortgage loan be required to jointly submit a request.

The Bureau also received comments on whether a consumer's request to receive or cease receiving periodic statements must be submitted in writing and not orally. Industry commenters generally favored a writing requirement, stating that it will make compliance easier and offer more protection from the automatic stay because a writing creates a record to which the parties and a court can refer. Some industry commenters suggested that opt-outs via email or other electronic forms of communications should satisfy the requirement. Two servicers stated that oral opt-outs should be permitted so that consumers could more easily opt out of receiving statements. Consumer advocacy groups suggested that a consumer should be able to exercise any opt-in right orally and that, if the Bureau adopts a writing requirement, a servicer should have to inform a consumer who makes an oral request of the need to submit a written request. Further, these commenters stated that the Bureau should not permit a servicer to designate an exclusive address for written requests because this creates an additional hurdle for a consumer. They stated that servicers have misused the exclusive address requirement for qualified written requests.

Transitioning to modified and unmodified periodic statements. Industry commenters generally suggested that the proposal would not afford a servicer sufficient time to begin providing a modified periodic statement to a consumer in bankruptcy or to resume providing an unmodified periodic statement after the consumer exits bankruptcy. One servicer explained that providing a periodic statement tailored to bankruptcy requires disclosing additional or different information than a normal periodic statement and can require the servicer to account for payments differently. This commenter also stated that providing a periodic statement immediately following bankruptcy can be difficult because, for example, servicers subject to the National Mortgage Settlement are currently required to perform account reconciliation after a chapter 13 case is dismissed or discharged so that they can account for any payments received during the case. Another servicer stated that servicers cannot resume providing periodic statements within four days after the next payment due date because their systems may not contain the information necessary to produce the next statement. This servicer stated that, if the Bureau finalizes such a requirement, it may need to adjust the contents of the periodic statement, for example, to remove distinctions between pre- and post-petition payments. Some trade associations expressed concerns similar to those above.

Several industry commenters recommended allowing servicers a reasonable amount of time after the second payment due date to transition to a modified statement or to resume providing an unmodified statement following bankruptcy. Some commenters specifically recommended allowing up to two billing cycles or up to 60 days. Another trade association recommended that the Bureau should not require servicers to provide a modified periodic statement under § 1026.41(f) to a consumer in bankruptcy until 30 days after the servicer files a proof of claim. The trade association explained that a servicer might not know the correct amount to disclose as the amount due under § 1026.41(f)(3)(ii) until the servicer completes a post-filing escrow analysis; it added that a servicer currently has 120 days following the bankruptcy filing to conduct the analysis and proof of claim.

The U.S. Trustee Program suggested that the Bureau revise the proposal to clarify how the requirement to resume providing a periodic statement after the bankruptcy concludes would apply to a servicer who was providing a periodic statement during the bankruptcy. Only one commenter responded to the proposal's request for comment as to whether servicers receive timely notifications that a consumer has filed or exited bankruptcy. This servicer stated that, on occasion, it does not receive timely notices from the bankruptcy court.

The Bureau conducted additional outreach to several servicers regarding how they monitor for case openings, ongoing case activity, and case closings. Most servicers stated that they monitor these occurrences electronically and that they subscribe to some form of a third-party electronic notification system. As a result, these servicers learn of new filings, important case activity, and case closings quickly, usually within approximately a day. Servicers may also learn of filings through notices from the consumer or bankruptcy court. Some servicers rely on a manual review of the bankruptcy documents, including the consumer's bankruptcy petition or plan of reorganization, as the servicer receives them. Other servicers simply cease all activity with respect to the account until they receive a notice that the consumer has emerged from bankruptcy.

Providing statements to a chapter 13 trustee. Most commenters were opposed to any requirement that servicers provide periodic statements to a trustee overseeing a consumer's chapter 13 case. Several commenters stated the requirement would increase cost or burden on servicers without sufficient corresponding benefit to consumers. The burden would include systems updates and providing additional copies of periodic statements each month. One trade association and a bank commented that providing a trustee with access to a consumer's periodic statement would raise privacy concerns because the trustee is not the consumer's representative and might be adverse to the consumer in certain circumstances. The bank advised that it would incur additional redaction costs to remove the account number from each periodic statement before sending it to a trustee. Several commenters stated that trustees can obtain necessary information by requesting it from the servicer or consumer or via, among other things, the proof of claim, change-in-payment notices, or notices of post-petition fees. Several servicers suggested that overseeing payment application is not one of a trustee's duties under the Bankruptcy Code. Although one servicer acknowledged that trustees may have an interest in proper payment application, it stated that some trustees would want to receive periodic statements in every case while others would not, which could make the rule difficult to implement.

The U.S. Trustee Program stated that trustees should receive periodic statements for consumers in chapter 13 bankruptcy because, in cases where the trustee is making mortgage payments on behalf of the consumer, the trustee needs to know what payments are due and how they are applied. The U.S. Trustee Program also stated that receiving periodic statements will enable a trustee to determine whether a servicer's actual payment application matches representations the servicer makes to the bankruptcy court. In addition, the U.S. Trustee Program stated that it would be incongruous for a periodic statement to instruct a consumer to contact the trustee with questions (as proposed) while denying the trustee information necessary to answer those questions. Moreover, the U.S. Trustee Program observed that a trustee is not necessarily able to obtain the necessary information directly from a servicer and that obtaining it directly from a consumer results in costs to both the trustee and the consumer, as well as delays in the trustee's receipt of information. Finally, the U.S. Trustee Program stated that a trustee's receipt of a chapter 13 consumer's periodic statement would not necessarily raise privacy concerns, suggesting that servicers may not need to combine the mortgage statement with statements relating to other information.

Requiring Periodic Statements for Consumers in Bankruptcy

The Bureau is adopting § 1026.41(e)(5) with several revisions from the proposal. Among other things, revised § 1026.41(e)(5) limits the circumstances in which a servicer is exempt from the periodic statement requirements when a consumer is a debtor in bankruptcy or has discharged personal liability for a mortgage loan through bankruptcy. The Bureau continues to believe that a consumer in bankruptcy will generally benefit from receiving a periodic statement under certain circumstances.

The Bureau understands that a consumer in bankruptcy often does not receive information about a mortgage loan that would be disclosed on a periodic statement. As the Bureau explained in the proposal, consumers in bankruptcy have submitted complaints to the Bureau alleging that their servicers have denied requests to receive a periodic statement or other written information regarding upcoming payments. Consumers have complained that, as a result, they may fall behind on payments or lack basic information about the status of their loans. Bankruptcy case law also provides evidence that some servicers do not provide periodic statements to consumers in bankruptcy, even when requested to do so by the consumer.[349] The Bureau understands that, to address this issue, approximately 30 bankruptcy courts have adopted local rules permitting or requiring a servicer to provide a periodic statement to a consumer in bankruptcy under certain circumstances.[350]

The Bureau believes that a consumer's status in bankruptcy should not act as a bar to receiving fundamental information about the mortgage loan account. Like all consumers, those in bankruptcy may benefit from information regarding the application of their payments to principal, interest, escrow, and fees. As the Bureau noted in the 2013 TILA Servicing Final Rule, the explanation of amount due, transaction activity, and past payment breakdown give consumers the information they need to identify possible errors on the account and enable consumers to understand the costs of their mortgage loan.[351]

In the absence of a requirement that servicers provide periodic statements, consumers in bankruptcy often lack crucial information about their mortgage loan account. The Bureau understands that, for example, consumers in chapter 7 bankruptcy or those who have discharged personal liability for a mortgage loan often do not receive written information regarding their mortgage payments. The lack of information is particularly troubling for consumers in chapter 7 bankruptcy who use the ride-through option—that is, consumers who discharge personal liability for the mortgage loan but continue making mortgage payments to forestall foreclosure, which enables them to remain in their home. In that instance, the lien is unaffected by bankruptcy, such that a consumer's post-bankruptcy failure to stay current on the mortgage would enable a servicer to foreclose on the property, even though the servicer could not pursue a deficiency judgment against the consumer personally.[352] The Bureau understands that, although in many cases using this option may be a strategic decision by a consumer to avoid a future deficiency judgment, in some instances, courts will not permit a consumer to reaffirm a mortgage loan, and consumers are forced to use the ride-through option. Current § 1026.41(e)(5) exempts a servicer from providing a periodic statement for the life of the mortgage loan in these circumstances, even if the maturity date is years away and the consumer continues making regular payments.

Congress mandated in the Dodd-Frank Act that consumers receive periodic statements and did not provide a bankruptcy exception. In addition, the 2005 amendments to the Bankruptcy Code provide expressly that a mortgage creditor does not violate the discharge injunction by seeking to obtain periodic payments on a discharged mortgage loan in the ordinary course of its relationship with a consumer in lieu of pursuing foreclosure.[353] A leading bankruptcy treatise interprets these amendments as permitting a servicer to send a periodic statement to a consumer who has used the ride-through option.[354] Both the Dodd-Frank Act and the 2005 amendments to the Bankruptcy Code therefore indicate that Congress contemplated that consumers could receive periodic statements about their mortgage loans notwithstanding the bankruptcy process. The Bureau believes that maintaining a complete exemption from the periodic statement requirements with respect a consumer in bankruptcy would not further Congress's goals.

The Bureau also believes that a consumer in chapter 13 will benefit from receiving the information set forth in periodic statements provided under § 1026.41. With respect to mortgage loans, chapter 13 contains unique provisions that allow a consumer to repay pre-bankruptcy arrearages over a reasonable period of time while also making the regular periodic payments as they come due under the mortgage loan.[355] Under chapter 13, servicers may need to adopt special accounting practices for consumers with these ''cure and maintain'' plans and separately track payments made on the pre-bankruptcy arrearages and the regular periodic payments.[356] These

[349] *See, e.g., Henry* v. *Assocs. Home Equity Servs., Inc. (In re Henry),* 266 B.R. 457, 471 (Bankr. C.D. Cal. 2001) (''A secured creditor should be encouraged to send out payment coupons, envelopes and periodic statements if a debtor has filed a statement that the debtor plans to keep property subject to secured debt and to make payments. Debtors frequently complain to the court that they want to make their payments, but their creditors do not cooperate by providing payment coupons.''); *In re Freeman,* 352 B.R. 628 (Bankr. N.D. W. Va. 2006) (overruling creditor's objection to the debtor's request for periodic statements that were normally required by State law); *cf. Payne* v. *Mortg. Elec. Registration Sys., Inc. (In re Payne),* 387 B.R. 614, 626 (Bankr. D. Kan. 2008) (''[The servicer]'s representative testified [that the servicer] does not send payments books to mortgagors in bankruptcy because [the servicer] cannot present a true and accurate accounting of the loan payments [the servicer] is receiving from the Trustee as opposed to debtors' payments history.'').

[350] *See, e.g.,* LBR 4001–2, Bankr. M.D. Ala.; LBR 4072–1, Bankr. N.D. Ala.; Model Chapter 13 Plan, Bankr. S.D. Ala.; Bankr. D. Colo. LBR 4001–4; Bankr. S.D. Ill. Model Chapter 13 Plan; Bankr. E.D. La. General Order 2012–1 (adopting model Chapter 13 plan); Bankr. D. Md. L.R. 4001–5; Bankr. D. Mass. L.R. 4001–3; Bankr. E.D. Mich. Model Chapter 13 Plan; Bankr. E.D. Mo. L.R. 3021; Bankr. W.D. Mo. L.R. 4001–4; Bankr. D. Mont. LBR 4001–3; Bankr. D. Kan. Bk. S.O. 08–4; District of New Jersey Local Bankruptcy Rules, D.N.J LBR 4001–3; Bankr. N.D.N.Y. Model Chapter 13 Plan; Bankr. E.D.N.C. LBR 4001–2; Bankr. M.D.N.C Standing Order, *In re Terms and Provisions Available for Incorporation into Chapter 13 Confirmation Orders;* Bankr. W.D.N.C. LBR 4001–1; Bankr. D.N.H. L. Form 3015–1A, Model Chapter 13 Plan; Bankr. N.D. Ohio Admin. Order 13–02, *In re Form Chapter 13 Plan;* Bankr. D. Or. L.R. 3015–1; Bankr. D. R.I. LBR 4001–1; Bankr. D. S.C.SC LBR 3015–1 (adopting model Chapter 13 plan); Bankr. N.D. TX General Order 2010–1, *In re Amended Standing Order Concerning All Chapter 13 Cases;* Bankr. S.D. TX Uniform Plan and Motion for Valuation of Collateral; Bankr. W.D. TX (Austin Div.), *Consolidated Standing Order for Chapter 13 Case Administration for Austin Division* (adopting model Chapter 13 plan); Bankr. W.D. TX (San Antonio Div.), Model Chapter 13 Plan; Bankr. D. Vt. LBR 3071–1; Bankr. W.D. Wash. L. Form 13–4; Bankr. E.D. Wis. Model Chapter 13 Plan.

[351] 78 FR 10901, 10964–67 (Feb. 14, 2013).

[352] *See In re Henry,* 266 B.R. at 476 (discussing the ride-through option and disagreement among courts as to whether the Bankruptcy Code permits it); *In re Covel,* 474 B.R. 702, 708 (Bankr. W.D. Ark. 2012) (holding that Congress eliminated the ride-through option for personal property in 2005, but ''[b]y not making corresponding changes concerning real property, Congress appears to tacitly recognize a ride through option for real property.''); *Kibler* v. *WFS Fin., Inc. (In re Kibler),* Case No. 97–25258–B–7, Adv. No. 00–2604, 2001 WL 388764, at *5 (Bankr. E.D. Cal. Mar. 19, 2001) (''In jurisdictions that recognize the 'ride-though' option, debtors may want to preserve their property, yet not incur the potential personal liability imposed by a reaffirmation agreement. These debtors . . . need to receive normal monthly billings to avoid a contract default and potential foreclosure.'').

[353] 11 U.S.C. 524(j) (''Subsection (a)(2) does not operate as an injunction against an act by a creditor that is the holder of a secured claim, if—(1) such creditor retains a security interest in real property that is the principal residence of the debtor; (2) such act is in the ordinary course of business between the creditor and the debtor; and (3) such act is limited to seeking or obtaining periodic payments associated with a valid security interest in lieu of pursuit of in rem relief to enforce the lien.'').

[354] *See* 4 *Collier on Bankruptcy* ¶ 524.09 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2014) (''Section 524(j) clarifies that when a debtor does not reaffirm a mortgage debt secured by real estate that is the debtor's principal residence, the creditor may continue to send statements to the debtor in the ordinary course of business and collect payments made voluntarily by the debtor. The provision makes clear that debtors do not have to reaffirm such debts in order to keep paying them. In fact, it has long been the practice that mortgage debts are not reaffirmed.'').

[355] 11 U.S.C. 1322(b)(5).

[356] *See, e.g., Boday* v. *Franklin Credit Mgmt. Corp. (In re Boday),* 397 B.R. 846, 850–51 (Bankr. N.D. Ohio 2008) (''Section 1322(b)(5), by splitting a claim, means that a creditor is no longer permitted to allocate payments according to the terms of its contract. Instead, its effect is to require that any prepetition arrearage claim must be paid separately, according to the terms of the debtor's confirmed plan, based upon the creditor's allowed claim. The remaining debt, consisting of those payments which become due after the petition is filed, is then paid according to the terms of the parties' contract and original loan amortization as if no default ever existed . . . . From an accounting standpoint, this requires that a creditor allocate a debtor's loan payments in the following manner: First, the

accounting practices differ from a servicer's usual practice because, so long as a consumer is timely making all the payments due under the plan, a servicer should not treat a consumer as delinquent by, among other things, assessing certain fees and charges. As commenters noted, the bankruptcy plan and updates from a trustee may provide a consumer in chapter 13 with some information about the mortgage loan, but they do not inform a consumer about payments the servicer has received and applied, nor do they provide the same standardized point-in-time information about the consumer's mortgage loan as does a periodic statement.

The Bureau understands that the amendments to the Federal Rules of Bankruptcy Procedure, effective December 1, 2011, which require a servicer to disclose certain mortgage loan information to a consumer in chapter 13,[357] were motivated in part by pervasive and documented servicer failures to make accurate filings or disclose fees during chapter 13 cases.[358] Consumers would often successfully make all payments required under their chapter 13 plan, only to find that the servicer claimed substantial additional amounts were still owed.[359] Courts have detailed some servicers' failure to properly credit payments made pursuant to chapter 13 plans, noting that servicers' systems and accounting practices often fail to adjust to the needs of chapter 13, and courts have sanctioned servicers or disallowed fees.[360] These difficulties were also documented in and formed the basis of part of the National Mortgage Settlement, which required, among other things, that the subject servicers properly account for payments received in bankruptcy.[361]

In light of these documented concerns about servicers not properly applying payments in chapter 13 cases, the Bureau believes that a periodic statement would benefit a consumer in chapter 13 by, for example, enabling the consumer or the consumer's attorney to monitor for payment application errors. Moreover, in cases where a consumer was current as of the date of the bankruptcy petition or is making periodic payments directly to a servicer, a monthly reminder of amounts due may help a consumer make timely payments. The Bureau notes that the U.S. Trustee Program and other commenters strongly supported requiring servicers to provide a periodic statement to a consumer in chapter 13 for these and other reasons.

The Bureau understands and appreciates the concerns expressed by many servicers that their systems are not currently set up to easily track how payments are applied in chapter 13 cases and that, in order to be able to disclose this information on a periodic statement, they may need to incur significant costs to upgrade their systems. Servicers and trade groups also

creditor must apply the arrearage payments it receives during the plan's duration in accordance with the terms of the plan, so that upon completion of the plan the debtor is deemed current on the prepetition amortization schedule. *Accord* 8 Collier on Bankruptcy ¶ 1329.09[3] (15th ed. rev.2005). Second, payments received from the debtor to service those payments which contractually accrue postpetition[ ] must be allocated according to the terms of the parties' contract as if no default had occurred.''); *In re Wines,* 239 B.R. 703, 708 (Bankr. D.N.J. 1999) (''Crediting payments outside the plan to the installments due contemporaneously according to the original schedule is the only way to put the debtors in the same position as if default had never occurred.''); *In re Collins,* No. 07–30454, 2007 WL 2116416, at *13 (Bankr. E.D. Tenn. July 19, 2007) (holding that chapter 13 cure and maintain plan can include provisions requiring servicer to apply payments separately and stating that such a provision ''is not only reasonable but required''); *see also* Fannie Mae, *Fannie Mae Single Family 2016 Servicing Guide,* at E.2.2.04 (July 13, 2016), *available at https://www.fanniemae.com/content/guide/servicing/index.html* (''Details to be noted with the receipt of all payments pre-confirmation[:] Type of payment (pre-petition or post-petition)[;] Amount received; Date received[;] Source of the payment[; and] Allocation of the payment (principal, interest, late charges, etc.) . . . Unless the court requires the payments to be applied under the terms of the repayment plan, the servicer should generally hold any pre-petition payments it receives as ''unapplied'' funds until an amount equal to the contractual monthly or biweekly payment due is available for application . . . .'').

[357] Fed. R. Bankr. P. 3002.1 (requiring, among other things, servicers to provide 21-day advance notice of a change in payment amount and notice within 180 days after a servicer incurs a fees or expense for which the consumer is liable, and also providing for a reconciliation process at the end of the case to determine if a servicer disputes whether the consumer is current on the mortgage loan).

[358] Fed. R. Bankr. P. 3002.1 Advisory Committee's Notes (2011) (''[Rule 3002.1] is added to aid in the implementation of § 1322(b)(5), which permits a chapter 13 debtor to cure a default and maintain payments on a home mortgage over the course of the debtor's plan. It applies regardless of whether the trustee or the debtor is the disbursing agent for postpetition mortgage payments. In order to be able to fulfill the obligations of § 1322(b)(5), a debtor and the trustee have to be informed of the exact amount needed to cure any prepetition arrearage, *see* Rule 3001(c)(2), and the amount of the postpetition payment obligations.''); *In re Sheppard,* No. 10–33959–KRH, 2012 WL 1344112, at *2 (Bankr. E.D. Va. Apr. 18, 2012) (''Bankruptcy Rule 3002.1 was adopted to resolve significant and often hidden problems encountered by Chapter 13 debtors who utilized § 1322(b)(5) of the Bankruptcy Code to cure mortgage defaults in their confirmed plans. While debtors could cure an arrearage on their principal residence under § 1322(b)(5), they often incurred significant fees and other costs as a result of postpetition defaults or from interest or escrow fluctuations under the terms of the original loan documents. Fearful that any attempt to address these fees and charges could be construed as a violation of the automatic stay, many creditors would not inform debtors that these charges had been incurred until after the Chapter 13 case was closed. As the fees and charges were postpetition obligations not included in the plan and thus not discharged at the conclusion of the case, these debtors would emerge from bankruptcy only to face a substantial and previously undisclosed arrearage. This outcome was inconsistent with the goal of providing debtors with a fresh start.''); *In re Thongta,* 480 B.R. 317, 319 (Bankr. E.D. Wis. 2012) (similar).

[359] *See, e.g., Sheppard,* 2012 WL 1344112, at *2; *Thongta,* 480 B.R. at 319.

[360] *See, e.g., In re Jones,* 366 B.R. 584, 594–98 (Bankr. E.D. La. 2007) (sanctioning servicer that applied all amounts received to pre- and post-petition charges, interest, and non-interest bearing debt, resulting ''in such a tangled mess'' that neither the CPA debtor nor the servicer could explain the accounting, and stating that ''[i]n this Court's experience, few, if any, lenders make the adjustments necessary to properly account for a reorganized debt repayment plan.''); *In re Hudak,* No. 08–10478–SBB, 2008 WL 4850196, at *5 (Bankr. D. Colo. Oct. 24, 2008) (''Many courts have noted that mortgage lenders simply do not accommodate for the accounting intricacies created by Chapter 13.''); *Payne* v. *Mortg. Elec. Registration Sys., Inc. (In re Payne),* 387 B.R. 614, 627 (Bankr. D. Kan. 2008) (''[The servicer] admitted their computer system does not allow debtors who make all their payments in a timely manner to exit bankruptcy current on their mortgage obligation.''); *In re Myles,* 395 B.R. 599, 606 (Bankr. M.D. La. 2008) (holding that debtors stated claim for stay violation where creditor allegedly treated a chapter 13 debtor as in default due to improper payment application and applied payments to improper fees as a result); *Boday,* 397 B.R. at 850–51 (Bankr. N.D. Ohio 2008) (holding that creditor violated plan and section 1322(b)(5) by applying plan payments to interest rather than principal under daily simply interest loan); *In re Rathe,* 114 B.R. 253, 256–57 (Bankr. D. Idaho 1990) (''[The servicer]'s accounting procedure applied payments to the earliest payments due and not to the payments due and owing during the pendency of the plan. The purpose of a Chapter 13 plan is to allow a debtor to pay arrearages during the pendency of the plan while continuing to make payments at the contract rate. Payments made during the pendency of the Chapter 13 plan should have been applied by [the servicer] to the current payments due and owing with the arrearage amounts to be applied to the back payments. [The servicer] cannot utilize its accounting procedures to contravene the terms of a confirmed Chapter 13 plan and the Bankruptcy Code.''); *In re Stewart,* 391 B.R. 327 (Bankr. E.D. La. 2008) (sanctioning servicer for misapplying payments and noting that ''[t]he reconciliation of Debtor's account took [the servicer] four months to research and three hearings before this Court to explain,'' that ''[a]n account history was not produced until two months after the filing of the Objection,'' and that ''[a]n additional two months were spent obtaining the necessary information to explain or establish the substantial charges, costs, and fees reflected on the account''), *vacated in part,* 647 F.3d 553 (5th Cir. 2011).

[361] *See, e.g.,* Exhibit A at 9, *United States* v. *Bank of Am.,* (2014) (No. 12–361 (RMC), 2014 WL 1016286 (National Mortgage Settlement)), *available at https://d9klfgibkcquc.cloudfront.net/Ocwen-Consent-Judgment-Ex-A.pdf* (providing that, among other things, ''[i]n active chapter 13 cases, Servicer shall ensure that: a. Prompt and proper application of payments is made on account of (a) pre-petition arrearage amounts and (b) postpetition payment amounts and posting thereof as of the successful consummation of the effective confirmed plan; b. the debtor is treated as being current so long as the debtor is making payments in accordance with the terms of the then effective confirmed plan and any later effective payment change notices'').

stated that consumers may not understand the complexities of accounting for payments made under a chapter 13 plan. However, as the Bureau noted in the 2013 TILA Servicing Final Rule, this complexity argues for providing a consumer with a periodic statement. Commenters, including consumer advocacy groups, the U.S. Trustee Program, and other bankruptcy experts, have stated that consumers and their attorneys need the information on a periodic statement to understand the status of their mortgage loan and payments while in bankruptcy. Similarly, participants in the Bureau's consumer testing generally reacted favorably to the prospect of receiving a periodic statement while in chapter 13, often noting that they did not receive this same information during their own bankruptcy cases and wished that they had. In addition, the Bureau notes that, while the Bankruptcy Rules provide for a reconciliation procedure once the consumer completes all payments under a chapter 13 plan, a large proportion of chapter 13 cases are dismissed prior to completion.[362] As a result, many consumers in chapter 13 bankruptcy will not have a trustee or court oversee and ultimately determine whether a servicer correctly applied payments. For these consumers, having a record of payments made and applied may help resolve disputes once the bankruptcy case is over.[363] Accordingly, the Bureau believes that all consumers in chapter 13 cases who intend to retain the property, including those making payments through a trustee, would benefit from receiving periodic statements.

The Bureau recognizes that industry will incur costs associated with providing periodic statements to consumers in bankruptcy. The Bureau believes that most of those costs will be associated with one-time systems changes necessary to implement § 1026.41(f), as well as some additional ongoing costs to ensure that servicers accurately track and disclose payments they receive from consumers in chapter 13 who are repaying their pre-bankruptcy arrearage. The Bureau thus believes that, as discussed in the section-by-section analysis of § 1026.41(f) and in parts VII and IX below, once servicers update their systems, providing periodic statements to consumers in bankruptcy will not add significant ongoing cost. In addition, some servicers informed the Bureau that they already supply periodic statements to some or all consumers in bankruptcy. For these servicers, the additional burden of complying with § 1026.41(e)(5) should be reduced.

Interaction With Bankruptcy Law

As noted above, several commenters suggested that requiring a periodic statement for a consumer in bankruptcy would inappropriately interfere with bankruptcy law. Some of these commenters stated that a bankruptcy court may hold a servicer in violation of the Bankruptcy Code's automatic stay for providing a periodic statement to a consumer in bankruptcy, even if the servicer did so in order to comply with TILA and Regulation Z.[364] Some commenters suggested that, by a requiring a periodic statement for a consumer in bankruptcy, the Bureau would be effectively overruling bankruptcy law's general prohibition on creditors communicating with a debtor. Two commenters raised a question about the constitutionality of the Bureau's rulemaking in this area based on concerns about separation of powers, suggesting that the rulemaking would affect a judicial branch function. These two commenters urged the Bureau to defer to the expertise of the bankruptcy courts in developing a periodic statement.

As discussed more in the section-by-section analysis of § 1026.41(f), the Bureau has considered the rulings of bankruptcy courts in developing the periodic statement. The Bureau believes that the final rule is consistent with, rather than in conflict with, bankruptcy law. The Bureau has tailored § 1026.41(e)(5) to avoid requiring a servicer to send a periodic statement in circumstances when case law suggests that doing so would violate the automatic stay. As discussed above and in the proposal, courts have observed that whether periodic statements are appropriate in bankruptcy typically depends on whether ''the debtor needed the information contained in the statements when the statements were sent'' and that debtors need information about the mortgage loan when they intend to retain property, not when they intend to surrender it.[365] For example, under the final rule, a servicer generally will not be required to provide a periodic statement to a consumer in bankruptcy who has articulated an intent to surrender the property through a bankruptcy plan, a statement of intention filed with the bankruptcy court, or has made a written request to cease receiving a periodic statement.

The Bureau is not aware of any case law holding a servicer in violation for providing a periodic statement in the circumstances required by the final rule. Industry commenters cited several decisions finding automatic stay violations, but they all involved actions by a servicer that the final rule would not require, such as aggressive collections after the consumer agreed to surrender the property or sending notices misstating the consumer's obligations.[366] Reports from servicers appear to confirm that liability for alleged stay violations is unlikely: For example, a large national servicer advised the Bureau that it provides periodic statements to all consumers in bankruptcy with mortgage loans secured by a first lien, subject to a consumer's right to opt out, and that it believes this practice complies with the automatic stay. Given the case law on this issue, the tailored requirements of § 1026.41(e)(5) as described in more detail below, and the experiences of servicers that already provide periodic statements to consumers in bankruptcy, the Bureau does not believe that requiring servicers to send periodic statements to some consumers in bankruptcy exposes servicers to a risk of significant litigation or liability in the courts.

[362] *See* Ed Flynn, *Chapter 13 Revisited: Can it help Solve the Judiciary's Fiscal Problems?,* 32 Am. Bankr. Inst. J. 20, 20 (Dec. 2013).

[363] The Bureau further notes that in instances where bankruptcy courts have local rules expressly permitting periodic statements or coupon books, the rules predominantly apply when the consumer is a debtor under chapter 13. *See supra,* note 350.

[364] Some commenters stated that the risk of automatic stay violations could be reduced by requiring a consumer in bankruptcy to make an affirmative request before a servicer would be required to provide a periodic statement. The Bureau addresses those comments below.

[365] *Connor* v. *Countrywide Bank NA (In re Connor),* 366 B.R. 133, 136, 138 (Bankr. D. Haw. 2007)); *see also Henry* v. *Assocs. Home Equity Servs., Inc. (In re Henry),* 266 B.R. 457, 471 (Bankr. C.D. Cal. 2001) (collecting cases).

[366] *See, e.g., In re Draper,* 237 B.R. 502, 505–06 (Bankr. M.D. Fla. 1999) (holding that creditor violated the stay by sending periodic statements to chapter 13 debtor who had asked not to receive them); *Connor* v. *Countrywide Bank NA (In re Connor),* 366 B.R. 133, 136, 138 (Bankr. D. Haw. 2007) (debtor failed to state a claim for stay violation related to periodic statements received prior to chapter 13 plan confirmation, but debtor did state a claim related to statements received after conversation to chapter 7 because debtor had indicated his intent to surrender the property); *In re Schinabeck,* No. 08–41942, 2014 WL 5325781 (Bankr. E.D. Tex. Oct. 20, 2014) (holding that servicer violated the discharged injunction where it sent at least 60 written communications, including some after the consumer had filed the lawsuit alleging a discharge injunction violation, to a consumer who had vacated the property before bankruptcy and had requested to cease receiving communications about the property).

The Bureau's conclusion is informed particularly by the comments from the U.S. Trustee Program, which did not express concerns that the proposal would result in automatic stay violations and specifically stated that the proposal took the proper approach. Moreover, Congress amended TILA to require periodic statements for mortgage loans without any exception for consumers in bankruptcy, and the final rule simply limits the circumstances in which a servicer is exempt from this Congressionally-imposed requirement.[367] For the reasons discussed, the Bureau believes that § 1026.41(e)(5) does not inappropriately intrude upon bankruptcy law.

Final Rule

The Bureau is finalizing § 1026.41(e)(5) and associated commentary with several revisions from the proposal. As revised, § 1026.41(e)(5) limits the circumstances in which a servicer is exempt from the periodic statement requirements when a consumer is a debtor in bankruptcy or has discharged the mortgage loan through bankruptcy. The exemption criteria in the final rule depart from the proposal in three primary ways. First, the exemption applies at the mortgage-loan level rather than as to specific consumers. When the criteria for an exemption are satisfied with respect to one consumer on a mortgage loan, a servicer is also exempt from the periodic statement requirements with respect to any other consumer on the mortgage loan. Second, the exemption can be triggered by a consumer's proposed bankruptcy plan, instead of only by the consumer's confirmed plan.[368] Third, the final rule generally provides that a servicer is exempt upon the consumer filing a statement of intention identifying an intent to surrender the dwelling securing the mortgage loan only if the consumer has not made any partial or periodic payment on the mortgage loan after the commencement of the consumer's bankruptcy case.

The final rule also allows a servicer to establish an exclusive address that a consumer in bankruptcy must use to submit a written request to opt into or out of receiving periodic statements, provided that the servicer notifies the consumer of the address in a manner that is reasonably designed to inform the consumer of the address and uses the same address both for opt-ins and opt-outs. The final rule further sets forth a transitional single-billing-cycle exemption under certain circumstances to enable a servicer to transition to a periodic statement modified for bankruptcy and to an unmodified periodic statement upon the conclusion of the bankruptcy case or reaffirmation of the debt.

The Bureau is finalizing proposed comment 41(e)(5)–1 substantially as proposed, with minor revisions to improve clarity. Comment 41(e)(5)–1 clarifies that a written request that a servicer cease or continue providing a periodic statement is deemed to be submitted by the consumer if an agent of the consumer, such as the consumer's bankruptcy counsel, submits the request. The Bureau is finalizing proposed comment 41(e)(5)(ii)–1 substantially as proposed, renumbered as comment 41(e)(5)–2, with minor revisions to improve clarity. Comment 41(e)(5)–2 states that a consumer's most recent written request under § 1026.41(e)(5)(i)(B)(*1*) or (e)(5)(ii) determines whether the exemption in § 1026.41(e)(5)(i) applies. The Bureau is also finalizing new comment 41(e)(5)–3, which clarifies that a consumer's written request under § 1026.41(e)(5)(i)(B)(*1*) or (e)(5)(ii) is effective as of the date of receipt by the servicer. The Bureau is finalizing proposed comment 41(e)(5)(ii)–3, renumbered as comment 41(e)(5)(i)–4, without revision. The comment clarifies that, if a consumer's bankruptcy case is revived or if the court reinstates a previously dismissed case or reopens a case, § 1026.41(e)(5) may apply again.

41(e)(5)(i) Exemption

Scope of Exemption

Final § 1026.41(e)(5)(i) provides that a servicer is exempt from the requirements of § 1026.41 with regard to a mortgage loan if a two-prong test is satisfied. First, any consumer on the loan must be a debtor in bankruptcy under title 11 of the United States Code or must have discharged personal liability for the mortgage loan through bankruptcy pursuant to 11 U.S.C. 727, 1141, 1228, or 1328.

Second, one of the following additional conditions in § 1026.41(e)(5)(i)(B)(*1*) through (*4*) must apply with regard to any consumer on the mortgage loan: (1) The consumer requests in writing that the servicer cease providing a periodic statement; (2) the consumer's bankruptcy plan provides that the consumer will surrender the dwelling securing the mortgage loan, provides for the avoidance of the lien securing the mortgage loan, or otherwise does not provide for, as applicable, the payment of pre-bankruptcy arrearage or the maintenance of payments due under the mortgage loan; (3) a court enters an order in the bankruptcy case providing for the avoidance of the lien securing the mortgage loan, lifting the automatic stay pursuant to 11 U.S.C. 362 with regard to the dwelling securing the mortgage loan, or requiring the servicer to cease providing a periodic statement; or (4) the consumer files with the court overseeing the bankruptcy case a statement of intention pursuant to 11 U.S.C. 521(a) identifying an intent to surrender the dwelling securing the mortgage loan and a consumer has not made any partial or periodic payment on the mortgage loan after the commencement of the consumer's bankruptcy case.

Changes to the Proposed Exemption Criteria

Apart from the exceptions discussed below, the Bureau is adopting proposed § 1026.41(e)(5)(i) and associated commentary substantially as proposed, with various revisions to improve clarity. The exemption in the final rule departs from the proposal in three primary ways: (1) The exemption applies at the mortgage-loan level; (2) it can be triggered by a consumer's proposed bankruptcy plan; and (3) it includes an exemption upon the consumer filing a statement of intention identifying an intent to surrender the dwelling securing the mortgage loan only if a consumer has not made any partial or periodic payment on the mortgage loan after the commencement of the consumer's bankruptcy case.

Loan-level exemption. The exemption in final § 1026.41(e)(5)(i) applies at the loan level. This differs from the proposal, which would have exempted a servicer from the periodic statement requirements as to a specific consumer in bankruptcy but not, for example, as to any of the consumer's co-obligors who were not in bankruptcy. The Bureau is removing the reference to primary obligors that was in the

[367] One commenter stated that Regulation Z does not apply to a mortgage loan for which a consumer has discharged personal liability through bankruptcy. A bankruptcy discharge does not, however, by itself affect Regulation Z coverage. A bankruptcy discharge does not per se eliminate the existence of a debt or nullify an extension of credit; rather, the discharge operates as an injunction against collecting the debt as a personal liability of the consumer. *See* 11 U.S.C. 524(a) (''A discharge in a case under this title . . . operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived.''); *see also* 11 U.S.C. 524(f) (clarifying that the discharge injunction does not prevent a debtor from ''voluntarily repaying any debt'').

[368] The final rule uses the term bankruptcy plan instead of plan of reorganization to improve clarity.

proposal. As the Bureau is finalizing the exemption at the loan level rather than at the consumer level, and, as consumer is a defined term in Regulation Z, the Bureau believes it is more appropriate to refer solely to consumers and not to primary obligors in the regulation. The Bureau does not believe the omission of primary obligors from the regulation text is a substantive change. Comment 41(e)(5)(i)–1 discusses the applicability of the exemption when there is more than one primary obligor. Comment 41(e)(5)(i)–1 clarifies that, when two or more consumers are joint obligors with primary liability on a mortgage loan subject to § 1026.41, the exemption applies if any one of the consumers meets the criteria set forth in § 1026.41(e)(5)(i). The comment also offers an example in which two spouses jointly own a home and are primary obligors on the mortgage loan. One spouse files chapter 13 bankruptcy and has a bankruptcy plan that provides for surrendering the home. In part, § 1026.41(e)(5)(i) exempts the servicer from providing a periodic statement with regard to that mortgage loan, unless one of the spouses requests in writing that the servicer provide a periodic statement pursuant to § 1026.41(e)(5)(ii).

In general, the Bureau believes that a non-debtor co-obligor would benefit from receiving a periodic statement, just like any other consumer with a mortgage loan. Nonetheless, commenters raised legitimate concerns about the proposal, which in some circumstances would have exempted a servicer as to one co-obligor but not another. Commenters indicated that most servicers' systems currently would not accommodate such a requirement. For example, servicers' systems typically suppress communications at the loan level, and some servicers cannot easily remove names from an account. Nor can servicers' systems automate sending a periodic statement to one address while providing other mortgage-related notices to another address, which may have been necessary under the proposal when co-obligors live separately. For these reasons, servicers reported that they might have to reorder fundamentally their systems to comply with the proposal. Furthermore, the Bureau understands that a requirement to provide different disclosures to different addresses could cause conflict with mortgage security instruments, which often state that there can be only a single notice address for each mortgage loan. Implementing and complying with the proposed consumer-specific exemption therefore could have been resource-intensive.

Definition of bankruptcy plan. Final § 1026.41(e)(5)(i)(B)(*2*) provides that a servicer is exempt from the periodic statement requirements depending on the terms of a consumer's bankruptcy plan. The proposal used the term confirmed plan of reorganization, and proposed comment 41(e)(5)(i)–2 would have clarified the meaning of that term. The Bureau is finalizing the proposed comment, renumbered in the final rule as comment 41(e)(5)(i)(B)(*2*)–1, with revisions. The comment clarifies that the term bankruptcy plan, for purposes of § 1026.41(e)(5)(i)(B)(*2*), refers to a consumer's most recently filed bankruptcy plan filed under the applicable provisions of title 11 of the United States Code, regardless of whether the court overseeing the consumer's bankruptcy case has confirmed or approved the plan. Unlike the proposal, the final rule looks to the consumer's most recently filed bankruptcy plan, and it does not require the bankruptcy plan to be confirmed. The condition under § 1026.41(e)(5)(i)(B)(*2*) is thus satisfied if the consumer's most recently filed bankruptcy plan provides that the consumer will surrender the dwelling securing the mortgage loan, provides for the avoidance of the lien securing the mortgage loan, or otherwise does not provide for, as applicable, the payment of pre-bankruptcy arrearage or the maintenance of payments due under the mortgage, whether or not that plan is confirmed or a prior plan provided for the payment of the mortgage loan.

The Bureau is adopting these changes so that the exemption criteria in § 1026.41(e)(5)(i)(B)(*2*) are based on a consumer's most recent expressed intent to retain or surrender the property as identified in a proposed or confirmed bankruptcy plan. As the Bureau explained in the proposal, the value of receiving a periodic statement is diminished for a consumer who intends to surrender the property. Additionally, providing a periodic statement to a consumer who has indicated, through a bankruptcy plan, an intention to surrender the property, could increase the risk of a court finding that a servicer violated the automatic stay. The Bureau understands that a consumer will often perform according to a proposed plan for several months before a plan is confirmed, and a consumer who is surrendering the property or avoiding the lien may not benefit from a statement during that interval. The Bureau therefore does not believe that a servicer should have to provide a periodic statement to a consumer whose proposed bankruptcy plan indicates that the consumer intends to cease making payments on the mortgage loan.

Payment after bankruptcy filing and statement of intention. Final § 1026.41(e)(5)(i)(B)(*4*) requires both that a consumer has filed with the bankruptcy court a statement of intention identifying an intent to surrender the dwelling securing the mortgage loan and that a consumer has not made any partial or periodic payment on the mortgage loan after the commencement of the consumer's bankruptcy case. Unlike the proposal, the final rule requires a servicer to provide a periodic statement to a consumer whose statement of intention identifies an intent to surrender the property if a consumer either has made any partial or periodic payment on the mortgage loan after the commencement of the bankruptcy case or has requested in writing that the servicer provide a periodic statement.[369] The Bureau believes that making a payment on the mortgage loan may be a better indication of the consumer's intention to keep the property than a formal statement of intention filed with the bankruptcy court.[370] The statement of intention may reflect only the consumer's intention at a point in time and not the consumer's present intention. Moreover, the Bureau is also aware that a consumer in bankruptcy will often file a statement of intent identifying a purported intent to surrender the home even when the consumer fully intends to retain the property and continue making mortgage payments. The Bureau believes that such a consumer benefits from receiving periodic information about the loan and that, as discussed above, providing a periodic statement to a consumer who is continuing to make voluntary mortgage payments is consistent with bankruptcy law.[371]

[369] As noted above, one commenter requested that the final rule state more explicitly when a servicer is required to provide a periodic statement to a consumer who has discharged personal liability for the mortgage loan. The Bureau believes that the final rule does make these circumstances clear generally and that the inclusion of the partial or periodic payment language further eliminates any potential ambiguity.

[370] Even if a servicer were to return a consumer's partial payment or hold it in suspense, the servicer would still be required to resume compliance with § 1026.41 after the bankruptcy case concludes because the consumer would have made the payment. The final rule looks to the consumer's actions in determining the scope of the exemption.

[371] *See, e.g., Henry* v. *Assocs. Home Equity Servs., Inc. (In re Henry),* 266 B.R. at 471 (Bankr. C.D. Cal. 2001) (holding that creditor did not violate the automatic stay by sending periodic statements and notice of default to debtors who retain their property by continuing to make payments without reaffirming the mortgage loan); *Kibler* v. *WFS Fin., Inc. (In re Kibler),* Case No. 97–25258–B–7, Adv.

In addition, as with the expression of the consumer's intent in a bankruptcy plan, the Bureau believes that the consumer's most recent statement of intention is the relevant filing for purposes of § 1026.41(e)(5)(i)(B)(*4*). The Bureau has finalized comment 41(e)(5)(i)(B)(*4*)–1 accordingly. The comment also provides an illustrative example.

41(e)(5)(ii) Reaffirmation or Consumer Request To Receive Statement or Coupon Book

The Bureau is finalizing proposed § 1026.41(e)(5)(ii) with revisions. Final § 1026.41(e)(5)(ii) provides that a servicer ceases to qualify for an exemption pursuant to § 1026.41(e)(5)(i) with respect to a mortgage loan if the consumer reaffirms personal liability for the loan or any consumer on the mortgage loan requests in writing that the servicer provide a periodic statement or coupon book, unless a court enters an order in the bankruptcy case requiring the servicer to cease providing a periodic statement or coupon book. Proposed § 1026.41(e)(5)(ii)(A) would have similarly required a servicer to resume compliance with the periodic statement requirements upon receipt of a consumer's written request, unless a court ordered the servicer to cease providing a periodic statement or coupon book. Proposed § 1026.41(e)(ii)(B) would have likewise required a servicer to resume compliance after the consumer reaffirmed personal liability for the mortgage loan, among other things. The Bureau believes that final § 1026.41(e)(5)(ii) more clearly states that a servicer ceases to qualify for an exemption pursuant to § 1026.41(e)(5)(i) with respect to a mortgage loan after either receipt of a consumer's written request or the consumer reaffirms personal liability for the mortgage loan.

The Bureau is also adopting new comment 41(e)(5)(ii)–1 to clarify what form of periodic statement a servicer would provide after a consumer reaffirms personal liability for a mortgage loan or opts into receiving a periodic statement. The comment explains that a servicer would provide a modified statement only if § 1026.41(f) applies to the mortgage loan at that time. The comment explains that, for example, § 1026.41(f) does not apply with respect to a mortgage loan once the consumer has reaffirmed personal liability; therefore, following a consumer's reaffirmation, a servicer generally would provide a periodic statement that complies with § 1026.41 but without the modifications set forth in § 1026.41(f). The comment further explains that § 1026.41(f) does apply, however, with respect to a mortgage loan following a consumer's written request to receive a periodic statement, so long as any consumer on the mortgage loan remains in bankruptcy or has discharged personal liability for the mortgage loan; accordingly, following that written request, a servicer must provide a periodic statement that includes the modifications set forth in § 1026.41(f).

Written Opt-Out and Opt-In Requests Under 41(e)(5)(i) and 41(e)(5)(ii)

As explained above, § 1026.41(e)(5)(i)(B)(*1*) provides that a servicer may honor a consumer in bankruptcy's written request that the servicer cease providing a periodic statement. Section 1026.41(e)(5)(ii) provides, in part, that a servicer ceases to qualify for an exemption pursuant to § 1026.41(e)(5)(i) with respect to a mortgage loan if any consumer on the mortgage loan requests in writing that the servicer provide a periodic statement, unless a court enters an order in the bankruptcy case requiring the servicer to cease providing a periodic statement. Thus, § 1026.41(e)(5)(i)(B)(*1*) provides an opt-out mechanism and § 1026.41(e)(5)(ii) provides an opt-in mechanism.

Section 1026.41(e)(5)(i)(B)(*1*) generally provides the requirements for opt-out. Section 1026.41(e)(5)(i)(B)(*1*) does not prohibit servicers from continuing to honor opt-out requests received, whether orally or in writing, from consumers in bankruptcy before the effective date, so long as the servicer can document that the consumer affirmatively made the request. Servicers may choose to require consumers to submit a new written request, but the Bureau is not requiring it. The Bureau believes that imposing such a requirement in the final rule would unnecessarily increase burden on consumers and servicers.

As noted above, the Bureau is adopting comment 41(e)(5)–1, which clarifies that, if an agent of the consumer, such as the consumer's bankruptcy counsel, submits a request under § 1026.41(e)(5)(i)(B)(*1*) or (e)(5)(ii), the request is deemed to be submitted by the consumer. The Bureau is also adopting new comment 41(e)(5)–3, which clarifies that a consumer's written request under § 1026.41(e)(5)(i)(B)(*1*) or (e)(5)(ii) is effective as of the date of receipt by the servicer.

Requiring written opt-out and opt-in. Requiring opt-out and opt-in requests to be in writing reduces the potential for litigation in the bankruptcy court and eliminates ambiguities about whether a consumer made an effective request. Although a written requirement imposes greater burden on consumers, a significant majority of consumers in bankruptcy are represented by counsel, who should be able to assist them with preparing a request.[372] The section-by-section analysis of § 1026.41(e)(5)(iii) discusses the final rule provision that a servicer may establish an address that a consumer must use to submit a written request that the servicer cease or continue providing a periodic statement.

No universal opt-in requirement. The Bureau declines to require that a consumer in bankruptcy always submit an affirmative request to a servicer in order to receive a periodic statement. The Bureau shares the concern of some commenters that a consumer who wants to receive a periodic statement may nonetheless fail to make an affirmative request to opt in. Moreover, absent an express requirement that a servicer provide notice to a consumer of the right to opt in, a consumer may not be aware of this right, and the Bureau is concerned about the burden such a new notice requirement would impose on servicers. The Bureau is also concerned that a notice-and-opt-in procedure could create long delays between the bankruptcy filing and when a consumer receives a periodic statement, potentially causing a consumer to be unaware of additional fees and charges. The final rule already provides that a servicer has period of time constituting a limited exemption from the requirements of § 1026.41 before it must provide a periodic statement subject to § 1026.41(f) to a consumer in bankruptcy, and the Bureau is

No. 00–2604, 2001 WL 388764 (Bankr. E.D. Cal. Mar. 19, 2001) (noting that borrowers who retain their property by continuing to make payments without reaffirming the mortgage loan ''need to receive normal billings to avoid a contract default and potential foreclosure''); 4 Collier on Bankruptcy ¶ 524.04 (''Section 524(j) clarifies that when a debtor does not reaffirm a mortgage debt secured by real estate that is the debtor's principal residence, the creditor may continue to send statements to the debtor in the ordinary course of business and collect payments made voluntarily by the debtor.'') (citing *Jones* v. *Bac Home Loans Servicing, LP (In re Jones),* Case No. 08–05439–AJM–7, Adv. No. 09–50281, 2009 WL 5842122, at *3 (Bankr. S.D. Ind. Nov. 25, 2009)).

[372] *See In re LaGrone,* 525 B.R. 419, 427 (Bankr. N.D. Ill. 2015) (citing *By the Numbers—Pro Se Filers in the Bankruptcy Courts,* The Third Branch News (U.S. Cts.) Oct. 2011, *available at http://www.uscourts.gov/News/TheThirdBranch/11-10-01/By_the_Numbers-Pro_Se_Filers_in_the_Bankruptcy_Courts.aspx,* for the proposition that in 2011 debtors were represented by counsel in 92% of chapter 7 cases and 90% of chapter 13 cases).

concerned that lengthening this period with a notice-and-opt-in procedure could deprive the consumer of important information about the mortgage loan during a time when the consumer is attempting to reorder the consumer's financial affairs.

The Bureau does not believe an affirmative opt-in requirement is necessary to protect servicers from violating the automatic stay or discharge injunction. As discussed above, bankruptcy courts hold consistently that a servicer does not violate the automatic stay when it provides an accurate periodic statement to a consumer who intends to retain a property through bankruptcy, including specifically in the circumstances in which the final rule would require a periodic statement.[373] The Bureau notes that the U.S. Trustee Program opposed an opt-in requirement and did not express concerns that the proposal would result in automatic stay violations. Additionally, from outreach and comments received, the Bureau is aware that at least one large servicer provides a periodic statement to all of its consumers in bankruptcy who have a first-lien mortgage, subject to the consumer's right to opt out, and that this servicer believes its practice complies with the automatic stay. The final rule allows a consumer in bankruptcy to opt out of receiving a periodic statement, so a servicer does not risk an automatic stay violation by sending a periodic statement to a consumer who has requested not to receive them.

The Bureau further notes that the final rule incorporates a de facto opt-in requirement. As consumer advocacy groups commented about the proposal, a consumer must identify in either the bankruptcy plan or the statement of intention whether the consumer intends to retain or surrender the property. The exemption under § 1026.41(e)(5)(i) does not apply if the consumer identifies an intent to retain the property, but it does apply if the consumer identifies an intent to surrender (unless the consumer subsequently makes a partial or periodic payment on the mortgage loan or requests in writing that the servicer provide a periodic statement). Accordingly, in practice, a servicer will generally not be required to provide a periodic statement to a consumer in bankruptcy unless the consumer has taken an affirmative step identifying an intent to retain the property.

The Bureau believes that a consumer who makes such an affirmative step likely benefits from receiving a periodic statement.[374] Indeed, consumer testing participants stated overwhelmingly that they would prefer to receive a periodic statement if they intended to retain their property through bankruptcy.[375] The Bureau has also received complaints from consumers who are retaining their property but do not receive periodic statements from their servicers due to the bankruptcy.

The Bureau also does not believe that the final rule imposes substantially more burden than would a universal opt-in regime. The Bureau understands that a servicer likely will expend more resources to determine whether an exemption applies under the final rule, such as by reviewing bankruptcy court filings, than it would if it were required to send a periodic statement only upon receiving a request from the consumer. As noted above, however, a servicer may have incurred other costs if the Bureau had required the servicer to provide a notice to the consumer about an opt-in right. Moreover, as already discussed, the Bureau believes there are substantial benefits to consumers of not adopting an express opt-in requirement.

Other opt-in and opt-out issues raised by commenters. The Bureau is not adopting commenters' other recommendations relating to the written request requirement. For example, the Bureau is not adopting one commenter's recommendation that the rule require all co-obligors to sign any opt-in or opt-out requests. The Bureau believes that this approach would present practical challenges because some consumers may not be able to obtain a signature from all co-obligors and some consumers would be unaware of the need to obtain additional signatures. In such circumstances, requiring all co-obligors to sign a request could make it inappropriately difficult for a consumer to receive a periodic statement.

The Bureau also is not adopting commenters' recommendation to require that a servicer inform a consumer attempting to opt in or opt out orally about the need to submit a written request. Many consumers in bankruptcy are represented by counsel who can advise them of the writing requirement. The Bureau believes that requiring this notice could add an unnecessary compliance obligation. Although not required, the Bureau nevertheless encourages servicers to inform consumers of the writing requirement and notes that doing so does not violate § 1026.41(e)(5).

41(e)(5)(iii) Exclusive Address

Under new § 1026.41(e)(5)(iii), a servicer may establish an address that a consumer must use to submit a written request that the servicer cease or continue providing a periodic statement. The Bureau believes that allowing servicers to designate an address for these purposes may reduce compliance burden for servicers and facilitate consumers' exercise of their opt-in and opt-out preferences.

The Bureau shares some commenters' concerns, however, that some consumers may not know the specific address and therefore be unable to exercise these rights. Therefore, § 1026.41(e)(5)(iii) requires a servicer establishing a specific address for this purpose to notify the consumer of the address in a manner that is reasonably designed to inform the consumer of the address. For example, a servicer may be able to satisfy this requirement by including the address on the servicer's Web site or the periodic statement. Section 1026.41(e)(5)(iii) does not necessarily require that the servicer inform the consumer of the address in writing; for example, when a consumer has called the servicer requesting a periodic statement, the servicer may inform the consumer of the address in that phone call with the consumer. Section 1026.41(e)(5)(iii) also provides that, if a servicer designates a specific address for opt-in and opt-out requests, it must designate the same address for both. Requiring the same address for opt-ins and opt-outs should reduce the potential for uncertainty or mistakes about which address consumers or their counsel should use for making requests.

41(e)(5)(iv) Timing of Compliance Following Transition

The Bureau is finalizing new § 1026.41(e)(5)(iv) to ensure that a servicer has a sufficient period of time to transition to providing a modified or an unmodified periodic statement in connection with a consumer's

[373] *See supra,* note 335–340.

[374] The Bureau acknowledges that, in some circumstances, the final rule may require a servicer to provide a periodic statement to a consumer who has not yet filed a statement of intention or bankruptcy plan and thus to a consumer who has not yet made clear an intent to retain or surrender the property. In this circumstance, however, courts have held that a periodic statement would be helpful to the consumer because it provides information that may be relevant to deciding whether to retain or surrender. *See, e.g., Connor* v. *Countrywide Bank NA (In re Connor),* 366 B.R. 133, 136, 138 (Bankr. D. Haw. 2007) (holding that debtor failed to state a claim for stay violation related to periodic statements received prior to chapter 13 plan confirmation).

[375] Fors Marsh Group, *Testing of Bankruptcy Periodic Statement Forms for Mortgage Servicing,* at 58 (Feb. 2016), *available at http://www.consumerfinance.gov/data-research/research-reports/testing-bankruptcy-periodic-statement-forms-mortgage-servicing/* (report on consumer testing submitted to the Bureau of Consumer Fin. Prot.).

bankruptcy case. Section 1026.41(e)(5)(iv)(A) specifies the three bankruptcy-related events that would cause a servicer to transition to providing a different form of periodic statement: (1) A mortgage loan becomes subject to the requirement to provide a modified periodic statement pursuant to § 1026.41(f); (2) a mortgage loan ceases to be subject to the requirement to provide a modified periodic statement pursuant to § 1026.41(f); or (3) a servicer ceases to qualify for an exemption pursuant to a § 1026.41(f) with respect to a mortgage loan.

Comment 41(e)(5)(iv)(A)–1 clarifies when a mortgage loan becomes, or ceases to be, subject to the requirements of § 1026.41(f). The comment states that a mortgage loan becomes subject to the requirements of § 1026.41(f) when, for example, any consumer who is on the mortgage loan becomes a debtor in bankruptcy or discharges personal liability for the mortgage loan. A mortgage loan may cease to be subject to the requirements of § 1026.41(f) when, for example, the consumer in bankruptcy reaffirms personal liability for a mortgage loan or the consumer's bankruptcy case is closed or dismissed without the consumer having discharged personal liability.

Comment 41(e)(5)(iv)(A)–2 clarifies when a servicer ceases to qualify for an exemption pursuant § 1026.41(e)(5)(i) with respect to a mortgage loan. The comment states that a servicer ceases to qualify for an exemption pursuant to § 1026.41(e)(5)(i) with respect to a mortgage loan when, for example, (1) the consumer's bankruptcy case is dismissed or closed; (2) the consumer files an amended bankruptcy plan or statement of intention that provides, as applicable, for the maintenance of payments due under the mortgage loan and the payment of pre-petition arrearage or that the consumer will retain the dwelling securing the mortgage loan; (3) the consumer makes a partial or periodic payment on the mortgage loan despite having filed a statement of intention identifying an intent to surrender the dwelling securing the mortgage loan, thus making § 1026.1(e)(5)(i)(B)(*4*) inapplicable; (4) the consumer in bankruptcy reaffirms personal liability for the mortgage loan; or (5) the consumer submits a written request pursuant to § 1026.41(e)(5)(ii) that the servicer continue providing a periodic statement.

Section 1026.41(e)(5)(iv)(B) provides that a servicer is exempt from the periodic statement requirements with respect to a single billing cycle if the payment due date for that billing cycle is no more than 14 days after the date on which an event listed in § 1026.41(e)(5)(iv)(A) occurs. Comment 41(e)(5)(iv)(B)–1 clarifies that this single-billing-cycle exemption applies only for the first billing cycle that occurs after an event listed in § 1026.41(e)(5)(iv)(A) occurs. The comment explains that, if a servicer is required to provide a periodic statement, the servicer must do so beginning with the next billing cycle, in accordance with the timing provisions of § 1026.41(e)(5)(iv)(C).

Section 1026.41(e)(5)(iv)(C) sets forth the timeframe within which a servicer must provide the next periodic statement after an event listed in § 1026.41(e)(5)(iv)(A) occurs. When one of the events listed in § 1026.41(e)(5)(iv)(A) occurs, a servicer must provide the next modified or unmodified periodic statement by delivering or placing it in the mail within a reasonably prompt time after the first payment due date, or the end of any courtesy period for the payment's corresponding billing cycle, that is more than 14 days after the date on which the applicable event listed in § 1026.41(e)(5)(iv)(A) occurs. Comment 41(e)(5)(iv)(C)–1 clarifies that delivering, emailing, or placing the periodic statement in the mail within four days after the payment due date or the end of the courtesy period generally would be considered reasonably prompt. Comment 41(e)(5)(iv)(C)–2 clarifies that § 1026.41(e)(5)(iv)(C) applies to the timing of only the first periodic statement or coupon book a servicer provides after one of the events listed in § 1026.41(e)(5)(iv)(A) occurs. For subsequent billing cycles, a servicer must provide a periodic statement in accordance with the timing requirements of § 1026.41(a)(2) and (b) (or § 1026.41(e)(3), in the case of a coupon book). Comment 41(e)(5)(iv)(C)–3 clarifies that § 1026.41(e)(5)(iv)(C) requires a servicer to provide a new coupon book after one of the events listed in § 1026.41(e)(5)(iv)(A) occurs only to the extent the servicer has not previously provided the consumer with a coupon book that covered the upcoming billing cycle. Section 1026.41(e)(iv)(C) and comments 41(e)(5)(iv)(C)–1 and 2 thus impose timing requirements that are similar to those in § 1026.41(b) and comment 41(b)–1 in the non-bankruptcy context.

Industry commenters expressed concern about a servicer's ability to transition to providing modified periodic statements that are both accurate and timely following a consumer's bankruptcy filing, stating that the transition could be particularly difficult if a servicer learns of the consumer's bankruptcy within just a few days before it was scheduled to provide the next periodic statement. Similarly, servicers expressed concern about their ability to timely provide an unmodified periodic statement after the close of a consumer's bankruptcy case. An industry commenter suggested that additional time is necessary because the National Mortgage Settlement requires certain servicers to perform an account reconciliation after the close of a consumer's chapter 13 case.

The Bureau believes § 1026.41(e)(5)(iv) provides an appropriate transition period for a servicer while also not unnecessarily disadvantaging a consumer. The Bureau therefore declines to adopt commenters' recommendations that the rule should uniformly allow a transition period until the second payment due date, of two billing cycles, or of 60 days. Under the final rule, a servicer will have more than 14 days before the first billing cycle due date for which it must provide the next periodic statement when a mortgage loan becomes subject to the requirement to provide a modified periodic statement, a mortgage loan ceases to be subject to the requirement to provide a modified periodic statement, or the servicer ceases to qualify for an exemption pursuant to § 1026.41(e)(5)(i). The Bureau notes that, in practice, the final rule will afford most servicers a longer transition period than 14 days because § 1026.41(b) states that providing a periodic statement is timely if it occurs within a reasonably prompt time after the close of any courtesy period.[376]

Other Issues Raised by Commenters

The Bureau declines to adopt commenters' suggestion to exempt a servicer from the periodic statement when a consumer is in chapter 12 bankruptcy or has a bankruptcy plan that reduces the outstanding amount of the mortgage loan to the value of the collateral—that is, a cram-down plan. The Bureau believes that such a consumer would benefit from the information contained in a periodic statement, including in particular the

[376] For example, a servicer with a courtesy period of 15 days would have at least 29 days (the 14-day period before the first payment due date plus the 15-day courtesy period) before it would be required to provide a periodic statement with the modification set forth in § 1026.41(f). At that point, the servicer would have to deliver the periodic statement within a reasonably prompt time. *See* 12 CFR 1026.41(b); comment 41(b)–1 (explaining that ''[d]elivering, emailing or placing the periodic statement in the mail within four days of the close of the courtesy period of the previous billing cycle generally would be considered reasonably prompt'').

disclosure of payments received and applied, as would any other consumer. As commenters noted, however, in this situation the consumer's payment obligations during bankruptcy may be tailored to that specific consumer, such as requiring payments seasonally to coincide with the consumer's harvest or reducing payments to the remaining secured portion of the loan. A servicer therefore could bear additional costs attempting to disclose those specific circumstances on a periodic statement. The Bureau believes that the additional costs may not be warranted given that those types of bankruptcy cases are relatively infrequent.[377] Accordingly, as suggested by some commenters and in order to reduce burden further, the final rule provides servicers with flexibility as to how to present the information on periodic statements sent to consumers with cram-down plans, as explained in more detail in the section-by-section analysis of § 1026.41(f).

The Bureau also declines to require a servicer to send a periodic statement to a trustee overseeing a consumer's bankruptcy case. Industry commenters objected to the burden of preparing and mailing statements to a trustee, as well as to potential costs related to ensuring that the periodic statement does not disclose any personal information to the trustee. Some commenters also noted that trustees are not uniformly interested in receiving periodic statements. The Bureau recognizes that some trustees would use periodic statements to monitor how servicers apply payments and acknowledges that the information contained on the periodic statement may otherwise be difficult for the trustee to obtain. Nonetheless, the Bureau declines to mandate that servicers provide periodic statements to bankruptcy trustees at this time, based on concern about the burden this could impose on servicers.

The Bureau also declines to adopt other recommendations some commenters made relating to the exemption, for example, that the Bureau should require additional notices to the consumer or consumer's counsel regarding the exemption.

Legal Authority

The Bureau is exercising its authority under sections 105(a) and (f) of TILA and section 1405(b) of the Dodd-Frank Act to exempt servicers from the requirement in section 128(f) of TILA to provide periodic statements for a mortgage loan in certain bankruptcy-related circumstances. For the reasons discussed above, the Bureau believes this exemption is necessary and proper under section 105(a) of TILA to facilitate compliance. In addition, consistent with section 105(f) of TILA and in light of the factors in that provision, the Bureau believes that imposing the periodic statement requirements for certain consumers in bankruptcy may not currently provide a meaningful benefit to those consumers in the form of useful information. Consistent with section 1405(b) of the Dodd-Frank Act, the Bureau also believes that the modification of the requirements in section 128(f) of TILA to provide this exemption is in the interest of consumers and in the public interest.

41(e)(6) Charged-Off Loans

Proposed § 1026.41(e)(6) would have exempted a servicer from the requirements of § 1026.41 for a mortgage loan charged off in accordance with loan-loss provisions, but only if the servicer would not charge any additional fees or interest on the account, and only after the servicer provided the consumer a periodic statement with various additional disclosures relating to the effects of charge off. For the reasons set forth below, the Bureau is adopting § 1026.41(e)(6)(i) as proposed but is revising the disclosures that must appear on the periodic statement that servicers must provide before exercising the exemption. As finalized, § 1026.41(e)(6)(ii) also contains provisions relating to when a servicer must resume compliance with the periodic statement requirement.

The periodic statement rule set forth in § 1026.41 requires the creditor, assignee, or servicer of a closed-end consumer credit transaction secured by a dwelling (a mortgage loan) to provide the consumer, for each billing cycle, a periodic statement meeting certain time, form, and content requirements.[378] The Bureau understands that a servicer, pursuant to certain accounting standards and at a creditor's direction, may be required to charge off a delinquent mortgage loan in accordance with applicable loan-loss provisions. Charge off is an accounting practice that indicates that the creditor or servicer no longer considers the mortgage loan to be an asset. However, charge off does not release the consumer from liability for the mortgage loan. In some cases, although the mortgage loan has been charged off, the underlying lien secured by the dwelling remains in place. Therefore, even after charge off, the credit transaction is still secured by a dwelling. As explained in the proposal, under § 1026.41, unless the lien is released, the periodic statement is required for all charged-off mortgage loans, regardless of whether the mortgage loan was charged off prior to the effective date of the rule, January 10, 2014.

In advance of the proposal, the Bureau understood that the servicing of charged-off mortgage loans may differ from the servicing of non-charged-off mortgage loans. A servicer's software, systems, and platforms may treat charged-off mortgage loans distinctly, such that providing a periodic statement for a charged-off mortgage loan may be more burdensome, and therefore more costly, than providing a periodic statement for a non-charged-off mortgage loan. The Bureau also understood, however, that, even after charge-off, a servicer may pass along various fees to the consumer, such as attorney's fees, court costs, filing fees, garnishment fees, property maintenance fees, taxes, insurance, and fees for maintaining the lien. In the proposal, the Bureau explained that, where a servicer continues to charge a consumer fees and interest, the periodic statement may provide significant value to the consumer. An important role of the periodic statement is to document fees and charges to the consumer; as long as such charges may be assessed, the consumer is entitled to receive a periodic statement.[379] In advance of the proposal, the Bureau considered concerns expressed about circumstances in which periodic statements should not be required and acknowledged that some circumstances could make providing a periodic statement more complicated. However, such circumstances are often precisely when a consumer most needs the periodic statement.

Balancing these considerations, the Bureau proposed § 1026.41(e)(6), which would have exempted servicers from the requirements of § 1026.41 for a mortgage loan that a servicer has charged off in accordance with loan-loss provisions, but only if the servicer would not charge any additional fees or interest on the account and would provide the consumer a periodic statement with specified disclosures within 30 days of charge off or the most recent periodic

[377] For example, that there was an average of approximately 545 chapter 12 cases filed nationwide annually between 2011 and 2014. *See* Administrative Office of the U.S. Courts, U.S. Bankruptcy Courts—Caseload Statistics Data Tables, *available at http://www.uscourts.gov/statistics-reports/caseload-statistics-data-tables*.

[378] For purposes of § 1026.41, the term servicer includes the creditor, assignee, or servicer, as applicable. 12 CFR 1026.41(a)(2).

[379] *See* 2013 TILA Servicing Final Rule, 78 FR 10901, 10960 (Feb. 14, 2013).

statement. Proposed comment 41(e)(6)–1 would have clarified the relationship between proposed §§ 1026.41(e)(6) and 1026.39, which requires certain disclosures upon the purchase, assignment, or transfer of a mortgage loan. Proposed comment 41(e)(6)–2 would have clarified when the obligation to provide periodic statements resumes under certain circumstances. The Bureau is adopting § 1026.41(e)(6) and comments 41(e)(6)–1 and –2 with several revisions from the proposal, as described below. Some of the revisions are substantive, while others are technical to improve clarity.

In the proposal, the Bureau sought comment on whether limiting the exemption for charged-off mortgage loans as proposed would be appropriate. Additionally, the Bureau sought comment on whether, with respect to mortgage loans that were charged off prior to the rule's effective date, the Bureau should provide servicers additional time to comply with either the proposed exemption for charged-off mortgage loans or the otherwise applicable periodic statement rule. Finally, the Bureau sought comment on whether there are alternatives to periodic statements for charged-off mortgage loans, such as an annual reminder to the consumer of a loan's status, including what might be the associated benefits to consumers and costs to servicers of such alternatives.

The Bureau received numerous comments on proposed § 1026.41(e)(6). Some industry commenters and consumer advocacy groups generally expressed support for the proposal. One trade association expressed particular support for the proposed requirement to have clear labeling on the proposed final periodic statement, arguing that it would help consumers understand what has happened to their debt and various implications thereof. A servicer expressed appreciation for the approach taken in the proposal, agreeing that providing periodic statements to consumers with charged-off loans would provide little benefit to consumers while posing significant costs to servicers.

Other commenters recommended various revisions to the proposal. A trade association and a servicer requested that servicers be allowed to amend the periodic statements provided under § 1026.41(e)(6) as to continuing liability when the debt has been discharged in bankruptcy. A commenter also requested that servicers should not be required to provide a periodic statement under § 1026.41(e)(6) if the consumer has sent the servicer a cease communication letter pursuant to section 805(c) of the FDCPA. A state trade association commented that, although the exemption under proposed § 1026.41(e)(6) is worthwhile, the exemption should not depend on whether the servicer will continue to charge any fees, as providing statements after charge off imposes a heavy burden, servicers may have no choice but to assess additional fees, and the servicer should not be required to forego collecting such fees to take advantage of the exemption. One servicer generally agreed with the proposed exemption from providing periodic statements for charged-off mortgage loans. However, the servicer indicated that the proposed requirements would require servicers to create and maintain a new periodic statement that differs from the existing periodic statements, which takes between 60 and 90 days to create. This servicer thus expressed a preference for providing a simple notice setting forth the relevant information instead of a periodic statement that must comply with the requirements of proposed § 1026.41(e)(6). Another servicer requested that the Bureau clarify whether the proposed commentary for when there is a change in ownership likewise applies when there is an assignment for collection but no change in ownership.

Consumer advocacy groups suggested that the Bureau should clarify certain required language on the periodic statement provided under § 1026.41(e)(6), stating that consumers will not clearly understand the meaning and implications of charge off. One consumer advocacy group stated that the periodic statement should clearly state that the charge off does not eliminate the consumer's liability and that a lien secured by the dwelling remains in place. This commenter also suggested that servicers should be required to provide an annual reminder of the loan's status with important information, until the loan is transferred, assigned, or foreclosed upon, or the borrower has successfully obtained loss mitigation.

Other consumer advocacy groups stated that the periodic statement provided under § 1026.41(e)(6) should not contain the label ''Final Statement,'' as proposed, because the periodic statement might not in fact be final if the servicer is later required to provide a periodic statement, for example, because it adds fees or interest to the account. These commenters recommended that the Bureau consider the following specific adjustments to the periodic statement following charge off: Delete any reference to finality; indicate that the creditor or future creditor can go back to charging interest and fees and collecting on the debt; include an explanation that the creditor must notify the borrower and resume statements before the creditor may recommence charging interest or fees; include an explanation of the prohibition on various charges accruing if collection activity resumes; and detail the right of resumption. Additionally, these consumer advocacy groups stated that the periodic statement should emphasize that later creditors who have not received the periodic statement may later resume retroactive collection efforts, suggesting that this practice could be problematic for some borrowers who, having not retained the final statement, would have no proof that the creditor cannot do so. Finally, these consumer advocacy groups recommended requiring servicers to provide additional statements about the charged-off mortgage loan as a reminder, perhaps every six months, but also suggested finalizing a rule that would permit the servicer to stop providing periodic statements if they mark the mortgage as satisfied and remove the lien on the property post-charge-off.

One credit union commenter opposed requiring servicers to provide a periodic statement with the modifications proposed under § 1026.41(e)(6), indicating that providing a periodic statement with the term ''Final Statement'' could be misleading to consumers because servicers may make attempts to recover the debt after charge off, for example, through foreclosure. This commenter recommended that a periodic statement should not contain this language and instead contain language stating that, if the balance due is not paid, the loan may be referred to foreclosure.

A trade association stated that loans that were charged off before the effective date of the proposed amendments should not be subject to any periodic statement requirements. The association commented that guidance the Bureau issued in 2013, clarifying that the Bureau expects servicers to provide periodic statements for mortgage loans after charge off, came too late during industry's implementation of the 2013 Mortgage Servicing Final Rules for vendors to integrate the systems changes to comply in advance of the 2014 effective date.

The Bureau is adopting § 1026.41(e)(6) with several revisions, as described below. As finalized, § 1026.41(e)(6)(i) provides that a servicer is exempt from the requirements of § 1026.41 for a mortgage loan if two conditions are met. First, under § 1026.41(e)(6)(i)(A), the servicer must have charged off the loan in accordance with loan-loss provisions and will not charge any additional fees or interest on the account. Second, under § 1026.41(e)(6)(i)(B), the servicer must provide, within 30 days of charge off or the most recent periodic statement, a periodic statement, clearly and conspicuously labeled ''Suspension of Statements & Notice of Charge Off—Retain This Copy for Your Records.'' Section 1026.41(e)(6)(i)(B) also requires that this periodic statement provide a clear and conspicuous explanation that, as applicable: The mortgage loan has been charged off and the servicer will not charge any additional fees or interest on the account; the servicer will no longer provide the consumer a periodic statement for each billing cycle; the lien on the property remains in place and the consumer remains liable for the mortgage loan obligation and any obligations arising from or related to the property, which may include property taxes; the consumer may be required to pay the balance on the account in the future, for example, upon sale of the property; the balance on the account is not being canceled or forgiven; and the loan may be purchased, assigned or transferred. Providing this periodic statement as required under § 1026.41(e)(6)(i)(B) will provide important consumer protections while relieving the burden on servicers associated with providing ongoing periodic statements under § 1026.41. The Bureau stresses that a servicer does not need to include any of the enumerated statements unless they apply to a particular consumer. For example, if a consumer has discharged personal liability for the mortgage loan through bankruptcy, the servicer would not need to include on the periodic statement an explanation that the consumer remains liable for the mortgage loan obligation.

The Bureau is finalizing proposed comment 41(e)(6)–2, but incorporating it in § 1026.41(e)(6)(ii) instead of finalizing it as a comment. Section 1026.41(e)(6)(ii) clarifies when a servicer must resume compliance with § 1026.41 after exercising the exemption under § 1026.41(e)(6)(i) and how a servicer must treat fees or interest that accrued while the exemption applied. Section 1026.41(e)(6)(ii)(A) states that, if a servicer fails at any time to treat the mortgage loan that is exempt under § 1026.41(e)(6)(i) as charged off or charges any additional fees or interest on the account, the obligation to provide a periodic statement pursuant to § 1026.41 resumes. Section 1026.41(e)(6)(ii)(B) states that a servicer may not retroactively assess fees or interest on the account for the period of time during which the exemption in § 1026.41(e)(6)(i) applied. As the Bureau explained in the proposal, if the servicer or covered person at any time no longer treats the mortgage loan as charged off, begins charging fees or interest on the account, or retroactively assesses fees or interest on the account, such conduct would contravene the purpose of the exemption from the otherwise applicable periodic statement requirement. As noted above, an important role of the periodic statement is to document fees and charges to the consumer. As long as such charges may be assessed, the consumer is entitled to receive a periodic statement.

The Bureau is adopting three comments to clarify the requirements of § 1026.41(e)(6). The Bureau is adopting comment 41(e)(6)–1 substantially as proposed but separating it into two separate comments to clarify a servicer's obligations when there is a change in ownership and separately when there is a change in servicing. Comment 41(e)(6)–1, as finalized, clarifies the relationship between §§ 1026.41(e)(6) and 1026.39, which requires certain disclosures upon the purchase, assignment, or transfer of a mortgage loan. The comment provides that, if a charged-off mortgage loan is subsequently purchased, assigned, or transferred, § 1026.39(b) requires a covered person, as defined in § 1026.39(a)(1), to provide a mortgage transfer disclosure.[380]

Comment 41(e)(6)–2, as finalized, clarifies a servicer's rights and obligations under § 1026.41(e)(6) when there is a change in servicing. The comment provides that a servicer may take advantage of the exemption in § 1026.41(e)(6)(i), subject to the requirements of that paragraph, and may rely on a prior servicer's provision to the consumer of the periodic statement required under § 1026.41(e)(6)(i)(B), unless the servicer provided the consumer a periodic statement pursuant to § 1026.41(a). As noted above, the substance of this comment appeared in the proposal as a portion of comment 41(e)(6)–1. The Bureau also notes that comment 41(e)(6)–2 refers to the rights and obligations of a servicer, whereas the proposal would have referred to a covered person who would otherwise be subject to the requirements of § 1026.41.

The Bureau is also adopting new comment 41(e)(6)(i)(B)–1 to clarify the ''clearly and conspicuously'' standard for purposes of § 1026.41(e)(6)(i)(B). The comment reiterates that the periodic statement required under § 1026.41(e)(6)(i)(B) must be clearly and conspicuously labeled ''Suspension of Statements & Notice of Charge Off—Retain This Copy for Your Records'' and that it must provide certain clear and conspicuous explanations to the consumer, as applicable, but no minimum type size or other technical requirements are imposed. Comment 41(e)(6)(i)(B)–1 further states that the clear and conspicuous standard generally requires that disclosures be in a reasonably understandable form and readily noticeable to the consumer. Finally, the comment refers to comment 41(c)–1, which discusses the same standard for the periodic statements more generally.

Section 1026.41(e)(6) differs from the proposal in four primary ways. First, the Bureau is revising the label that must appear clearly and conspicuously on the periodic statement provided under § 1026.41(e)(6). Section 1026.41(e)(6)(i) requires that the periodic statement that a servicer provides as a prerequisite to taking advantage of the exemption in § 1026.41(e)(6) be clearly and conspicuously labeled in bold print ''Suspension of Statements & Notice of Charge Off—Retain This Copy for Your Records.'' The proposal would have required the label to read, ''Final Statement—Retain This Copy for Your Records.'' As the Bureau explained in the proposal, consumers should be advised to retain this periodic statement provided under § 1026.41(e)(6) for record-keeping purposes, as they may need the information therein for tax or accounting purposes or to demonstrate the status of the loan to various parties. However, as some commenters noted, the proposed label may have misled consumers because a servicer might still refer the loan to foreclosure following charge-off and provide an additional statement at that time, or the periodic statement that the servicer provides under § 1026.41(e)(6)(ii) may not in fact have been the final periodic statement. For example, as § 1026.41(e)(6)(ii)(A) clarifies, a servicer must resume providing periodic statements to a consumer if a servicer later either fails to treat the mortgage loan as charged off or charges any additional fees or interest on the account. Therefore, § 1026.41(e)(6)(ii) and comment 41(e)(6)–1 no longer require a reference to the ''Final Statement'' as in the proposal.

[380] Section 1026.39(a)(1) defines a covered person as any person, as defined in 12 CFR 1026.2(a)(22), that becomes the owner of an existing mortgage loan by acquiring legal title to the debt obligation, whether through a purchase, assignment or other transfer, and who acquires more than one mortgage loan in any twelve-month period.

Second, a periodic statement provided under § 1026.41(e)(6) must provide two new disclosures that the proposal would not have required. First, the statement must explain that the servicer will no longer provide the consumer a periodic statement for each billing cycle. This disclosure should alert consumers that they will no longer receive these types of communications. Second, the statement must explain that the lien on the property remains in place and that the consumer remains liable for the mortgage loan obligation and any obligations arising from or related to the property, which may include property taxes. These additional disclosures may help consumers better understand the meaning and consequences of charge off, including the consumers' ongoing obligations with respect to the mortgage loan and the property. The Bureau is adopting the remaining disclosures as proposed. Together, the requisite disclosures offer consumers information to help them understand the meaning and consequences of charge off. The Bureau is including these disclosures to address commenters' concerns that consumers could misconstrue the charge off to mean that the mortgage loan obligation or lien has been released, or the debt forgiven, when in fact this is generally not the case.

Third, as explained above, the Bureau is revising proposed comment 41(e)(6)–2 and is incorporating it into § 1026.41(e)(6)(ii). Fourth, the Bureau is adopting new comment 41(e)(6)(i)(B)–1, to clarify the ''clearly and conspicuously'' standard for purposes of the label required under § 1026.41(e)(6)(i)(B). The Bureau believes that this comment will help servicers understand what the rule requires.

The Bureau is adopting § 1026.41(e)(6) to reduce the burden on servicers of otherwise having to provide a regular periodic statement on an ongoing basis and to also ensure that consumers still receive important information about the mortgage loan. Although the general periodic statement requirements in § 1024.41(a) through (d) provide important consumer protections, if a servicer will not charge any additional fees or interest on the account, the benefit to a consumer of receiving a regular periodic statement may be minimal, and there will be potential for increased costs passed on to consumers.

The Bureau has narrowly tailored the exemption from the requirements of § 1026.41. As noted above, the exemption applies only to mortgage loans that have been charged off in accordance with loan-loss provisions and only if the servicer will not charge any additional fees or interest on the account. Additionally, the exemption requires that the servicer provide the consumer the periodic statement required under § 1026.41(e)(6)(i) with specific disclosures. The Bureau believes that limiting the exemption in this fashion reduces the risk that this exemption will be used to circumvent the servicing rules.

The Bureau declines to adopt other amendments to the disclosures required by § 1026.41(e)(6)(i)(B) that commenters recommended, including, among others, adding an explanation of possible future fees or interest, or the consumer's right of redemption. Generally, the periodic statement required under § 1026.41(e)(6)(i) is not the appropriate vehicle for these or other recommended disclosures. The Bureau is concerned that including these additional disclosures could overload the consumer with information. Moreover, additional disclosures are likely to increase compliance costs.

The Bureau also declines to adopt one commenter's recommendation to remove the predicate that servicers may take advantage of the exemption under § 1026.41(e)(6) only if they do not charge any additional fees or interest on the account. The commenter stated that providing periodic statements after charge off imposes a heavy burden on servicers, servicers may have no choice but to assess fees, and servicers should not be required to forego collecting such fees to take advantage of the exemption. As the Bureau explained in the 2013 TILA Servicing Final Rule, in determining the disclosures that a general periodic statement must contain, the Bureau aimed to allow periodic statements to serve a variety of important purposes, including informing consumers of their payment obligations, providing information about the mortgage loan, and creating a record of transactions that increase or decrease the outstanding balance.[381] The Bureau continues to believe that periodic statements should serve these purposes and allowing servicers to charge additional fees or interest without providing a periodic statement to disclose such fees or interest would not accomplish this end. Consumers cannot adequately protect their interests if they are not aware that their mortgage loan is accruing interest or fees.[382]

The Bureau also declines to allow servicers to provide a simple written notification setting forth relevant information in place of a periodic statement, as one industry commenter recommended. The commenter stated that § 1026.41(e)(6) will require servicers to create and maintain a new and different periodic statement, and that the new periodic statement could take several months to create. The Bureau acknowledges that servicers using the exemption under § 1026.41(e)(6) will incur some additional costs to create and maintain a periodic statement with the additional disclosures required under § 1026.41(e)(6). However, the Bureau is not mandating that servicers discontinue providing periodic statements for charged-off mortgage loans as § 1026.41(e)(6) allows. Rather, servicers will have the option to take advantage of the exemption. The Bureau also notes that the periodic statement required under § 1026.41(e)(6)(i) would not significantly differ from the periodic statement otherwise provided under § 1026.41 except that it would include additional disclosures related to the charge off. Further, although a simple written notification may contain some relevant information appropriate for consumers, the Bureau believes that including the required additional disclosures on the periodic statement under § 1026.41(e)(6) will be clearer for consumers and create a single record for the consumer to retain.

The Bureau also declines to require servicers to provide borrowers with semi-annual or annual periodic statements following the periodic statement provided under

[381] 78 FR 10901, 10959, (Feb. 14, 2013).

[382] As explained in the proposal, the exemption under § 1026.41(e)(6) is similar to existing § 1026.5(b)(2)(i), which provides an exemption for certain charged-off accounts from the periodic statement requirement in § 1026.7 for open-end credit transactions. Section 1026.5(b)(2)(i) states, in relevant part, that ''[a] periodic statement need not be sent for an account . . . if the creditor has charged off the account in accordance with loan-loss provisions and will not charge any additional fees or interest on the account. . . .'' 12 CFR 1026.5(b)(2)(i). In finalizing this exemption under § 1026.5(b)(2)(i), the Board weighed the costs and benefits and determined that ''the value of a periodic statement does not justify the cost of providing the disclosure because the amount of a consumer's obligation will not be increasing,'' while reiterating that ''this provision does not apply if a creditor has charged off the account but continues to accrue new interest or charge new fees.'' 74 FR 5244, 5276 (Jan. 29, 2009). The Bureau continues to agree with the Board's reasoning and believes that a similar analysis applies with respect to the proposed exemption from the periodic statement requirement in § 1026.41 for a mortgage loan that a servicer has charged off in accordance with loan-loss provisions if the servicer will not charge any additional fees or interest on the account. However, because closed-end consumer credit transactions secured by a dwelling are distinct from unsecured, open-end credit transactions by virtue of the underlying lien, the Bureau also believes that it is appropriate to impose additional requirements in this context.

§ 1026.41(e)(6)(ii). The Bureau believes that, on balance, the additional cost to servicers of tracking the appropriate timeframes and providing these additional periodic statements outweighs the potential benefit to consumers of receiving these statements.

The Bureau also declines to adopt one commenter's recommendation that servicers should not be required to provide a periodic statement if the consumer has sent a cease communication letter pursuant to 805(c) of the FDCPA. As noted in the Bureau's October 2013 Servicing Bulletin, periodic statements are specifically mandated by the Dodd-Frank Act, which makes no mention of their potential cessation under the FDCPA and presents a more recent and specific statement of legislative intent regarding these disclosures than does the FDCPA. Moreover, the Bureau believes that the periodic statements provide useful information to consumers regardless of their collections status. Finally, the Bureau notes that nothing in § 1026.41(e)(6) affects a debt collector's obligations under the FDCPA, including, for example, the requirement to provide the consumer a written validation notice under section 809 of the FDCPA.

Further, the Bureau declines to offer an exemption from the requirement to provide periodic statements for mortgage loans that were charged off before this final rule's effective date. As the Bureau indicated in the proposal, under the current rule, the periodic statement is required for charged-off mortgage loans unless the lien is released. For charged-off mortgage loans, if a servicer wishes to take advantage of the new exemption in § 1026.41(e)(6), the servicer must comply with the requirements of that section and provide, within 30 days of the most recent periodic statement, a periodic statement that meets the requirements of § 1026.41(e)(6)(i).

Legal Authority

The Bureau is exempting from the periodic statement requirement under section 128(f) of TILA a mortgage loan that a servicer has charged off in accordance with loan-loss provisions if the servicer will not charge any additional fees or interest on the account, provided that the servicer must provide the consumer a periodic statement under § 1026.41(e)(6) within 30 days of charge off or the most recent periodic statement. The Bureau is adopting this exemption pursuant to its authority under section 105(a) and (f) of TILA and section 1405(b) of the Dodd-Frank Act.

For the reasons discussed above, the Bureau believes that the exemption is necessary and proper under section 105(a) of TILA to facilitate TILA compliance. As discussed above, the Bureau believes that the proposal to exempt certain mortgage loans that a servicer has charged off facilitates compliance with TILA by allowing servicers to service loans cost effectively in compliance with applicable regulatory requirements.

In addition, consistent with section 105(f) of TILA and in light of the factors in that provision, for servicers that are required to charge off mortgage loans in accordance with loan-loss provisions, the Bureau believes that requiring them to comply with the periodic statement requirement in section 128(f) of TILA would not provide a meaningful benefit to consumers in the form of useful information or protection. The Bureau believes, as noted above, that requiring provision of periodic statements would impose significant costs and burden. Specifically, the Bureau believes that the requirement will not complicate, hinder, or make more expensive the credit process. In addition, consistent with section 1405(b) of the Dodd-Frank Act, for the reasons discussed above, the Bureau believes that exempting a mortgage loan that a servicer has charged off in accordance with loan-loss provisions if the servicer will not charge any additional fees or interest on the account, provided that the servicer must provide the consumer a periodic statement under § 1026.41(e)(6) within 30 days of charge off or the most recent periodic statement, from the requirements of section 128(f) of TILA would be in the interest of consumers and in the public interest.

In addition, the Bureau relies on its authority pursuant to section 1022(b) of the Dodd-Frank Act to prescribe regulations necessary or appropriate to carry out the purposes and objectives of Federal consumer financial law, including the purposes and objectives of Title X of the Dodd-Frank Act. Specifically, the Bureau believes that this final rule is necessary and appropriate to carry out the purpose under section 1021(a) of the Dodd-Frank Act of ensuring that all consumers have access to markets for consumer financial products and services that are fair, transparent, and competitive, and the objective under section 1021(b) of the Dodd-Frank Act of ensuring that markets for consumer financial products and services operate transparently and efficiently to facilitate access and innovation.

41(f) Modified Periodic Statements and Coupon Books for Certain Consumers in Bankruptcy

Currently, § 1026.41(e)(5) exempts servicers from the requirement to provide a periodic statement for a mortgage loan while a consumer is a debtor in bankruptcy. (Except where noted specifically, the section-by-section analyses of § 1026.41(f), including this overview and the analyses of § 1026.41(f)(1) through (4), use the term periodic statement to refer to both a periodic statement and a coupon book that meets the requirements of § 1026.41(e)(3).) As discussed in the section-by-section analysis of § 1026.41(e)(5), the proposal would have limited that exemption to a specified set of consumers who are in bankruptcy or have discharged personal liability for a mortgage loan through bankruptcy. Further, proposed § 1026.41(f) would have specified that, when no exemption under § 1026.41(e)(5) applied, servicers may make various clarifications and modifications to the periodic statement requirements with respect to those consumers. For the reasons set forth below, the Bureau is adopting § 1026.41(f) largely as proposed, but with some substantive revisions.

As discussed in greater detail in the section-by-section analysis of § 1026.41(e)(5), the Bureau sought comment in the October 2013 IFR as to how the content of a periodic statement might be tailored to meet the particular needs of consumers in bankruptcy. The Bureau received written comments in response to that solicitation during the official comment period. Prior to issuing the proposal, the Bureau continued to receive comments and consulted with servicers, trade groups, consumer advocacy groups, bankruptcy attorneys, bankruptcy trustees, and bankruptcy judges regarding how a periodic statement may be tailored for purposes of bankruptcy, including hosting a roundtable discussion on June 16, 2014. The Bureau already addressed these comments and outreach efforts in the proposal; [383] the discussion below generally addresses only the comments the Bureau received after issuing the proposal.

The Bureau received comments relating to various elements of proposed § 1026.41(f). Comments specific to particular subsections are summarized in the relevant section-by-section analyses below.

Some consumer advocacy groups and industry commenters addressed more

[383] 78 FR 74175, 74246–74251 (Dec. 15, 2014).

generally proposed § 1026.41(f). They expressed general support for the proposed modifications to the periodic statement requirement. One consumer advocacy group stated that consumers and their attorneys would benefit from being able to ensure that the servicer is correctly applying payments. Other consumer advocacy groups expressed strong support for the proposal, stating that receiving disclosures regarding pre-petition and post-petition payments would resolve concerns about misapplication of payments and consumer understanding of their bankruptcy obligations. A trade association stated that the proposed amendments would protect credit unions from liability related to automatic stay violations.

The Bureau also received numerous comments from members of industry stating directly or indirectly that complying with proposed § 1026.41(f) would be costly and burdensome. Some credit unions stated that credit unions in particular would not be able to manage the level of detail that the proposal would have required. Other industry commenters stated that servicers in general would have difficulty accurately making the proposed disclosures. Several commenters stated that complying with the proposed modifications would require systems updates. Some of these commenters stated that the modified periodic statements would provide little corresponding benefit to consumers, for example, because the consumer can obtain the information from other sources, such as a bankruptcy trustee.

Having considered the comments it received following the proposal, the Bureau is adopting § 1026.41(f) with the revisions discussed below. In general, the Bureau believes that it is appropriate to modify or omit certain of the disclosures required by § 1026.41(d) with respect to a periodic statement provided to a consumer in bankruptcy or who has discharged the mortgage loan through bankruptcy. As explained in more detail in the section-by-section analyses of § 1026.41(f)(1) through (3), the Bureau believes that the final rule's modifications and omissions are necessary to ensure that a periodic statement takes into account the unique circumstances of bankruptcy and accurately reflects the payments made by a consumer in bankruptcy. The Bureau further believes that it is appropriate to require certain modifications to the periodic statement specifically for consumers who have filed under chapter 12 or chapter 13, in part because of the special treatment of mortgage loans secured by a consumer's principal residence under chapter 12 and chapter 13, which permit a consumer to repay pre-bankruptcy arrearages over a reasonable time while continuing to make monthly periodic payments due under the loan.[384]

Thus, as explained in more detail in respective section-by-section analyses below, § 1026.41(f)(1) through (5) set forth various requirements for these modified periodic statements. Briefly stated, § 1026.41(f)(1) permits the periodic statement to omit certain delinquency information that would otherwise be required under § 1026.41(d) when the consumer is in bankruptcy. Section 1026.41(f)(2) requires all periodic statements modified under § 1026.41(f) to include certain informational disclosures about the bankruptcy. Section 1026.41(f)(3) sets forth various specific modifications to the periodic statement when the consumer is in chapter 12 or chapter 13 bankruptcy. Section 1026.41(f)(4) describes how a servicer complies with § 1026.41(f) when there is more than one primary obligor. And § 1026.41(f)(5) sets forth certain requirements when the servicer provides a coupon book under § 1026.41(e)(3) instead of a periodic statement.

Under revised § 1026.41(f), these requirements apply while any consumer on a mortgage loan is a debtor in bankruptcy under title 11 of the United States Code or if such consumer has discharged personal liability for the mortgage loan pursuant to 11 U.S.C. 727, 1141, 1228, or 1328. This modifies the proposal to clarify that, where applicable, § 1026.41(f) applies only while such consumer is a debtor in bankruptcy or has discharged personal liability for the mortgage loan. Once the bankruptcy case ends, § 1026.41(f) no longer applies unless the consumer has discharged personal liability for the mortgage loan.[385]

The Bureau is also adopting proposed comments 41(f)–1 through –3 with revisions to improve clarity. The Bureau is renumbering proposed comment 41(f)–3 as comment 41(f)–4 because the Bureau is finalizing a new comment as comment 41(f)–3. The Bureau is also adopting new comments 41(f)–5 and –6.

The Bureau received no comments on proposed comment 41(f)–1 but is revising it to improve clarity. As revised, the comment provides that, except as provided in § 1026.41(e)(5), § 1026.41(f) applies with regard to a mortgage loan for which any consumer with primary liability is a debtor in a case under title 11 of the United States Code. The comment further states that, after the debtor exits bankruptcy, § 1026.41(f) continues to apply if the consumer has discharged personal liability for the mortgage loan, but § 1026.41(f) does not apply if the consumer has reaffirmed personal liability for the mortgage loan or otherwise has not discharged personal liability for the mortgage loan.

The Bureau received few comments on proposed comment 41(f)–2, which generally would have allowed servicers some flexibility to use different terminology on a periodic statement than that found on the sample form in appendix H–30. A servicer supported the proposal to allow flexibility in modifying the terminology on a periodic statement. In the context of § 1026.41(f)(3), some trade associations stated more generally that they support express flexibility to revise the terminology relating to the payment amount. However, another servicer suggested that the proposed comment used an example that would create challenges for some consumers in chapter 12 bankruptcy. The proposed comment would have stated that a servicer may, for example, refer to amounts past due as unpaid post-petition payments, and the commenter stated that some chapter 12 debtors may not have monthly post-petition payment obligations, so consumers would not benefit from receiving a modified periodic statement under § 1026.41(f).

Having considered these comments, the Bureau is adopting comment 41(f)–2 substantially as proposed, with several revisions to improve clarity by better aligning the comment with the terminology used on the sample periodic statement provided in appendix H–30, as well as with terminology that consumer testing participants more readily understood. As revised, comment 41(f)–2 provides that, with regard to a periodic statement provided under § 1026.41(f), a servicer may use terminology other than that found on the sample periodic statements in appendix H–30, so long as

[384] *See* 11 U.S.C. 1222(b)(5), 1322(b)(5) (both stating that a plan ''may provide for the curing of any default within a reasonable time and maintenance of payments while the case is pending on any unsecured claim or secured claim on which the last payment is due after the date on which the final payment under the plan is due.''). Under chapter 12, moreover, a court may modify the terms of a mortgage loan secured by a principal residence. 11 U.S.C. 1222(b)(2).

[385] *See also* the section-by-section analysis of § 1026.41(e)(5). Under the final rule, § 1026.41(e)(5)(iv)(B) and comment 41(e)(5)(iv)(B)–1 and –2 set forth guidelines for resuming the obligation to provide a periodic statement or coupon book under § 1026.41 without the modifications set forth in § 1026.41(f) when the bankruptcy case is dismissed, the case is closed, or the consumer reaffirms the mortgage loan pursuant to 11 U.S.C. 524.

the new terminology is commonly understood. The comment refers to comment 41(d)–3, which includes similar language with respect to periodic statements generally. Comment 41(f)–2 also provides a non-exhaustive list of examples. The list includes examples that also appear on the new sample forms in appendices H–30(E) and H–30(F). Comment 41(f)–2, as finalized, does not include several examples that were in the proposal; the Bureau believes the examples provided in the final rule are more appropriate than the proposed examples with respect to the final sample forms. The Bureau does not intend for these changes to alter the meaning of the comment.

Comment 41(f)–2 explains that, for purposes of § 1026.41(f)(1) through (3), servicers may use terminology specific to the circumstances of bankruptcy. This approach is consistent with that of existing comment 41(d)–3, which provides similar flexibility on periodic statements generally with respect to, for example, regional differences in terminology. Some industry commenters stated that courts sometimes disfavor terms such as ''amount due,'' ''payment due date,'' and ''overdue'' or ''past due payments,'' as those terms call to mind an attempt to collect a debt; court decisions have occasionally focused on the precise language of the terms used on a periodic statement.[386] The Bureau also believes that the need to distinguish between pre-petition and post-petition payments in a chapter 13 case may require different terminology than that used on other periodic statements. Although many testing participants expressed a preference for the more-familiar terms ''amount due'' or ''due date'' that normally appear on periodic statements and other bills,[387] the consumer testing on sample forms demonstrated that consumers generally understood alternative terminology. Testing also suggested that some consumers prefer more technical, bankruptcy-specific language.[388] As to one commenter's concern that proposed comment 41(f)–2 would have offered an example that would create challenges for some consumers in chapter 12 bankruptcy, the Bureau notes that comment 41(f)–2 is designed to afford servicers greater flexibility, within certain limitations. If the specific language offered as an example is not appropriate in a certain context, a servicer does not need to use that language.

The Bureau is adopting a new comment, finalized as comment 41(f)–3, to clarify that the requirements of § 1026.41, including the content and layout requirements of § 1026.41(d), apply unless modified expressly by § 1026.41(e)(5) or (f). For example, as described in more detail in the section-by-section analysis of § 1026.41(d)(3), the disclosure of past payment breakdown information is already in § 1026.41(d)(3) and need not be restated in § 1026.41(f). The comment clarifies that the requirement under § 1026.41(d)(3) to disclose a past payment breakdown applies without modification with respect to a periodic statement provided to a consumer in bankruptcy.

The Bureau is adopting proposed comment 41(f)–3 but is renumbering the comment as 41(f)–4. The Bureau sought comment on whether the proposed comment may afford servicers too little or too much flexibility with respect to the required content of a periodic statement. A servicer supported additional flexibility in modifying the periodic statement requirements under § 1026.41(f). The Bureau is finalizing the comment as proposed. The comment provides that a periodic statement or coupon book provided under § 1026.41(f) may be modified as necessary to facilitate compliance with title 11 of the United States Code, the Federal Rules of Bankruptcy Procedure, court orders, and local rules, guidelines, and standing orders. The comment provides an example: A periodic statement or coupon book may include additional disclosures or disclaimers not required under § 1026.41(f) but that are related to the consumer's status as a debtor in bankruptcy or that advise the consumer how to submit a written request under § 1026.41(e)(5)(i)(B)(*1*) that the servicer cease providing a periodic statement or coupon book.

As explained in the proposal, servicers may need flexibility to modify the periodic statement's content to comply with applicable rules and guidelines. The Bureau understands that many local bankruptcy rules already impose certain requirements regarding periodic statements, and the Bureau believes that servicers should be able to comply with both those rules and Regulation Z. The Bureau further believes that giving servicers the flexibility to include disclosures related to a consumer's status in bankruptcy is important and necessary to permit servicers to comply with local practice or rules.

The Bureau is adopting new comment 41(f)–5 to clarify the timing of compliance with § 1026.41(f), when applicable. The comment states that a servicer must begin to provide a periodic statement or coupon book that complies with § 1026.41(f) within the timeframe set forth in § 1026.41(e)(5)(iv).[389]

41(f)(1) Requirements Not Applicable

For the reasons set forth below, the Bureau is adopting § 1026.41(f)(1) substantially as proposed, with minor revisions. Generally stated, the provision allows a periodic statement for consumers in bankruptcy to omit certain information about a consumer's failure to make timely payments. The provision also explains that such a periodic statement need not show the amount due more prominently than other disclosures on the page.

Section 1026.41(d) requires a periodic statement to disclose information related to a consumer's failure to make timely payments. Section 1026.41(d)(1)(ii) sets forth one such disclosure, requiring a periodic statement to include the amount of any late fee and the date on which the fee will be imposed if payment has not been received. Section 1026.41(d)(8) requires that a periodic statement include certain information for consumers who are 45 days or more delinquent on a mortgage loan. Specifically, current § 1024.41(d)(8)(i), (ii), and (v) require the disclosure of the date on which the consumer became delinquent; a notification of possible risks, such as foreclosure and expenses, that may be incurred if the delinquency is not cured; and a notice of whether the servicer has made the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process, if applicable. Section 1026.41(d) also contains certain layout requirements, including the requirement in § 1026.41(d)(1)(iii) that the amount due be displayed more prominently than other disclosures on the page.

Proposed § 1026.41(f)(1) would have provided that certain of § 1026.41(d)'s

[386] *See, e.g., In re Draper,* 237 B.R. 502, 505–06 (Bankr. M.D. Fla. 1999) (statement listed the ''total amount due''); *Butz* v. *People First Fed. Credit Union (In re Butz),* 444 B.R. 301, 305 (Bankr. M.D. Pa. 2011) (statement requested immediate payment of an ''amount due''); *Harris* v. *Mem'l Hosp. (In re Harris),* 374 B.R. 611, 61461 (Bankr. N.D. Ohio 2007) (statement advised that the ''account is past due'').

[387] Fors Marsh Group, *Testing of Bankruptcy Periodic Statement Forms for Mortgage Servicing,* at 53–54 (Feb. 2016), *available at http://www.consumerfinance.gov/data-research/research-reports/testing-bankruptcy-periodic-statement-forms-mortgage-servicing/* (report on consumer testing submitted to the Bureau of Consumer Fin. Prot.).

[388] *Id* at 58.

[389] *See* section-by-section analysis of § 1026.41(e)(5)(iv) for more detail.

disclosures and layout requirements do not apply to a periodic statement provided to consumers in bankruptcy under proposed § 1026.41(f). The proposal would have further provided that servicers may exclude the disclosures set forth in § 1026.41(d)(1)(ii) and (d)(8)(i), (ii), and (v), and that servicers do not need to comply with § 1026.41(d)(1)(iii)'s requirement to display the amount due more prominently than other disclosures on the page.

The Bureau solicited comment on whether these modifications would be appropriate and whether additional modifications are necessary. The Bureau also solicited comment on whether the proposed modifications or additional modifications would be necessary if the Bureau required a consumer in chapter 7 or chapter 11 (or a consumer who has discharged personal liability for the mortgage loan through bankruptcy) to opt in to receiving a periodic statement by submitting a written request to a servicer.

A servicer and a trade association expressed support for the proposal. A chapter 13 trustee recommended that the final rule retain § 1026.41(d)(7)(i)'s requirement to disclose the outstanding principal balance, while some trade associations stated that the final rule should clarify that servicers are permitted to disclose the outstanding principal balance according to contractual accounting methods. The final rule does not require a servicer to use any particular accounting method when calculating the outstanding principal balance, so long as the servicer accurately discloses this amount.

Consumer advocacy groups expressed limited support for aspects of proposed § 1026.41(f)(1). They stated that § 1026.41(f)(1) should not apply after the bankruptcy case closes and the consumer continues making payments on the mortgage loan—that is, it should not apply to consumers who use chapter 7 to discharge personal liability but continue making payments on the mortgage after bankruptcy so that they can keep the property (the ride-through option). These consumer advocacy groups asserted that the delinquency information, such as the late fee disclosure, is no different from any other contractual term and that they were unaware of any case law holding that delinquency information violates the discharge injunction. Thus, the consumer advocacy groups stated that consumers who use the ride-through option should receive a periodic statement with all the normal information, including delinquency information, following bankruptcy.

Several comments addressed whether servicers should be required to disclose late fee and past due amount information. Consumer advocacy groups initially stated that it may be appropriate to allow servicers to omit information about a late fee for chapter 13 consumers because some servicers do not charge late fees for payments disbursed by chapter 13 trustees. Upon reviewing the consumer testing report, some consumer advocacy groups stated definitively that the Bureau should require the disclosure that a late fee will be charged if payment is not received by the specified date.

Some trade associations stated that the Bureau should either require a late fee disclosure when applicable or make clear that the final rule does not prohibit a servicer from including one on a periodic statement provided to a consumer in bankruptcy. Two trade associations commented that § 1026.41(f)(1) should also allow a servicer to exclude past due amounts from the amount due on a periodic statement provided to a consumer in chapter 7 because including them could be seen as a collection attempt that violates the automatic stay. This commenter suggested that servicers be given the flexibility to list past due amounts elsewhere on a periodic statement, such as in the explanation of amount due or a separate box.

The Bureau is finalizing § 1026.41(f)(1) substantially as proposed. For consumers in bankruptcy or who have discharged personal liability for a mortgage loan through bankruptcy, § 1026.41(f)(1) permits servicers to omit from the periodic statement the amount of any late payment fee that will be imposed and the date on which that fee will be imposed if payment has not been received. These disclosures would normally be required under § 1026.41(d)(1)(ii). Section 1026.41(f)(1) also permits servicers to omit for these consumers the delinquency-related disclosures set forth in § 1024.41(d)(8)(i), (ii), and (v)—that is, the length of the consumer's delinquency; a notification of possible risks, such as foreclosure and expenses, that may be incurred if the delinquency is not cured; and a notice of whether the servicer has made the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process, if applicable. Finally, § 1026.41(f)(1) states that, for these consumers, the requirement in § 1026.41(d)(1)(iii) to show the amount due more prominently than other disclosures on the page does not apply.

The Bureau continues to believe that receiving information regarding the consequences of late payments or continued delinquencies, such as disclosures regarding potential fees and possible foreclosure, provides tangible benefits to consumers. Indeed, consumer testing suggested that some consumers prefer to receive information about the delinquency, including the consequences of non-payment.[390] Moreover, the Bureau continues to believe that a consumer in bankruptcy may already be aware of the consequences of non-payment and may have filed for bankruptcy precisely to avoid those consequences. Nonetheless, as the Bureau acknowledged in the proposal, bankruptcy courts have found that certain statements regarding potential late fees or foreclosure and other language that could be construed as threatening consequences for a failure to make payments could, in certain instances, violate the automatic stay. The Bureau is therefore permitting servicers to exclude from the periodic statement certain information regarding consequences of late payment or continued non-payment. The final rule, however, does not prohibit a servicer from including these disclosures.

Consistent with the flexibility the Bureau is affording servicers in modifying the periodic statement as necessary, discussed above, the Bureau also believes it is appropriate to give servicers the flexibility to include other disclosures, such as a disclaimer acknowledging the consumer's bankruptcy case and advising that the statement is for informational purposes only, as the most prominent disclosures on the page. The Bureau notes that the amount due disclosures required by § 1026.41(d)(1) must still be located at the top of the first page of the statement.

The Bureau declines to adopt a rule that would provide that § 1026.41(f)(1) does not apply for consumers using the ride-through option. Such a rule would allow servicers to omit certain disclosures while the consumer is in bankruptcy but require it again after the bankruptcy case closes. The Bureau believes that consumers using the ride-through option would benefit from receiving the disclosures and that section 524(j) of the Bankruptcy Code may allow servicers the freedom to include information about the

[390] Fors Marsh Group, *Testing of Bankruptcy Periodic Statement Forms for Mortgage Servicing,* at 56 (Feb. 2016), *available at http://www.consumerfinance.gov/data-research/research-reports/testing-bankruptcy-periodic-statement-forms-mortgage-servicing/* (report on consumer testing submitted to the Bureau of Consumer Fin. Prot.)

consequences of non-payment on a periodic statement following a consumer's discharge. However, the Bureau understands that chapter 7 cases often last six months or less, and it may be operationally difficult and burdensome for servicers to switch to yet a third version of the periodic statement following bankruptcy. Finally, while § 1026.41(f)(1) allows servicers to omit certain disclosures from the periodic statement, the final rule does not, as noted above, prohibit a servicer from including them. The Bureau encourages those servicers that currently include such information on a periodic statement without violating the automatic stay or discharge injunction during or after bankruptcy to continue doing so.

The Bureau further continues to believe that the remainder of the delinquency disclosures required by § 1026.41(d)(8)—that is, § 1026.41(d)(8)(iii), (iv), (vi), and (vii)—may be appropriate for consumers in a chapter 7 or chapter 11 case and for consumers who have discharged personal liability for a mortgage loan. For example, references to any loss mitigation program to which the consumer has agreed [391] or to homeownership counselor information [392] do not relate to amounts owed, nor do they threaten consequences for non-payment. No commenter specifically identified this information as problematic and none cited case law indicating that providing it would cause a servicer to violate the automatic stay. The Bureau finds particularly instructive the comments submitted by the U.S. Trustee Program, which did not identify any automatic stay concerns related to this delinquency information.

Additionally, the Bureau continues to believe that consumers in chapter 7 or chapter 11 bankruptcy (or those who have discharged personal liability for a mortgage loan through bankruptcy) who are intending to retain their homes have a need for information regarding recent account activity [393] and the amount needed to bring the loan current.[394] As the Bureau stated in the 2013 TILA Servicing Final Rule, the accounting associated with mortgage loan payments is complicated and can be even more so in delinquency situations.[395] The account history helps a consumer better understand the exact amount owed on the loan and how that total was calculated, and it enables a consumer to better identify errors in payment application. Moreover, the Bureau understands that many housing counselors believe that this information is vital when trying to assist a consumer to pursue home retention options and cure prior defaults because it enables the counselor to understand the circumstances of a consumer's delinquency. The Bureau continues to believe that this information may have unique benefits for a consumer in bankruptcy because such a consumer may be facing an immediate decision whether to retain or surrender a home and in that situation the consumer needs accurate information about the amount the consumer owes.

The Bureau further notes that the disclosures in § 1026.41(d)(8) do not require a servicer to use any specific language. A servicer is therefore permitted to describe those disclosures in any number of ways to avoid concerns about, for example, the account history appearing to be a collection attempt rather than simply providing useful information.

For similar reasons, the Bureau declines to adopt a recommendation to allow servicers to exclude past due amounts from the amount due. The Bureau believes that providing such information to a consumer who is retaining the property through bankruptcy would be helpful, would not violate the automatic stay, and is consistent with some servicers' current practices. The Bureau further notes that participants in the Bureau's consumer testing overwhelmingly preferred and found clearer periodic statements which included past due amounts in the amount due. Some testing participants had difficulty determining how much they needed to pay to retain their homes when past due amounts were listed separately.

41(f)(2) Bankruptcy Notices

Proposed § 1026.41(f)(2) would have required that a periodic statement modified under § 1026.41(f) include the following on the first page: (1) A statement identifying the consumer's status as a debtor in bankruptcy or the discharged nature of the mortgage loan, and (2) a statement that the periodic statement is for informational purposes only. Two industry commenters expressed support for § 1026.41(f)(2) as proposed. No commenters opposed proposed § 1026.41(f)(2). The Bureau is adopting the proposed disclosures, with revisions.

The Bureau sought comment on whether servicers should be permitted to include the disclosures under proposed § 1026.41(f)(2) on a separate page enclosed with the periodic statement, whether the disclosures under proposed § 1026.41(f)(2) should be permissive rather than mandatory, and whether there are other appropriate disclosures that should be permitted or required. A servicer stated that the disclosures in proposed § 1026.41(f)(2) should be mandatory and included on the first page of the periodic statement. A trade association expressed support for requiring the proposed disclaimers when the debtor requests in writing to continue to receive a periodic statement.

As revised, § 1026.41(f)(2) requires the periodic statement to include a statement identifying the consumer's status as a debtor in bankruptcy or the discharged nature of the mortgage loan, and a statement that the periodic statement is for informational purposes only. The Bureau understands that this requirement is consistent with the practice of servicers that currently provide a periodic statement to consumers in bankruptcy. Consumer testing participants generally understood the content of these disclosures.[396] Most testing participants also inferred from the language that appears on the sample forms in appendices H–30(E) and H–30(F) that the sample forms were informational in nature rather than primarily an attempt to collect a debt.[397]

Although a servicer recommended that the disclosures be included on the first page of the periodic statement, the Bureau is not adopting that proposed requirement. Servicers may locate the statements on the first page if they wish, but doing so may not be feasible or appropriate in some circumstances. Section 1026.41(f)(2) therefore grants servicers flexibility to determine how to include the relevant disclosures.

41(f)(3) Chapter 12 and Chapter 13 Consumers

For the reasons set forth below, the Bureau is finalizing § 1026.41(f)(3) with several revisions. As proposed, § 1026.41(f)(3) generally would have set forth additional modifications for a periodic statement provided to consumers in chapter 12 or chapter 13 cases. Proposed § 1026.41(f)(3)(i) would have permitted the omission of certain disclosures relating to delinquency.

[391] 12 CFR 1026.41(d)(8)(iv).

[392] 12 CFR 1026.41(d)(8)(vii).

[393] 12 CFR 1026.41(d)(8)(iii).

[394] 12 CFR 1026.41(d)(8)(vi).

[395] 78 FR 10901, 10971 (Feb. 14, 2013).

[396] Fors Marsh Group, *Testing of Bankruptcy Periodic Statement Forms for Mortgage Servicing,* at 13 (Feb. 2016), *available at http://www.consumerfinance.gov/data-research/research-reports/testing-bankruptcy-periodic-statement-forms-mortgage-servicing/* (report on consumer testing submitted to the Bureau of Consumer Fin. Prot.).

[397] *Id.* at 13–14.

Proposed § 1026.41(f)(3)(ii) through (v) would have described how a periodic statement for a consumer in chapter 12 or chapter 13 bankruptcy may disclose the amount due, explanation of amount due, past payment breakdown, and transaction activity. Proposed § 1026.41(f)(3)(vi) would have required the periodic statement to include specific information about the pre-petition arrearage. Proposed § 1026.41(f)(3)(vii) would have required several additional standard bankruptcy-specific disclosures on the periodic statement. The comments on each of these specific aspects of the proposal are discussed in the respective section-by-section analyses below.

The Bureau also received comments relating generally to § 1026.41(f)(3). Consumer advocacy groups, a chapter 13 trustee, and the U.S. Trustee Program generally supported the proposal regarding modified periodic statements for consumers in bankruptcy. These commenters noted servicers' history of misapplying payments in bankruptcy and argued that requiring pre-petition and post-petition disclosures would discourage improper fees and improve servicing practices.

Numerous credit unions and trade associations objected to the entirety of the proposal, arguing that it would introduce too much burden for credit unions. The commenters stated that credit unions' systems are not equipped to modify a periodic statement as proposed § 1026.41(f)(3) would have required, so they would bear significant implementation costs. Commenters stated that, for example, some credit unions may track the amount of the pre-petition arrearage and post-petition payments ''off-system,'' that is, in a manner that is not readily automated or cannot be exported onto a periodic statement. These comments were consistent with comments the Bureau had received on the IFR, in which commenters stated that some servicers may be tracking pre-petition arrearage and post-petition payments in an Excel file or in another format that could not be exported easily to a periodic statement and some simply wait until the end of the consumer's bankruptcy case and compare the chapter 13 trustee's ledger to payments they received. Comments on the proposal stated that, no matter the method by which credit unions track the pre-petition arrearage and post-petition payments, most credit unions currently cannot easily export the pre-petition and post-petition information into a monthly statement. Additionally, one commenter stated that credit unions' systems currently are not equipped to produce numerous different versions of periodic statements in order to comply with various local rules and orders in individual cases. Several commenters stated that their systems currently cannot differentiate between pre-petition and post-petition payments and the proposed modifications under § 1026.41(f)(3) would pose challenges.

Other industry commenters similarly objected to proposed § 1026.41(f)(3) in its entirety as unworkable in light of systems limitations and the complexity of chapter 13 bankruptcy cases. One commenter stated that servicing platforms have limited functionality with respect to pre-petition and post-petition payments, and that attempting to reconcile accurately payments from the consumer and the trustee would be exceedingly difficult.

The Bureau also received comments relating to accounting methods for consumers in bankruptcy and how proposed § 1026.41(f)(3) would affect servicers' accounting practices. Some industry commenters, including banks, trade associations, and an industry working group, stated that the proposal was inconsistent with their accounting practices. Some commenters stated that proposed § 1026.41(f)(3) would have inappropriately mandated that servicers adhere to a bankruptcy accounting method, under which the servicer applies post-petition periodic payments received to the current month and pre-petition arrearage payments are the only amounts allocated to the amount that is past due as of the bankruptcy filing. Commenters stated that, in practice, servicers generally use the contractual accounting method, under which they apply all payments to the oldest outstanding debt as is normally done under the contract.

Servicers generally requested that the Bureau provide them flexibility to make disclosures under § 1026.41(f)(3) based on either method. A servicer provided a mock-up of a periodic statement that includes the contractual accounting method on page one and the bankruptcy accounting method on page two. Some commenters recommended requiring certain information relating to the bankruptcy on the second page only after a proof of claim is filed and only when the information is relevant to the consumer, such as when the consumer is curing a pre-petition arrearage and maintaining post-petition obligations. A commenter also stated that consumers who were current on the mortgage loan when they filed for bankruptcy are better served by a contractual statement than the modified statement under § 1026.41(f). One servicer stated that, because it currently employs contractual accounting, the proposal to break down how post-petition payments are applied to principal, interest, and escrow could confuse consumers. One commenter stated that consumers may not understand how transactions are applied due to differences in trustees' and servicers' accounting methods. A trade association argued that requiring disclosure of pre-petition and post-petition payments could be interpreted as requiring disclosure of how funds will be applied even before the servicer applies them. Some commenters objected to requiring disclosures under § 1026.41(f)(3), saying that servicers do not know how trustees will apply payments in advance, and servicers will be unable to match the trustee's accounting on a real-time basis.

Consumer advocacy groups and the U.S. Trustee Program favored the bankruptcy accounting method. Consumer advocacy groups stated that consumers might be confused by a periodic statement that did not take into account the consumer's status in bankruptcy because, for example, it might list late fees that normally would be charged to a consumer who is behind on a mortgage payments but that would be inappropriate to impose on a consumer who is making timely chapter 13 plan payments. In addition, they stated that bankruptcy accounting is preferable because it shows the amounts the consumer is obligated to pay while in bankruptcy, as well as how those payments are applied. Consumer advocacy groups also stated that bankruptcy accounting is required under applicable bankruptcy law. They further stated that Fannie Mae and Freddie Mac already require servicers to track payments according to the terms of a chapter 13 plan.

Some commenters opposed requiring a periodic statement to be sent when the consumer has a cram-down bankruptcy plan—that is, the plan provides, for example, that the outstanding amount of the loan will be reduced to the value of the collateral—because it would be difficult to capture accurately all aspects of the cram-down and that servicers would need to prepare the periodic statement manually. These commenters also stated that most cram-downs are unsuccessful and that servicers would have to revert to the contractual application of payments following bankruptcy. These commenters offered three suggestions with respect to mortgage loans subject to a cram-down plan: Exempt servicers from the periodic statement requirement with respect to such loans; permit servicers to send an unmodified periodic statement; or permit servicers to send a periodic statement that discloses the amounts due and past payments related to only the remaining secured portion of the loan.

Several commenters requested clarification of the definition of pre-petition and post-petition payments proposed in comment 41(f)(3)–2. A servicer stated that the proposed comment could be interpreted to mean that there can be no pre-petition or post-petition payments after a bankruptcy filing and before there is a confirmed plan. The servicer stated this interpretation could create a circumstance in which no information about the payments would be required in bankruptcy statements. The servicer recommended that the Bureau require a periodic statement to include the best information reasonably available to servicers.

The Bureau notes that some trade associations requested clarification that servicers have the flexibility to adjust information disclosed on a periodic statement based on information they receive from trustees or through the National Data Center. These trade associations stated that servicers may need to determine how to apply payments made through trustees if the treatment is not readily apparent. The Bureau notes that the final rule does not prohibit a servicer from adjusting its records based on information it obtains from a trustee or other sources, including the National Data Center. The final rule does not, however, require a servicer to consult these sources before providing a periodic statement.

The Bureau is adopting § 1026.41(f)(3) with the revisions discussed below and in the section-by-section analyses of § 1026.41(f)(3)(i) through (vi). Section 1024.41(f)(3) generally sets forth additional modifications for a periodic statement provided to consumers in chapter 12 or chapter 13 cases.

The Bureau acknowledges that servicers will incur costs and burden to implement § 1026.41(f)(3) in particular. Nevertheless, the Bureau is adopting § 1026.41(f)(3) because of the benefits to consumers. As explained in the section-by-section analysis of § 1026.41(e)(5), consumers in chapter 12 and chapter 13 bankruptcy generally benefit from receiving the information in a periodic statement; consumer testing [398] and consumer complaint information indicate that consumers generally want to receive a periodic statement; and bankruptcy courts, the Advisory Committee on Bankruptcy Rules, and Congress have recognized that debtors need mortgage loan information. The modifications under § 1026.41(f)(3) balance burden reduction on servicers and consumers' access to crucial information by tailoring the disclosures to account for a chapter 12 or chapter 13 bankruptcy case.

The Bureau is revising certain aspects of § 1026.41(f)(3) to reduce some of the implementation burden. For example, as explained in the section-by-section analysis of § 1026.41(f)(3)(iv), the final rule does not modify the requirements of § 1026.41(d)(3) with respect to a periodic statement provided to consumers in chapter 12 or chapter 13 as proposed § 1026.41(f)(3)(iv) would have done. Servicers are not required to alter how they disclose their method of applying payments for purposes of providing a periodic statement to a consumer in bankruptcy. Moreover, not all information must appear on the first page and some information may be omitted.[399] A servicer may choose to include additional information on a periodic statement, including bankruptcy-specific information, such as descriptions of agreed orders or additional details about post-petition payments, even if such information is not required by § 1026.41.

The Bureau is adopting several comments to § 1026.41(f)(3). The Bureau is not finalizing proposed comment 41(f)(3)–1 but is adopting proposed comments 41(f)(3)–2 through –4 with revisions. As proposed, comment 41(f)(3)–1 would have clarified that the term plan of reorganization, for purposes of § 1026.41(f)(3), refers to a consumer's plan of reorganization filed under the applicable provision of chapter 12 or chapter 13 of the Bankruptcy Code and confirmed by a court with jurisdiction over the consumer's bankruptcy case. The Bureau proposed this comment to help avoid any confusion about the meaning of the term plan of reorganization and whether the term refers to a proposed plan or one that has been confirmed by a court. The Bureau is not adopting proposed comment 41(f)(3)–1 because the final rule uses the term bankruptcy plan, and the Bureau does not believe that term needs to be clarified for purposes of § 1026.41(f).

The Bureau is revising proposed comment 41(f)(3)–2 and renumbering the comment as 41(f)(3)–1. The comment contains two parts. First, comment 41(f)(3)–1.i is similar to the proposal but contains revisions to improve clarity. It provides that, for purposes of § 1026.41(f)(3), pre-petition payments are payments made to cure the consumer's pre-bankruptcy defaults, and post-petition payments are payments made to satisfy the mortgage loan's periodic payments as they come due after the bankruptcy case is filed. The comment provides an illustrative example.

Second, the Bureau is adopting new 41(f)(3)–1.ii to gives servicers flexibility with respect to chapter 12 cases and cram-down plans. The comment provides that, if a consumer is a debtor in a case under chapter 12 or if a consumer's bankruptcy plan modifies the terms of the mortgage loan, such as by reducing the outstanding balance of the mortgage loan or altering the applicable interest rate, the disclosures under § 1026.41(d)(1) and (2) and (f)(3)(ii) and (iii) may disclose either the amount payable under the original terms of the mortgage loan, the amount payable under the remaining secured portion of the adjusted mortgage loan, or a statement that the consumer should contact the trustee or the consumer's attorney with any questions about the amount payable. The comment further provides that, in such cases, the remaining disclosures under § 1026.41(d) or (f)(3), as applicable, may be limited to how payments are applied to the remaining secured portion of the adjusted mortgage loan. The Bureau is adopting this comment to accommodate industry commenters' request for flexibility when a consumer has a cram-down plan, given that the plans are atypical. Although it is important for consumers with such plans to receive a periodic statement (as explained in the section-by-section analysis of § 1026.41(e)(5)), consumers with cram-down plans may better understand a periodic statement disclosing the terms of the portion of either the modified or unmodified mortgage loan, depending on the specific terms of the plan.

The Bureau is adopting proposed comment 41(f)(3)–3 without revision but renumbering it as comment 41(f)(3)–2. This comment clarifies the distinction between fees and charges imposed before the bankruptcy case was filed and those imposed after filing. It provides that, for purposes of § 1026.41(f)(3), post-petition fees and charges are those fees and charges

[398] *Id.* at 13, 33, 51.

[399] *See, e.g.,* comment 41(d)–2 (providing that a periodic statement may omit information that is not applicable to the mortgage loan); comment 41(f)(2)–4 (providing that a periodic statement or coupon book provided under § 1026.41(f) may be modified as necessary to facilitate compliance with title 11 of the United States Code, the Federal Rules of Bankruptcy Procedure, court orders, and local rules, guidelines, and standing orders); comment 41(f)(3)(v)–1 (explaining that a servicer may omit pre-petition arrearage information until the servicer has a reasonable opportunity to determine the amount of the pre-petition arrearage, but providing that the servicer may not omit the pre-petition arrearage after the deadline the bankruptcy court has fixed for filing a proof of claim).

imposed after the bankruptcy case is filed. The comment further states that, to the extent that the court overseeing the consumer's bankruptcy case requires such fees and charges to be included as an amendment to a servicer's proof of claim, a servicer may include such fees and charges in the balance of the pre-petition arrearage under § 1026.41(f)(3)(v)(C) rather than treating them as post-petition fees and charges for purposes of § 1026.41(f)(3).

The Bureau is also adopting proposed comment 41(f)(3)–4 substantially as proposed, renumbered as comment 41(f)(3)–3, with revisions for clarity and to indicate the renumbering of certain regulatory provisions referenced in the comment. The comment addresses the disclosures that must be made on the first modified periodic statement provided to a consumer under proposed § 1024.41(f)(3) after an exemption under § 1026.41(e) expires. The comment states that § 1026.41(f)(3)(iii) through (v) requires, in part, the disclosure of certain information regarding account activity that has occurred since the last statement. For purposes of the first periodic statement provided to the consumer following termination of an exemption under § 1026.41(e), those disclosures regarding account activity that has occurred since the last statement may be limited to account activity since the last payment due date that occurred while the exemption was in effect. The comment includes a reference to comment 41(d)–5, which includes similar language addressing the disclosures that servicers must make on the first unmodified periodic statement provided to a consumer after an exemption under § 1026.41(e) terminates.

41(f)(3)(i) Requirements Not Applicable

For the reasons set forth in the proposal, the Bureau is adopting § 1026.41(f)(3)(i) as proposed. Section 1026.41(f)(3)(i) provides that, in addition to omitting the information set forth in § 1026.41(f)(1), the periodic statement may also omit the information set forth in § 1026.41(d)(8)(iii), (iv), (vi), and (vii), which relate generally to a consumer's account history, loss mitigation, the total payment amount needed to bring the account current, and homeownership counselor information.

Consumer advocacy groups opposed permitting servicers to exclude information about the consumer's account history if the confirmed plan of reorganization provides for maintenance of payments and the servicer contends that the consumer has failed to maintain the post-petition payments. The commenters stated that, for unknown reasons, servicers have recently permitted some debtors to remain delinquent on post-petition payments for months or years without providing notification to debtors, their attorneys, or chapter 13 trustees. To combat this problem, the commenters recommended that the periodic statement disclose the date on which the consumer became delinquent on post-petition payments and an account history listing past due post-petition payments.

As the Bureau explained in the proposal, requiring a periodic statement to include the delinquency information in § 1026.41(d)(8)(iii), (iv), (vi), and (vii) could be confusing or of little value to consumers in a chapter 13 case. Information related to pre-bankruptcy defaults may not be helpful, and in fact may be confusing, to a consumer whose bankruptcy plan is designed to repay those defaults over time. Moreover, industry commenters stated that a consumer who fails to make several plan payments will likely face immediate consequences in bankruptcy, such as a trustee's motion to dismiss or a servicer's motion for relief from the automatic stay, and the delinquency information in these disclosures may serve less value in that scenario. The Bureau acknowledges that information related to post-petition defaults could be helpful to consumers, and the Bureau encourages servicers that currently provide such information to continue doing so, but the Bureau is concerned about the additional burden a requirement to provide these disclosures could impose on servicers. Accordingly, § 1026.41(f)(3)(i) provides that a servicer may omit the delinquency information required by current § 1026.41(d)(8).

41(f)(3)(ii) and (iii) Amount Due and Explanation of Amount Due

For the reasons set forth in the proposal and those explained below, the Bureau is adopting § 1024.41(f)(3)(ii) and (iii) substantially as proposed, with revisions to improve clarity. Thus, § 1026.41(f)(3)(ii) and (iii) respectively modify the amount due and explanation of amount due disclosures, required under § 1026.41(d)(1) and (2), for purposes of periodic statements provided to consumers in chapter 12 or chapter 13 bankruptcy.

Under § 1026.41(d)(1), a periodic statement must disclose, among other things, the payment due date and the amount due. Section 1026.41(d)(2) requires disclosure of an explanation of amount due, including: (1) The monthly payment amount, with a breakdown showing how much, if any, will be applied to principal, interest, and escrow; (2) the total sum of any fees or charges imposed since the last statement; and (3) any payment amount past due. Section 1026.41(f)(3)(ii) and (iii) of the final rule generally provides that these amount due and explanation of amount due disclosure may be limited to the monthly post-petition payments due under the mortgage loan and any post-petition fees or charges imposed since the last periodic statement. Generally stated, comments 41(f)(3)(ii)–1 and (iii)–1 clarify, in part, that these disclosures would not be required to include the amounts of any payments on account of a consumer's pre-petition arrearage or that are due under a court order.

The Bureau solicited comment on whether the explanation of amount due should include a breakdown of the amount of the monthly payment that will be applied to principal, interest, and escrow or whether a more limited disclosure is appropriate, such as listing the monthly payment as a lump sum or listing the principal and interest as a combined figure with the escrow amount disclosed separately. Additionally, the Bureau requested comment on whether a servicer should be permitted or required to include post-petition fees and charges in the amount due disclosure.

Consumer advocacy groups submitted a comment expressing strong support for the proposal's requirement that the explanation of amount due break down the principal, interest, escrow, and fees and charges (as is currently required for non-bankruptcy periodic statements under § 1026.41). The commenters reasoned that the disclosures will enable debtors, their attorneys, and chapter 13 trustees to detect when servicers fail to properly apply payments in accordance with bankruptcy law and the underlying mortgage contract.

Numerous industry commenters supported aspects of § 1026.41(f)(3)(ii) and (iii) while also suggesting changes. One servicer supported disclosing post-petition information, as well as the amount of the arrearage balance. A trade organization and two servicers supported limiting the amount due disclosure under § 1026.41(f)(3)(ii) to the post-petition payment and any fees and charges, instead of including any pre-petition amounts. Another servicer agreed that the amount due disclosure should include post-petition payments but stated that attempting to collect fees and charges without court approval could violate the automatic stay. In contrast, another servicer stated that the National Mortgage Settlement requires disclosure of fees and charges during bankruptcy, that it is industry practice to collect them as they are incurred, and that bankruptcy law does not prohibit this. One servicer requested that the Bureau clarify in comment 41(f)(3)(ii)–1 that compliance with Federal Rule of Bankruptcy Procedure 3002.1(c) is not a prerequisite for disclosing a post-petition fee or charge in the explanation of amount due disclosure under § 1026.41(f)(3)(iii). One servicer stated that it does not object to disclosing the amount of overdue payments in the explanation of amount due but requested flexibility.

Several other industry commenters stated that the amount due disclosure should not include any past due amounts that became due and unpaid during the bankruptcy case. Some of these commenters stated that, when consumers make the post-petition payments to a trustee, there is often a delay before the trustee forwards the payment to the servicer, and, as a result, periodic statements may inaccurately show the consumer as behind on payments. One commenter added that repayment of past due amounts is often resolved through a court-approved agreed order, which may be inconsistent with the periodic statement's amount due disclosure. Another commenter stated that periodic statements under § 1026.41(f) would be for informational purposes only, and that disclosing payment of an amount in default may be a collection effort inconsistent with the bankruptcy proceeding.

These industry commenters also stated that seeking payment of past due post-petition amounts could violate the automatic stay. They recommended limiting the amount due disclosure to the current monthly payment and permitting servicers to identify past due amounts elsewhere in the statement—either in the explanation of amount due disclosure under § 1026.41(f)(3)(iii) or in a separate box for outstanding post-petition payments. A servicer suggested placing the amount due disclosure with a disclaimer that the periodic statement is not an attempt to collect a debt.

Several commenters stated that servicers' systems cannot currently differentiate between pre-petition and post-petition payments. One servicer stated that its systems can track post-petition payments but currently cannot translate the information into a periodic statement. A credit union stated that its systems currently cannot limit the amount due disclosure to reflect only post-petition payments as proposed. A servicer similarly stated that it would have to alter its systems to allow the amount due disclosure to contain only post-petition payments.

Numerous industry commenters also argued that principal and interest should be permitted to be disclosed as a lump sum in the explanation of amount due disclosure under § 1026.41(f)(3)(iii). Some commenters stated that, because servicers apply payments to the oldest outstanding debt, consumers will be confused if the principal-interest breakdown of a payment due in one month differs from how that payment is actually applied in the following month. One servicer also stated that breaking down principal and interest could complicate reporting requirements to loan owners because servicers must apply or remit payments according to the underlying contract. Another servicer stated that, because it currently applies payments received to the oldest outstanding debt, the proposal to break down how post-petition payments are applied to principal, interest, and escrow could result in consumer confusion. A trade association opposing a breakdown of principal, interest, and escrow stated that, if such a breakdown is required, the Bureau should require the most detailed breakdown possible, given concerns about violating the FDCPA's prohibition against making false, deceptive, or misleading representations.

One servicer stated that the breakdown of principal and interest may not match the trustee's records because servicers may not be able to discern how the trustee allocates payments. That servicer also stated that allowing the disclosure of principal and interest components in a lump sum would also ensure that the periodic statement discloses escrow and fees separately. Some trade associations argued that such a lump sum disclosure offers the consumer the necessary information, the amount of the required post-petition maintenance payment and the balance of the pre-petition arrearage. One commenter stated that consumers would still receive disclosure of the actual application of funds in the past payment breakdown section under proposed § 1026.41(f)(3)(iv). One servicer stated that a rule requiring servicers to disclose a breakdown of principal and interest is inconsistent with the Bankruptcy Code and Bankruptcy Rules.

The U.S. Trustee Program stated that removing a breakdown of principal, interest, taxes, and insurance would render the periodic statements less helpful. Consumer advocacy groups and a chapter 13 trustee indicated strong support for breaking down the payments into these constituent parts, saying that it would help consumers and attorneys monitor for payment application errors.

Several commenters recommended that, if the Bureau does require periodic statements to disclose a breakdown of principal and interest, the breakdown should disclose how a servicer is applying payments according to the terms of the mortgage loan agreement, rather than according to bankruptcy accounting. These commenters stated that, while they track separately pre-petition and post-petition payments, they actually apply and remit funds to the investor in accordance with the mortgage loan agreement. They added that, if the debtor fails to complete all payments and the case is dismissed, the servicer is to apply the payments as if the bankruptcy case never occurred. Some trade associations stated that, if the Bureau requires the past payment breakdown to identify principal and interest, the breakdown should include all payments received, not just post-petition payments.

One servicer commented that the proposal did not address certain product types, such as payment option loans. The servicer requested clarification as to whether it could continue to provide periodic statements disclosing the various payment options consistent with the sample form in appendix H–30(C), or whether it would be appropriate to provide such a consumer with statements that disclose only the minimum payment option.

The Bureau is adopting § 1026.41(f)(3)(ii) and (iii) substantially as proposed, with revisions to improve clarity. Thus, § 1026.41(f)(3)(ii) provides that the amount due information set forth in § 1026.41(d)(1) may be limited to the date and amount of the post-petition payments due and any post-petition fees and charges imposed by the servicer.

Comment 41(f)(3)(ii)–1 clarifies the amounts that must be included in the amount due and the amounts that may be included in the amount due at a servicer's discretion. The comment provides that the amount due under § 1026.41(d)(1) is not required to include any amounts other than post-petition payments the consumer is required to make under the terms of the bankruptcy plan, including any past due post-petition payments, and post-petition fees and charges that a servicer has imposed. The comment further provides that the servicer is not required to include in the amount due any pre-petition payments due under the bankruptcy plan or other amounts payable pursuant to a court order. The comment further provides that the servicer is not required to include in the amount due any post-petition fees and charges that the servicer has not imposed. The comment explains that a servicer that defers collecting a fee or a charge until after complying with the Federal Rule of Bankruptcy Procedure 3002.1 procedures, and thus after a potential court determination on whether the fee or charge is allowed, is not required to disclose the fee or charge until complying with such procedures. The comment concludes by explaining that a servicer may include in the amount due other amounts due to the servicer that are not post-petition payments or fees or charges, such as amounts due under an agreed order, provided those other amounts are also disclosed in the explanation of amount due and transaction activity.

Section 1026.41(f)(3)(iii) similarly provides that the explanation of amount due information set forth in § 1026.41(d)(2) may be limited to the following: (1) The monthly post-petition payment amount, including a breakdown showing how much, if any, will be applied to principal, interest, and escrow; (2) the total sum of any post-petition fees or charges imposed since the last statement; and (3) any post-petition payment amount past due. Comment 41(f)(3)(iii)–1 clarifies the amounts that must be included in the explanation of amount due and the amounts that may be included in the explanation amount due at a servicer's discretion. The comment provides that the explanation of amount due under § 1026.41(d)(2) is not required to include any amounts other than the post-petition payments, including the amount of any past due post-petition payments, and post-petition fees and charges that a servicer has imposed. The comment further clarifies that, consistent with § 1026.41(d)(3)(i), the post-petition payments must be broken down by the amount, if any, that will be applied to principal, interest, and escrow. The comment states that the servicer is not required to disclose, as part of the explanation of amount due, any pre-petition payments or the amount of the consumer's pre-bankruptcy arrearage. Finally, the comment clarifies that, however, a servicer may identify other amounts due to the servicer provided those amounts are also disclosed in the amount due and transaction activity. The comment includes a reference to new comment 41(d)–4, which explains certain disclosure requirements if the consumer has agreed to a temporary loss mitigation program.

The Bureau continues to believe that it is appropriate to allow servicers to limit the amount due and explanation of amount due disclosures to include only post-petition payments and any fees and charges that the servicer is attempting to collect from the consumer during the bankruptcy case. In addition to the reasons provided by commenters, as the Bureau explained in the proposal, the Bureau understands that some local rules adopted by bankruptcy courts that address periodic statements provide that the statements should reflect the post-petition payments, and that these local rules would not require a servicer to include pre-petition payments or amounts due under a court order in the amount due field.[400] Accordingly, § 1026.41(f)(2)(ii) and (iii) requires a servicer to include post-petition payments in the amount due and explanation of amount due, including any past due post-petition payments, but does not require a servicer to include pre-petition payments that may be due under the bankruptcy plan.

The Bureau declines to adopt the recommendation of several industry commenters to allow servicers to omit past due post-petition amounts from the amount due and explanation of amount due and, for example, to permit servicers to include these amounts elsewhere on a periodic statement. As explained above in the section-by-section analysis of § 1026.41(f)(1), the Bureau believes that it is important for consumers to understand the full amounts they need to pay to stay current on the periodic payments, which, in the chapter 12 and chapter 13 context, include post-petition payments. Consumer testing participants preferred and found clearer sample forms that included past due post-petition amounts in the amount due and explanation of amount due.

The Bureau also is requiring the explanation of amount due to contain a breakdown of how much, if any, of the post-petition payment will be applied to principal, interest, and escrow, as would normally be required under § 1026.41(d)(2)(i). Although, as some commenters suggested, there may be some discrepancy between the principal-interest allocation in the amount to be paid one month and how that payment was actually applied in the following month, the Bureau notes that this prospect is not unique to bankruptcy consumers—it may arise any time a consumer is delinquent and pays less than the full outstanding amount. Moreover, consumer testing suggested that many consumers in bankruptcy find a breakdown of principal and interest helpful.[401] Further, the Bureau believes that the potential for some confusion is outweighed by the benefits of disclosing the breakdown of the post-petition payments by principal, interest, and escrow. As the Bureau explained in the proposal, this breakdown is intended to give a consumer a snapshot of why the consumer is being asked to pay the amount due. Without an explanation of, for example, the amount attributable to escrow, a consumer and the consumer's attorney may be unable to discern how a servicer calculated the amount due.

Some national trade associations asked that, if the rule required a principal-interest breakdown, the final rule should expressly endorse contractual accounting. The Bureau does not believe it is necessary or appropriate in this context to define how servicers should apply payments they receive from consumers in bankruptcy. Section 1026.41 imposes disclosure requirements; it does not establish accounting methods. Nonetheless, servicers must accurately disclose how they are applying payments, whether they use contractual or bankruptcy accounting.

As explained in the proposal, the Bureau believes that consumers, including those in bankruptcy, benefit from learning of fees and charges that have been imposed on their account. This information assists consumers' efforts to budget their finances and timely pay fees and charges. The Bureau further believes that servicers also benefit from fees or charges being disclosed on the periodic statement because it aids them in collecting the fees and charges quickly. The Bureau acknowledges the concern raised in comments that servicers should be permitted to disclose the fees and charges first to a bankruptcy court through the procedures set forth in Federal Rule of Bankruptcy Procedure 3002.1. Under the final rule, if a servicer defers collecting a fee or charge until after complying with the Federal Rule of Bankruptcy Procedure 3002.1 procedures, the servicer is not required to disclose the fee or charge until it has already complied with those procedures. To ensure that consumers

[400] The Bureau proposed under § 1026.41(f)(3)(vi) to require disclosures relating to a consumer's pre-petition arrearage. As described in the section-by-section analysis of § 1026.41(f)(3)(v), the Bureau renumbered that provision. Thus, the contents of § 1026.41(f)(3)(vi) relating to the date of post-petition delinquency are entirely new.

[401] Fors Marsh Group, *Testing of Bankruptcy Periodic Statement Forms for Mortgage Servicing,* at 39–40 (Feb. 2016), *available at http://www.consumerfinance.gov/data-research/research-reports/testing-bankruptcy-periodic-statement-forms-mortgage-servicing/* (report on consumer testing submitted to the Bureau of Consumer Fin. Prot.)

receive timely notice of such fees or charges, § 1026.41(f)(2)(iii) requires a servicer to include in the explanation of amount due the total sum of any post-petition fees or charges imposed since the last periodic statement.

With respect to payment option loans, the Bureau notes that a servicer may display the amount due and the explanation of amount due in the form and manner set forth in the sample form in appendix H–30(C). The sample forms tailored to consumers in bankruptcy, found at appendices H–30(E) and H–30(F) of the proposal and final rule, are intended to provide examples of how a servicer may comply with § 1026.41(f). The Bureau understands that certain product types may necessitate displaying the mortgage loan in a different manner.

41(f)(3)(iv)

The Bureau is not adopting § 1026.41(f)(3)(iv) as proposed. For the reasons described below, the Bureau is adopting the contents it proposed under § 1026.41(f)(3)(v), renumbered as § 1026.41(f)(3)(iv).

Past Payment Breakdown as Proposed

As proposed, § 1026.41(f)(3)(iv) would have provided that periodic statements under § 1026.41(f) must disclose the past payment breakdown, limited to the total of post-petition payments received and a breakdown of how those funds were applied. The Bureau has determined that it is not necessary to modify the requirements of § 1026.41(d)(3) for purposes of a periodic statement provided to a consumer in a chapter 12 or chapter 13 bankruptcy case. Section 1026.41(d)(3) therefore applies to such periodic statements without modification. As explained in the relevant section-by-section analyses, proposed § 1026.41(f)(3)(v) is adopted as revised at § 1026.41(f)(3)(iv).

The Bureau solicited comment on whether the past payment breakdown should include a breakdown of the amount of the post-petition payments that were applied to principal, interest and escrow, or whether a more limited disclosure is appropriate, such as listing the amounts applied as a lump sum or listing the principal and interest as a combined figure with the escrow amount broken out separately. Consumer advocacy groups and the U.S. Trustee Program supported the proposal, stating that it would allow consumers, their attorneys, and trustees to identify payment application errors. Consistent with their comments on the explanation of amount due disclosure under § 1026.41(f)(3)(iii), several industry commenters stated that the past payments breakdown disclosure should reflect contractual accounting. As such, they stated it should reflect all payments applied to the loan, not just post-petition payments. However, one servicer stated that the past payment breakdown should not disclose pre-petition payments held in suspense because a consumer may be confused by the accumulation of small payments made by a trustee. Some servicers suggested that servicers include a statement in the Important Messages box indicating whether the past payments breakdown was a contractual or bankruptcy accounting.

Several industry commenters requested permission to disclose principal and interest as a lump sum in the past payments breakdown disclosure. In the alternative, they asked that the principal and interest allocation reflect contractual accounting, saying this will show how the payment actually was applied. One commenter who also asked that principal and interest be a lump sum in the explanation of amount due disclosure under § 1026.41(f)(3)(iii) suggested that principal and interest be disclosed separately in the past payments breakdown.

As the Bureau explained in the proposal, disclosing a breakdown of the post-petition payments by principal, interest, and escrow provides a consumer with a snapshot of how their payments have been applied. This allows a consumer to identify potential errors in payment application, including any misapplication of payments to escrow or fees. This breakdown also plays an important role in educating a consumer, and consumer testing showed that participants found a breakdown of past payments generally helpful, and that they preferred a principal-interest breakdown.[402] However, the Bureau now believes that the past payments breakdown disclosure should include all payments applied to the loan, not just post-petition payments, so that consumers know the status of all payments received by a servicer. Further, a servicer that applies payments contractually should be permitted to disclose this application on the periodic statement. Proposed § 1026.41(f)(3)(iv) arguably would have limited the past payments breakdown to only post-petition payments applied, which may have left consumers unable to determine when a servicer applied other amounts to the loan. Similarly, the proposal could have made it challenging for consumers to determine how much was applied to the loan in the year-to-date disclosure under proposed § 1026.41(f)(3)(iv)(B). The proposal may have also made it difficult for servicers to disclose accurately all the amounts that they are applying to the mortgage loan.

Given the foregoing, the Bureau is not adopting the proposed requirement for periodic statements modified under § 1026.41(f) to disclose the past payment breakdowns by breaking out only post-petition payments. Instead, the past payment breakdown for consumers in bankruptcy must include all payments, just as it does for consumers not in bankruptcy under § 1026.41(d)(3). As the Bureau previously discussed in the context of § 1026.36(c)(1)'s prompt crediting requirements, servicers commonly maintain separate suspense accounts for pre-petition and post-petition payments,[403] and these servicers may, but are not required to, include more than one suspense account in the past payment breakdown in order to accurately disclose how they are applying payments. The Bureau is eliminating under § 1026.41(f)(3)(iv) any reference to the past payment breakdown. As described below, the provisions that would have followed § 1026.41(f)(3)(iv) are renumbered accordingly.

Transaction Activity

Proposed § 1026.41(f)(3)(v) would have required a modified disclosure of transaction activity. The Bureau is renumbering the provision as § 1026.41(f)(3)(iv) and adopting the provision substantially as proposed, with revisions to improve clarity. Specifically, revised § 1026.41(f)(3)(iv) requires the disclosure of transaction activity under § 1026.41(d)(4) [404] to include all payments the servicer has received since the last statement, including all post-petition and pre-petition payments and payments of post-petition fees and charges, and all post-petition fees and charges the servicer has imposed since the last statement. The provision also states that the brief description of the activity, required under § 1026.41(d)(4), need not identify the source of any payments.

[402] *Id.* at 39.

[403] 78 FR 10901, 10956 (Feb. 13, 2013).

[404] Section 1026.41(d)(4) requires a periodic statement to include a list of all the transaction activity that occurred since the last statement. It defines transaction activity for purposes of the provision as any activity that causes a credit or debit to the amount currently due. It also provides that the list must include the date of the transaction, a brief description of the transaction, and the amount of the transaction for each activity in the list.

As revised, § 1026.41(f)(3)(iv) incorporates the substance of proposed comment 41(f)(3)(v)–1 relating to transaction activity. The Bureau is therefore not adopting that proposed comment.

The Bureau solicited comment on whether the transaction activity should include post-petition payments, pre-petition payments, and post-petition fees and charges, or whether it should disclose different or additional types of activity. The Bureau received few comments specifically addressing this provision. Consumer advocacy groups supported the proposal, saying that it would help provide consumers in bankruptcy a complete and accurate record of account activity just as the transaction activity disclosure currently does for consumers who are not in bankruptcy. The consumer advocacy groups also stated that the transaction activity disclosure should include pre-petition arrears and post-petition amounts due that the servicer receives, regardless of whether they are disbursed by the consumer or the trustee, and that it is relatively unimportant to disclose the source of the payments. After reviewing the report summarizing the Bureau's consumer testing, however, two of these groups reconsidered and stated that disclosing the source of the payments is important to help consumers understand whether the payments were from the consumer or were pre-petition arrearage payments from a trustee. Some trade associations supported the proposal because it did not require servicers to identify the source of the payments. One servicer agreed that the transaction activity disclosure should include post-petition payments and fees and charges but stated that it should not include payments on the pre-petition arrearage because those payments are already disclosed in the pre-petition arrearage box.

The Bureau believes that consumers in bankruptcy may benefit if the transaction activity disclosed includes pre-petition payments. Although those payments do not affect the amount due (which may be limited to post-petition payments and fees in a chapter 12 or chapter 13 bankruptcy), they nonetheless serve to reduce a consumer's delinquency. Moreover, the Bureau understands that there may be a significant delay between when a consumer sends a pre-petition payment to a trustee and when a servicer ultimately receives that payment. Consumers may benefit by having a record of when such payments are received by the servicer. The Bureau notes that consumer testing suggests that consumers may be able to use the transaction activity disclosures to identify key information about timing of past payments [405] and fees and unpaid amounts included in the payment amount disclosure.[406]

However, the Bureau recognizes that it may be difficult for servicers to identify whether a payment came from a trustee, a consumer, or a third-party. Thus, § 1026.41(f)(3)(iv) does not require that § 1026.41(d)(4)'s brief description of the transaction activity identify the source of the payments received by the servicer. The transaction activity disclosure, however, must include activity since the last statement.

41(f)(3)(v) Pre-Petition Arrearage

Proposed § 1026.41(f)(3)(vi) would have required a periodic statement to include certain information about the pre-petition arrearage, if applicable. The proposal would have required a periodic statement to contain the following disclosures, grouped in close proximity: The total of all pre-petition payments received since the last statement, the total of all pre-petition payments received since the beginning of the current calendar year, and the current balance of the consumer's pre-petition arrearage. The Bureau is renumbering the provision as § 1026.41(f)(3)(v) and adopting certain revisions to the content of the disclosures and their location on the periodic statement.

The Bureau solicited comment on whether periodic statements should include the pre-petition payments received and applied and the balance of the pre-petition arrearage, and whether there are alternative avenues for apprising consumers of this information. Several consumer advocacy groups, a chapter 13 trustee, and the U.S. Trustee Program supported such disclosure, saying that it would help consumers to understand how their bankruptcy plans are progressing. Two of these consumer advocacy groups stated that it is unnecessary to require a breakdown of pre-petition payments by principal, interest, and escrow.

Numerous industry commenters opposed the disclosure of pre-petition payments because of systems limitations and the potential burden of tracking this information accurately. They stated that they would have to update their systems to disclose a pre-petition arrearage.

Several servicers and some trade associations suggested that the periodic statement should include the amount paid on the arrearage over the entire bankruptcy case rather than year-to-date. These commenters stated this will provide more helpful information to consumers about how their bankruptcy plans are progressing. Other industry commenters also suggested that the Bureau require disclosure of the arrearage's starting balance instead of the amount received last month. One servicer requested clarification on whether the disclosure of pre-petition payments received and how they were applied referred to how the payments were applied to reduce the outstanding pre-petition claim balance or how they were applied to the mortgage loan account.

The Bureau is adopting the pre-petition arrearage disclosure with several revisions. As revised, § 1026.41(f)(3)(v) requires a periodic statement modified in accordance with § 1026.41(f) to include, if applicable, the total of all pre-petition payments received since the last statement, the total of all pre-petition payments received since the beginning of the consumer's bankruptcy case, and the current balance of the consumer's pre-petition arrearage. The pre-petition arrearage disclosures must be grouped in close proximity to each other and located on the first page of the statement or, alternatively, on a separate page enclosed with the periodic statement or in a separate letter.

The Bureau believes that consumers should have an accurate record of the payments received by a servicer, including pre-petition arrearage payments. Consumers need this information to track the delinquency, understand payment application, and monitor their accounts for possible servicer error. Consequently, the Bureau is mandating the inclusion of specified pre-petition information. Without this information, periodic statements would not provide any indication whether chapter 12 or chapter 13 consumers are contractually current or delinquent. Moreover, while some participants in the Bureau's consumer testing did not find the pre-petition arrearage disclosure helpful, most readily understood it and responded positively to its inclusion on the tested forms.[407]

The final rule requires disclosure of pre-petition payments received since the beginning of the bankruptcy case, whereas the proposal would have

[405] Fors Marsh Group, *Testing of Bankruptcy Periodic Statement Forms for Mortgage Servicing,* at 37 (Feb. 2016), *available at http://www.consumerfinance.gov/data-research/research-reports/testing-bankruptcy-periodic-statement-forms-mortgage-servicing/* (report on consumer testing submitted to the Bureau of Consumer Fin. Prot.).

[406] *Id.* at 55–56.

[407] *Id.* at 56–57.

required disclosure of pre-petition payments received only since the beginning of the current calendar year. As some commenters noted, a disclosure of the payments received since the beginning of the plan is more helpful for consumers in bankruptcy because it provides a more complete picture of the overall progress in the consumer's the bankruptcy plan.

Further, the Bureau has learned that servicers generally keep records of this information and that servicers of Fannie Mae and Freddie Mac loans are required to do so. The Bureau therefore believes that, with an appropriate implementation period, servicers would be able to disclose the information on a periodic statement. During outreach with industry participants, several servicers informed the Bureau that they expected that their third-party systems vendors would develop sufficient programming upgrades to enable servicers to more easily track and disclose information about pre-petition arrearages. Accordingly, § 1026.41(f)(3)(v) requires a servicer to disclose, if applicable, the total of all pre-petition payments received since the last periodic statement, the total of all pre-petition payments received since the beginning of the consumer's bankruptcy case, and the current balance of the consumer's pre-petition arrearage.

The Bureau continues to believe that the pre-petition arrearage disclosure does not need to include a breakdown of principal, interest, and escrow. No commenters suggested that such a breakdown would be helpful or necessary, as the purpose of this disclosure is to inform the consumer of the consumer's overall progress in reducing a pre-bankruptcy delinquency. Moreover, the Bureau understands that servicers may not be equipped currently to disclose a breakdown of this information on the periodic statement as modified for bankruptcy.

Unlike the proposal, the final rule expressly permits servicers to include the disclosures on the first page of the periodic statement, on a separate enclosed page, or in a separate letter. The final rule ensures that these important disclosures are prominent while addressing industry's concerns about the cost of compliance given current systems limitations.

The Bureau is also adopting proposed comment 41(f)(3)(vi)–1, renumbered as comment 41(f)(3)(v)–1, with certain revisions. The final comment provides that, if the amount of the pre-petition arrearage is subject to dispute, or has not yet been determined by the servicer, the periodic statement may include a statement acknowledging the unresolved amount of the pre-petition arrearage. Thus, the comment addresses situations where the servicer has not filed a proof of claim specifying the amount of the pre-petition arrearage, where an objection has been filed to the servicer's proof of claim, or where the servicer has not had time to determine the amount of the pre-petition arrearage before having to provide a periodic statement. Final comment 41(f)(3)(v)–1 further clarifies that a servicer may omit the information required by § 1026.41(f)(3)(v) from the periodic statement until such time as the servicer has had a reasonable opportunity to determine the amount of the pre-petition arrearage, and that the servicer may not omit that information from the periodic statement after the date that the bankruptcy court has fixed for filing proofs of claim in the consumer's bankruptcy case.

41(f)(3)(vi) Additional Disclosures

Proposed § 1026.41(f)(3)(vii) would have required periodic statements under § 1026.41(f) to include certain additional bankruptcy-specific disclosures. The Bureau solicited comment on whether servicers should be permitted to include the proposed additional disclosures on a separate page enclosed with the periodic statement, whether the proposed disclosures should be permissive or mandatory when applicable, and whether there are other disclosures that a servicer should be required to include in a periodic statement under proposed § 1026.41(f).

The Bureau received several comments on this aspect of the proposal. Two servicers recommended that the Bureau allow servicers flexibility as to the location of the disclosures, citing servicers' systems limitations as the reason. One of these servicers expressed support for the proposed disclosures. Some trade associations specifically supported the proposal under § 1026.41(f)(3)(vii)(D) to require a statement directing consumers to contact their attorneys or trustees with payment application questions, stating that servicers cannot answer those questions. The Bureau received no comments opposing the additional disclosures proposed.

The Bureau is renumbering this provision as § 1026.41(f)(3)(vi) and mandating a new disclosure relating to post-petition delinquency when applicable. The Bureau is otherwise adopting the provision substantially as proposed, with minor revisions to improve clarity. Section 1026.41(f)(3)(vi) requires a servicer to include five additional statements on the periodic statement, as applicable, when a consumer is in chapter 12 or chapter 13 bankruptcy. Under the final rule, servicers have flexibility to determine where on the periodic statement the disclosures will appear.

Section 1026.41(f)(3)(vi)(A) requires a statement that the amount due includes only post-petition payments and does not include other payments that may be due under the terms of the consumer's bankruptcy plan. The purpose of this disclosure is to ensure that a consumer understands that there may be additional amounts due under the plan that relate to the mortgage debt. The Bureau continues to believe that consumers may benefit from this disclosure, and consumer testing shows that consumers may find this statement helpful.

Section 1026.41(f)(3)(vi)(B) provides that, if the consumer's bankruptcy plan requires the consumer to make the post-petition mortgage payments directly to a bankruptcy trustee, the periodic statement must include a statement that the consumer should send the payment to the trustee and not to the servicer. This proposed disclosure is intended to ensure that consumers have information about whether to send a post-petition payment to the trustee or servicer. The Bureau continues to believe that such a disclosure is appropriate. Some consumer testing participants cited this statement when explaining that they would follow their bankruptcy plan's instructions as to where to send payments.

Section 1026.41(f)(3)(vi)(C) and (D) requires disclosures tailored to when the consumer makes payments to a trustee. Section 1026.41(f)(3)(vi)(C) requires a statement that the information disclosed on the periodic statement may not include payments the consumer has made to the trustee and may not be consistent with the trustee's records. Section 1026.41(f)(3)(vi)(D) requires a statement that encourages the consumer to contact the consumer's attorney or the trustee with questions regarding the application of payments. The Bureau is requiring these disclosures because there can be a delay between when a trustee receives a payment from a consumer and when the trustee remits that payment to a servicer. For pre-petition payments in particular, the Bureau understands that the delay can be weeks or even months, as a trustee may not distribute payments on pre-petition claims until the creditor files a proof of claim or until higher priority claims have been paid. Thus, the periodic statement the consumer receives may not include all payments the consumer has made. Additionally, the Bureau understands that a trustee may allocate payments differently than a servicer, and until the allocations are reconciled, the periodic statement may indicate different allocations than a trustee's records. Based on these timing and allocation issues, the Bureau believes that it is appropriate to advise consumers of the differences between a servicer's records and a trustee's records and to encourage consumers to contact the attorney or trustee with questions. Consumer testing participants generally stated that these statements were helpful to explain why a servicer's records may differ from a trustee's or not include all of the consumer's payments made to a trustee.

Finally, the Bureau is adding new § 1026.41(f)(3)(vi)(E). If the consumer is more than 45 days delinquent on post-petition payments, § 1026.41(f)(3)(vi)(E) requires the periodic statement to include a statement that the servicer has not received all the payments that became due since the consumer filed for bankruptcy. The Bureau considered whether to require periodic statements to include an account history listing only post-petition payments the consumer has failed to make or, alternatively, the date the consumer became delinquent on post-petition payments. Although the Bureau believes that this information would be beneficial to a consumer who is delinquent on mortgage payments due during the bankruptcy case, the Bureau is concerned that requiring this information may impose additional burdens on servicers. Nonetheless, the Bureau agrees with the consumer advocacy group commenters that consumers need to know when the servicer believes that the consumer has not made all required post-petition payments. Among other consequences, the failure to make a post-petition payment could lead to dismissal of the bankruptcy case. Accordingly, the Bureau is requiring in § 1026.41(f)(3)(vi)(E) that, if the consumer is at least 45 days delinquent on post-petition payments, the periodic statement must include a statement that the servicer has not received all of the consumer's payments due during the bankruptcy case. The Bureau believes that this disclosure will help alert consumers to any delinquency and that, because the language is standard, the burden on industry should be low.

41(f)(4) Multiple Obligors

Proposed § 1026.41(f)(4) would have addressed the situation where more than one consumer is primarily obligated on a mortgage loan and a servicer is required to provide at least one of the primary obligors with a modified periodic statement pursuant to § 1026.41(f). Proposed § 1026.41(f)(4) provided that, in this circumstance, the servicer may provide the modified version of the periodic statement to any or all of the primary obligors instead of providing any statements that do not include the bankruptcy-specific modifications, even if not all primary obligors are debtors in bankruptcy.

The Bureau only received one comment on this aspect of the proposal. A trade association commenter agreed with the proposal to permit servicers to provide only one type of periodic statement per mortgage loan account.

The Bureau is adopting § 1026.41(f)(4) substantially as proposed, with minor revisions to improve clarity. As revised, § 1026.41(f)(4) provides that, if § 1026.41(f) applies in connection with a mortgage loan with more than one primary obligor, the servicer may provide the modified statement to any or all of the primary obligors, even if a primary obligor to whom the servicer provides the modified statement is not a debtor in bankruptcy.

The Bureau is also adopting comment 41(f)(4)–1 substantially as proposed but with certain revisions. As revised, comment 41(f)(4)–1 provides that, when two or more consumers are joint obligors with primary liability on a mortgage loan subject to § 1026.41, a servicer may send the periodic statement to any one of the primary obligors. Comment 41(f)(4)–1 further clarifies that § 1026.41(f)(4) provides that a servicer may provide a modified statement under § 1026.41(f), if applicable, to any or all of the of the primary obligors, even if the primary obligor to whom the servicer provides the modified statement is not a debtor in bankruptcy. The comment specifies that the servicer need not provide an unmodified statement to any of the primary obligors. The comment provides an illustrative example.

This result is consistent with comment 41(a)–1, which clarifies that, when more than one consumer is primarily obligated on a mortgage loan, a servicer may send the periodic statement to any one of the primary obligors; the servicer would not be required to provide periodic statements to all primary obligors. The Bureau also recognizes that, given current limitations on technology, servicers would incur costs if they were required to send one version of the periodic statement to a consumer in bankruptcy and a different version to the consumer's non-bankrupt co-obligors. As clarified by comment 41(f)(4)–1 of the final rule, § 1026.41(f)(4) should eliminate those costs.

The Bureau notes that comment 41(f)(4)–1, as revised, does not include a proposed example describing a servicer's obligations when there are multiple obligors on the mortgage loan and an exemption applies under § 1026.41(e)(5)(ii). As described in greater detail in the section-by-section analysis of § 1026.41(e)(5), revisions to comment 41(e)(5)(i)–1 clarify that, subject to certain restrictions, servicers are exempt from providing any periodic statement with regard to a mortgage loan if one of the primary obligors, for example, files chapter 13 bankruptcy and has a bankruptcy plan that provides for surrendering the dwelling that secures the mortgage loan.

New comment 41(f)(4)–2 clarifies disclosure requirements when co-obligors are both debtors under different chapters of bankruptcy. The comment provides that, if two or more consumers are joint obligors with primary liability on a mortgage loan subject to § 1026.41 and are debtors under different chapters of bankruptcy, only one of which is subject to § 1026.41(f)(3), a servicer may, but need not, include the modifications set forth in § 1026.41(f)(3). The comment sets forth an illustrative example.

41(f)(5) Coupon Books

The Bureau proposed § 1026.41(f)(5) to require a coupon book to comply with certain requirements of § 1026.41(f) where applicable. The Bureau solicited comment on applying the modifications set forth in proposed § 1026.41(f)(1) and (f)(3)(i) through (v) and (vii) when a servicer provides a coupon book under § 1026.41(e)(3). In particular, the Bureau solicited comment on whether there may be alternative means to providing consumers with substantially the same information regarding the mortgage loan account while they are in bankruptcy. Additionally, the Bureau solicited comment on whether servicers should be required to issue a new coupon book or other disclosures immediately upon a consumer's bankruptcy filing. Finally, the Bureau solicited comment on servicers' current practices with respect to providing a coupon book to consumers in bankruptcy.

The Bureau received no comments on § 1026.41(f)(5) and is adopting it substantially as proposed, with minor modifications to improve clarity. Under § 1026.41(f)(5), a servicer that provides a coupon book instead of a periodic statement under § 1026.41(e)(3) must include in the coupon book the disclosures set forth in § 1026.41(f)(2) and (f)(3)(vi), as applicable. The servicer may include these disclosures anywhere in the coupon book provided to the consumer or on a separate page enclosed with the coupon book. The servicer must make available upon request to the consumer by telephone, in writing, in person, or electronically, if the consumer consents, the pre-petition arrearage information listed in § 1026.41(f)(3)(v), as applicable. Section 1026.41(f)(5) also provides that the modifications set forth in § 1026.41(f)(1) and (f)(3)(i) through (iv) and (vi) apply to a coupon book and other information a servicer provides to the consumer under § 1026.41(e)(3).

The Bureau continues to believe that § 1026.41(f)(5) will not impose significant burden on servicers that use a coupon book. The statements set forth in § 1026.41(f)(1) and (f)(3)(vi) are the only new, bankruptcy-specific disclosures that a servicer must include in a coupon book. These are standardized statements; servicers will not need to craft language for individual consumers. Additionally, the Bureau is allowing servicers to include these statements anywhere in the coupon book or on a separate page enclosed with the coupon book.

As to the pre-petition arrearage information set forth in § 1026.41(f)(3)(v), the Bureau understands that servicers already maintain internal records regarding pre-petition payments and the balance of the pre-petition arrearage. Therefore, the Bureau does not believe that the cost of providing this information upon a consumer's request will impose significant new burdens.

The remainder of the modifications set forth in proposed § 1026.41(f)(1) and (f)(3)(i) through (iv) and (vi) do not require a servicer to modify any of the disclosures in the coupon book or provide new information to a consumer. Rather, these modifications provide that certain disclosures (such as a description of late payment fees) are not required when a consumer is in bankruptcy and clarify the requirements for certain other disclosures (such as amount due) in a manner that is consistent with the information already provided in a coupon book. Thus, while a servicer has the option to modify its coupon books to omit certain disclosures that are not required when a consumer is in bankruptcy, § 1026.41(f)(5) does not require servicers to redesign their coupon books specifically for consumers in bankruptcy, and servicers can determine the most cost-efficient method of providing the required information.

Servicers also are not required to update the coupon book with the bankruptcy disclosures immediately upon learning of the bankruptcy filing. Section 1026.41(f)(5) permits a servicer to provide a modified coupon book according to its normal schedule. For example, if a servicer provided a 12-month coupon book to a consumer in January and the consumer filed for bankruptcy in March, the servicer would not need to issue a new, modified coupon book accompanied by § 1026.41(f)(1) and (f)(3)(vi) disclosures until the following January.

Sample Forms

Section 1026.41(c) specifies that sample forms for periodic statements are provided in appendix H–30 and that proper use of these forms complies with the form and layout requirements of § 1026.41(c) and (d). The Bureau believes that sample forms are appropriate to provide servicers with guidance for complying with the requirements of § 1026.41(c) and (d) as modified by § 1026.41(f). The Bureau therefore exercises its authority under, among other things, section 128(f) of TILA to finalize sample forms for § 1026.41(c) and (d) as modified by § 1026.41(f). The Bureau notes that these are not required forms and that any arrangements of the information that meet the requirements of § 1026.41 would be considered in compliance with the section. For the reasons discussed, the Bureau believes that finalizing the sample forms in appendices H–30(E) and H–30(F) is appropriate.

Appendix H–30(E) provides a sample form for complying with the requirements of § 1026.41(c) and (d) as modified by § 1026.41(f) with respect to a consumer in a chapter 7 or chapter 11 bankruptcy case or who has discharged personal liability for a mortgage loan. This form includes disclosures that may not be applicable in all circumstances. For example, the form includes certain delinquency-related information to demonstrate compliance with § 1026.41(d)(8) as modified by § 1026.41(f), but a periodic statement does not need to include this information if it is not applicable to a mortgage loan.

Appendix H–30(F) provides a sample form for complying with the requirements of § 1026.41(c) and (d) as modified by § 1026.41(f) with respect to a consumer in a chapter 12 or chapter 13 bankruptcy case. Not all information on this form will be applicable in all circumstances. For example, the form includes a pre-petition arrearage disclosure to demonstrate compliance with § 1026.41(f)(3)(v), but a periodic statement does not need to include this information if it is not applicable to a mortgage loan. In addition, comment 41(f)(3)–1.ii clarifies that a servicer has additional flexibility in making certain disclosures when the consumer is in chapter 12 or has a plan that modifies the terms of the mortgage loan, and a servicer has the flexibility to make corresponding changes to the sample form.

The sample forms in appendices H–30(E) and H–30(F) use some terminology that differs from terminology used on the sample forms located in appendices H–30(A) through H–30(C), such as ''payment amount'' instead of ''amount due'' and ''past unpaid amount'' instead of ''overdue payment.'' This alternative terminology is not required but serves simply an example of how servicers may comply with the requirements of § 1026.41(c) and (d) as modified by § 1026.41(f). As comment 41(f)–2 states, a periodic statement may use terminology other than that found on the sample forms in appendix H–30, so long as the new terminology is commonly understood. For example, a servicer could use commonly understood terms such as ''amount due,'' ''explanation of amount due,'' and ''past due payment,'' on a periodic statement provided to a consumer in bankruptcy without affecting the servicer's safe harbor afforded by § 1026.41(c).

Consistent with § 1026.41(f)(1) and (f)(3)(i), the sample forms in appendices H–30(E) and H–30(F) omit certain disclosures otherwise required by § 1026.41(d), including disclosures that appear on the sample forms located on appendixes H–30(A) through H–30(C), such as the amount of any late payment fee and the date on which it will be assessed. A servicer has the option to include such disclosures on a periodic statement provided to a consumer in bankruptcy, and doing so would not affect the servicer's safe harbor for using the forms located in appendices H–30(E) or H–30(F). Similarly, a servicer may use a different presentation of the explanation of amount due, such as that on the sample form in appendix H–30(C), for payment option and other special types of loans, without affecting the servicer's safe harbor under § 1026.41(c).

Proposed sample forms. The proposed rule included proposed sample forms in appendices H–30(E) and H–30(F). A credit union supported the Bureau's efforts to gauge consumer understanding and stated that some proposed iterations of the sample forms may facilitate consumer comprehension. Two trade associations recommended that the Bureau publish the anticipated final versions of the forms for notice and comment prior to issuing a final rule. Consumer advocacy groups generally did not oppose sample forms, and one consumer advocacy group suggested that the Bureau publish Spanish-language versions of the forms.

Other trade associations requested that the Bureau state expressly that safe harbors remain in place under both the Dodd-Frank Act and TILA if servicers use the sample forms, even if a servicer omits certain information that Regulation Z does not require or a servicer rearranges the format or layout of the form. The commenters stated that, absent such a statement, servicers might feel compelled to include information that appears in the sample form exactly as displayed even if the regulation does not require such disclosures in the precise layout of the sample form.

Several commenters stated that providing a sample form similar to the one that servicers provide to a consumer not in bankruptcy would facilitate consumer comprehension, minimize burden on servicers, or avoid potential conflicts with debt collection and bankruptcy law. Other commenters suggested the Bureau provide a single sample form that could be used for a consumer in any chapter of bankruptcy, which could be achieved by permitting a servicer to omit certain information that is not relevant to a particular consumer's loan. Some trade associations requested flexibility as to how to display the information required by § 1026.41(d) as modified by § 1026.41(f), including suggesting that a servicer should have wide latitude when drafting the narrative messages required by § 1026.41(f)(2) and (f)(3)(vi) to incorporate language that has been received positively by consumers and bankruptcy courts.

Some commenters also commented on the format and presentation of the proposed sample forms. For example, the U.S. Trustee Program recommended that the Bureau use less technical language, referring in particular to the proposed form's use of the term ''post-petition payments.'' Several consumer advocacy groups favored the technical language, however, noting that most consumers in bankruptcy would have an attorney to help them understand the disclosures. Other commenters had various alternative terminology and formatting suggestions.

As discussed above, the Bureau believes it is appropriate to provide sample forms to assist servicers in complying with § 1026.41(f). The Bureau reiterates that, as sample forms, their use is permissive and, as comment 41(c)–2 states, servicers may provide additional information on a periodic statement unless expressly prohibited by § 1024.41 or another provision of subpart E of Regulation Z. In addition, comment § 1024.41(d)–2 states that servicers need not include on a periodic statement information that is inapplicable to a mortgage loan, while comment § 1026.41(f)–4 clarifies that a servicer may modify a periodic statement or coupon book as necessary to facilitate compliance with the Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, court orders, and local rules, guidelines, and standing orders. A servicer thus does not lose a safe harbor under the Dodd-Frank Act or TILA by omitting inapplicable information or modifying a periodic statement in a manner consistent with the rule, including those comments. In addition, as discussed above, a servicer is permitted to use alternative terminology on a periodic statement so long as it is commonly understood. A servicer may use different language to convey the statements required by § 1026.41(f)(2) and (f)(3)(vi), so long as that language contains the information required by those provisions and is commonly understood.

The Bureau also notes that, as explained in more detail below, the final sample forms in appendices H–30(E) and H–30(F) incorporate information the Bureau received through public comments and consumer testing. The final sample forms use language that is less technical than on the proposed forms and which testing participants readily understood. They incorporate many elements from the existing periodic statement sample forms located in appendices H–30(A) through H–30(C), while providing servicers flexibility as to how to incorporate new disclosures required by § 1026.41(f). The Bureau intends for consumers to be able to comprehend the language in the new sample forms and for servicers not to have to fundamentally redesign their periodic statement templates for consumers in bankruptcy.

The Bureau further believes that there has been a sufficient opportunity to comment on the sample forms. The final sample forms in appendices H–30(E) and H–30(F) closely resemble both the proposed sample forms and the tested prototypes. Stakeholders have commented on both the proposed sample forms and the prototypes used during consumer testing (the prototypes were included in the testing report that the Bureau published for public comment, as discussed below). The Bureau therefore believes that it is not necessary to seek additional comments on the final forms. The Bureau is not at this time providing sample forms in languages other than English, but the Bureau will continue to consider whether to do so in the future and whether additional consumer testing on such forms would be necessary or appropriate.

Consumer testing methodology. The Bureau conducted consumer testing on the proposed sample forms and revisions thereto following publication of the proposed rule. The Bureau published and sought comment on a report summarizing the methods and results of the consumer testing.[408] The Bureau received approximately 20 comments on the testing report from, among others, trade associations, servicers, credit unions, and consumer advocacy groups.

Commenters were divided on aspects of the Bureau's testing methodology. For example, several industry commenters and one consumer advocacy group stated that the testing should have used a larger and more diverse sample of consumers. The consumer advocacy group stated that the study lacked any mention of minority group outreach, especially to representatives from the Hispanic communities, and recommended publishing the forms in Spanish. A credit union commented that the testing results would have been more statistically sound had the consumers been asked a more controlled set of questions, and a trade association questioned why the report does not cite to medical literature in support of its conclusions, particularly with respect to the monitoring of eye tracking movements in one round of testing. Some trade associations expressed general concern that it was unclear how the Bureau would use the findings from the eye-tracking tool employed in that round of testing and more specific concern that the Bureau might rely on eye-tracking results obtained from, at most, five participants. Some trade associations stated that the Bureau should have solicited greater input on the testing methodology from other stakeholders who may use and review the forms, such as bankruptcy judges, bankruptcy attorneys, or trade associations. Some commenters suggested that the Bureau conduct additional testing, with one recommending additional testing

[408] 81 FR 24519 (Apr. 26, 2016); Fors Marsh Group, *Testing of Bankruptcy Periodic Statement Forms for Mortgage Servicing* (Feb. 2016), *available at http://www.consumerfinance.gov/data-research/research-reports/testing-bankruptcy-periodic-statement-forms-mortgage-servicing/* (report on consumer testing submitted to the CFPB).

focused on the pre-petition arrearage disclosure.

Some trade associations also commented that the testing did not account for the variety of procedures used in chapter 13 cases, such as cases in which the consumer sends all mortgage payments to a trustee, the trustee makes several streams of payments to a servicer, or the trustee provides information about the mortgage loan to the consumer. A trade association questioned how the testing would correlate to policy determinations related to the substantive requirements of periodic statements for consumers in bankruptcy.

Several commenters expressed concerns about the inclusion of a payment coupon on the tested forms. For example, a bank stated that a blank payment coupon with a payment date but no payment amount, which was used in the second and third rounds of testing, seemed confusing. A trade association expressed concern that the testing report indicates that consumers focused on the payment coupon instead of the outstanding principal balance; the trade association recommended that the form be redesigned to focus the consumer on information other than the payment coupon.

On the other hand, some consumer advocacy groups, industry commenters, and a bankruptcy trustee expressed support for the Bureau's consumer testing process. They commented favorably on, among other things, the use of multiple revised statements to determine which presentation might be most comprehensible to consumers and stated that the forms are clearer as a result of the testing process. They also noted that participants' understanding of the forms appeared to increase with each successive round of testing, and they suggested that the Bureau factor the report's findings into the rulemaking.

The Bureau believes that the testing it conducted is appropriate. The testing methodology, including the number of rounds, the number of participants who reviewed each form in each round, the participants' relevant background experience, and the iterative process of form design and consumer interviews, is consistent with the testing the Bureau conducted in connection with other rulemakings, including the 2013 TILA Servicing Final Rule. The Bureau notes that consumers' comprehension of the periodic statements improved from round to round and that the Bureau has integrated adjustments from the testing where appropriate. For example, the Bureau has revised the narrative statements required by § 1026.41(f)(2) and (f)(3)(vi) from the proposed sample forms so that the final sample forms use language that testing participants found easier to understand. Similarly, the Bureau has adjusted the presentation of the § 1026.41(f)(3)(v) pre-petition arrearage disclosure from the proposed sample form so that the final sample form presents the information more effectively. While consumer testing cannot replicate every possible unique factual circumstance that may arise in a bankruptcy case, the Bureau's testing and the disclosures on the forms did address various scenarios such as, for example, a consumer who should make monthly post-petition payments to a trustee instead of a servicer. Most testing participants stated that, consistent with the direction on the sample form, they would continue to send such payments to the trustee if their bankruptcy plan so required.

The Bureau also emphasizes that it is not relying solely on the consumer testing to determine that the sample forms will be effective; it is also relying on its knowledge of, and expertise in, consumer understanding and behavior, as well as principles of effective disclosure design. The Bureau further notes that many aspects of the final sample forms are similar or identical to aspects of the existing sample forms in appendices H–30(A) through H–30(C), which the Bureau previously tested in connection with the 2013 TILA Servicing Final Rule and which are now familiar to many consumers. Finally, the Bureau acknowledges that the eye-tracking findings came from only a handful of testing participants and has placed only limited weight on the eye-tracking findings.

As to a commenter's question regarding how the consumer testing would inform the substantive requirements of periodic statements for consumers in bankruptcy, the Bureau notes that the purpose of the testing was to test consumer understanding and make the sample forms clearer for consumers. As to the concerns some commenters raised about payment coupons on the sample forms, the Bureau notes that § 1026.41 does not mandate the inclusion of a payment coupon on periodic statements. The Bureau included them on the tested forms because servicers commonly include payment coupons on periodic statements. Servicers have flexibility to adjust the sample forms and the content of any payment coupon they choose to include on a periodic statement.

Consumer testing results. Commenters made numerous comments about the specific disclosures and language that appeared on the tested versions of the forms. To the extent that these comments addressed the findings set forth in the testing report or the accuracy of the language on the final sample forms, they are addressed below. The Bureau does not address, however, comments that suggested alternative disclosures or language without referencing the testing report or the findings therein. Some of the comments the Bureau received raise issues that relate to the substantive requirements of § 1026.41(e)(5) or (f) rather than to the format or design of the sample forms. Most of these comments are similar to comments the Bureau previously received in response to the proposal and that the Bureau addressed above in the section-by-section analyses of § 1026.41(e)(5) and (f). Some commenters submitted substantive comments on the proposal. These comments were similar to the comments received on the proposal and, where appropriate, are addressed in the relevant section-by-section analyses.

Some commenters recommended that the sample forms incorporate specific language that testing participants understood or preferred. For example, consumer advocacy groups recommended that the Bureau adopt the language tested in round three relating to the pre-petition arrearage because consumers demonstrated a high level of comprehension and because the information would benefit consumers in various ways. A chapter 13 trustee also recommended that the sample form in appendix H–30(F) refer expressly to ''pre-petition arrearage,'' in part because the first round of testing showed that consumers understand the phrase. This trustee further recommended that, based on the testing participants' positive responses, the sample forms should separately break down principal and interest, include language stating that the periodic statement is being sent for informational and compliance purposes only, and include a message that the statement may not show recent payments sent to the trustee but not yet forwarded to the servicer. A servicer commented that the form in appendix H–30(E) should use the term ''account information'' because testing participants preferred it over ''delinquency information.'' Another servicer recommended that the final forms use concise versions of certain disclosures that were tested in certain rounds.

Other commenters indicated that the final forms should not incorporate disclosures that the consumer testing participants did not readily understand. Among concerns about other disclosures, one credit union commented that testing participants' trust in the accuracy of the tested forms was diminished by some of the narrative statements regarding the unique circumstances of chapter 13 cases, such as a disclaimer that the periodic statement may not be up to date. Similarly, one commenter expressed concern that consumers paying their mortgage through a chapter 13 trustee would be confused by a periodic statement, citing the uncertainty some testing participants expressed about the meaning of the narrative messages. Two servicers commented that testing participants appeared uncertain about how much they should pay when reviewing certain of the tested forms, such as when past due amounts were listed separately from the amount currently due. One of these servicers further stated that testing participants had some difficulty distinguishing between pre-petition and post-petition payments when both types of payments were listed in the transaction activity and past payment breakdown. One credit union stated that the participants' feedback on the forms' overall organization, clarity, and helpfulness suggested that the participants did not fully understand the disclosures. Some commenters recommended making clearer whether amounts due and payments received relate to pre-petition arrearage or to post-petition payments. One servicer cautioned that providing greater detail about the breakdown of principal, interest, and escrow could confuse consumers comparing the previous month's statement to the subsequent month's statement. A credit union also noted that some testing participants stated that they would rather the periodic statements be sent to their attorneys to avoid miscommunications, and it added, more generally, that the Bureau should not ignore the report's negative findings.

Industry commenters took opposing views on the testing report's finding that testing participants preferred disclosure of the consequences of nonpayment and language that uses the term ''due.'' Some commenters stated that the forms should reflect the participants' preference because it conveys information clearly and accurately, while others stated that disclosing this information and using ''due'' language could raise concerns about the automatic stay. One servicer expressed concerns that providing a periodic statement similar to the tested forms could violate the automatic stay because some testing participants stated that several iterations of the tested forms were collection attempts rather than purely informational notices. A trade association argued that the sample forms should not identify the number of days a mortgage loan is delinquent because testing participants' reactions varied as to whether the disclosure would be helpful.[409]

The Bureau acknowledges that, as commenters noted, some versions of the narrative messages shown to testing participants received mixed or negative reactions, primarily in the first round and, to a lesser degree, the second round of testing. The Bureau notes that participants in each successive round found the various narrative messages to be clearer than those in the prior round, and the Bureau believes, that the versions of the messages included on the final sample forms in appendices H–30(E) and H–30(F) are clear and generally understandable to consumers. For example, while some participants in round one stated the periodic statement tested was untrustworthy because of a message that it might not be up to date, participants in the later rounds found helpful a revised message that recent payments to a trustee may not be disclosed on the statement because the trustee had not yet forwarded them to the servicer.

The final versions of the sample forms in appendices H–30(E) and H–30(F) incorporate findings set forth in the testing report, including specifically the language regarding pre-petition arrearage that participants found helpful in the third round of testing. Similarly, the final sample forms include language identifying payments as ''pre-petition'' or ''post-petition'' payments, which some participants found helpful; the forms also include ''plain language'' terminology identifying those payments to assist consumers who are less familiar with bankruptcy-specific terminology. In addition, the sample form in appendix H–30(E) uses the term ''account history'' in lieu of ''delinquency information,'' as testing participants found that term helpful.

The Bureau believes that the testing report indicates that consumers generally should understand the account information as displayed on the sample forms. For example, testing participants readily comprehended the principal-interest breakdown and preferred such a disclosure over a combined disclosure. Consistent with this finding and the Bureau's other knowledge and experience regarding disclosures, the final rule requires a periodic statement to include a principal-interest breakdown. Testing participants also generally understood the pre-petition arrearage disclosure, and their comprehension was highest in the final round of testing, which used a disclosure similar to the disclosure on the final sample form. The final sample forms also present the amount due and explanation of amount due in the manner that participants found most helpful. Moreover, the Bureau believes that, as consumer advocacy groups commented and as explained in the testing report, a consumer may understand the disclosures on a periodic statement when they relate to the consumer's own mortgage loan and bankruptcy rather than a hypothetical testing scenario.

As to commenters' concerns about some participants' preference that a servicer provide the periodic statement to their bankruptcy attorney, the Bureau notes that, depending on the circumstances, a servicer may be able to satisfy the requirements of § 1026.41 by providing a periodic statement to a consumer's attorney. The Bureau further notes that, while some testing participants stated that the tested forms appeared to be more in the nature of collection attempts than purely informational, most participants viewed the forms as informational, and nearly all participants expressed a preference for receiving a similar form if they were attempting to retain their home through bankruptcy. More generally, as explained in the section-by-section of § 1026.41(e)(5), the Bureau does not believe that a servicer is likely to violate the automatic stay by providing a periodic statement that complies with the provision of § 1026.41(c) and (d) as modified by § 1026.41(f), nor does the Bureau believe that an automatic stay violation is likely when a servicer uses properly one of the sample forms in appendices H–30(E) or H–30(F).

Format and Design of the Sample Forms. Several commenters had suggestions on the general design and format of the sample forms. For example, a consumer advocacy group suggested that the sample forms display information in a bullet point format, while other consumer advocacy groups recommended that certain of the bankruptcy-related narrative messages be located in a separate box because testing participants preferred that approach. Some servicers recommended against listing multiple suspense accounts in the past payments breakdown, as was done in one version of the tested forms. Industry commenters stated that the bankruptcy sample forms should be similar to the non-bankruptcy sample forms, that the Bureau should have a single bankruptcy

[409] Final § 1026.41(f) permits, but does not require, a servicer to disclose the length of a delinquency on a periodic statement.

sample form that could be adapted to all chapters of bankruptcy, and that servicers should have flexibility in how they present the required information. Two consumer advocacy groups stated that the sample forms should describe a trustee's pre-petition payments as payments rather than partial payments. The Bureau also received several comments asking how the sample forms in appendices H–30(E) or H–30(F) should address specific scenarios or hypotheticals.

As noted above, the sample forms are one way a servicer may choose to present the required information in a manner that complies with the formatting requirements of § 1026.41(c), (d), and (f). To the extent that a servicer may wish to use a different format or add additional informational, it may do so within the limits provided by the rule. For example, a servicer may, as one commenter suggested, disclose one or multiple suspense accounts on a periodic statement without jeopardizing its safe harbor use of the sample forms.

Consistent with these commenters' general recommendations, the sample forms in appendices H–30(E) and H–30(F) incorporate to a large degree the format and content of the sample forms in appendices H–30(A) through H–30(C). For example, the sample forms all contain the same general presentation of general account information, amount due, transaction activity, and past payment breakdown, among other things. The sample form in appendix H–30(E) contains the same disclosures in a similar format as the form in appendix H–30(B), except that appendix H–30(E) omits three specific pieces of information, adds a short bankruptcy message, and uses alternative terminology that a servicer may but is not required to use for a consumer in bankruptcy. The Bureau believes that these similarities will help reduce the potential burdens on a servicer that chooses to use the new sample forms and will help make the forms generally understandable to consumers.

Legal Authority

The Bureau is adopting § 1026.41(f), which contains content and layout requirements for periodic statements in bankruptcy, to implement section 128(f) of TILA as well as section 105(a) of TILA and section 1032(a) of the Dodd-Frank Act. Section 128(f)(1)(e) of TILA requires the periodic statement to include a description of any late payment fees. For the reasons discussed above, the Bureau is using its authority under section 105(a) and (f) of TILA to exempt servicers from having to include this information in periodic statements provided to consumers who are in bankruptcy or have discharged personal liability for a mortgage loan. This proposed exemption is additionally authorized under section 1405(b) of the Dodd-Frank Act.

41(g) Successors in Interest

As explained in part V.A. and the section-by-section analysis of Regulation X § 1024.32, the final rule allows servicers to provide an initial explanatory written notice and acknowledgment form to confirmed successors in interest who are not liable on the mortgage loan obligation. The notice explains that the confirmed successor in interest is not liable unless and until the confirmed successor in interest assumes the mortgage loan obligation under State law. The notice also indicates that the confirmed successor in interest must return the acknowledgment to receive certain servicing notices under the Mortgage Servicing Rules. For the reasons stated in part V.A. and in this discussion, the final rule includes new § 1026.41(g), which provides that, if, upon confirmation, a servicer provides a confirmed successor in interest who is not liable on the mortgage loan obligation with such a written notice and acknowledgment form, the servicer is not required to provide to the confirmed successor in interest any written disclosure required by § 1026.41 unless and until the confirmed successor in interest either assumes the mortgage loan obligation under State law or has provided an executed acknowledgment in accordance with Regulation X § 1024.32(c)(1)(iv) that the confirmed successor in interest has not revoked.

The final rule does not mandate that servicers send the initial written notice and acknowledgment form; instead Regulation X § 1024.32(c)(1) gives servicers the option to do so and, if they choose to do so, § 1026.41(g) relieves them of the obligation to provide periodic statements until the confirmed successor in interest affirmatively indicates a desire to receive them by returning the acknowledgment or assumes the mortgage loan obligation under State law. Similar provisions in §§ 1024.32(c)(2), 1026.20(g), and 1026.39(f) address the disclosures required by, respectively, the Mortgage Servicing Rules in Regulation X and §§ 1026.20(c), (d), and (e), and 1026.39. As noted in part V.A., the Bureau has decided to excuse servicers that have not received an acknowledgment back from a confirmed successor in interest from the requirement to send periodic statements and other Mortgage Servicing Rule notices because doing so relieves servicers of the costs associated with sending notices to confirmed successors in interest who are not liable on the mortgage loan obligation and do not want them. However, if a confirmed successor in interest assumes a mortgage loan obligation under State law, the information in the initial notice and acknowledgment form is no longer applicable, and § 1026.41(g) accordingly does not suspend the servicer's obligation to provide periodic statements.

Appendix H to Part 1026—Closed-End Model Forms and Clauses

Appendix H–4(C) to Part 1026

The 2013 TILA Servicing Final Rule revised the commentary to § 1026.19(b) to reflect the revised § 1026.20(c) and revised § 1026.20(d) ARM notices. The proposal would have modified the Variable-Rate Model Clauses in appendix H–4(C) to reflect the language in the revised commentary. The Bureau is adopting these modifications as proposed. No change to the table of contents of appendix H is necessary.

Appendix H–14 to Part 1026

The 2013 TILA Servicing Final Rule changed the commentary to § 1026.19(b) to reflect the revised § 1026.20(c) and revised § 1026.20(d) ARM notices. This proposal would have modified the Variable-Rate Mortgage Sample form in appendix H–14 to reflect the language in the revised commentary. The Bureau is adopting these modifications as proposed. No change to the table of contents of appendix H is necessary.

Appendix H–30(C) to Part 1026

This proposal would have made a minor technical revision to the entry for H–30(C) in the table of contents at the beginning of this appendix and republishes sample form H–30(C). The technical change amends ''Sample Form of Periodic Statement for a Payment-Options Loan (§ 1026.41)'' to ''Sample Form of Periodic Statement for a Payment-Option Loan (§ 1026.41).'' The Bureau is adopting this technical change as proposed.

Appendices H–30(E) and H–30(F) to Part 1026

This final rule provides sample forms for periodic statements for certain consumers in bankruptcy in proposed appendices H–30(E) and H–30(F) and makes corresponding additions to the table of contents for appendix H. Section 1026.41(c) specifies that sample forms for periodic statements are provided in appendix H–30 and that proper use of these forms complies with the form and layout requirements of § 1026.41(c) and (d). The Bureau believes that sample forms are appropriate to provide servicers with guidance for complying with the requirements of § 1026.41(c) and (d) as modified by proposed § 1026.41(f). The Bureau therefore exercises its authority under, among other things, section 128(f) of TILA to provide sample forms for § 1026.41(c) and (d), as modified by § 1026.41(f). Appendix H–30(E) provides a sample form for complying with the requirements of § 1026.41(f) with respect to a consumer in a chapter 7 or chapter 11 bankruptcy case or a consumer who has discharged personal liability for a mortgage loan. Appendix H–30(F) provides a sample form for complying with the requirements of § 1026.41(f) with respect to a consumer in a chapter 12 or chapter 13 bankruptcy case. They would not be required forms, however, and any arrangements of the information that meet the requirements of § 1026.41 would be considered in compliance with the section.

VI. Effective Date

The Bureau proposed an effective date of 280 days (approximately nine months) after publication of a final rule for all of the final rule provisions except the changes to § 1026.41(e)(5) and (f) (bankruptcy periodic statement exemption and modified statements), for which the Bureau proposed an effective date of one year after publication. As discussed further below, the Bureau is adopting an effective date of one year after publication for most provisions, with an extended effective date of 18 months after publication for the provisions relating to bankruptcy periodic statements and to successors in interest.

The Bureau received over a dozen comments on the effective date, all of which were from industry commenters, including both servicers and industry trade associations. Nearly all of the commenters recommended extensions of the proposed effective dates, generally to one year, 18 months, or two years. Several commenters suggested one effective date for all provisions, while others suggested that having two different effective dates was appropriate and requested more time to implement those provisions regarding bankruptcy periodic statements, successors in interest, and early intervention notices. Industry trade association commenters requested an explicit safe harbor for servicers that come into compliance before the effective date.

Approximately half of commenters discussing the effective date indicated that an implementation period of 12 months or less would be sufficient for the provisions other than those regarding bankruptcy and successors in interest, while approximately half requested more time to implement the provisions other than those regarding bankruptcy and successors in interest. Approximately half of commenters discussing the effective date indicated that an implementation period of 18 months would be sufficient for the provisions regarding bankruptcy and successors in interest, while approximately half requested more time to implement those provisions. One commenter indicated that consumer-focused enhancements to the rule, including the provisions addressing successors in interest, loss mitigation, transfers, and bankruptcy should be implemented promptly but cautioned that these areas involve significant operational complexity and will require significant time to implement properly. Similarly, in explaining their recommended extensions to the proposed effective dates, several commenters focused on the need for sufficient time to update operating systems and software; coordinate with third party service providers and, if applicable, bankruptcy trustees; train staff; and test customer support and technology to comply with the final rule.

Regarding bankruptcy periodic statement requirements specifically, several industry commenters requested that the Bureau allow servicers a sufficiently long period to implement the changes necessary to comply. Multiple trade associations recommended 18 months. A systems vendor commenter and a credit union commenter each recommended 24 months. Another credit union commenter estimated it would take approximately four to six months for vendors to develop the statements, three months to test the statements, and two months to train employees and inform consumers about the statements, for a total of nine to 11 months.

Industry trade association commenters noted that this rulemaking is not subject to a statutory deadline. They stated that the prior rulemakings under title XIV of the Dodd-Frank Act did not provide sufficient implementation time and so urged the Bureau to extend the effective dates. Several commenters pointed out that the industry is still implementing other Bureau rules, including the 2013 Integrated Mortgage Disclosures under the Real Estate Settlement Procedures Act and the Truth in Lending Act and the 2015 Home Mortgage Disclosure Act rulemaking. Commenters also indicated that they might have to implement other upcoming anticipated rules.

For the reasons discussed in detail below, the Bureau is adopting an effective date of one year after publication for all provisions, except for an effective date of 18 months after publication for the bankruptcy periodic statement exemption and modified statements (§ 1026.41(e)(5) and (f)) and for the following regulation text and commentary provisions specifically addressing successors in interest: In Regulation X, § 1024.30(d) and related comments 30(d)–1 through –3; the definitions of successor in interest and confirmed successor in interest in § 1024.31 and related comments 31 (Successor in interest)–1 and –2; § 1024.32(c) and related comments 32(c)(1)–1, 32(c)(2)–1 and –2, and 32(c)(4)–1; § 1024.35(e)(5); § 1024.36(d)(3) and (i) and related comments 36(i)–1 through –3; § 1024.38(b)(1)(vi) and related comments 38(b)(1)(vi)–1 through –5; comment 41(b)–1; comment appendix MS to part 1024–2; and in Regulation Z, § 1026.2(a)(11) and (27) and related comments 2(a)(11)–4 and 2(a)(27)(i)–1 and –2; comment 20(e)(4)–3; § 1026.20(f); comment 36(c)(1)(iii)–2; § 1026.39(f); comment 41(c)–5; and § 1026.41(g). The Bureau considered the comments, including the potential issues that could arise as a result of an inadequate implementation period and industry's focus on other recent mortgage rulemakings, and believes that these effective dates achieve the right balance between affording industry sufficient time for implementation and promptly affording consumers the benefits of the final rule.

The Bureau recognizes that the final rule provisions regarding bankruptcy periodic statements and successors in interest may take more time to implement than the other final rule provisions. Specifically, servicers and third-party service providers need sufficient time to coordinate, develop, and test systems required to modify periodic statements for consumers in bankruptcy. They also need sufficient time to train employees regarding the bankruptcy periodic statement requirements. In addition, although the successor in interest provisions generally should not require the same levels of operating systems changes as the bankruptcy periodic statement requirements, the Bureau acknowledges that these proposed provisions generated more comments than any other aspect of the proposal. Many servicers may need to institute new systems to track potential and confirmed successors in interest who are not obligated on the loan, particularly as to those successors in interest who are not already covered under the policies and procedures requirement in existing § 1024.38(b)(1)(vi). Servicers also need sufficient time to develop policies and procedures relating to the types of documents that they will accept to confirm successor in interest status for common factual scenarios that could arise under the final rule's broader definition of successor in interest. The Bureau also recognizes that servicers may wish to work with third-party service providers to ensure compliance with the successor in interest provisions. Thus, the Bureau believes that an implementation period of 18 months is reasonable for the changes to the bankruptcy periodic statement exemption and modified statements and to the provisions specifically addressing successors in interest.

After further consideration, the Bureau also believes it is unlikely that servicers could implement within the proposed 280 days (approximately nine months) all of the remaining provisions of the final rule, including the early intervention notice requirements for which commenters specifically requested an extension of time for compliance. The Bureau recognizes that, in particular, the new notices required under the final rule will require some systems changes while servicers are, at the same time, implementing most of the other changes in the final rule. Thus, the Bureau believes that a one-year implementation period is reasonable for all of the provisions of the final rule other than the bankruptcy periodic statements and successor in interest provisions identified above.

The Bureau considered whether to offer servicers a safe harbor for early compliance, as requested by some commenters. Specifically, the Bureau considered whether to adopt an early effective date (*i.e.,* at or shortly after the time of publication in the **Federal Register**) and permit optional compliance with some or all of the final rule provisions for a specific period of time (*e.g.,* one year or 18 months, depending on the provision) after that effective date, at which time compliance would be mandatory. For the reasons discussed below, the Bureau is choosing not to set an early effective date with optional early compliance.

The Bureau does not believe that it is appropriate to permit servicers to choose optional early compliance for only some provisions of the final rule without requiring early compliance with other provisions. The provisions of the existing rule are closely intertwined with each other and with the final rule; early compliance with only some provisions of the final rule risks interfering with the connections among the different parts of the rule. Nor does the Bureau believe that servicers would choose or be able to comply with all aspects of the final rule prior to the mandatory compliance dates, in part because, as noted above, some provisions will require systems changes. Thus, the Bureau believes that any optional early compliance would require the Bureau to specify those provisions of the final rule with which a servicer must also comply if it chooses to comply early with other provisions of the final rule. This task would be speculative, given that the Bureau did not receive any comments on which portions of the proposal would be feasible for an early optional compliance period. In addition, offering an early optional compliance period could result in confusion about when, during that period, servicers must comply with either the current rule provisions or the final rule provisions.

In addition, the Bureau is concerned about causing considerable uncertainty for servicers, consumers, and regulators by adopting an early effective date and permitting optional compliance with some or all of the final rule provisions for a specific period of time after that date. Even if some servicers were to choose to comply with all aspects of the final rule prior to the mandatory compliance dates, it would result in broader compliance challenges and potential unnecessary litigation. Consumers may have difficulty understanding whether their servicers are complying with specific provisions at any given time. Regulators and the judiciary would have to spend additional time and resources to determine which servicers are complying with the final rule provisions at which times, and the lack of certainty could potentially lead to inconsistent interpretations, treatment of different servicers, and application of borrower protections.

The Bureau recognizes, however, that there are several instances where the final rule adopts new commentary to the current regulation that clarifies, reinforces, or does not conflict with the existing rule and commentary. Servicers may already be operating in a manner that is consistent with both these new commentary provisions and the existing regulation text and commentary. In those instances, servicers that continue to rely on the existing regulation and commentary prior to the effective dates do not violate the existing rules, even though the new commentary provisions are not yet effective during that period.

Similarly, the Bureau is aware, as noted in several parts of the section-by-section analysis above, that servicers may already be engaged in several consumer-friendly practices that are not specifically required under the current rule and thus do not violate the current rule. Some of these practices not only may be required under the final rule as of the effective dates but also will be subject to specific requirements as of those dates. For example, some servicers currently are providing periodic statements to consumers in bankruptcy or providing notices of complete applications to consumers. Those statements or notices may not meet all of the specific requirements under the final rule but are nonetheless beneficial to borrowers. As another example, some servicers currently reevaluate borrowers for loss mitigation options in certain circumstances (such as a new hardship) under the requirements of § 1024.41, even if they are not required to do so for a borrower's subsequent complete loss mitigation application under the current rule, as provided in § 1024.41(i). Those reevaluations are not a violation of the current rule and may benefit borrowers in those circumstances. The Bureau recognizes that some servicers may be engaging in several other such practices, in addition to the above examples, that are not mandated by the current rule. Where such practices that will be mandated by the final rule are in compliance with the current rule or are not in violation of the current rule, servicers may continue those practices in compliance with the existing rule without necessarily adopting all of the specific requirements of the final rule before their effective dates.

For the reasons discussed above, the Bureau believes that these effective dates, which provide extended implementation periods of one year and 18 months, are appropriate and will provide industry with sufficient time to revise and update policies and procedures; coordinate with third-party service providers to implement and test systems changes; and train staff. In addition, to assist industry with efficient and effective implementation of the rule, the Bureau intends to provide implementation material in advance of the effective dates in the form of revisions to the Bureau's small entity compliance guide to the mortgage servicing rules and other aids.

VII. Dodd-Frank Act Section 1022(b)

A. Overview

In developing the final rule, the Bureau has considered the final rule's potential benefits, costs, and impacts.[410] The proposal set forth a preliminary analysis of these effects, and the Bureau requested comment on this topic. In addition, the Bureau has consulted, or offered to consult with, the prudential regulators, the Securities and Exchange Commission, HUD, the HUD Office of Inspector General, the Federal Housing Finance Agency, the Federal Trade Commission, the Department of the Treasury, the Department of Agriculture, and the Department of Veterans Affairs, including regarding consistency with any prudential, market, or systemic objectives administered by such agencies.

The final rule covers nine major topics, summarized below, generally in the order they appear in the final rule. More details can be found in the section-by-section analysis above.

1. Successors in interest. The Bureau is finalizing three sets of rule changes relating to successors in interest. First, the Bureau is adopting definitions of successor in interest for purposes of Regulation X's subpart C and Regulation Z that are modeled on the categories of transfers protected under section 341(d) of the Garn-St Germain Act. Second, the Bureau is finalizing rules relating to how a mortgage servicer confirms a successor in interest's identity and ownership interest.[411] Third, the Bureau is applying the Regulation X and Z mortgage servicing rules to successors in interest once a servicer confirms the successor in interest's status.

2. Definition of delinquency. The Bureau is finalizing a general definition of delinquency that applies to all of the servicing provisions of Regulation X and the provisions regarding periodic statements for mortgage loans in Regulation Z. Delinquency means a period of time during which a borrower and a borrower's mortgage loan obligation are delinquent. A borrower and a borrower's mortgage loan obligation are delinquent beginning on the date a periodic payment sufficient to cover principal, interest, and, if applicable, escrow, becomes due and unpaid, until such time as no periodic payment is due and unpaid.

3. Requests for information. The Bureau is finalizing amendments that change how a servicer must respond to requests for information asking for ownership information for loans in trust for which the Federal National Mortgage Association (Fannie Mae) or Federal Home Loan Mortgage Corporation (Freddie Mac) is the owner of the loan or the trustee of the securitization trust in which the loan is held.

4. Force-placed insurance. The Bureau is finalizing amendments to the force-placed insurance disclosures and model forms to account for when a servicer wishes to force-place insurance when the borrower has insufficient, rather than expiring or expired, hazard insurance coverage on the property. Additionally, servicers now will have the option to include a borrower's mortgage loan account number on the notices required under § 1024.37. The Bureau also is finalizing several technical edits to correct discrepancies between the model forms and the text of § 1024.37.

5. Early intervention. The Bureau is clarifying the early intervention live contact obligations for servicers to establish or make good faith efforts to establish live contact so long as the borrower remains delinquent. The Bureau is also clarifying requirements regarding the frequency of the written early intervention notices, including when there is a servicing transfer. In addition, regarding certain borrowers who are in bankruptcy or who have invoked their cease communication rights under the FDCPA, the Bureau is finalizing exemptions for servicers from complying with the live contact obligations but requiring servicers to provide written early intervention notices under certain circumstances.

6. Loss mitigation. The Bureau is finalizing several amendments relating to the loss mitigation requirements. The final rule: (1) Requires servicers to meet the loss mitigation requirements more than once in the life of a loan for borrowers who become current on payments at any time between the borrower's prior complete loss mitigation application and a subsequent loss mitigation application; (2) Modifies an existing exception to the 120-day prohibition on foreclosure filing to allow a servicer to join the foreclosure action of a superior or subordinate lienholder; (3) Clarifies how servicers select the reasonable date by which a borrower should return documents and information to complete an application; (4) Clarifies that, if the servicer has already made the first notice or filing, and a borrower timely submits a complete loss mitigation application: (i) The servicer must not move for foreclosure judgment or order of sale, or conduct a foreclosure sale, even where the sale proceedings are conducted by a third party, unless one of the specified circumstances is met (*i.e.,* the borrower's loss mitigation application is properly denied, withdrawn, or the borrower fails to perform on a loss mitigation agreement); (ii) That absent one of the specified circumstances, conduct of the sale violates the rule; (iii) That the servicer must instruct foreclosure counsel promptly not to make any further dispositive motion, to avoid a ruling or order on a pending dispositive motion, or to prevent conduct of a foreclosure sale, unless one of the specified circumstances is met; and (iv) That the servicer is not relieved from its obligations by counsel's actions or inactions; (5) Requires that servicers provide a written notice to a borrower within five days (excluding Saturdays, Sundays, or legal holidays) after they receive a complete loss mitigation application and requires that the notice: (i) Indicate that the servicer has received a complete application; (ii) provide the date of completion, a statement that the servicer expects to complete its evaluation within 30 days from the date it received the complete application, and an explanation that the borrower is entitled to certain specific foreclosure protections and may be entitled to additional protections under State or Federal law; (iii) Clarify that the servicer might need additional information later, in which case the evaluation could take longer and the foreclosure protections could end if the servicer does not receive the information as requested.; (6) Sets forth how servicers must attempt to obtain information not in the borrower's control and evaluate a loss mitigation application while waiting for third party information; requires servicers to exercise reasonable diligence to obtain the information and prohibits servicers from denying borrowers solely because a servicer lacks required information not in the borrower's control, except under certain circumstances; requires servicers in this circumstance to complete all possible steps in the evaluation process within the 30 days, notwithstanding the lack of the required third-party information; requires that servicers promptly provide a written notice to the borrower if the servicer lacks required third party information 30 days after receiving the

[410] Specifically, section 1022(b)(2)(A) of the Dodd-Frank Act requires the Bureau to consider the potential benefits and costs of the regulation to consumers and covered persons, including the potential reduction of access by consumers to consumer financial products and services; the impact of the rule on insured depository institutions and insured credit unions with less than $10 billion in total assets as described in section 1026 of the Dodd-Frank Act; and the impact on consumers in rural areas.

[411] This final rule uses the term ''successor in interest's status'' to refer to the successor in interest's identity and ownership interest in the property.

borrower's complete application and cannot evaluate the application in accordance with applicable requirements established by the owner or assignee of the mortgage loan; and requires servicers to notify borrowers of their determination on the application in writing promptly upon receipt of the third party information it lacked; (7) Permits servicers to offer a short-term repayment plan based upon an evaluation of an incomplete loss mitigation application; (8) Clarifies that servicers may stop collecting documents and information from a borrower for a particular loss mitigation option after receiving information confirming that, pursuant to any requirements established by the owner or assignee, the borrower is ineligible for that option; and clarifies that servicers may not stop collecting documents and information for any loss mitigation option based solely upon the borrower's stated preference but may stop collecting documents and information for any loss mitigation option based on the borrower's stated preference in conjunction with other information, as prescribed by requirements established by the owner or assignee of the mortgage loan; and (9) Addresses and clarifies how loss mitigation procedures and timelines apply when a transferee servicer receives a mortgage loan for which there is a loss mitigation application pending at the time of a servicing transfer.

7. Prompt payment crediting. The Bureau is clarifying how servicers must treat periodic payments made by consumers who are performing under either temporary loss mitigation programs or permanent loan modifications. Periodic payments made pursuant to temporary loss mitigation programs must continue to be credited according to the loan contract and could, if appropriate, be credited as partial payments, while periodic payments made pursuant to a permanent loan modification must be credited under the terms of the permanent loan agreement.

8. Periodic statements. The Bureau is finalizing several requirements relating to periodic statements. The final rule: (1) Clarifies certain periodic statement disclosure requirements relating to mortgage loans that have been accelerated, are in temporary loss mitigation programs, or have been permanently modified, to conform generally the disclosure of the amount due with the Bureau's understanding of the legal obligation in each of those circumstances, including that the amount due may only be accurate for a specified period of time when a mortgage loan has been accelerated; (2) Requires servicers to send modified periodic statements (or coupon books, where servicers are otherwise permitted to send coupon books instead of periodic statements) to consumers who have filed for bankruptcy, subject to certain exceptions, with content varying depending on whether the consumer is a debtor in a chapter 7 or 11 bankruptcy case, or a chapter 12 or 13 bankruptcy case; and includes proposed sample periodic statement forms that servicers may use for consumers in bankruptcy to ensure compliance with § 1026.41; and (3) Exempts servicers from the periodic statement requirement for charged-off mortgage loans if the servicer will not charge any additional fees or interest on the account and provides a periodic statement including additional disclosures related to the effects of charge-off.

9. Small servicer. The Bureau is finalizing certain changes to the small servicer determination. The small servicer exemption generally applies to servicers who service 5,000 or fewer mortgage loans for all of which the servicer is the creditor or assignee. The final rule excludes certain seller-financed transactions and mortgage loans voluntarily serviced for a non-affiliate, even if the non-affiliate is not a creditor or assignee, from being counted toward the 5,000 loan limit, allowing servicers that would otherwise qualify for small servicer status to retain their exemption while servicing those transactions.

In addition to the changes discussed above, the final rule also makes technical corrections and minor clarifications to wording throughout several provisions of Regulations X and Z that generally are not substantive in nature.

B. Provisions To Be Analyzed

The analysis below considers the potential benefits, costs, and impacts to consumers and covered persons of the following key provisions of the final rule:

1. Requirements related to successors in interest.
2. A new definition of ''delinquency'' for purposes of Regulation X's mortgage servicing rules.
3. Early intervention written notice requirements for certain consumers.
4. Changes to loss mitigation procedures, including:
   - Requiring a notice of complete application for loss mitigation applications;
   - Requirements applicable when determination of what loss mitigation options to offer a borrower is delayed because information outside the borrower's control is missing;
   - Clarifications to the dual tracking protections in § 1024.41(g);
   - Requiring review of multiple loss mitigation applications from the same borrower in some circumstances;
   - Clarification of how loss mitigation timelines apply in the case of servicing transfers; and
   - Permitting evaluation for short-term repayment plans based on incomplete applications.
5. Periodic statement requirements applicable to consumers in bankruptcy.
6. An exemption from the servicing rule's periodic statement requirement for mortgage loans that have been charged off.
7. Revisions to the small servicer determination.

In addition to the changes listed above, the final rule modifies or clarifies other provisions of the 2013 Mortgage Servicing Final Rules. These other changes include: Commentary relaxing certain information provision requirements under § 1024.36(a) when a borrower requests information about the owner of a loan and Fannie Mae or Freddie Mac is the owner of the loan or the trustee of the securitization trust in which the loan is held; an amendment to the force-placed insurance notice described in § 1024.37(c) through (e) to require the notice to state that coverage is insufficient (rather than expiring or expired), when applicable, and to allow inclusion of the account number on the notice; a policies and procedures requirement under § 1024.38(b)(2)(vi) regarding identifying and obtaining documents not in the borrower's control that a servicer requires to determine what loss mitigation options, if any, to offer a borrower; commentary regarding a servicer's flexibility in collecting documents and information to complete a loss mitigation application under § 1024.41(b)(1); commentary under § 1024.41(b)(2)(i) to clarify how a servicer must treat a loss mitigation application it receives when no foreclosure sale has been scheduled; commentary relevant to the reasonable date for return of documents under § 1024.41(b)(2)(ii); amendments to § 1024.41(c)(2)(iv) clarifying when a loss mitigation application is considered facially complete; an exception to § 1024.41(f)(1)'s 120-day pause for circumstances in which a servicer joins the foreclosure action of a superior or subordinate lienholder; commentary clarifying the effect of § 1026.36(c)'s and § 1026.41(d)'s prompt crediting and periodic statement requirements with regard to loan modifications and loans that have been accelerated; commentary to clarify the information that must be included in a periodic statement pursuant to § 1026.41(d) following a period when the servicer was exempt from sending periodic statements; removal of the phrase ''creditor or assignee'' from the description of voluntarily serviced loans that may be excluded in determining the small servicer exemption under § 1026.41(e)(4), and certain other minor changes. The Bureau believes these modifications and clarifications will generally benefit consumers and covered persons and impose minimal new costs on consumers and covered persons.

C. Data Limitations and Quantification of Benefits, Costs and Impacts

Prior to publishing the proposal, the Bureau engaged in extensive outreach on many of the issues addressed by the final rule, including discussions with several servicers of different sizes, consultations with other stakeholders, and convening a roundtable on the application of the mortgage servicing rules in the case of bankrupt borrowers. The Bureau received several comments related to the potential impacts of the proposal on consumers and industry. However, as discussed further below, the data with which to quantify the potential costs, benefits, and impacts of the final rule are generally limited.

Quantifying the benefits of the final rule for consumers presents particular challenges. As discussed further below, certain provisions may directly save consumers time and money while others may benefit consumers by, for example, facilitating household budgeting, supporting the consumer's ability to obtain credit, and reducing default and avoidable foreclosure. Many of these benefits are qualitative in nature, while others are quantifiable but would require a wide range of data that is not currently available to the Bureau.

In addition, the Bureau believes, based on industry outreach, that many servicers already follow procedures that comply with at least some provisions of the final rule. However, the Bureau does not have representative data on the extent to which servicer operations currently comply with the final rule. Consequently, the Bureau is unable to quantify the benefits to consumers or the costs to servicers of the final rule. Even with additional representative 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 final rule.

In light of these data limitations, the analysis below generally provides a qualitative discussion of the benefits, costs, and impacts of the final rule. General economic principles, together with the limited data that are available, provide insight into these benefits, costs, and impacts.

D. Small Servicer Exemption

Small servicers—generally, those that service 5,000 or fewer mortgage loans, all of which the servicer or affiliates own or originated—are exempt from many of the provisions of the 2013 Mortgage Servicing Final Rules, including most of the provisions affected by the final rule.[412] Therefore, most of the discussion of potential benefits and costs below generally does not apply to small servicers or to consumers whose mortgage loans are serviced by small servicers. The two exceptions are (1) the provisions related to successors in interest, which create new, limited information request procedures for potential successors in interest and extend the protections of the Mortgage Servicing Rules, including certain provisions from which small servicers are not exempt, to confirmed successors in interest, and (2) the definition of delinquency in § 1024.31, which may affect the scope of the 2013 RESPA Servicing Final Rule's prohibition on initiating foreclosure proceedings unless a borrower's mortgage loan obligation is more than 120 days delinquent. For those provisions, the discussion of potential benefits and costs does apply to loans serviced by small servicers.

E. Potential Benefits and Costs to Consumers and Covered Persons

The Bureau believes that, compared to the baseline established by the 2013 Mortgage Servicing Final Rules, many of the final rule provisions benefit both consumers and covered persons by increasing the clarity and precision of the servicing rules and thereby reducing compliance costs. Other benefits and costs are considered below.

1. Successors in Interest

The final rule includes new requirements for mortgage servicers with respect to successors in interest. For purposes of these provisions, successors in interest generally include individuals who receive an ownership interest in a property securing a mortgage loan in certain types of transfers that are protected by the Garn-St Germain Act, including, for example, certain transfers resulting from the death of the borrower, transfers to the borrower's spouse or children, or transfers resulting from divorce. As described in more detail below, these provisions relate to how mortgage servicers confirm a successor in interest's identity and ownership interest in the property and apply the Mortgage Servicing Rules to confirmed successors in interest.

Section 1024.36(i) generally requires a servicer to respond to a written request that indicates that the person making the request may be a successor in interest by providing that person with a description of the documents the servicer reasonably requires to confirm the person's identity and ownership interest in the property. Section 1024.38(b)(1)(vi) requires servicers to maintain certain policies and procedures with respect to successors in interest, which are generally intended to facilitate the process of confirming a person's status as a successor in interest and communicating with the person about the status.

Section 1024.30(d) provides that a confirmed successor in interest shall be considered a borrower for the purposes of the Mortgage Servicing Rules in Regulation X. Similarly, § 1026.2(a)(11) provides that a confirmed successor in interest is a consumer with respect to the Mortgage Servicing Rules in Regulation Z. Under the final rule, the Mortgage Servicing Rules apply with respect to a confirmed successor in interest regardless of whether that person has assumed the mortgage loan obligation (*i.e.,* legal liability for the mortgage debt) under State law.

Potential benefits and costs to consumers. As described in more detail below, the final rule will benefit successors in interest by permitting them to protect and manage their interest in the property, and to make key decisions about that property interest, without unnecessary delays and associated costs.[413]

The Bureau understands, based on pre-proposal discussions with certain large servicers, that only a small number of properties for which they service mortgage loans are transferred to

[412] Section 1026.41(e)(4)(ii) defines the term small servicer as a servicer that either: (1) Services, together with any affiliates, 5,000 or fewer mortgage loans, for all of which the servicer (or an affiliate) is the creditor or assignee; (2) is a Housing Finance Agency, as defined in 24 CFR 266.5; or (3) is a nonprofit entity that services 5,000 or fewer mortgage loans, including any mortgage loans serviced on behalf of associated nonprofit entities, for all of which the servicer or an associated nonprofit entity is the creditor.

[413] The Dodd-Frank Act's broad definition of consumer includes successors in interest since it means an individual or an agent, trustee, or representative acting on behalf of an individual. 12 U.S.C. 5481(4).

successors in interest in any given year.[414] The Bureau does not have representative data on current servicer policies toward such successors in interest. Because the Garn-St Germain Act prevents foreclosure solely on the basis that a home was transferred to a successor in interest, the Bureau expects that servicers currently are servicing loans for successors in interest, regardless of whether such successors in interest assume the mortgage loan. The Bureau does not have representative information on the standards servicers use in servicing loans for successors in interest; however, as discussed below, the Bureau believes, based on information it has received through the comment process and from consumers and other stakeholders prior to issuing the proposal, that in many cases successors in interest would benefit from additional protections.

The final rule will help potential successors in interest confirm their status as successors in interest by requiring generally that servicers respond to written requests from potential successors in interest with a description of the documents the servicer requires to confirm the person's identity as a successor in interest, reducing the time and effort required to establish their status in the eyes of the servicer. In their comments, consumer advocacy groups and government commenters confirmed what the Bureau had heard through prior reports from consumers, consumer advocacy groups, and other stakeholders: That successors in interest often have difficulty demonstrating their identity and ownership interest in the property to servicers' satisfaction and that some servicers currently require successors in interest to submit documents that are unreasonable in light of the particular situation of that successor in interest or in light of the laws of the relevant jurisdiction. The Bureau has heard repeated reports that some servicers have taken a long time to confirm the successor in interest's status, even after receipt of appropriate documentation. The Bureau has also heard reports that servicers may fail to communicate to the successor in interest whether the servicer has confirmed the successor in interest's status. Unnecessary delays and other difficulties can harm successors in interest because successors in interest who have not been confirmed by the servicer may not be able to obtain information about the mortgage, and in some instances servicers may be unwilling to accept payment from the unconfirmed successor in interest. These problems may lead successors in interest to incur unnecessary costs related to the mortgage or deprive them of rights to which they would otherwise be entitled and may even lead to unnecessary foreclosures.

The final rule will also benefit successors in interest after they have been confirmed by the servicer by extending the protections of the Mortgage Servicing Rules to confirmed successors in interest, regardless of whether they assume the obligations of the mortgage loan under State law. The benefits of the Mortgage Servicing Rules to consumers generally are discussed in the 2013 RESPA Servicing Final Rule and the 2013 TILA Servicing Final Rule, in which the Bureau noted that the need for these rules arises in part from the fact that, because borrowers generally do not choose their servicers, it is difficult for consumers to protect themselves from shoddy service or harmful practices.[415] This reasoning is particularly applicable to successors in interest because they may not be parties to the mortgage loan. In addition, successors in interest may find that they have a particular need for access to information about the mortgage loan secured by the property that they now own. Access to this information may help them avoid unwarranted or unnecessary costs and fees on the mortgage loan and prevent unnecessary foreclosure.

Furthermore, confirmed successors in interest obtaining an ownership interest in a home that is their principal residence may benefit in particular from Regulation X's rules relating to loss mitigation procedures, particularly when deciding whether to assume the obligations of the mortgage loan. Successors in interest may often experience a disruption in household income due to death or divorce and therefore may be more likely than other homeowners to need loss mitigation to avoid foreclosure. If the servicer does not evaluate the successor in interest promptly for loss mitigation options, or if the servicer requires the successor in interest to assume the mortgage obligation before it will evaluate the successor in interest for loss mitigation options, the successor in interest will be required to decide whether to assume the mortgage obligation without knowing what loss mitigation options will be available. As noted by some government and consumer advocacy group commenters, the final rule helps confirmed successors in interest to assess whether they will be able to afford to keep the home, permitting them to make a more fully informed decision about whether to accept the mortgage obligation.

Potential benefits and costs to covered persons. The costs of complying with the final rule's provisions related to successors in interest depend on servicers' current policies and procedures. Because the Garn-St Germain Act generally protects successors in interest from enforcement of due-on-sale provisions after transfer of homeownership to them, servicers are effectively required to continue servicing loans following their transfer to successors in interest. Thus, the Bureau believes that servicers likely already have some policies and procedures in place for confirming a successor in interest's identity and ownership interest in the property (and thereby determining whether the Garn-St Germain Act is applicable) and for servicing a loan secured by property that has been transferred to a successor in interest. The final rule establishes certain standards for the performance of these activities. To the extent to which some servicers are meeting these standards already, the costs for these servicers will be reduced. However, many servicers may need to significantly alter certain of their policies and procedures to comply with the final rule's successor in interest provisions.

The revisions to § 1024.38(b)(1)(vi) and new § 1024.36(i) may require servicers to develop and implement new policies and procedures for confirming a successor in interest's interest in a property and communicating with potential successors in interest about documents the servicer requires to confirm the person's status. Under current § 1024.38(b)(1)(vi), servicers must maintain policies and procedures designed to identify and facilitate

[414] One large servicer indicated that in recent years the number of successors in interest applying to assume a mortgage loan each year represented less than 0.03 percent of the total loans it services. However, this number does not include successors in interest that did not apply to assume the loan but nonetheless might have benefitted from the final rule (for example, because they would have been able to obtain more information about the loan before deciding whether to apply to assume the loan). Data from the American Housing Survey indicate that, in 2011, 239,000 homeowners (approximately 0.5 percent of those with a mortgage) had assumed the mortgage loan on their home; however, these data do not indicate whether the homeowner was a successor in interest as defined in the final rule at the time the loan was assumed. Office of Policy Dev. and Research, U.S. Dep't of Hous. & Urban Dev. & U.S. Census Bureau, U.S. Dep't of Commerce, *American Housing Survey for the United States: 2011,* at 79 (Sept. 2013), *available at http://www.census.gov/content/dam/Census/programs-surveys/ahs/data/2011/h150–11.pdf.*

[415] *See* 78 FR 10695, 10842–61 (Feb. 14, 2013); 78 FR 10901, 10978–94 (Feb. 14, 2013).

communication promptly with the successor in interest of a deceased borrower. As discussed above, the Bureau believes that, because the Garn-St Germain Act generally protects successors in interest from enforcement of due-on-sale provisions, servicers likely already have some policies and procedures in place for confirming the identity and ownership interest in the property of a successor in interest following most transfers covered by the final rule. However, the Bureau does not have data on the extent to which servicers' current policies and procedures may comply with the final rule's successor in interest provisions or the extent of the changes that will be required to bring policies and procedures into compliance with these provisions. In addition, servicers may not currently have policies in place for establishing a successor in interest's status when the transferor of the property retains an ownership interest following the transfer. Such transfers may not change servicers' servicing approach at all under current practice, whereas under the final rule servicers will be required to treat confirmed successors in interest as borrowers for purposes of the servicing rules.

Some industry commenters pointed out that legal determinations of successorship are often complex and may involve competing claims or borrower confusion about their legal status. The Bureau acknowledges that such determinations may be difficult, particularly when there is a dispute regarding title to the property, and that laws relevant to successorship vary across jurisdictions. However, servicers must already make such determinations to assess whether the Garn-St Germain Act applies and, more generally, because, in order to protect the investor's security interest in the property, servicers may need to know who owns the property securing the loan they are servicing. Thus, while servicers will bear costs of establishing and carrying out procedures to establish a successor in interest's status under the final rule, the Bureau expects that in most cases servicers will be revising or formalizing existing processes for establishing ownership of the property following a transfer.

In addition, some industry commenters said that the proposed rule's provisions could increase the risk of fraud losses. One commenter noted that the Bureau's discussion of benefits and costs in the preamble to the proposed rule did not discuss the possibility of increased servicer fraud losses. However, the Bureau does not expect that the final rule will lead to a significant increase in fraud losses to servicers. Servicers can comply with the final rule while taking steps designed to prevent fraudulent claims prior to confirming a successor in interest's status.[416] Furthermore, because fraudulently establishing oneself as a confirmed successor in the eyes of the servicer would not affect title to the property, it is not clear what direct benefit this would offer to a fraudster or what direct fraud losses it would cause for the servicer.

Sections 1024.30(d) and 1026.2(a)(11), which extend the protections of the Mortgage Servicing Rules to confirmed successors in interest, generally require servicers to continue to apply existing policies and procedures to a set of loans that were subject to the Mortgage Servicing Rules prior to an ownership interest in the property being transferred to the successor in interest. As discussed above, the Bureau expects that such loans make up a small fraction of the total loans serviced by any particular servicer. For these reasons, the Bureau expects that the cost to servicers of complying with most existing Mortgage Servicing Rules with respect to confirmed successors in interest generally will be small.

Servicers may need to develop new policies and procedures to address certain circumstances specific to successors in interest. For example, servicers will need to decide whether to send the notice and acknowledgment form permitted by § 1024.32(c)(1) through (3) before sending Mortgage Servicing Rule notices to a confirmed successor or may need to develop new policies and procedures for cases in which, following the transfer, the transferor retains an interest in the property or there are multiple borrowers. Servicers currently must address such situations in some manner, but given the final rule's requirement to comply with the Mortgage Servicing Rules with respect to successors in interest, servicers will likely need to reconsider policies and procedures to ensure they are in compliance.

The Bureau acknowledges that, due to the unique circumstances of a confirmed successor in interest who has recently obtained an interest in the property, there may be additional costs associated with complying with the Mortgage Servicing Rules with respect to confirmed successors in interest. For example, confirmed successors in interest may have experienced a disruption in household income due to death or divorce and therefore may be more likely to seek loss mitigation to avoid foreclosure, possibly delaying the foreclosure process. Confirmed successors in interest may also be more likely to seek information regarding the loan that is secured by the property in which they now hold an interest. Compensation structures in servicing, which tend to make mortgage servicing a high-volume, low-margin business, may mean that servicers are not compensated for the time required to address the circumstances of some successors in interest even when doing so might minimize the aggregate costs to servicers and investors.[417] Nonetheless, because the Bureau believes that the number of successors in interest serviced at any given time is small and that many servicers are already performing servicing tasks with respect to successors in interest, the Bureau expects that servicers would not incur significant additional costs as a result of the final rule's successor in interest provisions.

One industry commenter noted that, in discussing the costs and benefits of the proposed successor in interest provisions in the preamble to the proposed rule, the Bureau did not discuss the costs to servicers of becoming equipped to originate mortgage loans. However, the final rule does not require servicers to originate mortgage loans.

2. Definition of "Delinquency"

The final rule adds a general definition of delinquency in § 1024.31 that applies to all sections of subpart C of Regulation X, replacing the existing definition of delinquency for purposes of §§ 1024.39 and 1024.40(a). Delinquency is defined as a period of time during which a borrower and a borrower's mortgage loan obligation are delinquent, and a borrower and a borrower's mortgage loan obligation are delinquent beginning on the date a periodic payment sufficient to cover principal, interest, and, if applicable, escrow, becomes due and unpaid, until such time as no periodic payment is due and unpaid. Comment 31 (Delinquency)-2 clarifies that, if a servicer applies payments to the oldest outstanding periodic payment, a payment by a delinquent borrower advances the date the borrower's delinquency began. The Bureau

[416] For example, comment 38(b)(1)(vi)–2 to Regulation X indicates that the documents that a servicer requires to confirm a potential successor in interest's identity and ownership interest in the property may include documents the servicer reasonably believes are necessary to prevent fraud or other criminal activity (such as if a servicer has reason to believe that the documents presented are forged).

[417] *See* 78 FR 10695, 10843–44 (Feb. 14, 2013).

understands from its pre-proposal outreach and from commenters that the majority of servicers credit payments made to a delinquent account to the oldest outstanding periodic payment. Some servicers that use this method have expressed concern about how to calculate the length of a borrower's delinquency without increased certainty from the Bureau.[418]

The Bureau believes that the final rule's definition will clarify the application of the servicing rules without imposing significant new burdens on servicers. The Bureau recognizes that, in principle, the definition could affect the circumstances under which a servicer may initiate foreclosure proceedings, because the definition of ''delinquency'' affects the application of § 1024.41(f)(1)'s prohibition on initiating foreclosure proceedings unless ''a borrower's mortgage loan obligation is more than 120 days delinquent.'' In particular, Comment 31 (Delinquency)-2 implies that a servicer that otherwise applies payments to the oldest outstanding periodic payment may not initiate foreclosure proceedings unless the borrower has missed the equivalent of at least four monthly payments. Absent this clarification, § 1024.41(f)(1) could be interpreted to permit such a servicer to commence foreclosure even if the borrower has missed only one payment, so long as the payment was missed more than 120 days ago and the borrower has not become current since. However, information gathered in pre-proposal industry outreach indicates that servicers generally would not treat borrowers who are behind by three or fewer payments as seriously delinquent. More specifically, servicers contacted by the Bureau during pre-proposal outreach, when asked about policies for referring a loan for foreclosure, uniformly told the Bureau that they generally would not initiate foreclosure in cases where a borrower is making regular payments, even if such a borrower has a long-standing delinquency of up to three months' payments. In addition, Fannie Mae and Freddie Mac guidelines generally prevent servicers from initiating foreclosure if a loan is delinquent by fewer than four monthly payments. Therefore, the Bureau expects that the final rule's definition will not impose meaningful new constraints on servicers.

[418] See Am. Bankers Ass'n. Letter to Bureau of Consumer Fin. Prot. (Oct. 24, 2014), *available at http://www.aba.com/Advocacy/commentletters/Pages/default.aspx#2014*.

3. Early Intervention Written Notices

The final rule revises the scope of the exemptions from the early intervention requirements in § 1024.39(c) and (d) for two groups of borrowers: Those who are debtors in bankruptcy and those who have exercised their cease communication rights under the FDCPA regarding their mortgage loans when a servicer is subject to the FDCPA with respect to those loans. Servicers are currently exempt from each of § 1024.39's early intervention requirements with respect to these two groups of borrowers. Under the final rule, servicers remain exempt from the live contact requirement of § 1024.39(a) with respect to these borrowers. Servicers also remain exempt from the written notice requirement with respect to these borrowers if no loss mitigation option is available and if a borrower invokes the FDCPA's cease communication protections while any borrower on the mortgage loan is a debtor in bankruptcy. However, if these conditions are not met, the final rule requires that a servicer provide these two groups of borrowers with a modified version of the written early intervention notice that is generally required by § 1024.39(b). Notices sent to such borrowers may not include a request for payment, and notices sent to borrowers who have exercised their cease communication rights under the FDCPA must include certain other modifications and may not be provided more than once during any 180-day period.

Potential benefits and costs to consumers. As discussed in more detail below, § 1024.39(c) and (d) of the final rule may benefit borrowers who are in bankruptcy or who have exercised their cease communication rights under the FDCPA by providing them with information about loss mitigation options that could enable them to remain in their homes or avoid other costs associated with default on their mortgages.

The Bureau recognizes that many borrowers affected by this provision will have already received early intervention communications prior to filing for bankruptcy or invoking the FDCPA's cease communication protections. Most homeowners who file for bankruptcy are delinquent on their mortgage payments prior to filing for bankruptcy, in which case their servicers frequently will have been required to send early intervention communications prior to the filing.[419] However, many borrowers filing for bankruptcy are not delinquent on their mortgages at the time of filing, and so, under the IFR, do not receive required communications about loss mitigation options if they become delinquent while in bankruptcy. Even borrowers who do receive an early intervention written notice prior to their bankruptcy filing may benefit from information about available loss mitigation options after filing for bankruptcy, given that the borrower's servicer may have changed or new loss mitigation options may have otherwise become available since the borrower initially became delinquent. Information regarding loss mitigation may have unique value for borrowers in bankruptcy as they make decisions about how best to eliminate or reorganize their debts.

Borrowers have FDCPA protections only with respect to debt collectors and a servicer generally is considered a debt collector for purposes of the FDCPA only if the servicer acquires servicing rights to a mortgage loan after the mortgage loan is in default. Therefore, at the time a borrower first becomes delinquent on a mortgage loan, the servicer is not covered by the FDCPA with respect to that mortgage loan, and is thus generally obligated to provide written early intervention communications no later than the 45th day of the borrower's delinquency even if that borrower provides the servicer with a cease communication notification. When servicing of a borrower's loan is subsequently transferred while the loan is in default, the borrower has FDCPA protections with respect to the transferee servicer and may then properly invoke the FDCPA's cease communication protection. When the initial early intervention communications came from a different servicer that may have offered different loss mitigation options, such borrowers may benefit from written information about loss mitigation options available from the new servicer.

The final rule also may impose costs on some borrowers in both groups who would prefer not to receive any servicer communications regarding their mortgage loan. Both the Bankruptcy Code's automatic stay and the FDCPA's cease communication provision are intended to protect borrowers from being harassed by creditors while the borrowers are attempting to work

[419] One study found that, among homeowners that file for bankruptcy, more than 60 percent of homeowners with prime mortgages and more than 75 percent of homeowners with subprime mortgages were delinquent on their mortgages prior to filing for bankruptcy. Wenli Li & Michelle J. White, *Mortgage Default, Foreclosure, and Bankruptcy* (Nat'l Bureau of Economic Research, Working Paper No. 15472, Nov. 2009), *available at http://www.nber.org/papers/w15472*.

through difficult financial circumstances. By requiring servicers to send early intervention written notices to such borrowers, the final rule may cause some borrowers to receive unwanted communications. However, the Bureau notes that final § 1024.39(c) and (d) limit the content and frequency of such communications so as to reduce any perceived harassment. Specifically, the modified written notice may not contain a request for payment. Furthermore, the written notice is not required to be provided more than once to borrowers in bankruptcy during a single bankruptcy case and may not be provided more than once during any 180-day period to borrowers who have invoked their FDCPA cease communication rights.

Potential benefits and costs to covered persons. The requirement to send notices to borrowers who are in bankruptcy or who have provided a cease communication notification under the FDCPA will result in certain compliance costs for non-exempt servicers. These servicers will incur one-time costs from changing their systems to provide early intervention notices to these groups of borrowers and will incur ongoing costs from distributing these notices to an additional population. The Bureau believes that most, if not all, servicers are likely to service at least some mortgages for homeowners in bankruptcy. Fewer servicers are likely to service mortgage loans for borrowers who have FDCPA rights with respect to the mortgage loan, because these rights are triggered only if the servicer acquired the servicing rights at a time when the mortgage loan was already in default. Servicers that do not have a practice of acquiring servicing rights from others, or a practice of acquiring the servicing rights to loans that are in default, are therefore not subject to the FDCPA and are not affected by the final rule.

Servicers will bear one-time costs to develop early intervention notices that comply with the modified requirements for borrowers in bankruptcy or who have exercised FDCPA cease communication rights. The Bureau expects that these one-time costs will be relatively small given the limited nature of the modifications and the fact that the final rule includes a model clause for the specific disclosures required for borrowers who have exercised their FDCPA cease communication rights. In addition, servicers will need to ensure that their procedures for sending written early intervention notices are designed to identify borrowers who must receive modified notices under the final rule. However, servicers already must identify borrowers in bankruptcy and borrowers that have exercised FDCPA cease communication rights in order to comply with bankruptcy law and the FDCPA. Therefore, the Bureau expects that servicers will need to make only minor changes to their procedures to begin sending written early intervention notices to such borrowers.

Servicers will also incur ongoing costs from the requirement to distribute notices to these additional groups of borrowers. However, the Bureau believes that the number of additional written early intervention notices that are required by the final rule is relatively small. With respect to borrowers in bankruptcy, FHFA data indicate that, for homeowners with GSE loans, between 0.3 percent and 0.4 percent of borrowers were in bankruptcy during 2015.[420] Based on information from industry and other Federal agencies, the Bureau believes that the percentage of homeowners with non-GSE loans in bankruptcy may be higher but that the overall percentage of homeowners with mortgage loans in bankruptcy is less than 1 percent. The Bureau expects that the share of borrowers who have exercised the FDCPA cease communication right is likewise relatively small, since the right is available only to borrowers for whom the servicer acquired servicing rights after the loan is in default.

4. Loss Mitigation Procedures

Notice of Complete Loss Mitigation Application

Section 1024.41(c)(3) requires a servicer to provide a borrower a written notice within five days (excluding legal public holidays, Saturdays, and Sundays) after receiving a borrower's complete loss mitigation application, subject to certain limitations discussed below. The notice informs the borrower that the application is complete; the date the servicer received the complete application; and certain other information regarding the borrower's rights under the servicing rules. A notice is not required if the application was not complete or facially complete more than 37 days before a scheduled foreclosure sale; the servicer has already notified the borrower under § 1024.41(b)(2)(i)(B) that the application is complete and the servicer has not subsequently requested additional documents or information from the borrower to complete the application; or the servicer has already provided a notice approving or denying the application.

Potential benefits and costs to consumers. Section 1024.41(c)(3) creates a new requirement to notify a borrower that a loss mitigation application is complete in those cases where the application was not complete when the servicer provided the notice acknowledging receipt of an application under § 1024.41(b)(2)(i)(B). Although this is a new requirement, the Bureau understands, based on pre-proposal outreach and comments it received, that many servicers nonetheless already notify borrowers in writing once their applications are complete. However, such notices may not include all the information borrowers need to determine when the application was considered complete for purposes of determining their protections under Regulation X's mortgage servicing rules.

The new required notice is intended to benefit borrowers who apply for loss mitigation by providing them with more information about their application status and foreclosure protections, thereby allowing them to better protect their interests. Borrowers who have not yet received a notice will be able to infer that their applications are not yet complete and, if necessary, to follow up with the servicer to determine what remains missing. Once borrowers have received the notice, they will know that the servicer is prohibited from completing the foreclosure process until the application has been evaluated and will be able to plan based on the expectation that a decision will be reached within 30 days (unless the servicer determines that more information is needed). The notice will also provide the borrower, the servicer's compliance function, regulators, and courts with a written record that can help them evaluate a servicer's compliance with § 1024.41(c)(1)'s 30-day evaluation requirement and other requirements that depend on the date the servicer received a complete application.

As noted above, several servicers informed the Bureau during pre-proposal outreach efforts or in comments that they already provide a notice informing the borrower that an application is complete. Some commenters also said that they are already in close contact with borrowers about the status of their loss mitigation applications. To the extent that servicers are already providing a notice that includes some of the information required by the notice or otherwise communicating such information to borrowers, the incremental benefit to

[420] Fed. Housing Fin. Agency, *Foreclosure Prevention Report,* at 6 (January 2016), *available at http://www.fhfa.gov/AboutUs/Reports/ReportDocuments/FPR_January2016.pdf.*

borrowers of the provision may be reduced. Another industry commenter expressed concern that the costs of providing these notices could limit servicers' ability to make other changes that could benefit borrowers or could increase the cost of servicing non-performing loans, thereby reducing access to credit. The Bureau recognizes that additional costs to servicers can create negative consequences for consumers but agrees with other commenters that the notices will have significant benefits for many borrowers.

Potential benefits and costs to covered persons. Servicers will incur costs associated with changing their policies and procedures and updating their systems to ensure that they are sending notices in compliance with the final rule and, in addition, will incur distribution costs associated with sending notices to borrowers. However, the Bureau expects that these costs may be less than those associated with some other disclosure requirements, for two reasons. First, to comply with § 1024.41, servicers must already determine the time at which an application is complete and whether foreclosure protections apply under § 1024.41(f)(2) and (g); thus, servicers will not be required to make any new determinations in order to comply with the requirement. Second, based on pre-proposal industry outreach and comments on the proposal, the Bureau understands that many servicers are already sending a written notification informing applicants that their applications are complete, so the costs of the new requirement will be limited for these servicers.

In addition, the Bureau notes that certain provisions of the notice requirement are intended to prevent servicers from incurring unnecessary costs in connection with the requirement. The notice is not required under certain circumstances in which a borrower would not benefit from the notice, including when the servicer is able to notify the borrower of the outcome of its evaluation before the notice is sent.

Information Outside of the Borrower's Control

The final rule amends § 1024.41(c)(1) and comment 41(b)(1)–4 and adds § 1024.41(c)(4) to address a servicer's obligations with respect to information not in the borrower's control that the servicer requires to determine which loss mitigation options, if any, it will offer the borrower. A servicer must exercise reasonable diligence in obtaining such information. The final rule also prohibits a servicer from denying a borrower's complete application due to a lack of information not in the borrower's control except under certain circumstances; requires that a servicer inform a borrower in writing if the servicer is unable to complete its evaluation within 30 days of receiving a complete application because it lacks information from a party other than the borrower or the servicer; requires that a servicer promptly provide the borrower written notice stating the servicer's determination upon receipt of missing information from a party other than the borrower or the servicer; and requires the servicer to provide the determination notice under § 1024.41(c)(1) promptly upon receipt of the required third-party information.

Potential benefits and costs to consumers. Under the existing rule, if a servicer receives a complete loss mitigation application more than 37 days before a foreclosure sale, the servicer must, within 30 days of receipt, determine what loss mitigation options, if any, it will offer a borrower, regardless of whether it has received required information not in the borrower's control. The new provision will benefit borrowers applying for loss mitigation in situations in which the servicer faces delays in receiving necessary information from a party other than the servicer or the borrower, such as homeowner association payoff information or approval of the loan owner, investor, or mortgage insurance company. It may also indirectly reduce the likelihood that evaluations are delayed by encouraging investors and servicers to consider more carefully what third-party documents are required as part of a loss mitigation application. When evaluations are nonetheless delayed beyond 30 days, the final rule will reduce the impact on the borrower of such delays by requiring servicers to exercise reasonable diligence in obtaining the information, limiting their ability to deny the borrower's application solely on the basis of missing information outside the borrower's control, and ensuring that the borrower is aware of the application's status.

The Bureau understands from pre-proposal industry outreach that servicers currently follow different practices in the event they have not received required information that is outside the borrower's control 30 days after receipt of a complete loss mitigation application. Some servicers informed the Bureau that they exceed the 30-day evaluation timeframe in § 1024.41(c)(1) and wait to receive the information before making any decision on the application. One servicer informed the Bureau that it sends a denial notice to borrowers but also informs them that the servicer will reevaluate the application upon receipt of the third-party information. As a result, borrowers may be receiving conflicting messages from servicers about the status of their applications, and, in some cases, borrowers' applications for loss mitigation may be denied because the servicer has experienced a delay in receiving required information that is not in the borrower's control. The final rule requires servicers to give borrowers clearer information about their application status.

Potential benefits and costs to covered persons. The final rule will benefit servicers by clarifying servicer responsibilities when non-borrower information has not been received within 30 days of receiving a complete application from the borrower and preventing servicers from risking non-compliance with the evaluation requirement in order to provide a benefit to borrowers seeking loss mitigation options. On the other hand, the changes require servicers to review and perhaps change their policies applicable to gathering information from parties other than the borrower and informing borrowers of their loss mitigation decisions, which will impose one-time costs of revising policies and systems. In addition, servicers will bear the one-time costs of developing the new required notice and the ongoing cost of providing consumers with the new notice required by the final rule. One commenter estimated that, in addition to internal legal, business process, and technology costs, the vendor costs associated with programming the new notice would be $2,000.

The final rule provision also may impose costs on servicers because the requirement not to make a determination unless the servicer has obtained information outside of the borrower's control or has been unable to obtain such documents or information for a significant period of time while exercising reasonable diligence may delay the foreclosure process for a servicer that would otherwise deny an application without having received such information. The Bureau understands from pre-proposal industry outreach that, in cases where investor approval has not been delegated to the servicer, the missing non-borrower information is frequently investor approval of the application. Because investors bear costs when foreclosure proceedings are delayed, investors have incentives to weigh the cost of expediting their approval process against the potential delay in a foreclosure proceeding.

Clarification of the 2013 RESPA Servicing Final Rule's Dual Tracking Protections

The final rule includes revised commentary to § 1024.41(g) that clarifies servicers' obligations with respect to § 1024.41(g)'s prohibition against moving for foreclosure judgment or order of sale, or conducting a sale, during evaluation of a complete loss mitigation application received more than 37 days before a foreclosure sale. Revised comment 41(g)–3 explains that the prohibitions against moving for judgment or order of sale or conducting a sale may require a servicer to act through foreclosure counsel; that upon receipt of a complete application, the servicer must instruct counsel promptly to take certain steps to avoid a violation of § 1024.41(g); and that the servicer is not relieved of its obligations because the foreclosure counsel's actions or inactions caused a violation. Similarly, comment 38(b)(3)(iii)–1 clarifies that policies and procedures required under § 1024.38(b)(3)(iii) to facilitate sharing of information with service provider personnel responsible for handling foreclosure proceedings must be reasonably designed to ensure that servicer personnel promptly inform service provider personnel handling foreclosure proceedings that the servicer has received a complete loss mitigation application. New comment 41(g)–5 explains that § 1024.41(g) prohibits a servicer from conducting a foreclosure sale, even if a person other than the servicer administers or conducts the foreclosure sale proceedings.

Section 1024.41(g) is intended to protect borrowers by preventing a foreclosure sale from going forward while review of a complete loss mitigation application is pending. The revised commentary clarifies servicers' obligations to protect borrowers from foreclosure when a complete loss mitigation application is pending, even if it may be late in the foreclosure process. The commentary may reduce servicer compliance costs by adding clarity regarding the application of § 1024.41(g) when a foreclosure sale has been scheduled. At the same time, servicers will bear costs in confirming that their policies and procedures for foreclosures, including communication with counsel, meet the requirements of § 1024.41(g) in light of the revised commentary. However, the Bureau does not believe that the revisions will impose significant burdens on servicers. Section 1024.41(g) and its existing commentary already require servicers to prevent a scheduled foreclosure sale from going forward when a timely loss mitigation application has been received. The commentary is intended to aid servicers in complying with § 1024.41(g) by elaborating upon and clarifying a servicer's obligations under the existing requirement, but does not impose new obligations on servicers.

The Bureau recognizes that there may be situations where servicers, despite their attempts to delay foreclosure sales, have to dismiss a foreclosure proceeding to avoid a violation of § 1024.41(g), and then may have to re-file where the borrower ultimately does not qualify for, or perform on, a loss mitigation option. The costs of dismissal may be significant in an individual case. However, the Bureau does not believe that the final commentary will impose significant overall costs on servicers because § 1024.41(g) already prohibits the conduct of a foreclosure sale when a timely loss mitigation application is pending. Moreover, the Bureau expects that servicers generally will be able to avoid the costs of dismissal so long as they comply with existing requirements.

Review of Multiple Loss Mitigation Applications

Currently, § 1024.41(i) requires a servicer to comply with the requirements of § 1024.41 for only a single complete loss mitigation application for a borrower's mortgage loan account. The final rule revises § 1024.41(i) to require servicers to comply with the requirements of § 1024.41 each time a borrower submits a loss mitigation application, unless the servicer has previously complied with § 1024.41 for a borrower's complete loss mitigation application and the borrower has been delinquent at all times since the borrower submitted the prior application.

Potential benefits and costs to consumers. Section 1024.41's loss mitigation procedures are intended to protect borrowers from harm in connection with the process of evaluating a borrower for loss mitigation options and proceeding to foreclosure. As discussed in the 2013 RESPA Servicing Final Rule, benefits to these borrowers include a period of 120 days in which to submit a loss mitigation application before foreclosure can commence, restrictions on dual tracking, an appeals process for denials of loss mitigation applications, and consideration for all available loss mitigation alternatives.[421] The final rule makes these benefits available to borrowers who complete a loss mitigation application, become (or remain) current after they submit that application, and subsequently encounter difficulties making payments and apply for loss mitigation again. The provision thereby benefits borrowers in two general circumstances: First, borrowers who have previously applied for and received a loan modification, and then subsequently have difficulty making payments on the modified loan (perhaps due to an unrelated hardship months or years after the modification), will be able to obtain the protections of § 1024.41's procedures for a subsequent loss mitigation application. Second, borrowers who previously applied for loss mitigation but were not approved for any option that they chose to accept will be able to apply for loss mitigation and benefit from § 1024.41's procedures if they become (or remain) current on their loan following the prior complete application.

A significant percentage of the borrowers who receive loan modifications subsequently become delinquent. The OCC Mortgage Metrics Report indicates that, for modifications completed since the second quarter of 2014, 13 to 16 percent of modified loans were 60 or more days delinquent six months after modification, and 20 percent were 60 or more days delinquent after one year.[422] For the HAMP program, as of January 2016, 33 percent of the permanent modifications that became effective between April 2009 and January 2016 had defaulted by the end of this period.[423] These numbers suggest that a significant fraction of borrowers receiving loan modifications may benefit from the final rule's provision because they will have the protection of § 1024.41's loss mitigation procedures in the wake of these subsequent delinquencies. Many such borrowers may have received a loan modification that was affordable for them but then suffered a subsequent hardship. On the other hand, the large number of borrowers who become delinquent as soon as six months after

[421] See 78 FR 10695, 10857–60 (Feb. 14, 2013).

[422] Office of the Comptroller of the Currency, *OCC Mortgage Metrics Report: Disclosure of Nat'l Bank and Fed. Savings Ass'n Mortgage Loan Data,* at 30 (Third Quarter 2015), *available at http://www.occ.treas.gov/publications/publications-by-type/other-publications-reports/mortgage-metrics/mortgage-metrics-q3-2015.pdf.*

[423] *See* Fed. Housing Fin. Agency, *Foreclosure Prevention Report,* at 3 (Jan. 2016), *available at http://www.fhfa.gov/AboutUs/Reports/ReportDocuments/FPR_January2016.pdf* (reporting that, of 650,511 permanent modifications that became effective between April 2009 and January 2016, 211,918 had defaulted by the end of the period).

completing a loan modification suggests that, in many cases, the subsequent delinquency may reflect, not a new adverse event, but the failure of the modification to achieve an affordable monthly payment for the borrower in light of the circumstances that preceded the modification. To the extent that a borrower's circumstances have not changed significantly, a subsequent loss mitigation application may not yield a new option for which the borrower is eligible and that the borrower finds more beneficial.

The Bureau does not have data indicating the number of borrowers in the second group—that is, those who apply for loss mitigation, are not approved for any option that they choose to accept, and subsequently become or remain current on their mortgage. The Bureau notes that the final rule may provide additional flexibility to borrowers who are current on their mortgage but might benefit from a loss mitigation option, because such borrowers could apply and determine whether they are eligible for loss mitigation without losing the right to § 1024.41's loss mitigation procedures in the future. For example, homeowners who are able to make their mortgage payments but would like to determine whether a short sale is possible will be able to apply for a short sale without losing the protection of § 1024.41's loss mitigation procedures in connection with a subsequent application for loss mitigation.

The benefits to borrowers of the final rule's revision to § 1024.41(i) depend on whether and under what circumstances investors make loss mitigation options available to borrowers who have completed an earlier loss mitigation application and perhaps received a loan modification. Section 1024.41 does not require a servicer to make any loss mitigation options available to a borrower, but only governs a servicer's evaluation of a borrower for any loss mitigation option that is available. Many borrowers may not realize benefits from the change to § 1024.41(i), even though it may entitle them to the protections in § 1024.41 with regard to a subsequent loss mitigation application, because they are not eligible to receive a second loan modification. For example, Fannie Mae and Freddie Mac's servicing guidelines generally do not permit a subsequent loan modification when a borrower has become 60 days delinquent within the 12 months after a borrower receives a prior loan modification.[424] The Bureau notes, however, that, for some borrowers affected by the final rule, any loss mitigation option provided as a result of the revision may be the first loss mitigation option offered to that borrower, even if it is not the first evaluation of a complete application.

Potential benefits and costs to covered persons. The final rule will impose costs on servicers by requiring them to evaluate certain borrowers' subsequent loss mitigation applications in accordance with § 1024.41's requirements. Costs of complying with § 1024.41's requirements include those arising from the requirements to send specific notices, comply with the rule's timelines for evaluation of loss mitigation applications, evaluate the borrower for all loss mitigation options available to the borrower, and, under certain circumstances, to delay initiation of foreclosure proceedings. The extent to which these requirements impose additional costs on servicers depends on their current policies with respect to subsequent loss mitigation applications. The Bureau learned through its pre-proposal outreach efforts that many servicers already reevaluate borrowers who reapply for loss mitigation using the procedures set forth in § 1024.41. To the extent that servicer practices already meet the requirements of the rule, the burden on servicers will be reduced.

Some industry commenters expressed concern that the requirement to review multiple loss mitigation applications would increase the burden to servicers of complying with § 1024.41, and in particular that borrowers might take advantage of the ability to submit multiple loss mitigation applications to ''game the system'' and delay a possible foreclosure. The Bureau notes that any costs imposed by the rule are mitigated by the fact that servicers can determine whether any loss mitigation options are available to borrowers and set the eligibility criteria for any subsequent loss mitigation application. In addition, the requirement that the borrower bring the loan current before § 1024.41's loss mitigation procedures apply to a subsequent application mitigates the costs of the final rule's provision for servicers by limiting the risk that a borrower will use multiple loss mitigation applications as a way to postpone foreclosure.

Loss Mitigation Timelines and Servicing Transfers

Section 1024.41(k) of the final rule addresses the requirements applicable to loss mitigation applications pending at the time of a servicing transfer. Section 1024.41(k) clarifies that, subject to certain exceptions, a transferee servicer must comply with § 1024.41's requirements within the same timeframes that were applicable to the transferor servicer. The first exception applies to the written notification required by § 1024.41(b)(2)(i)(B), which servicers generally must provide within five days of a borrower's initial application. The final rule provides that, if a transferee servicer acquires the servicing of a mortgage loan for which the period to provide the notice required by § 1024.41(b)(2)(i)(B) has not expired as of the transfer date and the transferor servicer has not provided such notice, the transferee servicer must provide the notice within 10 days (excluding legal public holidays, Saturdays, and Sundays) of the transfer date. The second exception applies to the evaluation of loss mitigation applications, which servicers generally must complete within thirty days after receipt of a complete application. The final rule provides that, if a transferee servicer acquires the servicing of a mortgage loan for which a complete loss mitigation application is pending as of the transfer date, the transferee servicer must complete the evaluation within 30 days of the transfer date. The final rule also provides that, if a borrower's appeal under § 1024.41(h) is pending as of the transfer date or is timely filed after the transfer date, a transferee servicer must determine the appeal within 30 days of the transfer date or 30 days of the date the borrower made the appeal, whichever is later, if it is able to determine whether it should offer the borrower the loan modification options subject to the appeal; a transferee servicer that is unable to determine an appeal must treat the appeal as a complete loss mitigation application and evaluate the borrower for all loss mitigation options available to the borrower from the transferee servicer.

Potential benefits and costs to consumers. Section 1024.41(k) is intended to benefit borrowers who have loss mitigation applications in process at the time their mortgage loans are transferred to another servicer by ensuring that the transfer does not unnecessarily delay the completion or evaluation of their applications or limit their ability to obtain the protections of § 1024.41. Delays in the processing of loss mitigation applications can prolong

[424] *See* Fannie Mae, *Fannie Mae Single Family 2012 Servicing Guide,* at § 602.05 Redefault (Mar. 14, 2012), *available at https://www.fanniemae.com/content/guide/svc031412.pdf*; Freddie Mac, *Single-Family Seller/Servicer Guide,* at § 9206.6: Ineligibility for Freddie Mac Standard Modification, *available at http://www.allregs.com/tpl/Viewform.aspx?formid=00051757&formtype=agency.*

a borrower's delinquency, during which time fees and other costs may accrue, making it more difficult for the borrower to recover from financial distress. For some borrowers, delays in completing loss mitigation applications could prevent them from obtaining protections under § 1024.41, such as the prohibition on initiating foreclosure proceedings if a borrower has completed a loss mitigation application more than 37 days before a foreclosure sale.

The Bureau does not have representative data on how quickly servicers currently comply with the various loss mitigation requirements in the event of a servicing transfer but believes that timelines vary significantly across servicers. The Bureau understands that, while some servicers may already have practices that would comply with the final rule's timelines, others may not. To the extent that servicer practices already comply with § 1024.41(k), consumer benefits from the final rule will be lower.

Potential benefits and costs to covered persons. Section 1024.41(k) is intended to reduce the costs to servicers that engage in servicing transfers of complying with the loss mitigation rules by clarifying the application of loss mitigation timelines in the context of a servicing transfer. At the same time, while transferor and transferee servicers are currently required under § 1024.38 to have policies and procedures in place to ensure the timely transfer and receipt of accurate data, including through the devotion of appropriate personnel and resources, § 1024.41(k) will impose incremental costs on servicers to the extent that, under their current transfer procedures, their transfers do not comply with the final rule's timelines. Transferor and transferee servicers both may be required to devote more personnel and other resources in the days or weeks before and after a transfer to ensure that the data is accurately transferred in a way that permits the transferee servicer to comply with the timelines with respect to all pending loss mitigation applications.

The final rule's exceptions, including extended timelines in connection with the acknowledgment notice confirming receipt of a loss mitigation application and the evaluation of loss mitigation applications and determination of appeals, are intended to mitigate the costs to servicers of complying with the final rule in circumstances in which the Bureau understands that complying with the timelines that are otherwise applicable would be especially difficult. The final rule generally provides transferee servicers with as much time to provide the acknowledgement notice, to evaluate loss mitigation applications, and to determine the outcome of appeals as servicers generally have when they receive a consumer's application, complete application, or appeal (as applicable) directly from the consumer.

Evaluation for Short-Term Repayment Plans Based on Incomplete Applications

Section 1024.41(c)(2)(iii) of the final rule permits a servicer to offer short-term repayment plans based upon an evaluation of an incomplete loss mitigation application. This is an exception to the general rule under § 1024.41(c)(2)(i) that a servicer may not evaluate a borrower for loss mitigation options based on an incomplete application, and parallels an existing exception to this rule, which permits a servicer to offer a short-term payment forbearance program based upon an incomplete application. Borrowers who are offered a short-term repayment plan based on an incomplete application will not lose their protections under § 1024.41 with respect to a subsequent loss mitigation application.

As with the existing exception for short-term payment forbearance plans, § 1024.41(c)(2)(iii) of the final rule is intended to benefit borrowers and servicers by permitting servicers to offer a short-term loss mitigation option to address a temporary hardship, while preserving borrowers' loss mitigation protections, in situations in which completing an application would be time-consuming or burdensome or would significantly delay a decision. The provision does not impose costs on borrowers because a borrower always has the option to reject a short-term repayment plan based on review of an incomplete loss mitigation application, provide a complete loss mitigation application, and be reviewed for all loss mitigation options available to the borrower (and receive other protections) under § 1024.41. Similarly, the provision does not impose costs on servicers because it does not impose any new obligations on servicers.

5. Periodic Statement Requirements Applicable to Consumers in Bankruptcy

The final rule revises § 1026.41(e)(5) to limit the circumstances in which a servicer is exempt from the periodic statement requirements with respect to a consumer who is a debtor in bankruptcy and adds § 1026.41(f) to modify the content of periodic statements for certain consumers in bankruptcy. Currently, § 1026.41(e)(5) provides that a servicer is exempt from the requirement to provide periodic statements for a mortgage loan while the consumer is a debtor in bankruptcy. In general, § 1026.41(e)(5) of the final rule limits the exemption to consumers in bankruptcy who are surrendering the property or avoiding the lien securing the mortgage loan, to consumers in bankruptcy who have requested in writing that a servicer cease providing periodic statements or coupon books, and in certain other circumstances. Notwithstanding meeting the above conditions for an exemption, the final rule requires servicers to provide periodic statements or coupon books if the consumer reaffirms personal liability for the mortgage loan or requests statements in writing (unless a court has entered an order requiring otherwise) and to resume providing periodic statements when the consumer exits bankruptcy with respect to any portion of the mortgage debt that is not discharged through bankruptcy.

Potential benefits and costs to consumers. The periodic statement requirements in § 1026.41 are intended to benefit consumers by providing accurate information about payments that consumers can use to monitor the servicer, assert errors if necessary, and track the accumulation of equity so that they can effectively determine how to allocate income and consider options for refinancing. As revised, § 1026.41(e)(5) is intended to make these benefits available to consumers in bankruptcy who own a home subject to a mortgage and intend to retain the home post-bankruptcy. The Bureau does not have representative data describing the number of consumers in the bankruptcy process that own a home and intend to retain it through the bankruptcy process. The FHFA reports that of the mortgage loans serviced for Fannie Mae and Freddie Mac, between 0.3 percent and 0.4 percent were in bankruptcy during 2015.[425] However, based on information the Bureau has received from servicers and other Federal agencies, the Bureau believes that the percentage of non-GSE loans in bankruptcy may be significantly higher.

There are at least two reasons to expect that consumers who are in bankruptcy and intend to retain the property are particularly likely to benefit from receiving periodic statements. First, consumers in bankruptcy have demonstrated difficulties in meeting their financial obligations and face unique challenges in rehabilitating their finances. Such consumers face complex decisions

[425] Fed. Housing Fin. Agency, *Foreclosure Prevention Report,* at 6 (Jan. 2016), *available at http://www.fhfa.gov/AboutUs/Reports/ReportDocuments/FPR_January2016.pdf.*

about how to restructure their financial lives and may derive particular benefit from information about the status of their mortgages that enables them to allocate income and make other decisions about their finances. Second, as discussed in the section-by-section analysis of § 1026.41(e)(5), there is evidence that some servicers may be especially prone to error in applying payments of consumers in bankruptcy, particularly in the context of chapter 13 cases. This evidence indicates that it may be especially important for consumers in bankruptcy to be able to monitor how servicers apply their payments. Further, the Bureau understands based on consumer testing of proposed modifications to periodic statements and consumer complaint information that many consumers in bankruptcy want to receive periodic statements.

Potential benefits and costs to covered persons. Section 1026.41(e)(5) and (f) will impose costs on servicers by requiring them to modify systems to provide statements that show how payments are applied for consumers in bankruptcy, particularly those in chapter 13 bankruptcy. The Bureau understands from comments and from pre-proposal industry outreach that the principal systems some servicers currently use to process and apply mortgage payments are not designed to accommodate payments from consumers in chapter 13 bankruptcy and that many servicers account for payments from consumers in chapter 13 bankruptcy using a separate system or process. Servicer systems for producing periodic statements are generally not designed to produce statements for consumers in chapter 13 bankruptcy. While servicers generally must be capable of accounting for payments from consumers in chapter 13 bankruptcy, this accounting currently may not be done on a timeline that permits statements to be produced on a regular billing cycle. Several commenters noted that these system limitations mean complying with the rule will require costly system updates. While some larger servicers already have systems designed to provide similar disclosures in bankruptcy, the Bureau acknowledges that, for many servicers, this will involve significant one-time costs to develop new systems. In the final rule, the Bureau is not requiring a past payment breakdown that distinguishes between pre-petition and post-petition payments, which some commenters identified as particularly burdensome. In addition, some servicers indicated that they expected vendors would modify software platforms used to generate periodic statements to accommodate requirements to send modified periodic statements to consumers in bankruptcy. While this will not eliminate all costs to servicers of establishing systems to provide periodic statements for consumers in bankruptcy, the Bureau expects that vendor adjustments to their systems will help mitigate the burden of the rule for many servicers.

Some commenters noted that, in order to send statements in compliance with the proposed rule, servicers would need to analyze multiple factors, such as which chapter of the Bankruptcy Code the consumer has filed under and whether the plan of reorganization provides that the consumer intends to retain the home. The Bureau understands, based on outreach to industry, that many servicers already track these aspects of each bankruptcy case. The Bureau does expect that there will be one-time costs to ensure that servicing systems capture this information in order to determine whether periodic statements are required and in what form.

Because the final rule requires sending periodic statements to an additional group of consumers, servicers will also incur additional vendor costs associated with distributing statements. With respect to servicers that provide consumers with coupon books, the final rule will require servicers to provide transaction activity and past payment application information to consumers upon a consumer's request, consistent with current § 1026.41(e)(3)(iii). The Bureau does not believe that providing this information will impose significant new costs on servicers that provide coupon books because the Bureau understands that the vast majority of servicers are already required to provide such information in response to a consumer's written information request pursuant to § 1024.36.

The final rule includes sample forms for periodic statements in bankruptcy. Sample forms will lower costs to servicers by eliminating the need to develop compliant forms of periodic statements, and may also increase the overall usefulness to consumers of the periodic statements.

6. Periodic Statements Following Charge Off

The final rule adds a new exemption from the requirement to provide periodic statements under § 1026.41. The exemption applies to a mortgage loan that a servicer has charged off in accordance with loan-loss provisions if the servicer will not charge any additional fees or interest on the account, provided that the servicer must provide the consumer a periodic statement within 30 days of charge off or the most recent periodic statement. The periodic statement must clearly and conspicuously labeled ''Suspension of Statements & Notice of Charge Off—Retain This Copy for Your Records'' and clearly and conspicuously explain that, as applicable: The mortgage loan has been charged off and the servicer will not charge any additional fees or interest on the account; the servicer will no longer provide the consumer a periodic statement for each billing cycle; the lien on the property remains in place and the consumer remains liable for the mortgage loan obligation and any obligations arising from or related to the property, which may include property taxes; the consumer may be required to pay the balance on the account in the future, for example, upon sale of the property; the balance on the account is not being canceled or forgiven; and the loan may be purchased, assigned, or transferred.

Potential benefits and costs to consumers. The periodic statement requirements in § 1026.41 are intended to benefit consumers by providing accurate information about payments that consumers can use to monitor the servicer, assert errors if necessary, and track the accumulation of equity. Where a consumer's loan has been charged off and the servicer will no longer charge any additional fees or interest on the account, these benefits are significantly decreased. So long as the consumer is aware that no additional fees or interest will be charged, monthly statements will include no new information useful to the consumer. A periodic statement notifying the consumer of suspension of periodic statements and charge off, on the other hand, may provide consumers with important information about the ongoing status of the loan and the significance of its status. The required periodic statement will clarify that, although the mortgage loan has been charged off, the obligation remains in place. The periodic statement will also describe the implications of the remaining lien to the consumer.

Although periodic statements would not provide new information to consumers where accounts have been charged off and fees and interest no longer accrue, they may provide a benefit to some consumers as a reminder that the lien on the property remains in place. It is possible that, particularly years after charge off, a consumer (or successor in interest to the property securing the loan) may not realize that the obligation remains outstanding and the lien is still in place. A periodic statement that details the status could mitigate this issue but may not completely address it in all cases. This represents a potential cost of the exemption to some consumers.

Potential benefits and costs to covered persons. Because the provision does not impose any new requirements on servicers, it does not impose any new costs. The provision will benefit servicers by giving them the option to send a periodic statement explaining to the consumer the consequences of the charge off in lieu of continuing to send periodic statements for charged-off mortgage loans when they find it less costly to do so.

7. Small Servicer Exemption

The final rule amends certain criteria for determining whether a servicer qualifies for the small servicer exemption set forth under § 1026.41(e)(4). The final rule provides that transactions serviced by the servicer for a seller financer that meet certain criteria are not considered in determining whether a servicer qualifies as a small servicer. Small servicers (generally, those that service, together with any affiliates, 5,000 or fewer mortgage loans, for all of which the servicer (or an affiliate) is the creditor or assignee) are exempt from certain mortgage servicing requirements, including several of Regulation X's requirements, such as certain provisions related to force-placed insurance, general servicing policies and procedures, and communicating with borrowers about, and evaluation of applications for, loss mitigation options, and Regulation Z's requirement to provide periodic statements for residential mortgage loans. The final rule permits small servicers to maintain their small servicer status if they service transactions for a limited class of seller financers: Those that provide seller financing for only one property in any 12-month period for the purchase of a property that they own, so long as they did not construct a residence on the property in the ordinary course of business and the financing meets certain restrictions.

The Bureau believes that the changes to § 1026.41(e)(4) will have little or no effect on consumers who are not parties to seller-financed transactions. The Bureau understands that the practice of servicing seller-financed transactions is not widespread and that depository institutions offering this service do not obtain significant revenue from the practice, but instead offer the service as an accommodation to depository customers that are seller financers. Thus, the Bureau expects that, in the absence of the final rule, small servicers would generally choose not to service seller-financed transactions in order to maintain their status as small servicers. Consequently, the Bureau does not expect that servicers' status as small servicers will ultimately be affected by the rule. Therefore, the final rule will not have any significant effect on the number of consumers whose servicer qualifies for the small servicer exemption.

Given the limited nature of servicing loans for seller financers, and given the Bureau's understanding that these services are offered by depository institutions to their customers when alternative service providers are generally not available, the Bureau believes that, if seller financers were unable to obtain servicing from the depository institution where they do their banking then, in many cases, they would be likely to instead service the loan themselves. Consumers who purchase homes from seller financers may benefit from the servicing of the loan by a small servicer rather than directly by the seller financer. Purchasers of seller-financed residential real estate may benefit from a financial institution receiving scheduled periodic payments and providing an independent accounting as a third party to the transaction. In addition, small servicers may be able to process payments and perform other servicing activities at a lower cost than seller financers, and this cost savings may be passed on to purchasers of seller-financed residential real estate.

The final rule will benefit certain servicers by allowing them to service some seller-financed transactions while still qualifying as small servicers. One commenter pointed out that, to ensure that servicing such transactions does not jeopardize their small servicer status, servicers would need to establish internal controls to track and monitor whether a seller financer provides financing for more than one property. The Bureau acknowledges that servicers could incur costs to verify that the seller-financed transactions they service meet the criteria of the final rule and that any such costs would mitigate the benefits from the final rule's changes to § 1026.41(e)(4).

F. Potential Specific Impacts of the Final Rule

Depository Institutions and Credit Unions With $10 Billion or Less in Total Assets, as Described in Section 1026

The Bureau believes that a large fraction of depository institutions and credit unions with $10 billion or less in total assets that are engaged in servicing mortgage loans qualify as ''small servicers'' for purposes of the mortgage servicing rules because they service 5,000 or fewer loans, all of which they or an affiliate own or originated. The Bureau estimates that 96 percent of insured depositories and credit unions with $10 billion or less in total assets service 5,000 mortgage loans or fewer.[426] The Bureau believes that servicers that service loans that they neither own nor originated tend to service more than 5,000 loans, given the returns to scale in servicing technology. The impact of the final rule on small servicers, which are exempt from many of the provisions of the servicing rules that are affected by the final rule, is discussed below in connection with the Regulatory Flexibility Act.

With respect to servicers that are not small servicers as defined in § 1026.41(e)(4), the Bureau believes that the consideration of benefits and costs of covered persons presented above provides a largely accurate analysis of the impacts of the final rule on depository institutions and credit unions with $10 billion or less in total assets that are engaged in servicing mortgage loans.

Impact of the Final Rule's Provisions on Consumer Access to Credit and on Consumers in Rural Areas

The Bureau believes that the additional costs to servicers from the final rule are not likely to be extensive enough to have a significant impact on consumer access to credit. The exemption of small servicers from many provisions of the final rule will help maintain consumer access to credit through these providers.

Consumers in rural areas may experience benefits from the final rule that are different in certain respects from the benefits experienced by consumers in general. Consumers in rural areas may be more likely to obtain mortgages from small local banks and credit unions that either service the loans in portfolio or sell the loans and retain the servicing rights. The business model of these servicers may mean that they already provide most of the benefits to consumers that the final rule is designed to provide. It is also possible, however, that a lack of alternative lenders in certain rural areas may reduce competition and therefore the level of customer service, making it possible for the final rule to provide rural consumers with greater benefits

[426] Based on an analysis of December 2015 Call Report data as compiled by SNL Financial.

than consumers elsewhere. More specifically, seller financing may be more common in rural areas, and the final rule's provisions related to servicing of seller-financed loans may help small servicers continue to service such loans in rural areas.

VIII. Regulatory Flexibility Act Analysis

The Regulatory Flexibility Act (RFA) generally requires an agency to conduct an initial regulatory flexibility analysis (IRFA) and a final regulatory flexibility analysis (FRFA) of any rule subject to notice-and-comment rulemaking requirements, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities.[427] 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.[428]

The undersigned certified that the proposed rule would not have a significant economic impact on a substantial number of small entities and that an IRFA was therefore not required. The final rule adopts the proposed rule with some modifications that do not lead to a different conclusion. Therefore, a FRFA is not required.[429]

A. Application of the Final Rule to Small Entities

The analysis below evaluates the potential economic impact of the final rule on small entities as defined by the RFA.[430] The analysis uses as a baseline the 2013 Mortgage Servicing Final Rules as currently in effect. The Bureau has identified five categories of small entities that may be subject to the final rule for purposes of the RFA: Commercial banks/savings institutions (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 $550 million or less in assets. Firms providing real estate credit are small businesses if average annual receipts do not exceed $38.5 million, and firms engaged in other activities related to credit intermediation are small businesses if their average annual receipts do not exceed $20.5 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.

The Bureau estimates that there are approximately 9,868 insured depositories (banks, thrifts and credit unions) and 862 non-depositories that engage in mortgage servicing and are therefore subject to the 2013 Mortgage Servicing Final Rules.[431] Of these, the Bureau estimates that approximately 8,308 depositories and 742 non-depositories are ''small entities'' as defined in the RFA.[432]

The large majority of these small entities qualify as ''small servicers'' for purposes of the 2013 Mortgage Servicing Final Rules: Generally, servicers that service 5,000 or fewer mortgage loans, all of which the servicer or affiliates own or originated. The Bureau estimates that, among 9,050 small entities subject to the 2013 Mortgage Servicing Final Rules, all but approximately 11 depositories and all but approximately 78 non-depositories (collectively, approximately 1.0 percent of all small entities subject to the 2013 Mortgage Servicing Final Rules) service 5,000 loans or fewer.[433] The Bureau does not have data to indicate whether these institutions service loans that they do not own and did not originate. However, as discussed in the 2013 RESPA Servicing Final Rule, the Bureau believes that a servicer that services 5,000 loans or fewer is unlikely to service loans that it did not originate, because a servicer that services loans for others is likely to see servicing as a stand-alone line of business and would likely need to service substantially more than 5,000 loans to justify its investment in servicing activities.[434]

Small servicers are exempt from many of the servicing provisions of Regulation X and Regulation Z. Pursuant to § 1024.30, small servicers are exempt from Regulation X's general servicing policies and procedures requirements (§ 1024.38), early intervention and continuity of contact requirements (§§ 1024.39 and 1024.40), and all loss mitigation procedures requirements of § 1024.41 other than § 1024.41(j), which makes applicable to small servicers § 1024.41(f)(1)'s prohibition on initiating foreclosure proceedings unless a borrower is more than 120 days delinquent and prohibits servicers from initiating foreclosure proceedings while a borrower is performing pursuant to the terms of an agreement on a loss mitigation option. Similarly, pursuant to § 1026.41(e)(4), small servicers are exempt from Regulation Z's requirement to provide periodic statements for residential mortgage loans pursuant to § 1026.41.

Given the Bureau's estimate that all but approximately 1.0 percent of small entities subject to the rule are small servicers, the final rule provisions that amend sections of Regulation X and Regulation Z from which small servicers are exempt will have no effect on almost all small entities, and therefore will not have a significant economic impact on a substantial number of small entities. Most provisions of the final rule would amend §§ 1024.38 through 1024.41 and 1026.41 and would therefore not affect small servicers.

In addition, certain provisions of the final rule apply to small servicers but reduce servicer compliance costs by relaxing the existing rules. This includes changes to the commentary to § 1024.36(a) to reduce disclosure requirements when a borrower requests information about ownership of a loan

[427] 5 U.S.C. 601 through 612.

[428] 5 U.S.C. 609.

[429] 5 U.S.C. 605(b).

[430] For purposes of assessing the impacts of the final rule on small entities, ''small entities'' is defined in the RFA to include small businesses, small not-for-profit organizations, and small government jurisdictions. 5 U.S.C. 601(6). A ''small business'' is determined by application of Small Business Administration regulations and reference to the North American Industry Classification System (''NAICS'') classifications and size standards. 5 U.S.C. 601(3). A ''small organization'' is any ''not-for-profit enterprise which is independently owned and operated and is not dominant in its field.'' 5 U.S.C. 601(4). A ''small governmental jurisdiction'' is the government of a city, county, town, township, village, school district, or special district with a population of less than 50,000. 5 U.S.C. 601(5).

[431] The estimated number of insured depositories engaged in mortgage servicing is based on the December 2015 Call Report data as compiled by SNL Financial, and the estimated number of non-depositories is based on December 2015 data from the Nationwide Mortgage Licensing System and Registry.

[432] The estimated number of insured depositories engaged in mortgage servicing that are small entities is based on the December 2015 Call Report data as compiled by SNL Financial, and the estimated number of non-depositories that are ''small entities'' as defined in the RFA is based on December 2015 data from the Nationwide Mortgage Licensing System and Registry. Non-profits and small non-profits engaged in mortgage loan servicing would be included in this estimate if their primary activity is originating or servicing loans. The Bureau has not been able to separately estimate the number of non-profits and small non-profits engaged in loan servicing.

[433] For insured depositories, the estimate is based on an analysis of the December 2015 Call Report data as compiled by SNL Financial, and the estimated number of non-depositories that are ''small entities'' as defined in the RFA is based on December 2015 data from the Nationwide Mortgage Licensing System and Registry.

[434] 78 FR 10695, 10866 (Feb. 14, 2013). For example, one industry participant estimated that most servicers would need a portfolio of 175,000 to 200,000 loans to be profitable. Bonnie Sinnock, *Servicers Search for 'Goldilocks' Size for Max Profits,* American Banker (Sept. 10, 2015), *available at http://www.americanbanker.com/news/consumer-finance/servicers-search-for-goldilocks-size-for-max-profits-1076620-1.html.*

for which Fannie Mae or Freddie Mac is the owner of the loan or the trustee of the securitization trust in which the loan is held; an additional exception to § 1024.41(f)(1)'s 120-day pause on initiating foreclosure proceedings for a servicer joining the foreclosure action of a senior lienholder; and revisions to the definition of small servicer in § 1026.41(e)(4)(iii) that permit small servicers to service loans for seller financers under certain circumstances.

There are three provisions of the final rule that do apply to small servicers and could potentially impose new costs on a substantial number of small entities: (1) The provisions related to successors in interest, which create a new, limited information request procedure for potential successors in interest and extend the protections of all the Mortgage Servicing Rules, including certain provisions from which small servicers are not exempt, to confirmed successors in interest; (2) the definition of delinquency in § 1024.31, which may affect the scope of the 2013 RESPA Servicing Final Rule's prohibition on initiating foreclosure proceedings unless a borrower's mortgage loan obligation is more than 120 days delinquent; and (3) a minor revision to the content of force-placed insurance notices required by § 1024.37(c). The following sections of this part discuss in greater detail the potential impact of these three provisions of the final rule on small servicers.

B. Successors in Interest

The final rule imposes new requirements on mortgage servicers with respect to successors in interest. For purposes of these provisions, successors in interest generally include individuals who acquire an ownership interest in the property securing a mortgage loan through transfers that are protected by the Garn-St Germain Act, including, for example, certain transfers resulting from the death of the borrower, transfers to the borrower's spouse or children, or transfers incident to divorce. The provisions relate to how mortgage servicers confirm a successor in interest's identity and ownership interest in the property and apply the Mortgage Servicing Rules to confirmed successors in interest.

Small servicers must comply with some, but not all, of the Mortgage Servicing Rules, and the final rule requires small servicers to comply with that same set of rules with respect to confirmed successors in interest. Small servicers must comply, at least in part, with Regulation X's requirements regarding escrow accounts (§§ 1024.17 and 1024.34), general disclosure requirements (§ 1024.32), mortgage servicing transfers (§ 1024.33), error resolution procedures (§ 1024.35), requests for information (§ 1024.36), force-placed insurance (§ 1024.37), and certain prohibitions on initiating foreclosure proceedings and moving for foreclosure judgment or order of sale (§ 1024.41(f)(1) and (j)), and with Regulation Z's requirements regarding ARM disclosures (§ 1026.20(c) and (d)), regarding escrow account cancellation notices (§ 1026.20(e)), regarding payment processing, the prohibition on pyramiding of late fees, and the requirement to provide payoff statements (§ 1026.36(c)), and regarding mortgage transfer disclosures (§ 1026.39). The final rule requires small servicers to comply with each of these provisions with respect to successors in interest once a servicer has confirmed the successor in interest's identity and ownership interest in the property.

The Bureau does not believe that the application of these requirements to confirmed successors in interest will have a significant impact on the small entities subject to the Mortgage Servicing Rules. While the Bureau does not have representative data on the number of loans that are serviced by small servicers and for which the underlying property has been transferred to a successor in interest, the Bureau expects that such loans make up a small fraction of the total loans serviced by any small servicer. The final rule does not require small servicers to develop new policies and procedures, but rather to continue to apply existing policies and procedures for servicing loans subject to the servicing rules to what the Bureau believes is a relatively small set of loans previously subject to the Mortgage Servicing Rules before the interest in the property was transferred to a successor in interest.

In addition, given that under the Garn-St Germain Act small servicers are effectively obligated to service loans secured by property that has been transferred to a successor in interest, many small servicers are likely servicing such loans using the same policies and procedures that they use to service other mortgage loans that are already subject to the Mortgage Servicing Rules. Given that there are fixed costs associated with developing servicing policies and procedures and systems to implement those policies and procedures, it may be less costly for servicers to apply the same policies and procedures with respect to successors in interest that they apply to all other loans they service, rather than developing separate policies, procedures and systems to service loans for successors in interest. Moreover, as discussed in the 2013 RESPA Servicing Final Rule and the 2013 TILA Servicing Final Rule, the Bureau believes that small servicers generally depend on a relationship-based business model that depends on repeat business and could suffer significant harm from any major failure to treat customers properly because small servicers are particularly vulnerable to ''word of mouth.''[435] A servicer that had a practice of servicing loans for confirmed successors in interest using lower standards than those used to service other loans would risk reputational harm and an associated loss of business.

Small servicers are also subject to § 1024.36(i), which generally requires a servicer to respond to a written request that indicates that the person making the request may be a successor in interest by providing the person with a description of the documents the servicer reasonably requires to confirm the person's identity and ownership interest in the property. Small servicers are required to treat the person making the request as a borrower for the purposes of the procedural requirements of § 1024.36(c) through (g)—that is, servicers must respond to these requests the way they must respond to other written information requests, by generally acknowledging receipt of the request within five days and responding within 30 or 45 days without charge.

However, because small servicers are exempt from § 1024.38, they are not subject to § 1024.38(b)(1)(vi), which requires servicers to have policies and procedures in place to provide promptly upon request a description of what documents the servicer reasonably requires to confirm the person's status, and, upon the receipt of such documents, notify the person promptly, as applicable, that the servicer has confirmed the person's status, has determined that additional documents are required (and what those documents are), or has determined that the person is not a successor in interest. Therefore, the final rule does not necessarily require small servicers to make any changes to their policies and procedures for identifying successors in interest, but only to communicate to potential successors, using the same procedures they use to respond to other borrower requests, what documents they reasonably need to confirm a person's status as a successor in interest. Because small servicers may not need to make any changes to the documents they require and will already have

[435] 78 FR 10696, 10843 (Feb. 14, 2013); 78 FR 10902, 10978 (Feb. 14, 2013).

procedures in place for responding to borrower requests generally, the Bureau believes that the costs to small servicers of complying with § 1024.36(i) will be small.

C. Definition of Delinquency

The final rule adds a general definition of delinquency in § 1024.31 that applies to all sections of subpart C of Regulation X, replacing the existing definition of delinquency for purposes of §§ 1024.39 and 1024.40(a). Under the final rule, delinquency is defined as a period of time during which a borrower and a borrower's mortgage loan obligation are delinquent, and a borrower and a borrower's mortgage loan obligation are delinquent beginning on the date a periodic payment sufficient to cover principal, interest, and, if applicable, escrow, becomes due and unpaid, until such time as no periodic payment is due and unpaid. Comment 31 (Delinquency)–2 clarifies that, if a servicer applies payments to the oldest outstanding periodic payment, a payment by a delinquent borrower advances the date the borrower's delinquency began. The Bureau understands from its pre-proposal outreach and from comments that the majority of servicers credit payments made to a delinquent account to the oldest outstanding periodic payment. The Bureau also understands that some servicers that use this method may be concerned about how to calculate the length of a borrower's delinquency without increased certainty from the Bureau.[436]

The Bureau believes that the final rule's definition will clarify the application of the servicing rules—thereby reducing the costs to small servicers of complying with the rules—without imposing significant new burdens on servicers. The Bureau recognizes that, in principle, the definition could affect the circumstances under which a servicer may initiate foreclosure proceedings, because the definition of ''delinquency'' affects the application of § 1024.41(f)(1)'s prohibition on initiating foreclosure proceedings unless ''a borrower's mortgage loan obligation is more than 120 days delinquent.''[437] In particular, Comment 31 (Delinquency)-2 implies that a servicer that otherwise applies payments to the oldest outstanding periodic payment may not initiate foreclosure proceedings unless the borrower has missed the equivalent of at least four monthly payments. In contrast, the current rule could be interpreted to permit the servicer to commence foreclosure even if the borrower has missed only one payment, so long as the payment was missed more than 120 days ago and the borrower has not become current since. However, information gathered in pre-proposal industry outreach indicates that the majority of servicers generally do not initiate foreclosure proceedings in the case of consumers that are behind by three or fewer payments. In addition, Fannie Mae and Freddie Mac servicing guidelines generally prevent servicers from initiating foreclosure if a loan is delinquent by fewer than four monthly payments. For servicers that do not apply payments to the oldest outstanding periodic payment, the final rule will not affect their application of the 120-day pre-foreclosure review period.

In addition, the Bureau believes that it is particularly unlikely that a small servicer would initiate foreclosure proceedings with respect to a borrower who is not at least four payments behind. As the Bureau stated in the 2013 RESPA Servicing Final Rule, the vast majority of small servicers are community banks and credit unions that generally maintain a ''relationship'' model that depends on repeat business and are particularly vulnerable to reputational harm from a failure to treat customers well. The Bureau believes that such servicers would be particularly unlikely to initiate foreclosure proceedings in a case where a consumer had fallen behind by a few mortgage payments but continued to make regular payments going forward. For these reasons, the Bureau expects that the final rule's definition will not impose meaningful new constraints on servicers.

D. Changes to Force-Placed Insurance Notices

The final rule includes changes to force-placed insurance notices, which pursuant to § 1024.37 servicers must deliver to borrowers before they can charge borrowers for force-placed insurance, to modify the prescribed notices slightly to accommodate the circumstance where a consumer's hazard insurance coverage is insufficient, rather than expiring or expired. This change is intended to reduce the burden on servicers and borrowers by providing greater clarity in circumstances where the form of notice that is currently required does not accurately describe the deficiency in the borrower's insurance coverage. The change represents a minor amendment to the required force-placed insurance notice and the Bureau does not believe that it will impose any significant burden on servicers.

Certification

Accordingly, the undersigned certifies that the final rule will not have a significant economic impact on a substantial number of small entities.

IX. Paperwork Reduction Act

Certain provisions of the final rule contain ''collection of information'' requirements within the meaning of the Paperwork Reduction Act of 1995[438] (Paperwork Reduction Act or PRA). The collection of information contained in the final rule, and identified as such, has been submitted to OMB for review under section 3507(d) of the PRA. Notwithstanding any other provision of law, under the PRA, the Bureau may not conduct or sponsor, and a person is not required to respond to, this information collection unless the information collection displays a currently valid control number.

The final rule amends 12 CFR part 1024 (Regulation X), which implements the Real Estate Settlement Procedures Act (RESPA), and 12 CFR part 1026 (Regulation Z), which implements the Truth in Lending Act (TILA). Regulations X and Z currently contain collections of information approved by OMB. The Bureau's OMB control number for Regulation X is 3170–0016 and for Regulation Z is 3170–0015. Information collections for the final rule would be authorized under OMB control numbers 3170–0027 for Regulation X and 3170–0028 for Regulation Z.

On December 15, 2014, notice of the proposed rule was published in the **Federal Register**. The Bureau invited comment on: (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. The comment period for the proposed information collection expired on March 16, 2015.

[436] *See* Am. Bankers Ass'n. Letter to Bureau of Consumer Fin. Prot. (Oct. 24, 2014), *available at http://www.aba.com/Advocacy/commentletters/Pages/default.aspx#2014.*

[437] Small servicers, while otherwise exempt from the provisions of § 1024.41, are not exempt from § 1024.41(f)(1) pursuant to § 1024.41(j).

[438] 44 U.S.C. 3501 through 3521.

The Bureau received two comments addressing the PRA notice. An industry commenter noted the Bureau's estimate of the one-time hourly burden of complying with the proposed rule's successor in interest provisions and noted that the estimated time would not be sufficient for a servicer to become equipped to originate mortgage loans. However, the final rule does not require servicers to originate mortgage loans. Another industry commenter noted the Bureau's estimate of the one-time and ongoing burden of providing two new notices: The notice to consumers when a loss mitigation application is complete and the notice provided when evaluation of a loss mitigation application is delayed because necessary information from third parties has not been submitted. This commenter expressed concern that the estimated costs would increase the cost of servicing, and that this would have negative implications for consumers. The Bureau discusses the impacts of these notices on consumers and servicers in the Dodd-Frank Act section 1022(b) discussion above.

The Bureau is requiring six new information collection requirements, or changes to existing information collection requirements, in Regulation X:

1. Provisions requiring servicers to communicate with potential successors in interest about their requirements for confirming a successor in interest's identity and ownership interest in the property and to treat confirmed successors in interest as borrowers for purposes of the Mortgage Servicing Rules in Regulation X.

2. Minor changes to force-placed insurance notices to address the circumstance in which a borrower's hazard insurance coverage is insufficient (rather than expired or expiring) and permit the consumer's account number to be included on the notice.

3. Provisions requiring servicers to provide early intervention written notices to consumers in bankruptcy and to consumers who have provided the servicer with a cease communications notice under the FDCPA.

4. Requirement that servicers provide a notice to consumers when a loss mitigation application is complete.

5. Requirement that servicers provide a notice to consumers if their determination with respect to a loss mitigation application is delayed beyond a date that is 30 days after receipt of a complete loss mitigation application because information from third parties required to evaluate the application has not been submitted.

6. Requirement that servicers comply with the loss mitigation provisions of Regulation X with respect to multiple loss mitigation applications from the same borrower. Servicers that offer loss mitigation options in the ordinary course of business are required to follow certain procedures when evaluating loss mitigation applications, including (1) providing a notice telling the borrower if the loss mitigation application 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 second liens encumbering the property that is the subject of the loss mitigation application copies of the loss mitigation application.

The Bureau is also requiring two new information collection requirements, or changes to existing information collection requirements, in Regulation Z:

7. Requirement that servicers treat confirmed successors in interest as consumers for purposes of the Mortgage Servicing Rules in Regulation Z.

8. Requirement that servicers provide periodic statements to consumers in bankruptcy.

These information collections are required to provide benefits for consumers and are mandatory.[439] Because the Bureau does not collect any information, no issue of confidentiality arises. The likely respondents would be federally insured depository institutions (such as commercial banks, savings banks, and credit unions) and non-depository institutions (such as mortgage brokers, real estate investment trusts, private-equity funds, *etc.*) that service consumer mortgages.[440]

Under the rule, the Bureau accounts for the entire paperwork burden for respondents under Regulation X. The Bureau generally also accounts for the paperwork burden associated with Regulation Z for the following respondents pursuant to its administrative enforcement authority: Insured depository institutions with more than $10 billion in total assets, their depository institution affiliates, and certain non-depository institutions. The Bureau and the FTC generally both have enforcement authority over non-depository institutions for Regulation Z. Accordingly, the Bureau has allocated to itself half of the estimated burden to non-depository institutions. Other Federal agencies 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 Bureau believes the total estimated industry burden under Regulation X for the approximately 10,730 respondents subject to the final rule will be approximately 128,000 hours for one time changes and 64,000 hours annually. Using the Bureau's burden estimation methodology, the total estimated industry burden under Regulation Z for the approximately 10,730 banks, savings institutions, credit unions, and mortgage companies subject to the final rule, including Bureau respondents,[441] is approximately 7,000 hours for one-time changes and 8,300 hours annually. The estimates presented in this part IX represent weighted averages across respondents. The Bureau expects that the amount of time required to implement each of the changes for a given institution may vary based on the size, complexity, and practices of the respondent.

For purposes of this PRA analysis, the Bureau estimates that there are 9,868 depository institutions and credit unions subject to the final rule, and an additional 862 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 final rule for large- and medium-

[439] *See* 15 U.S.C. 1601 *et seq.;* 12 U.S.C. 2601 *et seq.*

[440] 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.

[441] For purposes of this PRA analysis, the Bureau's depository respondents with respect to the changes to Regulation Z are 120 depository institutions and depository institution affiliates that service closed-end consumer mortgages. The Bureau's non-depository respondents are an estimated 862 non-depository servicers. Unless otherwise specified, all references to burden hours and costs for the Bureau respondents for the collection requirements under the changes to Regulation Z 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.

sized respondents but not for small respondents.

A. Information Collection Requirements—Regulation X

The Bureau believes the following aspects of the final rule are information collection requirements under the PRA.

1. Successors in Interest

Under the final rule, servicers are generally required (1) to respond to a written request from a person that indicates that the person may be a successor in interest by providing that person with a description of the documents the servicer reasonably requires to confirm the person's identity and ownership interest in the property and (2) to have policies and procedures reasonably designed to ensure that the servicer can provide promptly upon request a description of what documents the servicer reasonably requires to confirm the person's identity and ownership interest in the property, and, upon the receipt of such documents, notify the person promptly, as applicable, that the servicer has confirmed the person's status, has determined that additional documents are required (and what those documents are), or has determined that the person is not a successor in interest. Servicers are also subject to Regulation X's mortgage servicing requirements, including loss mitigation requirements, with respect to confirmed successors in interest.

All respondents will have a one-time burden under this requirement associated with reviewing the regulation and developing a compliance plan. Certain respondents will have one-time burden in hours from training personnel in compliance with the requirement. The Bureau estimates that one-time hourly burden to comply with the disclosure requirements to be eight hours and forty-five minutes, on average, per respondent.

Respondents will have ongoing burden in hours and vendor costs associated with the information technology used in producing the required disclosures. All respondents will have ongoing vendor costs associated with distributing (*e.g.,* mailing) the required disclosures and some will have production costs associated with the new disclosures. The Bureau estimates this ongoing burden to be 10 minutes and $0.44, on average, for each respondent.

2. Changes to Force-Placed Insurance Disclosures

The final rule makes minor changes to the content of required force-placed insurance notices, which are required before a servicer may charge a borrower for force-placed insurance.

All respondents will have a one-time burden under this requirement associated with reviewing the regulation and developing a compliance plan. All respondents will also have one-time burden in hours or vendor costs from changing existing systems to accommodate the required new disclosure. The Bureau estimates the one-time hourly burden to comply with the disclosure requirements to be one hour and 15 minutes and $70, on average, per respondent.

Because the content of the required notices will not change substantially under the final rule and the circumstances under which the disclosures are required will not change, there will not be an ongoing burden under the final rule.

3. Early Intervention Written Notices

The final rule requires that servicers send written early intervention notices to borrowers in bankruptcy and borrowers who have exercised their cease communication rights under the FDCPA. These notices must meet certain requirements that do not apply to the early intervention notices that must be sent to other borrowers. Borrowers have rights under the FDCPA only with respect to accounts that were delinquent at the time the servicer acquired the servicing rights. Therefore, servicers that do not acquire servicing rights in the course of their business are not subject to these modified disclosure requirements.

All respondents will have a one-time burden under this requirement associated with reviewing the regulation and developing a compliance plan. Certain respondents will have one-time burden in hours or vendor costs from changing existing systems to accommodate the required new disclosure. The Bureau estimates the one-time hourly burden to comply with the disclosure requirements to be nine hours and 30 minutes, on average, per respondent.

Respondents will have ongoing burden in hours and vendor costs associated with the information technology used in producing the disclosure. All respondents will have ongoing vendor costs associated with distributing (*e.g.,* mailing) the disclosure and some will have production costs associated with the new disclosure. The Bureau estimates this ongoing burden to be four hours and $380, on average, for each respondent.

4. Notice of Complete Loss Mitigation Application

The final rule requires a servicer to provide a written notice to a borrower within five days (excluding legal public holidays, Saturdays, and Sundays) after receiving the borrower's complete application. The Bureau understands that the practice of providing borrowers with a written notice informing them that their loss mitigation application is complete is a common business practice (*i.e.,* a ''usual and customary'' business practice) today for most mortgage servicers. However, the Bureau understands that the specific content of the required notices may not reflect existing common practices.

All respondents will have a one-time burden under this requirement associated with reviewing the regulation and developing a compliance plan. In addition, while the Bureau considers borrower notifications that loss mitigation applications are complete 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 final rule's disclosure provisions. As a result, the Bureau's one-time burden incorporates these costs. The Bureau estimates this one-time burden to be ten hours and 20 minutes, on average, for each respondent.

5. Notice Regarding Outstanding Third-Party Information

The final rule requires written notice to borrowers within thirty days following receipt of a complete loss mitigation application if the servicer has not received information from a party other than the servicer or the borrower that is necessary to make a determination of which loss mitigation options, if any, to offer the borrower.

All respondents will have a one-time burden under this requirement associated with reviewing the regulation and developing a compliance plan. Certain respondents will have one-time burden in hours or vendor costs from creating software and information technology capability to produce the disclosure. The Bureau estimates that one-time hourly burden to comply with the disclosure requirements to be ten hours and 20 minutes, on average, per respondent.

Respondents will have ongoing burden in hours and vendor costs associated with the information technology used in producing the disclosure. All respondents will have ongoing vendor costs associated with distributing (*e.g.,* mailing) the disclosure and some will have production costs associated with the new disclosure. The Bureau estimates this ongoing burden to be 10 minutes and $12, on average, for each respondent.

6. Requirement To Evaluate Multiple Loss Mitigation Applications

Currently, servicers (other than small servicers) are required to comply with the loss mitigation provisions of § 1024.41 only once during the life of a loan, including the provision of up to three notices per loss mitigation application. Under the final rule, servicers must comply with the loss mitigation provisions of § 1024.41 for borrowers who have previously completed a loss mitigation application, so long as the borrower has become current in the period following the completion of the prior application.

All respondents will have a one-time burden under this requirement associated with reviewing the regulation and developing a compliance plan. Certain respondents will have a one-time burden from revising their systems to provide for evaluation of borrowers for subsequent loss mitigation applications. The Bureau estimates this one-time burden to be four hours and 30 minutes, on average, for each respondent. The Bureau estimates the ongoing burden to be 103 hours and $181, on average, for each respondent.

B. Information Collection Requirements—Regulation Z

1. Successors in Interest Under Regulation Z

Under the final rule, servicers are subject to Regulation Z's mortgage servicing requirements with respect to confirmed successors in interest. All respondents will have a one-time burden under this requirement associated with reviewing the regulation and developing a compliance plan. The Bureau estimates that one-time hourly burden to comply with the disclosure requirements to be one hour and 50 minutes, on average, per respondent.

Certain respondents will have ongoing vendor costs associated with distributing (*e.g.,* mailing) the required disclosures and some will have production costs associated with the new required disclosures. The Bureau estimates this ongoing burden to be 10 minutes and $7, on average, for each respondent.

2. Periodic Statements

Under the final rule, respondents that are not small servicers must provide periodic statements to certain consumers in bankruptcy.

All respondents that are not small servicers will have a one-time burden under this requirement associated with reviewing the regulation and developing a compliance plan. Certain respondents will have one-time burden in hours or vendor costs from changing existing systems to produce the required new disclosure. The Bureau estimates that one-time hourly burden to comply with the disclosure requirements to be 31 hours, on average, per respondent.

Respondents will have ongoing burden in hours and vendor costs associated with the information technology used in producing the disclosure. Certain respondents will have ongoing vendor costs associated with distributing (*e.g.,* mailing) the disclosure and some will have production costs associated with the new disclosure. The Bureau estimates this ongoing burden to be 43 hours and $4,273, on average, for each respondent.

C. Summary of Burden Hours—Regulation X

The estimated burden on Bureau respondents from the changes to Regulation X is summarized below. Under the final rule, the Bureau accounts for the entire paperwork burden for respondents under Regulation X.

	Respondents	Disclosures per respondent	Hours burden per disclosure	Total burden hours	Total vendor costs
Ongoing:					
Successors in Interest—Regulation X	10,730	6	0.016	1,086	$4,731
Force-Placed Insurance	10,730	0	0	0	0
Early Intervention Written Notices	592	1,261	0.003	2,239	223,890
Notice of Complete Loss Mitigation Application	592	0	0	0	0
Third-Party Information	592	44	0.003	67	6,681
Loss Mitigation—Subsequent Applications	592	709	0.144	60,571	107,100
One-Time:					
Successors in Interest—Regulation X	10,730	1	8.745	93,830	0
Force-Placed Insurance	10,730	1	1.272	13,652	729,936
Early Intervention Written Notices	592	1	9.514	5,632	0
Notice of Complete Loss Mitigation Application	592	1	10.277	6,084	0
Third-Party Information	592	1	10.327	6,114	60,000
Loss Mitigation—Subsequent Applications	592	1	4.505	2,667	0

Totals may not be exact due to rounding.

D. Summary of Burden Hours—Regulation Z

The estimated burden on Bureau respondents from the changes to Regulation Z is summarized below. The Bureau accounts for the paperwork burden associated with Regulation Z for the following respondents pursuant to its administrative enforcement authority: Insured depository institutions with more than $10 billion in total assets, their depository institution affiliates, and certain non-depository institutions. The Bureau and the FTC generally both have enforcement authority over non-depository institutions for Regulation Z. Accordingly, the Bureau has allocated to itself half of the estimated burden to non-depository institutions.

	Bureau respondents	Disclosures per bureau respondent	Hours burden per disclosure	Total burden hours for bureau respondents	Total vendor costs for bureau respondents
Ongoing:					
Successors in Interest—Regulation Z	551	35	0.003	56	$5,678
Periodic Statements in Bankruptcy	193	23,938	0.002	8,247	824,670

	Bureau respondents	Disclosures per bureau respondent	Hours burden per disclosure	Total burden hours for bureau respondents	Total vendor costs for bureau respondents
One-Time:					
Successors in Interest—Regulation Z	551	1	1.842	1,015	0
Periodic Statements in Bankruptcy	193	1	30.935	5,971	0

Totals may not be exact due to rounding.

List of Subjects

12 CFR Part 1024

Condominiums, Consumer protection, Housing, Insurance, Mortgages, Mortgagees, Mortgage servicing, Reporting and recordkeeping requirements.

12 CFR Part 1026

Advertising, Appraisal, Appraiser, Banking, Banks, 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 in the preamble, the Bureau amends 12 CFR parts 1024 and 1026 as follows:

PART 1024—REAL ESTATE SETTLEMENT PROCEDURES ACT (REGULATION X)

■ 1. The authority citation for part 1024 continues to read as follows:

Authority: 12 U.S.C. 2603–2605, 2607, 2609, 2617, 5512, 5532, 5581.

Subpart B—Mortgage Settlement and Escrow Accounts

■ 2. Section 1024.6 is amended by revising paragraphs (d)(1) and (2) to read as follows:

§ 1024.6 Special information booklet at time of loan application.

* * * * *

(d) *Permissible changes.* (1) No changes to, deletions from, or additions to the special information booklet currently prescribed by the Bureau shall be made other than the permissible changes specified in paragraphs (d)(2) and (3) of this section or changes as otherwise approved in writing by the Bureau in accordance with the procedures described in this paragraph (d). A request to the Bureau for approval of any changes other than the permissible changes specified in paragraphs (d)(2) and (3) of this section shall be submitted in writing to the address indicated in the definition of *Public Guidance Documents* in § 1024.2, stating the reasons why the applicant believes such changes, deletions, or additions are necessary.

(2) The cover of the booklet may be in any form and may contain any drawings, pictures, or artwork, provided that the words ''settlement costs'' are used in the title. Names, addresses and telephone numbers of the lender or others and similar information may appear on the cover, but no discussion of the matters covered in the booklet shall appear on the cover.

* * * * *

■ 3. Section 1024.9 is amended by revising paragraphs (a)(5) and (c) to read as follows:

§ 1024.9 Reproduction of settlement statements.

(a) * * *

(5) The following variations in layout and format are within the discretion of persons reproducing the HUD–1 and do not require prior Bureau approval: Size of pages; tint or color of pages; size and style of type or print; vertical spacing between lines or provision for additional horizontal space on lines (for example, to provide sufficient space for recording time periods used in prorations); printing of the HUD–1 contents on separate pages, on the front and back of a single page, or on one continuous page; use of multicopy tear-out sets; printing on rolls for computer purposes; reorganization of sections B through I, when necessary to accommodate computer printing; and manner of placement of the HUD number, but not the OMB approval number, neither of which may be deleted. The expiration date associated with the OMB number listed on the form may be deleted. Any changes in the HUD number or OMB approval number may be announced by notice in the **Federal Register**, rather than by amendment of this part.

* * * * *

(c) *Written approval.* Any other deviation in the HUD–1 or HUD–1A forms is permissible only upon receipt of written approval of the Bureau; provided, however, that notwithstanding contrary instructions in this section or appendix A of this part, reproducing the HUD–1 or HUD–1A forms with the Bureau's OMB approval number displayed in place of HUD's OMB approval number does not require the written approval of the Bureau. A request to the Bureau for approval shall be submitted in writing to the address indicated in the definition of *Public Guidance Documents* in § 1024.2 and shall state the reasons why the applicant believes such deviation is needed. The prescribed form(s) must be used until approval is received.

■ 4. Section 1024.17 is amended by revising paragraph (h)(1) to read as follows:

§ 1024.17 Escrow accounts.

* * * * *

(h) *Format for initial escrow account statement.* (1) The format and a completed example for an initial escrow account statement are set out in Public Guidance Documents entitled ''Initial Escrow Account Disclosure Statement—Format'' and ''Initial Escrow Account Disclosure Statement—Example,'' available in accordance with the direction in the definition of *Public Guidance Documents* in § 1024.2.

* * * * *

Subpart C—Mortgage Servicing

■ 5. Effective April 19, 2018, § 1024.30 is amended by adding paragraph (d) to read as follows:

§ 1024.30 Scope.

* * * * *

(d) *Successors in interest.* A confirmed successor in interest shall be considered a borrower for purposes of § 1024.17 and this subpart.

■ 6. Section 1024.31 is amended by:

■ a. Adding a definition of *Delinquency* in alphabetical order; and

■ b. Effective April 19, 2018, adding definitions of *Confirmed successor in interest* and *Successor in interest* in alphabetical order.

The additions read as follows:

§ 1024.31 Definitions.

* * * * *

Confirmed successor in interest means a successor in interest once a servicer has confirmed the successor in interest's identity and ownership interest in a property that secures a mortgage loan subject to this subpart.

* * * * *

Delinquency means a period of time during which a borrower and a borrower's mortgage loan obligation are delinquent. A borrower and a borrower's mortgage loan obligation are delinquent beginning on the date a periodic payment sufficient to cover principal, interest, and, if applicable, escrow becomes due and unpaid, until such time as no periodic payment is due and unpaid.

* * * * *

Successor in interest means a person to whom an ownership interest in a property securing a mortgage loan subject to this subpart is transferred from a borrower, provided that the transfer is:

(1) A transfer by devise, descent, or operation of law on the death of a joint tenant or tenant by the entirety;

(2) A transfer to a relative resulting from the death of a borrower;

(3) A transfer where the spouse or children of the borrower become an owner of the property;

(4) A transfer resulting from a decree of a dissolution of marriage, legal separation agreement, or from an incidental property settlement agreement, by which the spouse of the borrower becomes an owner of the property; or

(5) A transfer into an *inter vivos* trust in which the borrower is and remains a beneficiary and which does not relate to a transfer of rights of occupancy in the property.

* * * * *

■ 7. Effective April 19, 2018, § 1024.32 is amended by adding paragraph (c) to read as follows:

§ 1024.32 General disclosure requirements.

* * * * *

(c) *Successors in interest*—(1) *Optional notice with acknowledgment form.* Upon confirmation, a servicer may provide a confirmed successor in interest who is not liable on the mortgage loan obligation with a written notice together with a separate acknowledgment form that meets the requirements of paragraph (c)(1)(iv) of this section and that does not require acknowledgment of any items other than those identified in paragraph (c)(1)(iv) of this section. The written notice must clearly and conspicuously explain that:

(i) The servicer has confirmed the successor in interest's identity and ownership interest in the property;

(ii) Unless the successor in interest assumes the mortgage loan obligation under State law, the successor in interest is not liable for the mortgage debt and cannot be required to use the successor in interest's assets to pay the mortgage debt, except that the lender has a security interest in the property and a right to foreclose on the property, when permitted by law and authorized under the mortgage loan contract;

(iii) The successor in interest may be entitled to receive certain notices and communications about the mortgage loan if the servicer is not providing them to another confirmed successor in interest or borrower on the account;

(iv) In order to receive such notices and communications, the successor in interest must execute and provide to the servicer an acknowledgment form that:

(A) Requests receipt of such notices and communications if the servicer is not providing them to another confirmed successor in interest or borrower on the account; and

(B) Indicates that the successor in interest understands that such notices do not make the successor in interest liable for the mortgage debt and that the successor in interest is only liable for the mortgage debt if the successor in interest assumes the mortgage loan obligation under State law; and

(C) Informs the successor in interest that there is no time limit to return the acknowledgment but that the servicer will not begin sending such notices and communications to the confirmed successor in interest until the acknowledgment is returned; and

(v) Whether or not the successor in interest executes the acknowledgment described in paragraph (c)(1)(iv) of this section, the successor in interest is entitled to submit notices of error under § 1024.35, requests for information under § 1024.36, and requests for a payoff statement under § 1026.36 with respect to the mortgage loan account, with a brief explanation of those rights and how to exercise them, including appropriate address information.

(2) *Effect of failure to execute acknowledgment.* If, upon confirmation, a servicer provides a confirmed successor in interest who is not liable on the mortgage loan obligation with a written notice and acknowledgment form in accordance with paragraph (c)(1) of this section, the servicer is not required to provide to the confirmed successor in interest any written disclosure required by § 1024.17, § 1024.33, § 1024.34, § 1024.37, or § 1024.39 or to comply with the live contact requirements in § 1024.39(a) with respect to the confirmed successor in interest until the confirmed successor in interest either assumes the mortgage loan obligation under State law or executes an acknowledgment that complies with paragraph (c)(1)(iv) of this section and provides it to the servicer.

(3) *Additional copies of acknowledgment form.* If a servicer provides a confirmed successor in interest with a written notice and acknowledgment form in accordance with paragraph (c)(1) of this section, the servicer must make additional copies of the written notice and acknowledgment form available to the confirmed successor in interest upon written or oral request.

(4) *Multiple notices unnecessary.* Except as required by § 1024.36, a servicer is not required to provide to a confirmed successor in interest any written disclosure required by § 1024.17, § 1024.33, § 1024.34, § 1024.37, or § 1024.39(b) if the servicer is providing the same specific disclosure to another borrower on the account. A servicer is also not required to comply with the live contact requirements set forth in § 1024.39(a) with respect to a confirmed successor in interest if the servicer is complying with those requirements with respect to another borrower on the account.

■ 8. Effective April 19, 2018, § 1024.35 is amended by adding paragraph (e)(5) to read as follows:

§ 1024.35 Error resolution procedures.

* * * * *

(e) * * *

(5) *Omissions in responses to requests for documentation.* In its response to a request for documentation under paragraph (e)(4) of this section, a servicer may omit location and contact information and personal financial information (other than information about the terms, status, and payment history of the mortgage loan) if:

(i) The information pertains to a potential or confirmed successor in interest who is not the requester; or

(ii) The requester is a confirmed successor in interest and the information pertains to any borrower who is not the requester.

* * * * *

■ 9. Effective April 19, 2018, § 1024.36 is amended by adding paragraphs (d)(3) and (i) to read as follows:

§ 1024.36 Requests for information.

* * * * *

(d) * * *

(3) *Omissions in responses to requests.* In its response to a request for information, a servicer may omit location and contact information and personal financial information (other than information about the terms, status,

and payment history of the mortgage loan) if:

(i) The information pertains to a potential or confirmed successor in interest who is not the requester; or

(ii) The requester is a confirmed successor and the information pertains to any borrower who is not the requester.

* * * * *

(i) *Potential successors in interest.* (1) With respect to any written request from a person that indicates that the person may be a successor in interest and that includes the name of the transferor borrower from whom the person received an ownership interest and information that enables the servicer to identify the mortgage loan account, a servicer shall respond by providing the potential successor in interest with a written description of the documents the servicer reasonably requires to confirm the person's identity and ownership interest in the property and contact information, including a telephone number, for further assistance. With respect to the written request, a servicer shall treat the potential successor in interest as a borrower for purposes of the requirements of paragraphs (c) through (g) of this section.

(2) If a written request under paragraph (i)(1) of this section does not provide sufficient information to enable the servicer to identify the documents the servicer reasonably requires to confirm the person's identity and ownership interest in the property, the servicer may provide a response that includes examples of documents typically accepted to establish identity and ownership interest in a property; indicates that the person may obtain a more individualized description of required documents by providing additional information; specifies what additional information is required to enable the servicer to identify the required documents; and provides contact information, including a telephone number, for further assistance. A servicer's response under this paragraph (i)(2) must otherwise comply with the requirements of paragraph (i)(1). Notwithstanding paragraph (f)(1)(i) of this section, if a potential successor in interest subsequently provides orally or in writing the required information specified by the servicer pursuant to this paragraph (i)(2), the servicer must treat the new information, together with the original request, as a new, non-duplicative request under paragraph (i)(1), received as of the date the required information was received, and must respond accordingly.

(3) In responding to a request under paragraph (i)(1) of this section prior to confirmation, the servicer is not required to provide any information other than the information specified in paragraphs (i)(1) and (2) of this section. In responding to a written request under paragraph (i)(1) that requests other information, the servicer must indicate that the potential successor in interest may resubmit any request for information once confirmed as a successor in interest.

(4) If a servicer has established an address that a borrower must use to request information pursuant to paragraph (b) of this section, a servicer must comply with the requirements of paragraph (i)(1) of this section only for requests received at the established address.

■ 10. Section 1024.37 is amended by revising paragraphs (c)(2)(v), (c)(4), (d)(2)(ii) introductory text, (d)(2)(ii)(B), (d)(3), (d)(4), and (e)(4) to read as follows:

§ 1024.37 Force-placed insurance.

* * * * *

(c) * * *

(2) * * *

(v) A statement that:

(A) The borrower's hazard insurance is expiring, has expired, or provides insufficient coverage, as applicable;

(B) The servicer does not have evidence that the borrower has hazard insurance coverage past the expiration date or evidence that the borrower has hazard insurance that provides sufficient coverage, as applicable; and

(C) If applicable, identifies the type of hazard insurance for which the servicer lacks evidence of coverage;

* * * * *

(4) *Additional information.* Except for the mortgage loan account number, a servicer may not include any information other than information required by paragraph (c)(2) of this section in the written notice required by paragraph (c)(1)(i) of this section. However, a servicer may provide such additional information to a borrower on separate pieces of paper in the same transmittal.

(d) * * *

(2) * * *

(ii) *Servicer lacking evidence of continuous coverage.* A servicer that has received hazard insurance information after delivering to a borrower or placing in the mail the notice required by paragraph (c)(1)(i) of this section, but has not received, from the borrower or otherwise, evidence demonstrating that the borrower has had sufficient hazard insurance coverage in place continuously, must set forth in the notice required by paragraph (c)(1)(ii) of this section the following information:

* * * * *

(B) The information required by paragraphs (c)(2)(ii) through (iv) and (ix) through (xi) and (d)(2)(i)(B) and (D) of this section;

* * * * *

(3) *Format.* A servicer must set the information required by paragraphs (d)(2)(i)(B) and (D) of this section in bold text. The requirements of paragraph (c)(3) of this section apply to the information required by paragraph (d)(2)(i)(C) of this section. A servicer may use form MS–3B in appendix MS–3 of this part to comply with the requirements of paragraphs (d)(1) and (d)(2)(i) of this section. A servicer may use form MS–3C in appendix MS–3 of this part to comply with the requirements of paragraphs (d)(1) and (d)(2)(ii) of this section.

(4) *Additional information.* Except for the borrower's mortgage loan account number, a servicer may not include any information other than information required by paragraph (d)(2)(i) or (ii) of this section, as applicable, in the written notice required by paragraph (c)(1)(ii) of this section. However, a servicer may provide such additional information to a borrower on separate pieces of paper in the same transmittal.

* * * * *

(e) * * *

(4) *Additional information.* Except for the borrower's mortgage loan account number, a servicer may not include any information other than information required by paragraph (e)(2) of this section in the written notice required by paragraph (e)(1) of this section. However, a servicer may provide such additional information to a borrower on separate pieces of paper in the same transmittal.

* * * * *

■ 11. Section 1024.38 is amended by:

■ a. Adding paragraph (b)(2)(vi); and

■ b. Effective April 19, 2018, revising paragraph (b)(1)(vi).

The addition and revision read as follows:

§ 1024.38 General servicing policies, procedures, and requirements.

* * * * *

(b) * * *

(1) * * *

(vi)(A) Upon receiving notice of the death of a borrower or of any transfer of the property securing a mortgage loan, promptly facilitate communication with any potential or confirmed successors in interest regarding the property;

(B) Upon receiving notice of the existence of a potential successor in interest, promptly determine the documents the servicer reasonably requires to confirm that person's identity and ownership interest in the property and promptly provide to the potential successor in interest a description of those documents and how the person may submit a written request under § 1024.36(i) (including the appropriate address); and

(C) Upon the receipt of such documents, promptly make a confirmation determination and promptly notify the person, as applicable, that the servicer has confirmed the person's status, has determined that additional documents are required (and what those documents are), or has determined that the person is not a successor in interest.

* * * * *

(2) * * *

(vi) Promptly identify and obtain documents or information not in the borrower's control that the servicer requires to determine which loss mitigation options, if any, to offer the borrower in accordance with the requirements of § 1024.41(c)(4).

* * * * *

■ 12. Section 1024.39 is amended by revising paragraphs (a), (b)(1), (c), and (d) to read as follows:

§ 1024.39 Early intervention requirements for certain borrowers.

(a) *Live contact.* Except as otherwise provided in this section, a servicer shall establish or make good faith efforts to establish live contact with a delinquent borrower no later than the 36th day of a borrower's delinquency and again no later than 36 days after each payment due date so long as the borrower remains delinquent. Promptly after establishing live contact with a borrower, the servicer shall inform the borrower about the availability of loss mitigation options, if appropriate.

(b) *Written notice*—(1) *Notice required.* Except as otherwise provided in this section, a servicer shall provide to a delinquent borrower a written notice with the information set forth in paragraph (b)(2) of this section no later than the 45th day of the borrower's delinquency and again no later than 45 days after each payment due date so long as the borrower remains delinquent. A servicer is not required to provide the written notice, however, more than once during any 180-day period. If a borrower is 45 days or more delinquent at the end of any 180-day period after the servicer has provided the written notice, a servicer must provide the written notice again no later than 180 days after the provision of the prior written notice. If a borrower is less than 45 days delinquent at the end of any 180-day period after the servicer has provided the written notice, a servicer must provide the written notice again no later than 45 days after the payment due date for which the borrower remains delinquent.

* * * * *

(c) *Borrowers in bankruptcy*—(1) *Partial exemption.* While any borrower on a mortgage loan is a debtor in bankruptcy under title 11 of the United States Code, a servicer, with regard to that mortgage loan:

(i) Is exempt from the requirements of paragraph (a) of this section;

(ii) Is exempt from the requirements of paragraph (b) of this section if no loss mitigation option is available, or if any borrower on the mortgage loan has provided a notification pursuant to the Fair Debt Collection Practices Act (FDCPA) section 805(c) (15 U.S.C. 1692c(c)) with respect to that mortgage loan as referenced in paragraph (d) of this section; and

(iii) If the conditions of paragraph (c)(1)(ii) of this section are not met, must comply with the requirements of paragraph (b) of this section, as modified by this paragraph (c)(1)(iii):

(A) If a borrower is delinquent when the borrower becomes a debtor in bankruptcy, a servicer must provide the written notice required by paragraph (b) of this section not later than the 45th day after the borrower files a bankruptcy petition under title 11 of the United States Code. If the borrower is not delinquent when the borrower files a bankruptcy petition, but subsequently becomes delinquent while a debtor in bankruptcy, the servicer must provide the written notice not later than the 45th day of the borrower's delinquency. A servicer must comply with these timing requirements regardless of whether the servicer provided the written notice in the preceding 180-day period.

(B) The written notice required by paragraph (b) of this section may not contain a request for payment.

(C) A servicer is not required to provide the written notice required by paragraph (b) of this section more than once during a single bankruptcy case.

(2) *Resuming compliance.* (i) Except as provided in paragraph (c)(2)(ii) of this section, a servicer that was exempt from paragraphs (a) and (b) of this section pursuant to paragraph (c)(1) of this section must resume compliance with paragraphs (a) and (b) of this section after the next payment due date that follows the earliest of the following events:

(A) The bankruptcy case is dismissed;

(B) The bankruptcy case is closed; and

(C) The borrower reaffirms personal liability for the mortgage loan.

(ii) With respect to a mortgage loan for which the borrower has discharged personal liability pursuant to 11 U.S.C. 727, 1141, 1228, or 1328, a servicer:

(A) Is not required to resume compliance with paragraph (a) of this section; and

(B) Must resume compliance with paragraph (b) of this section if the borrower has made any partial or periodic payment on the mortgage loan after the commencement of the borrower's bankruptcy case.

(d) *Fair Debt Collection Practices Act—partial exemption.* With regard to a mortgage loan for which any borrower has provided a notification pursuant to the Fair Debt Collection Practices Act (FDCPA) section 805(c) (15 U.S.C. 1692c(c)), a servicer subject to the FDCPA with respect to that borrower's loan:

(1) Is exempt from the requirements of paragraph (a) of this section;

(2) Is exempt from the requirements of paragraph (b) of this section if no loss mitigation option is available, or while any borrower on that mortgage loan is a debtor in bankruptcy under title 11 of the United States Code as referenced in paragraph (c) of this section; and

(3) If the conditions of paragraph (d)(2) of this section are not met, must comply with the requirements of paragraph (b) of this section, as modified by this paragraph (d)(3):

(i) In addition to the information required pursuant to paragraph (b)(2) of this section, the written notice must include a statement that the servicer may or intends to invoke its specified remedy of foreclosure. Model clause MS–4(D) in appendix MS–4 to this part may be used to comply with this requirement.

(ii) The written notice may not contain a request for payment.

(iii) A servicer is prohibited from providing the written notice more than once during any 180-day period.

■ 13. Section 1024.41 is amended by:

■ a. Revising paragraphs (c)(1) introductory text and (c)(2)(iii) and (iv);

■ b. Adding paragraphs (c)(3) and (4);

■ c. Revising paragraphs (f)(1)(iii) and (i); and

■ d. Adding paragraph (k).

The revisions and additions read as follows:

§ 1024.41 Loss mitigation procedures.

* * * * *

(c) * * *

(1) *Complete loss mitigation application.* Except as provided in

paragraph (c)(4)(ii) of this section, if a servicer receives a complete loss mitigation application more than 37 days before a foreclosure sale, then, within 30 days of receiving the complete loss mitigation application, a servicer shall:

* * * * *

(2) * * *

(iii) *Short-term loss mitigation options.* Notwithstanding paragraph (c)(2)(i) of this section, a servicer may offer a short-term payment forbearance program or a short-term repayment plan to a borrower based upon an evaluation of an incomplete loss mitigation application. Promptly after offering a payment forbearance program or a repayment plan under this paragraph (c)(2)(iii), unless the borrower has rejected the offer, the servicer must provide the borrower a written notice stating the specific payment terms and duration of the program or plan, that the servicer offered the program or plan based on an evaluation of an incomplete application, that other loss mitigation options may be available, and that the borrower has the option to submit a complete loss mitigation application to receive an evaluation for all loss mitigation options available to the borrower regardless of whether the borrower accepts the program or plan. A servicer shall not make the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process, and shall not move for foreclosure judgment or order of sale or conduct a foreclosure sale, if a borrower is performing pursuant to the terms of a payment forbearance program or repayment plan offered pursuant to this paragraph (c)(2)(iii). A servicer may offer a short-term payment forbearance program in conjunction with a short-term repayment plan pursuant to this paragraph (c)(2)(iii).

(iv) *Facially complete application.* A loss mitigation application shall be considered facially complete when a borrower submits all the missing documents and information as stated in the notice required under paragraph (b)(2)(i)(B) of this section, when no additional information is requested in such notice, or once the servicer is required to provide the borrower a written notice pursuant to paragraph (c)(3)(i) of this section. If the servicer later discovers that additional information or corrections to a previously submitted document are required to complete the application, the servicer must promptly request the missing information or corrected documents and treat the application as complete for the purposes of paragraphs (f)(2) and (g) of this section until the borrower is given a reasonable opportunity to complete the application. If the borrower completes the application within this period, the application shall be considered complete as of the date it first became facially complete, for the purposes of paragraphs (d), (e), (f)(2), (g), and (h) of this section, and as of the date the application was actually complete for the purposes of this paragraph (c). A servicer that complies with this paragraph (c)(2)(iv) will be deemed to have fulfilled its obligation to provide an accurate notice under paragraph (b)(2)(i)(B) of this section.

(3) *Notice of complete application.* (i) Except as provided in paragraph (c)(3)(ii) of this section, within 5 days (excluding legal public holidays, Saturdays, and Sundays) after receiving a borrower's complete loss mitigation application, a servicer shall provide the borrower a written notice that sets forth the following information:

(A) That the loss mitigation application is complete;

(B) The date the servicer received the complete application;

(C) That the servicer expects to complete its evaluation within 30 days of the date it received the complete application;

(D) That the borrower is entitled to certain foreclosure protections because the servicer has received the complete application, and, as applicable, either:

(*1*) If the servicer has not made the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process, that the servicer cannot make the first notice or filing required to commence or initiate the foreclosure process under applicable law before evaluating the borrower's complete application; or

(*2*) If the servicer has made the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process, that the servicer has begun the foreclosure process, and that the servicer cannot conduct a foreclosure sale before evaluating the borrower's complete application;

(E) That the servicer may need additional information at a later date to evaluate the application, in which case the servicer will request that information from the borrower and give the borrower a reasonable opportunity to submit it, the evaluation process may take longer, and the foreclosure protections could end if the servicer does not receive the information as requested; and

(F) That the borrower may be entitled to additional protections under State or Federal law.

(ii) A servicer is not required to provide a notice pursuant to paragraph (c)(3)(i) of this section if:

(A) The servicer has already provided the borrower a notice under paragraph (b)(2)(i)(B) of this section informing the borrower that the application is complete and the servicer has not subsequently requested additional information or a corrected version of a previously submitted document from the borrower pursuant to paragraph (c)(2)(iv) of this section;

(B) The application was not complete or facially complete more than 37 days before a foreclosure sale; or

(C) The servicer has already provided the borrower a notice regarding the application under paragraph (c)(1)(ii) of this section.

(4) *Information not in the borrower's control*—(i) *Reasonable diligence.* If a servicer requires documents or information not in the borrower's control to determine which loss mitigation options, if any, it will offer to the borrower, the servicer must exercise reasonable diligence in obtaining such documents or information.

(ii) *Effect in case of delay.* (A)(*1*) Except as provided in paragraph (c)(4)(ii)(A)(*2*) of this section, a servicer must not deny a complete loss mitigation application solely because the servicer lacks required documents or information not in the borrower's control.

(*2*) If a servicer has exercised reasonable diligence to obtain required documents or information from a party other than the borrower or the servicer, but the servicer has been unable to obtain such documents or information for a significant period of time following the 30-day period identified in paragraph (c)(1) of this section, and the servicer, in accordance with applicable requirements established by the owner or assignee of the borrower's mortgage loan, is unable to determine which loss mitigation options, if any, it will offer the borrower without such documents or information, the servicer may deny the application and provide the borrower with a written notice in accordance with paragraph (c)(1)(ii) of this section. When providing the written notice in accordance with paragraph (c)(1)(ii) of this section, the servicer must also provide the borrower with a copy of the written notice required by paragraph (c)(4)(ii)(B) of this section.

(B) If a servicer is unable to make a determination within the 30-day period identified in paragraph (c)(1) of this section as to which loss mitigation options, if any, it will offer to the borrower because the servicer lacks required documents or information from a party other than the borrower or the servicer, the servicer must, within such 30-day period or promptly thereafter, provide the borrower a written notice, informing the borrower:

(*1*) That the servicer has not received documents or information not in the borrower's control that the servicer requires to determine which loss mitigation options, if any, it will offer to the borrower on behalf of the owner or assignee of the mortgage;

(*2*) Of the specific documents or information that the servicer lacks;

(*3*) That the servicer has requested such documents or information; and

(*4*) That the servicer will complete its evaluation of the borrower for all available loss mitigation options promptly upon receiving the documents or information.

(C) If a servicer must provide a notice required by paragraph (c)(4)(ii)(B) of this section, the servicer must not provide the borrower a written notice pursuant to paragraph (c)(1)(ii) of this section until the servicer receives the required documents or information referenced in paragraph (c)(4)(ii)(B)(*2*) of this section, except as provided in paragraph (c)(4)(ii)(A)(*2*) of this section. Upon receiving such required documents or information, the servicer must promptly provide the borrower with the written notice pursuant to paragraph (c)(1)(ii) of this section.

* * * * *

(f) * * *

(1) * * *

(iii) The servicer is joining the foreclosure action of a superior or subordinate lienholder.

* * * * *

(i) *Duplicative requests.* A servicer must comply with the requirements of this section for a borrower's loss mitigation application, unless the servicer has previously complied with the requirements of this section for a complete loss mitigation application submitted by the borrower and the borrower has been delinquent at all times since submitting the prior complete application.

* * * * *

(k) *Servicing transfers*—(1) *In general*—(i) *Timing of compliance.* Except as provided in paragraphs (k)(2) through (4) of this section, if a transferee servicer acquires the servicing of a mortgage loan for which a loss mitigation application is pending as of the transfer date, the transferee servicer must comply with the requirements of this section for that loss mitigation application within the timeframes that were applicable to the transferor servicer based on the date the transferor servicer received the loss mitigation application. All rights and protections under paragraphs (c) through (h) of this section to which a borrower was entitled before a transfer continue to apply notwithstanding the transfer.

(ii) *Transfer date defined.* For purposes of this paragraph (k), the transfer date is the date on which the transferee servicer will begin accepting payments relating to the mortgage loan, as disclosed on the notice of transfer of loan servicing pursuant to § 1024.33(b)(4)(iv).

(2) *Acknowledgment notices*—(i) *Transferee servicer timeframes.* If a transferee servicer acquires the servicing of a mortgage loan for which the period to provide the notice required by paragraph (b)(2)(i)(B) of this section has not expired as of the transfer date and the transferor servicer has not provided such notice, the transferee servicer must provide the notice within 10 days (excluding legal public holidays, Saturdays, and Sundays) of the transfer date.

(ii) *Prohibitions.* A transferee servicer that must provide the notice required by paragraph (b)(2)(i)(B) of this section under this paragraph (k)(2):

(A) Shall not make the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process until a date that is after the reasonable date disclosed to the borrower pursuant to paragraph (b)(2)(ii) of this section, notwithstanding paragraph (f)(1) of this section. For purposes of paragraph (f)(2) of this section, a borrower who submits a complete loss mitigation application on or before the reasonable date disclosed to the borrower pursuant to paragraph (b)(2)(ii) of this section shall be treated as having done so during the pre-foreclosure review period set forth in paragraph (f)(1) of this section.

(B) Shall comply with paragraphs (c), (d), and (g) of this section if the borrower submits a complete loss mitigation application to the transferee or transferor servicer 37 or fewer days before the foreclosure sale but on or before the reasonable date disclosed to the borrower pursuant to paragraph (b)(2)(ii) of this section.

(3) *Complete loss mitigation applications pending at transfer.* If a transferee servicer acquires the servicing of a mortgage loan for which a complete loss mitigation application is pending as of the transfer date, the transferee servicer must comply with the applicable requirements of paragraphs (c)(1) and (4) of this section within 30 days of the transfer date.

(4) *Applications subject to appeal process.* If a transferee servicer acquires the servicing of a mortgage loan for which an appeal of a transferor servicer's determination pursuant to paragraph (h) of this section has not been resolved by the transferor servicer as of the transfer date or is timely filed after the transfer date, the transferee servicer must make a determination on the appeal if it is able to do so or, if it is unable to do so, must treat the appeal as a pending complete loss mitigation application.

(i) *Determining appeal.* If a transferee servicer is required under this paragraph (k)(4) to make a determination on an appeal, the transferee servicer must complete the determination and provide the notice required by paragraph (h)(4) of this section within 30 days of the transfer date or 30 days of the date the borrower made the appeal, whichever is later.

(ii) *Servicer unable to determine appeal.* A transferee servicer that is required to treat a borrower's appeal as a pending complete loss mitigation application under this paragraph (k)(4) must comply with the requirements of this section for such application, including evaluating the borrower for all loss mitigation options available to the borrower from the transferee servicer. For purposes of paragraph (c) or (k)(3) of this section, as applicable, such a pending complete loss mitigation application shall be considered complete as of the date the appeal was received by the transferor servicer or the transferee servicer, whichever occurs first. For purposes of paragraphs (e) through (h) of this section, the transferee servicer must treat such a pending complete loss mitigation application as facially complete under paragraph (c)(2)(iv) as of the date it was first facially complete or complete, as applicable, with respect to the transferor servicer.

(5) *Pending loss mitigation offers.* A transfer does not affect a borrower's ability to accept or reject a loss mitigation option offered under paragraph (c) or (h) of this section. If a transferee servicer acquires the servicing of a mortgage loan for which the borrower's time period under paragraph (e) or (h) of this section for accepting or rejecting a loss mitigation option offered by the transferor servicer has not expired as of the transfer date, the transferee servicer must allow the borrower to accept or reject the offer during the unexpired balance of the applicable time period.

■ 14. Revise the heading for appendix MS—Mortgage Servicing to read as follows:

Appendix MS to Part 1024—Mortgage Servicing

* * * * *

■ 15. Revise 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 Containing Information Required by § 1024.37(c)(2)

[Name and Mailing Address of Servicer]
[Date of Notice]
[Borrower's Name]
[Borrower's Mailing Address]
Subject: **Please provide insurance information for** [Property Address]
Dear [Borrower's Name]:

Our records show that your [hazard] [Insurance Type] insurance [is expiring] [expired] [provides insufficient coverage], and we do not have evidence that you have obtained new coverage. **Because [hazard] [Insurance Type] insurance is required on your property, [we bought insurance for your property] [we plan to buy insurance for your property].** You must pay us for any period during which the insurance we buy is in effect but you do not have insurance.

You should immediately provide us with your insurance information. [Describe the insurance information the borrower must provide]. [The information must be provided in writing.]

The insurance we [bought] [buy]:

- **May be significantly more expensive than the insurance you can buy yourself.**
- **May not provide as much coverage as an insurance policy you buy yourself.**

If you have any questions, please contact us at [telephone number].

[If applicable, provide a statement advising a borrower to review additional information provided in the same transmittal.]

MS–3(B)—Model Form for Force-Placed Insurance Notice Containing Information Required by § 1024.37(d)(2)(i)

[Name and Mailing Address of Servicer]
[Date of Notice]
[Borrower's Name]
[Borrower's Mailing Address]
Subject: **Second and final notice—please provide insurance information for** [Property Address]
Dear [Borrower's Name]:

This is your second and final notice that our records show that your [hazard] [Insurance Type] insurance [is expiring] [expired] [provides insufficient coverage], and we do not have evidence that you have obtained new coverage. **Because [hazard] [Insurance Type] insurance is required on your property, [we bought insurance for your property] [we plan to buy insurance for your property].** You must pay us for any period during which the insurance we buy is in effect but you do not have insurance.

You should immediately provide us with your insurance information. [Describe the insurance information the borrower must provide]. [The information must be provided in writing.]

The insurance we [bought] [buy]:

- **[Costs $[premium charge]] [Will cost an estimated $[premium charge]] annually, which may be significantly more expensive than insurance you can buy yourself.**
- **May not provide as much coverage as an insurance policy you buy yourself.**

If you have any questions, please contact us at [telephone number].

[If applicable, provide a statement advising a borrower to review additional information provided in the same transmittal.]

MS–3(C)—Model Form for Force-Placed Insurance Notice Containing Information Required by § 1024.37(d)(2)(ii)

[Name and Mailing Address of Servicer]
[Date of Notice]
[Borrower's Name]
[Borrower's Mailing Address]
Subject: **Second and final notice—please provide insurance information for** [Property Address]
Dear [Borrower's Name]:

We received the insurance information you provided, but we are unable to verify coverage from [Date Range].

Please provide us with insurance information for [Date Range] immediately.

We will charge you for insurance we [bought] [plan to buy] for [Date Range] unless we can verify that you have insurance coverage for [Date Range].

The insurance we [bought] [buy]:

- **[Costs $[premium charge]] [Will cost an estimated $[premium charge]] annually, which may be significantly more expensive than insurance you can buy yourself.**
- **May not provide as much coverage as an insurance policy you buy yourself.**

If you have any questions, please contact us at [telephone number].

[If applicable, provide a statement advising a borrower to review additional information provided in the same transmittal.]

MS–3(D)—Model Form for Force-Placed Insurance Notice Containing Information Required by § 1024.37(e)(2)

[Name and Mailing Address of Servicer]
[Date of Notice]
[Borrower's Name]
[Borrower's Mailing Address]
Subject: **Please update insurance information for** [Property Address]
Dear [Borrower's Name]:

Because we did not have evidence that you had [hazard] [Insurance Type] insurance on the property listed above, we bought insurance on your property and added the cost to your mortgage loan account.

The policy that we bought [expired] [is scheduled to expire]. **Because [hazard][Insurance Type] insurance] is required on your property, we intend to maintain insurance on your property by renewing or replacing the insurance we bought.**

The insurance we buy:

- **[Costs $[premium charge]] [Will cost an estimated $[premium charge]] annually, which may be significantly more expensive than insurance you can buy yourself.**
- **May not provide as much coverage as an insurance policy you buy yourself.**

If you buy [hazard] [Insurance Type] insurance, you should immediately provide us with your insurance information.

[Describe the insurance information the borrower must provide]. [The information must be provided in writing.]

If you have any questions, please contact us at [telephone number].

[If applicable, provide a statement advising a borrower to review additional information provided in the same transmittal.]

■ 16. In appendix MS–4 to part 1024, MS–4(D) is added to read as follows:

Appendix MS–4 to Part 1024—Model Clauses for the Written Early Intervention Notice

* * * * *

MS–4(D)—Written Early Intervention Notice for Servicers Subject to FDCPA (§ 1024.39(d)(2)(iii))

This is a legally required notice. We are sending this notice to you because you are behind on your mortgage payment. We want to notify you of possible ways to avoid losing your home. We have a right to invoke foreclosure based on the terms of your mortgage contact. Please read this letter carefully.

■ 17. In supplement I to part 1024—Official Bureau Interpretations:

■ a. Under *§ 1024.30—Scope,* after the entry *30(b) Exemptions:*

■ i. The heading *Paragraph 30(c)(2)* is added, and paragraph 1 under that heading is added.

■ ii. Effective April 19, 2018, the heading *30(d) Successors in interest* is added, and paragraphs 1 through 3 under that heading are added.

■ b. Under *§ 1024.31–Definitions:*

■ i. The heading *Delinquency* is added, in alphabetical order, and paragraphs 1 through 4 under that heading are added.

■ ii. Effective April 19, 2018, the heading *Successor in interest* is added, in alphabetical order, and paragraphs 1 and 2 under that heading are added.

■ c. Effective April 19, 2018, after the entry for *§ 1024.31—Definitions,* add the entry *§ 1024.32—General Disclosure Requirements.*

■ d. Under *§ 1024.36—Requests for Information:*

■ i. Under *36(a) Information request,* paragraph 2 is revised.

■ ii. Effective April 19, 2018, after the entry for *Paragraph 36(f)(1)(iv),* the heading *36(i) Potential successors in interest* is added, and paragraphs 1 through 3 under that heading are added.

■ e. Under *§ 1024.37—Force-Placed Insurance:*

■ i. The heading *37(d)(4) Updating notice with borrower information* is redesignated as *37(d)(5) Updating notice with borrower information.*

■ ii. Under newly redesignated heading *37(d)(5) Updating notice with borrower information,* paragraph 1 is revised.

■ f. The heading for *Section 1024.38* is revised and under that heading:

■ i. Effective April 19, 2018, after the entry for *Paragraph 38(b)(1)(iv),* the heading *Paragraph 38(b)(1)(vi)* is added, and paragraphs 1 through 5 under that heading are added.

■ ii. After the entry for *Paragraph 38(b)(2)(v),* the heading *38(b)(3) Facilitating oversight of, and compliance by, service providers,* the heading *Paragraph 38(b)(3)(iii),* and paragraph 1 under that heading are added.

■ g. Under *§ 1024.39—Early Intervention Requirements for Certain Borrowers:*

■ i. Under *39(a) Live contact,* paragraphs 1 introductory text, 1.i., and 2 are revised; paragraphs 3 and 4 are redesignated as paragraphs 4 and 5; a new paragraph 3 is added; newly redesignated paragraphs 4 and 5 are revised; and paragraph 6 is added.

■ ii. Under *39(b)(1) Notice required,* paragraphs 2 and 3 are revised and paragraph 5 is added.

■ iii. After the entry for *Paragraph 39(b)(2)(iv),* the heading *39(c) Borrowers in bankruptcy* is added, and paragraphs 1 and 2 under that heading are added.

■ iv. Under *39(c) Borrowers in bankruptcy:*

■ A. The heading *39(c)(1) Borrowers in bankruptcy—Partial exemption* is added, and paragraph 1 under that heading is added.

■ B. The heading *Paragraph 39(c)(1)(ii)* is added, and paragraphs 1 and 2 under that heading are added.

■ C. The heading *Paragraph 39(c)(1)(iii)* is added, and paragraph 1 under that heading is added.

■ D. The heading *39(c)(2) Resuming compliance* is added, and paragraph 1 under that heading is added.

■ v. The heading *39(d) Fair Debt Collection Practices Act—partial exemption* is added, and paragraphs 1 and 2 under that heading are added.

■ vi. The heading *39(d)(1) Borrowers in bankruptcy* is removed, and paragraphs 1 through 3 under that heading are removed.

■ vii. The heading *Paragraph 39(d)(2)* is added, and paragraph 1 under that heading is added.

■ h. Under *§ 1024.40—Continuity of Contact,* under *40(a) In general,* paragraph 3 is revised.

■ i. Under *§ 1024.41—Loss Mitigation Procedures:*

■ i. Effective April 19, 2018, under *41(b) Receipt of a loss mitigation application,* paragraph 1 is added.

■ ii. Under *41(b)(1) Complete loss mitigation application,* paragraph 1 is revised, the introductory text to paragraph 4 is revised, and paragraph 4.iii is revised.

■ iii. Under *41(b)(2)(i) Requirements,* paragraph 1 is added.

■ iv. Under *41(b)(2)(ii) Time period disclosure,* paragraph 1 is revised, and paragraphs 2 and 3 are added.

■ v. The heading for *41(c)* is revised.

■ vi. Under *41(c)(1) Complete loss mitigation application,* paragraph 4 is added.

■ vii. The heading for *41(c)(2)(iii)* is revised, paragraphs 1 through 3 under that heading are revised, and paragraphs 4 through 6 under that heading are added.

■ viii. After the entry for *41(c)(2)(iv) Facially complete application,* the heading *41(c)(3) Notice of complete application* is added.

■ ix. The heading *Paragraph 41(c)(3)(i)* is added, and paragraphs 1 through 3 under that heading are added.

■ x. The heading *41(c)(4) Information not in the borrower's control* is added.

■ xi. The heading *41(c)(4)(i) Diligence requirements* is added, and paragraphs 1 and 2 under that heading are added.

■ xii. The heading *41(c)(4)(ii) Effect in case of delay* is added, and paragraphs 1 and 2 under that heading are added.

■ xiii. Under *41(d) Denial of loan modification options,* paragraph (c)(1)(4) is removed.

■ xiv. Under *41(g) Prohibition on foreclosure sale,* paragraph 3 is revised, and paragraph 5 is added.

■ xv. Under *41(i) Duplicative requests,* paragraphs 1 and 2 are revised.

■ xvi. The heading *41(k) Servicing transfers* is added, and paragraph 1 under that heading is added.

■ xvii. The heading *41(k)(1) In general* is added.

■ xviii. The heading *41(k)(1)(i) Timing of compliance* is added, and paragraphs 1 through 3 under that heading are added.

■ xix. The heading *41(k)(1)(ii) Transfer date defined* is added, and paragraph 1 under that heading is added.

■ xx. The heading *41(k)(2) Acknowledgment notices* is added.

■ xxi. The heading *41(k)(2)(ii) Prohibitions* is added, and paragraphs 1 through 3 under that heading are added.

■ xxii. The heading *41(k)(3) Complete loss mitigation applications pending at transfer* is added, and paragraphs 1 and 2 under that heading are added.

■ xxiii. The heading *41(k)(4) Applications subject to appeal process* is added, and paragraphs 1 and 2 under that heading are added.

■ xxiv. The heading *41(k)(5) Pending loss mitigation offers* is added, and paragraph 1 under that heading is added.

■ j. The heading for *Appendix MS* is revised.

■ k. Effective April 19, 2018, under the heading for *Appendix MS,* paragraph 2 is revised.

The revisions and additions read as follows:

Supplement I to Part 1024—Official Bureau Interpretations

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Subpart C—Mortgage Servicing

§ 1024.30 Scope.

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Paragraph 30(c)(2).

1. *Principal residence.* If a property ceases to be a borrower's principal residence, the procedures set forth in §§ 1024.39 through 1024.41 do not apply to a mortgage loan secured by that property. Determination of principal residence status will depend on the specific facts and circumstances regarding the property and applicable State law. For example, a vacant property may still be a borrower's principal residence.

30(d) Successors in interest.

1. *Treatment of confirmed successors in interest.* Under § 1024.30(d), a confirmed successor in interest must be considered a borrower for purposes of this subpart and § 1024.17, regardless of whether the successor in interest assumes the mortgage loan obligation under State law. For example, if a servicer receives a loss mitigation application from a confirmed successor in interest, the servicer must review and evaluate the application and notify the confirmed successor in interest in accordance with the procedures set forth in § 1024.41 if the property is the confirmed successor in interest's principal residence and the procedures set forth in § 1024.41 are otherwise applicable. Treatment of a confirmed successor in interest as a borrower for purposes of this subpart and § 1024.17 does not affect whether the confirmed successor in interest is subject to the contractual obligations of the mortgage loan agreement, which is determined by applicable State law. Communications in compliance with this part to a confirmed successor in interest as defined in § 1024.31 do not violate

section 805(b) of the Fair Debt Collection Practices Act (FDCPA) because consumer for purposes of FDCPA section 805 includes any person who meets the definition in this part of confirmed successor in interest.

2. *Assumption of the mortgage loan obligation.* A servicer may not require a confirmed successor in interest to assume the mortgage loan obligation under State law to be considered a borrower for purposes of § 1024.17 and this subpart. If a successor in interest assumes a mortgage loan obligation under State law or is otherwise liable on the mortgage loan obligation, the protections that the successor in interest enjoys under this part are not limited to the protections that apply under § 1024.30(d) to a confirmed successor in interest.

3. *Treatment of transferor borrowers.* Even after a servicer's confirmation of a successor in interest, the servicer is still required to comply with all applicable requirements of this subpart with respect to the transferor borrower.

§ 1024.31 Definitions.

Delinquency.

1. *Length of delinquency.* A borrower's delinquency begins on the date an amount sufficient to cover a periodic payment of principal, interest, and, if applicable, escrow becomes due and unpaid, and lasts until such time as no periodic payment is due and unpaid, even if the borrower is afforded a period after the due date to pay before the servicer assesses a late fee.

2. *Application of funds.* If a servicer applies payments to the oldest outstanding periodic payment, a payment by a delinquent borrower advances the date the borrower's delinquency began. For example, assume a borrower's mortgage loan obligation provides that a periodic payment sufficient to cover principal, interest, and escrow is due on the first of each month. The borrower fails to make a payment on January 1 or on any day in January, and on January 31 the borrower is 30 days delinquent. On February 3, the borrower makes a periodic payment. The servicer applies the payment it received on February 3 to the outstanding January payment. On February 4, the borrower is three days delinquent.

3. *Payment tolerance.* For any given billing cycle for which a borrower's payment is less than the periodic payment due, if a servicer chooses not to treat a borrower as delinquent for purposes of any section of this subpart, that borrower is not delinquent as defined in § 1024.31.

4. *Creditor's contract rights.* This subpart does not prevent a creditor from exercising a right provided by a mortgage loan contract to accelerate payment for a breach of that contract. Failure to pay the amount due after the creditor accelerates the mortgage loan obligation in accordance with the mortgage loan contract would begin or continue delinquency.

* * * * *

Successor in interest.

1. *Joint tenants and tenants by the entirety.* If a borrower who has an ownership interest as a joint tenant or tenant by the entirety in a property securing a mortgage loan subject to this subpart dies, a surviving joint tenant or tenant by the entirety with a right of survivorship in the property is a successor in interest as defined in § 1024.31.

2. *Beneficiaries of* inter vivos *trusts.* In the event of a transfer into an *inter vivos* trust in which the borrower is and remains a beneficiary and which does not relate to a transfer of rights of occupancy in the property, the beneficiaries of the *inter vivos* trust rather than the *inter vivos* trust itself are considered to be the successors in interest for purposes of § 1024.31. For example, assume Borrower A transfers her home into such an *inter vivos* trust for the benefit of her spouse and herself. As of the transfer date, Borrower A and her spouse would be considered successors in interest and, upon confirmation, would be borrowers for purposes of certain provisions of Regulation X. If the lender has not released Borrower A from the loan obligation, Borrower A would also remain a borrower more generally for purposes of Regulation X.

§ 1024.32 General Disclosure Requirements.

32(c) Confirmed successors in interest.

32(c)(1) Optional notice with acknowledgment form.

1. A servicer may identify in the acknowledgment form examples of the types of notices and communications identified in § 1024.32(c)(1)(iii), such as periodic statements and mortgage servicing transfer notices. Any examples provided should be the types of notices or communications that would be available to a confirmed successor in interest if the confirmed successor in interest executed the acknowledgment and returned it to the servicer.

32(c)(2) Effect of failure to execute acknowledgment.

1. *No time limit to return acknowledgment.* A confirmed successor in interest may provide an executed acknowledgment that complies with § 1024.32(c)(1)(iv) to the servicer at any time after confirmation.

2. *Effect of revocation of acknowledgment.* If a confirmed successor in interest who is not liable on the mortgage loan obligation executes and then later revokes an acknowledgment pursuant to § 1024.32(c)(1)(iv), the servicer is not required to provide to the confirmed successor in interest any written disclosure required by § 1024.17, § 1024.33, § 1024.34, § 1024.37, or § 1024.39 or to comply with the live contact requirements in § 1024.39(a) with respect to the confirmed successor in interest from the date the revocation is received until the confirmed successor in interest either assumes the mortgage loan obligation under State law or executes a new acknowledgment that complies with § 1024.32(c)(1)(iv) and provides it to the servicer.

32(c)(4) Multiple notices unnecessary.

1. *Specific written disclosure.* A servicer may rely on § 1024.32(c)(4) if the servicer provides a specific written disclosure required by § 1024.17, § 1024.33, § 1024.34, § 1024.37, or § 1024.39(b) to another borrower. For example, a servicer is not required to provide a force-placed insurance notice required under § 1024.37 to a confirmed successor in interest if the servicer is providing the same force-placed insurance notice to a transferor borrower or to another confirmed successor in interest.

* * * * *

§ 1024.36 Requests for Information.

36(a) Information request.

* * * * *

2. *Owner or assignee of a mortgage loan.* i. When a loan is not held in a trust for which an appointed trustee receives payments on behalf of the trust, a servicer complies with § 1024.36(d) by responding to a request for information regarding the owner or assignee of a mortgage loan by identifying the person on whose behalf the servicer receives payments from the borrower. A servicer is not the owner or assignee for purposes of § 1024.36(d) if the servicer holds title to the loan, or title is assigned to the servicer, solely for the administrative convenience of the servicer in servicing the mortgage loan obligation. The Government National Mortgage Association is not the owner or assignee for purposes of such requests for information solely as a result of its role as the guarantor of the security in which the loan serves as the collateral.

ii. When the loan is held in a trust for which an appointed trustee receives payments on behalf of the trust, a servicer complies with § 1024.36(d) by responding to a borrower's request for information regarding the owner, assignee, or trust of the mortgage loan with the following information, as applicable:

A. For any request for information where the Federal National Mortgage Association or the Federal Home Loan Mortgage Corporation is not the owner of the loan or the trustee of the securitization trust in which the loan is held: The name of the trust, and the name, address, and appropriate contact information for the trustee. Assume, for example, a mortgage loan is owned by Mortgage Loan Trust, Series ABC–1, for which XYZ Trust Company is the trustee. The servicer complies with § 1024.36(d) by 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.

B. If the request for information did not expressly request the name or number of the trust or pool and the Federal National Mortgage Association or the Federal Home Loan Mortgage Corporation is the owner of the loan or the trustee of the securitization trust in which the loan is held: The name and contact information for the Federal National Mortgage Association or the Federal Home Loan Mortgage Corporation, as applicable, without also providing the name of the trust.

C. If the request for information did expressly request the name or number of the trust or pool and the Federal National Mortgage Association or the Federal Home Loan Mortgage Corporation is the owner of the loan or the trustee of the securitization trust in which the loan is held: The name of the trust, and the name, address, and appropriate contact information for the trustee, as in comment 36(a)–2.ii.A above.

* * * * *

36(i) Potential successors in interest.

1. *Requests that indicate that the person may be a successor in interest.* Section 1024.36(i) requires a servicer to respond to certain written requests received from a person that indicate the person may be a successor in interest. Examples of written requests that indicate that the person may be a successor in interest include, without limitation, a written statement from a person other than a borrower indicating that there has been a transfer of ownership or of an ownership interest in the property to the person or that a borrower has been divorced, legally separated, or died, or a written loss mitigation application received from a person other than a borrower.

2. *Time limits.* A servicer must respond to a request under § 1024.36(i) not later than the time limits set forth in § 1024.36(d)(2). Servicers subject to § 1024.38(b)(1)(vi)(B) must also maintain policies and procedures reasonably designed to ensure that, upon receiving notice of the existence of a potential successor in interest, the servicer can promptly determine the documents the servicer reasonably requires to confirm that person's identity and ownership interest in the property and promptly provide to the potential successor in interest a description of those documents and how the person may submit a written request under § 1024.36(i) (including the appropriate address). Depending on the facts and circumstances of the request, responding promptly may require a servicer to respond more quickly than the time limits established in § 1024.36(d)(2).

3. *Potential successor in interest's representative.* An information request pursuant to § 1024.36(i) is submitted by a potential successor in interest if the information request is submitted by an agent of the potential successor in interest. A servicer may undertake reasonable procedures to determine if a person that claims to be an agent of a potential successor in interest has authority from the potential successor in interest to act on the potential successor in interest's behalf, for example, by requiring that a person that claims to be an agent of the potential successor in interest provide documentation from the potential successor in interest stating that the purported agent is acting on the potential successor in interest's behalf. Upon receipt of such documentation, the servicer shall treat the request for information as having been submitted by the potential successor in interest.

§ 1024.37 Force-placed insurance.

* * * * *

37(d)(5) Updating notice with borrower information.

1. *Reasonable time.* If the written notice required by § 1024.37(c)(1)(ii) was put into production a reasonable time prior to the servicer delivering or placing the notice in the mail, the servicer is not required to update the notice with new insurance information received. For purposes of § 1024.37(d)(5), a reasonable time is no more than five days (excluding legal holidays, Saturdays, and Sundays).

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§ 1024.38 General servicing policies, procedures, and requirements.

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38(b)(1) Accessing and providing timely and accurate information.

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Paragraph 38(b)(1)(vi).

1. *Identification of potential successors in interest.* A servicer may be notified of the existence of a potential successor in interest in a variety of ways. For example, a person could indicate that there has been a transfer of ownership or of an ownership interest in the property or that a borrower has been divorced, legally separated, or died, or a person other than a borrower could submit a loss mitigation application. A servicer must maintain policies and procedures reasonably designed to ensure that the servicer can retain this information and promptly facilitate communication with potential successors in interest when a servicer is notified of their existence. A servicer is not required to conduct a search for potential successors in interest if the servicer has not received actual notice of their existence.

2. *Documents reasonably required.* The documents a servicer requires to confirm a potential successor in interest's identity and ownership interest in the property must be reasonable in light of the laws of the relevant jurisdiction, the specific situation of the potential successor in interest, and the documents already in the servicer's possession. The required documents may, where appropriate, include, for example, a death certificate, an executed will, or a court order. The required documents may also include documents that the servicer reasonably believes are necessary to prevent fraud or other criminal activity (for example, if a servicer has reason to believe that documents presented are forged).

3. *Examples of reasonable requirements.* Because the relevant law governing each situation may vary from State to State, the following examples are illustrative only. The examples illustrate what documents it would generally be reasonable for a servicer to require to confirm a potential successor in interest's identity and ownership interest in the property under the specific circumstances described.

i. *Tenancy by the entirety or joint tenancy.* Assume that a servicer knows that the potential successor in interest and the transferor borrower owned the property as tenants by the entirety or joint tenants and that the transferor borrower has died. Assume further that, upon the death of the transferor borrower, the applicable law of the relevant jurisdiction does not require a probate proceeding to establish that the potential successor in interest has sole interest in the property but requires only that there be a prior recorded deed listing both the potential successor in interest and the transferor borrower as tenants by the entirety (*e.g.,* married grantees) or joint tenants. Under these circumstances, it would be reasonable for the servicer to require the potential successor in interest to provide documentation of the recorded instrument, if the servicer does not already have it, and the death certificate of the transferor borrower. Because in this situation a probate proceeding is not required under the applicable law of the relevant jurisdiction, it generally would not be reasonable for the servicer to require documentation of a probate proceeding.

ii. *Affidavits of heirship.* Assume that a potential successor in interest indicates that an ownership interest in the property transferred to the potential successor in interest upon the death of the transferor borrower through intestate succession and offers an affidavit of heirship as confirmation. Assume further that, upon the death of the transferor borrower, the applicable law of the relevant jurisdiction does not require a probate proceeding to establish that the potential successor in interest has an interest in the property but requires only an appropriate affidavit of heirship. Under these circumstances, it would be reasonable for the servicer to require the potential successor in interest to provide the affidavit of heirship and the death certificate of the transferor borrower. Because a probate proceeding is not required under the applicable law of the relevant jurisdiction to recognize the transfer of title, it generally would not be reasonable for the servicer to require documentation of a probate proceeding.

iii. *Divorce or legal separation.* Assume that a potential successor in interest indicates that an ownership interest in the property transferred to the potential successor in interest from a spouse who is a borrower as a result of a property agreement incident to a divorce proceeding. Assume further that the applicable law of the relevant jurisdiction does not require a deed conveying the interest in the property but accepts a final divorce decree and accompanying separation agreement executed by both spouses to evidence transfer of title. Under these circumstances, it would be reasonable for the servicer to require the potential successor in interest to provide documentation of the final divorce decree and an executed separation agreement. Because the applicable law of the relevant jurisdiction does not require a deed, it generally would not be reasonable for the servicer to require a deed.

iv. *Living spouses or parents.* Assume that a potential successor in interest indicates that an ownership interest in the property transferred to the potential successor in interest from a living spouse or parent who is a borrower by quitclaim deed or act of donation. Under these circumstances, it would be reasonable for the servicer to require the potential successor in interest to provide the quitclaim deed or act of donation. It generally would not be reasonable, however, for the servicer to require additional documents.

4. *Additional documentation required for confirmation determination.* Section 1024.38(b)(1)(vi)(C) requires a servicer to maintain policies and procedures reasonably designed to ensure that, upon receipt of the documents identified by the servicer, the servicer promptly notifies a potential successor in interest that, as applicable, the servicer has confirmed the potential successor in interest's status, has determined that additional documents are required, or has determined that the potential successor in interest is not a successor in interest. If a servicer reasonably determines that it cannot make a determination of the potential successor in interest's status based on the documentation provided, it must specify what additional documentation is required. For example, if there is pending litigation involving the potential successor in interest and other claimants regarding who has title to the property at issue, a servicer may specify that documentation of a court determination or other resolution of the litigation is required.

5. *Prompt confirmation and loss mitigation.* A servicer's policies and procedures must be reasonably designed to ensure that the servicer can promptly notify the potential successor in interest that the servicer has confirmed the potential successor in interest's status. Notification is not prompt for purposes of this requirement if it unreasonably interferes with a successor in interest's ability to apply for loss mitigation options according to the procedures provided in § 1024.41.

* * * * *

38(b)(3) Facilitating oversight of, and compliance by, service providers.

Paragraph 38(b)(3)(iii).

1. *Sharing information with service provider personnel handling foreclosure proceedings.* A servicer's policies and procedures must be reasonably designed to ensure that servicer personnel promptly inform service provider personnel handling foreclosure proceedings that the servicer has received a complete loss mitigation application and promptly instruct foreclosure counsel to take any step required by § 1024.41(g) sufficiently timely to avoid violating the prohibition against moving for judgment or order of sale, or conducting a foreclosure sale.

* * * * *

§ 1024.39 Early intervention requirements for certain borrowers.

39(a) Live contact.

1. *Delinquency.* Section 1024.39 requires a servicer to establish or attempt to establish live contact no later than the 36th day of a borrower's delinquency. This provision is illustrated as follows:

i. Assume a mortgage loan obligation with a monthly billing cycle and monthly payments of $2,000 representing principal, interest, and escrow due on the first of each month.

A. The borrower fails to make a payment of $2,000 on, and makes no payment during the 36-day period after, January 1. The servicer must establish or make good faith efforts to establish live contact not later than 36 days after January 1—*i.e.,* on or before February 6.

B. The borrower makes no payments during the period January 1 through April 1, although payments of $2,000 each on January 1, February 1, and March 1 are due. Assuming it is not a leap year, the borrower is 90 days delinquent as of April 1. The servicer may time its attempts to establish live contact such that a single attempt will meet the requirements of § 1024.39(a) for two missed payments. To illustrate, the servicer complies with § 1024.39(a) if the servicer makes a good faith effort to establish live contact with the borrower, for example, on February 5 and again on March 25. The February 5 attempt meets the requirements of § 1024.39(a) for both the January 1 and February 1 missed payments. The March 25 attempt meets the requirements of § 1024.39(a) for the March 1 missed payment.

* * * * *

2. *Establishing live contact.* Live contact provides servicers an opportunity to discuss the circumstances of a borrower's delinquency. Live contact with a borrower includes speaking on the telephone or conducting an in-person meeting with the borrower but not leaving a recorded phone message. A servicer may rely on live contact established at the borrower's initiative to satisfy the live contact requirement in

§ 1024.39(a). Servicers may also combine contacts made pursuant to § 1024.39(a) with contacts made with borrowers for other reasons, for instance, by telling borrowers on collection calls that loss mitigation options may be available.

3. *Good faith efforts.* Good faith efforts to establish live contact consist of reasonable steps, under the circumstances, to reach a borrower and may include telephoning the borrower on more than one occasion or sending written or electronic communication encouraging the borrower to establish live contact with the servicer. The length of a borrower's delinquency, as well as a borrower's failure to respond to a servicer's repeated attempts at communication pursuant to § 1024.39(a), are relevant circumstances to consider. For example, whereas ''good faith efforts'' to establish live contact with regard to a borrower with two consecutive missed payments might require a telephone call, ''good faith efforts'' to establish live contact with regard to an unresponsive borrower with six or more consecutive missed payments might require no more than including a sentence requesting that the borrower contact the servicer with regard to the delinquencies in the periodic statement or in an electronic communication. Comment 39(a)–6 discusses the relationship between live contact and the loss mitigation procedures set forth in § 1024.41.

4. *Promptly inform if appropriate.* i. *Servicer's determination.* It is within a servicer's reasonable discretion to determine whether informing a borrower about the availability of loss mitigation options is appropriate under the circumstances. The following examples demonstrate when a servicer has made a reasonable determination regarding the appropriateness of providing information about loss mitigation options.

A. A servicer provides information about the availability of loss mitigation options to a borrower who notifies a servicer during live contact of a material adverse change in the borrower's financial circumstances that is likely to cause the borrower to experience a long-term delinquency for which loss mitigation options may be available.

B. A servicer does not provide information about the availability of loss mitigation options to a borrower who has missed a January 1 payment and notified the servicer that full late payment will be transmitted to the servicer by February 15.

ii. *Promptly inform.* If appropriate, a servicer may inform borrowers about the availability of loss mitigation options orally, in writing, or through electronic communication, but the servicer must provide such information promptly after the servicer establishes live contact. A servicer need not notify a borrower about any particular loss mitigation options at this time; if appropriate, a servicer need only inform borrowers generally that loss mitigation options may be available. If appropriate, a servicer may satisfy the requirement in § 1024.39(a) to inform a borrower about loss mitigation options by providing the written notice required by § 1024.39(b)(1), but the servicer must provide such notice promptly after the servicer establishes live contact.

5. *Borrower's representative.* Section 1024.39 does not prohibit a servicer from satisfying its requirements by establishing live contact with and, if applicable, providing information about loss mitigation options to a person authorized by the borrower to communicate with the servicer on the borrower's behalf. A servicer may undertake reasonable procedures to determine if a person that claims to be an agent of a borrower has authority from the borrower to act on the borrower's behalf, for example, by requiring a person that claims to be an agent of the borrower to provide documentation from the borrower stating that the purported agent is acting on the borrower's behalf.

6. *Relationship between live contact and loss mitigation procedures.* If the servicer has established and is maintaining ongoing contact with the borrower under the loss mitigation procedures under § 1024.41, including during the borrower's completion of a loss mitigation application or the servicer's evaluation of the borrower's complete loss mitigation application, or if the servicer has sent the borrower a notice pursuant to § 1024.41(c)(1)(ii) that the borrower is not eligible for any loss mitigation options, the servicer complies with § 1024.39(a) and need not otherwise establish or make good faith efforts to establish live contact. A servicer must resume compliance with the requirements of § 1024.39(a) for a borrower who becomes delinquent again after curing a prior delinquency.

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39(b)(1) Notice required.

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2. *Frequency of the written notice.* A servicer need not provide the written notice under § 1024.39(b) more than once during a 180-day period beginning on the date on which the written notice is provided. A servicer must provide the written notice under § 1024.39(b) at least once every 180 days to a borrower who is 45 days or more delinquent. This provision is illustrated as follows: Assume a borrower becomes delinquent on March 1, the amount due is not fully paid during the 45 days after March 1, and the servicer provides the written notice on the 45th day after March 1, which is April 15. Assume the borrower also fails to make the payment due on April 1 and the amount due is not fully paid during the 45 days after April 1. The servicer need not provide the written notice again until after the 180-day period beginning on April 15—*i.e.,* no sooner than on October 12—and then only if the borrower is at that time 45 days or more delinquent.

i. If the borrower is 45 days or more delinquent on October 12, the date that is 180 days after the prior provision of the written notice, the servicer is required to provide the written notice again on October 12.

ii. If the borrower is less than 45 days delinquent on October 12, the servicer must again provide the written notice 45 days after the payment due date for which the borrower remains delinquent. For example, if the borrower becomes delinquent on October 1, and the amount due is not fully paid during the 45 days after October 1, the servicer will need to provide the written notice again no later than 45 days after October 1—*i.e.,* by November 15.

3. *Borrower's representative.* Comment 39(a)–5 explains how a servicer may satisfy the requirements under § 1024.39 with a person authorized by the borrower to communicate with the servicer on the borrower's behalf.

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5. *Servicing transfers.* A transferee servicer is required to comply with the requirements of § 1024.39(b) regardless of whether the transferor servicer provided a written notice to the borrower in the preceding 180-day period. However, a transferee servicer is not required to provide a written notice under § 1024.39(b) if the transferor servicer provided the written notice under § 1024.39(b) within 45 days of the transfer date. For example, assume a borrower has monthly payments, with a payment due on March 1. The transferor servicer provides the notice required by § 1024.39(b) on April 10. The loan is transferred on April 12. Assuming the borrower remains delinquent, the transferee servicer is not required to provide another written notice until 45 days after May 1, the first post-transfer payment due date—*i.e.,* by June 15.

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39(c) Borrowers in bankruptcy.

1. *Borrower's representative.* If the borrower is represented by a person authorized by the borrower to communicate with the servicer on the borrower's behalf, the servicer may provide the written notice required by § 1024.39(b), as modified by § 1024.39(c)(1)(iii), to the borrower's representative. *See* comment 39(a)–5. In general, bankruptcy counsel is the borrower's representative. A servicer's procedures for determining whether counsel is the borrower's representative are generally considered reasonable if they are limited to, for example, confirming that the attorney's name is listed on the borrower's bankruptcy petition or other court filing.

2. *Adapting requirements in bankruptcy.* Section 1024.39(c) does not require a servicer to communicate with a borrower in a manner that would be inconsistent with applicable bankruptcy law or a court order in a bankruptcy case. If necessary to comply with such law or court order, a servicer may adapt the requirements of § 1024.39 as appropriate.

39(c)(1) Borrowers in bankruptcy—Partial exemption.

1. *Commencing a case.* Section 1024.39(c)(1) applies once a petition is filed under title 11 of the United States Code, commencing a case in which the borrower is a debtor in bankruptcy.

Paragraph 39(c)(1)(ii).

1. *Availability of loss mitigation options.* In part, § 1024.39(c)(1)(ii) exempts a servicer from the requirements of § 1024.39(b) if no loss mitigation option is available. A loss mitigation option is available if the owner or assignee of a mortgage loan offers an alternative to foreclosure that is made available through the servicer and for which a borrower may apply, even if the borrower ultimately does not qualify for such option.

2. *Fair Debt Collections Practices Act.* i. *Exemption.* To the extent the Fair Debt Collection Practices Act (FDCPA) (15 U.S.C. 1692 *et seq.*) applies to a servicer's communications with a borrower in bankruptcy and any borrower on the mortgage loan has provided a notification pursuant to FDCPA section 805(c) notifying the servicer that the borrower refuses to pay a debt or that the borrower wishes the servicer to cease further communications, with regard to that mortgage loan, § 1024.39(c)(1)(ii) exempts a servicer from providing the written notice required by § 1024.39(b).

ii. *Example.* For example, assume that two spouses jointly own a home and are both primarily liable on the mortgage loan. Further assume that the servicer is subject to the FDCPA with respect to that mortgage loan. One spouse is a debtor in bankruptcy under title 11 of the United States Code subject to § 1024.39(c). The other spouse provided the servicer a notification pursuant to FDCPA section 805(c). Section 1024.39(c)(1)(ii) exempts the servicer from providing the written notice required by § 1024.39(b) with respect to that mortgage loan.

Paragraph 39(c)(1)(iii).

1. *Joint obligors.* When two or more borrowers are joint obligors with primary liability on a mortgage loan subject to § 1024.39, if any of the borrowers is a debtor in bankruptcy, a servicer may provide the written notice required by § 1024.39(b), as modified by § 1024.39(c)(1)(iii), to any borrower.

39(c)(2) Resuming compliance.

1. *Bankruptcy case revived.* If the borrower's bankruptcy case is revived, for example if the court reinstates a previously dismissed case or reopens the case, § 1024.39(c)(1) once again applies. However, § 1024.39(c)(1)(iii)(C) provides that a servicer is not required to provide the written notice more than once during a single bankruptcy case. For example, assume a borrower's bankruptcy case commences on June 1, the servicer provides the written notice on July 10 in compliance with § 1024.39(b) as modified by § 1024.39(c)(1)(iii), and the bankruptcy case is dismissed on August 1. If the court subsequently reopens or reinstates the borrower's bankruptcy case and the servicer does not provide a second written notice for that bankruptcy case, the servicer has complied with § 1024.39(b) and (c)(1)(iii).

39(d) Fair Debt Collection Practices Act—partial exemption.

1. *Availability of loss mitigation options.* In part, § 1024.39(d)(2) exempts a servicer from providing the written notice required by § 1024.39(b) if no loss mitigation option is available. A loss mitigation option is available if the owner or assignee of a mortgage loan offers an alternative to foreclosure that is made available through the servicer and for which a borrower may apply, even if the borrower ultimately does not qualify for such option.

2. *Early intervention communications under the FDCPA.* To the extent the Fair Debt Collection Practices Act (FDCPA) (15 U.S.C. 1692 *et seq.*) applies to a servicer's communications with a borrower, a servicer does not violate FDCPA section 805(c) by providing the written notice required by § 1024.39(b) as modified by § 1024.39(d)(3) after a borrower has provided a notification pursuant to FDCPA section 805(c) with respect to that borrower's loan. Nor does a servicer violate FDCPA section 805(c) by providing loss mitigation information or assistance in response to a borrower-initiated communication after the borrower has invoked the cease communication right under FDCPA section 805(c). A servicer subject to the FDCPA must continue to comply with all other applicable provisions of the FDCPA, including restrictions on communications and prohibitions on harassment or abuse, false or misleading representations, and unfair practices as contained in FDCPA sections 805 through 808 (15 U.S.C. 1692c through 1692f).

Paragraph 39(d)(2).

1. *Borrowers in bankruptcy.* To the extent the Fair Debt Collection Practices Act (FDCPA) (15 U.S.C. 1692 *et seq.*) applies to a servicer's communications with a borrower and the borrower has provided a notification pursuant to FDCPA section 805(c) notifying the servicer that the borrower refuses to pay a debt or that the borrower wishes the servicer to cease further communications, with regard to that mortgage loan, § 1024.39(d)(2) exempts a servicer from providing the written notice required by § 1024.39(b) while any borrower on the mortgage loan is also a debtor in bankruptcy under title 11 of the United States Code. For an example, see comment 39(c)(1)(ii)–1.ii.

§ 1024.40 Continuity of contact.

40(a) In general.

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3. *Delinquency.* See § 1024.31 for the definition of delinquency applicable to subpart C of Regulation X.

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§ 1024.41 Loss mitigation procedures.

41(b) Receipt of a loss mitigation application.

1. *Successors in interest.* i. If a servicer receives a loss mitigation application from a potential successor in interest before confirming that person's identity and ownership interest in the property, the servicer may, but need not, review and evaluate the loss mitigation application in accordance with the procedures set forth in § 1024.41. If a servicer complies with the requirements of § 1024.41 for a complete loss mitigation application submitted by a potential successor in interest before confirming that person's identity and ownership interest in the property, § 1024.41(i)'s limitation on duplicative requests applies to that person, provided the servicer's evaluation of loss mitigation options available to the person would not have resulted in a different determination due to the person's confirmation as a successor in interest if it had been

conducted after the servicer confirmed the person's status as a successor in interest.

ii. If a servicer receives a loss mitigation application from a potential successor in interest and elects not to review and evaluate the loss mitigation application before confirming that person's identity and ownership interest in the property, the servicer must preserve the loss mitigation application and all documents submitted in connection with the application, and, upon such confirmation, the servicer must review and evaluate the loss mitigation application in accordance with the procedures set forth in § 1024.41 if the property is the confirmed successor in interest's principal residence and the procedures set forth in § 1024.41 are otherwise applicable. For purposes of § 1024.41, the servicer must treat the loss mitigation application as if it had been received on the date that the servicer confirmed the successor in interest's status. If the loss mitigation application is incomplete at the time of confirmation because documents submitted by the successor in interest became stale or invalid after they were submitted and confirmation is 45 days or more before a foreclosure sale, the servicer must identify the stale or invalid documents that need to be updated in a notice pursuant to § 1024.41(b)(2).

41(b)(1) Complete loss mitigation application.

1. *In general.* A servicer has flexibility to establish its own application requirements and to decide the type and amount of information it will require from borrowers applying for loss mitigation options. In the course of gathering documents and information from a borrower to complete a loss mitigation application, a servicer may stop collecting documents and information for a particular loss mitigation option after receiving information confirming that, pursuant to any requirements established by the owner or assignee of the borrower's mortgage loan, the borrower is ineligible for that option. A servicer may not stop collecting documents and information for any loss mitigation option based solely upon the borrower's stated preference but may stop collecting documents and information for any loss mitigation option based on the borrower's stated preference in conjunction with other information, as prescribed by any requirements established by the owner or assignee. A servicer must continue to exercise reasonable diligence to obtain documents and information from the borrower that the servicer requires to evaluate the borrower as to all other loss mitigation options available to the borrower. For example:

i. Assume a particular loss mitigation option is only available for borrowers whose mortgage loans were originated before a specific date. Once a servicer receives documents or information confirming that a mortgage loan was originated after that date, the servicer may stop collecting documents or information from the borrower that the servicer would use to evaluate the borrower for that loss mitigation option, but the servicer must continue its efforts to obtain documents and information from the borrower that the servicer requires to evaluate the borrower for all other available loss mitigation options.

ii. Assume applicable requirements established by the owner or assignee of the mortgage loan provide that a borrower is ineligible for home retention loss mitigation options if the borrower states a preference for a short sale and provides evidence of another applicable hardship, such as military Permanent Change of Station orders or an employment transfer more than 50 miles away. If the borrower indicates a preference for a short sale or, more generally, not to retain the property, the servicer may not stop collecting documents and information from the borrower pertaining to available home retention options solely because the borrower has indicated such a preference, but the servicer may stop collecting such documents and information once the servicer receives information confirming that the borrower has an applicable hardship under requirements established by the owner or assignee, such as military Permanent Change of Station orders or employment transfer.

* * * * *

4. Although a servicer has flexibility to establish its own requirements regarding the documents and information necessary for a loss mitigation application, the servicer must act with reasonable diligence to collect information needed to complete the application. A servicer must request information necessary to make a loss mitigation application complete promptly after receiving the loss mitigation application. Reasonable diligence for purposes of § 1024.41(b)(1) includes, without limitation, the following actions:

* * * * *

iii. A servicer offers a borrower a short-term payment forbearance program or a short-term repayment plan based on an evaluation of an incomplete loss mitigation application and provides the borrower the written notice pursuant to § 1024.41(c)(2)(iii). If the borrower remains in compliance with the short-term payment forbearance program or short-term repayment plan, and the borrower does not request further assistance, the servicer may suspend reasonable diligence efforts until near the end of the payment forbearance program or repayment plan. However, if the borrower fails to comply with the program or plan or requests further assistance, the servicer must immediately resume reasonable diligence efforts. Near the end of a short-term payment forbearance program offered based on an evaluation of an incomplete loss mitigation application pursuant to § 1024.41(c)(2)(iii), and prior to the end of the forbearance period, if the borrower remains delinquent, a servicer must contact the borrower to determine if the borrower wishes to complete the loss mitigation application and proceed with a full loss mitigation evaluation.

* * * * *

41(b)(2)(i) Requirements.

1. *Foreclosure sale not scheduled.* For purposes of § 1024.41(b)(2)(i), if no foreclosure sale has been scheduled as of the date a servicer receives a loss mitigation application, the servicer must treat the application as having been received 45 days or more before any foreclosure sale.

* * * * *

41(b)(2)(ii) Time period disclosure.

1. *Thirty days is generally reasonable.* In general and subject to the restrictions described in comments 41(b)(2)(ii)–2 and –3, a servicer complies with the requirement to include a reasonable date in the written notice required under § 1024.41(b)(2)(i)(B) by including a date that is 30 days after the date the servicer provides the written notice.

2. *No later than the next milestone.* For purposes of § 1024.41(b)(2)(ii), subject to the restriction described in comment 41(b)(2)(ii)–3, the reasonable date must be no later than the earliest of:

i. The date by which any document or information submitted by a borrower will be considered stale or invalid pursuant to any requirements applicable to any loss mitigation option available to the borrower;

ii. The date that is the 120th day of the borrower's delinquency;

iii. The date that is 90 days before a foreclosure sale;

iv. The date that is 38 days before a foreclosure sale.

3. *Seven-day minimum.* A reasonable date for purposes of § 1024.41(b)(2)(ii)

must never be less than seven days from the date on which the servicer provides the written notice pursuant to § 1024.41(b)(2)(i)(B).

* * * * *

41(c) Evaluation of loss mitigation applications.

41(c)(1) Complete loss mitigation application.

* * * * *

4. *Other notices.* A servicer may combine other notices required by applicable law, including, without limitation, a notice with respect to an adverse action required by Regulation B, 12 CFR part 1002, or a notice required pursuant to the Fair Credit Reporting Act, with the notice required pursuant to § 1024.41(c)(1), unless otherwise prohibited by applicable law.

* * * * *

41(c)(2)(iii) Short-term loss mitigation options.

1. *Short-term payment forbearance program.* The exemption in § 1024.41(c)(2)(iii) applies to, among other things, short-term payment forbearance programs. For purposes of § 1024.41(c)(2)(iii), a payment forbearance program is a loss mitigation option pursuant to which a servicer allows a borrower to forgo making certain payments or portions of payments for a period of time. A short-term payment forbearance program for purposes of § 1024.41(c)(2)(iii) allows the forbearance of payments due over periods of no more than six months. Such a program would be short-term regardless of the amount of time a servicer allows the borrower to make up the missing payments.

2. *Short-term loss mitigation options and incomplete applications.* Section 1024.41(c)(2)(iii) allows a servicer to offer a borrower a short-term payment forbearance program or a short-term repayment plan based on an evaluation of an incomplete loss mitigation application. The servicer must still comply with the other requirements of § 1024.41 with respect to the incomplete loss mitigation application, including the requirement in § 1024.41(b)(2) to review the application to determine if it is complete, the requirement in § 1024.41(b)(1) to exercise reasonable diligence in obtaining documents and information to complete a loss mitigation application (*see* comment 41(b)(1)–4.iii), and the requirement in § 1024.41(b)(2)(i)(B) to provide the borrower with written notice that the servicer acknowledges the receipt of the application and has determined that the application is incomplete.

3. *Short-term loss mitigation options and complete applications.* Even if a servicer offers a borrower a short-term payment forbearance program or a short-term repayment plan based on an evaluation of an incomplete loss mitigation application, the servicer must still comply with all applicable requirements in § 1024.41 if the borrower completes a loss mitigation application.

4. *Short-term repayment plan.* The exemption in § 1024.41(c)(2)(iii) applies to, among other things, short-term repayment plans. For purposes of § 1024.41(c)(2)(iii), a repayment plan is a loss mitigation option with terms under which a borrower would repay all past due payments over a specified period of time to bring the mortgage loan account current. A short-term repayment plan for purposes of § 1024.41(c)(2)(iii) allows for the repayment of no more than three months of past due payments and allows a borrower to repay the arrearage over a period lasting no more than six months.

5. *Specific payment terms and duration.* i. *General requirement.* Section 1024.41(c)(2)(iii) requires a servicer to provide the borrower a written notice stating, among other things, the specific payment terms and duration of a short-term payment forbearance program or a short-term repayment plan offered based on an evaluation of an incomplete application. Generally, a servicer complies with these requirements if the written notice states the amount of each payment due during the program or plan, the date by which the borrower must make each payment, and whether the mortgage loan will be current at the end of the program or plan if the borrower complies with the program or plan.

ii. *Disclosure of payment amounts that may change.* At the time a servicer provides the written notice pursuant to § 1024.41(c)(2)(iii), if the servicer lacks information necessary to determine the amount of a specific payment due during the program or plan (for example, because the borrower's interest rate will change to an unknown rate based on an index or because an escrow account computation year as defined in § 1024.17(b) will end and the borrower's escrow payment might change), the servicer complies with the requirement to disclose the specific payment terms and duration of a short-term payment forbearance program or short-term repayment plan if the disclosures are based on the best information reasonably available to the servicer at the time the notice is provided and the written notice identifies which payment amounts may change, states that such payment amounts are estimates, and states the general reason that such payment amounts might change. For example, if an escrow account computation year as defined in § 1024.17(b) will end during a borrower's short-term repayment plan, the written notice complies with § 1024.41(c)(2)(iii) if it identifies the payment amounts that may change, states that those payment amounts are estimates, and states that the affected payments might change because the borrower's escrow payment might change.

6. *Timing of notice.* Generally, a servicer acts promptly to provide the written notice required by § 1024.41(c)(2)(iii) if the servicer provides such written notice no later than five days (excluding legal public holidays, Saturdays, and Sundays) after offering the borrower a short-term payment forbearance program or short-term repayment plan. A servicer may provide the written notice at the same time the servicer offers the borrower the program or plan. A written offer that contains all the required elements of the written notice also satisfies § 1024.41(c)(2)(iii).

* * * * *

41(c)(3) Notice of complete application.

Paragraph 41(c)(3)(i).

1. *Completion date.* A servicer complies with § 1024.41(c)(3)(i)(B) by disclosing on the notice the most recent date the servicer received the complete loss mitigation application. For example, assume that a borrower first submits a complete loss mitigation application on March 1. The servicer must disclose March 1 as the date the servicer received the application under § 1024.41(c)(3)(i)(B). Assume the servicer discovers on March 10 that it requires additional information or corrected documents to complete the application and promptly requests such additional information or documents from the borrower pursuant to § 1024.41(c)(2)(iv). If the borrower subsequently completes the application on March 21, the servicer must provide another notice in accordance with § 1024.41(c)(3)(i) and disclose March 21 as the date the servicer received the complete application. *See* comment 41(c)(3)(i)–3.

2. *First notice or filing.* Section 1024.41(c)(3)(i)(D)(*1*) and (*2*) sets forth different requirements depending on whether the servicer has made the first notice or filing under applicable law for any judicial or non-judicial foreclosure process at the time the borrower submits a complete loss mitigation application. See comment 41(f)–1 for a description of

whether a document is considered the first notice or filing under applicable law.

3. *Additional notices.* Except as provided in § 1024.41(c)(3)(ii), § 1024.41(c)(3)(i) requires a servicer to provide a written notice every time a loss mitigation application becomes complete. For example, assume that a borrower first submits a complete loss mitigation application on March 1, and the servicer provides the notice under § 1024.41(c)(3)(i). Assume the servicer discovers on March 10 that it requires additional information or corrected documents regarding a source of income that the borrower previously identified. The servicer must promptly request such additional information or documents from the borrower pursuant to § 1024.41(c)(2)(iv). If the borrower subsequently completes the application on March 21, the servicer must provide another notice in accordance with § 1024.41(c)(3)(i), unless an exception applies under § 1024.41(c)(3)(ii). *See* comment 41(c)(3)(i)–1.

41(c)(4) Information not in the borrower's control.

41(c)(4)(i) Diligence requirements.

1. *During the first 30 days following receipt of a complete loss mitigation application.* Section 1024.41(c)(4)(i) requires a servicer to act with reasonable diligence to obtain documents or information not in the borrower's control, which includes information in the servicer's control, that the servicer requires to determine which loss mitigation options, if any, it will offer to the borrower. At a minimum and without limitation, a servicer must request such documents or information from the appropriate party:

i. Promptly upon determining that the servicer requires the documents or information to determine which loss mitigation options, if any, the servicer will offer the borrower; and

ii. By a date that will enable the servicer to complete the evaluation within 30 days of receiving the complete loss mitigation application, as set forth in § 1024.41(c)(1), to the extent practicable.

2. *More than 30 days following receipt of a complete loss mitigation application.* If a servicer has not, within 30 days of receiving a complete loss mitigation application, received the required documents or information from a party other than the borrower or the servicer, the servicer acts with reasonable diligence pursuant to § 1024.41(c)(4)(i) by heightening efforts to obtain the documents or information promptly, to minimize delay in making a determination of which loss mitigation options, if any, it will offer to the borrower. Such heightened efforts include, for example, promptly verifying that it has contacted the appropriate party and determining whether it should obtain the required documents or information from a different party.

41(c)(4)(ii) Effect in case of delay.

1. *Third-party delay.* Notwithstanding delay in receiving required documents or information from any party other than the borrower or the servicer, § 1024.41(c)(1)(i) requires a servicer to complete all possible steps in the process of evaluating a complete loss mitigation application within 30 days of receiving the complete loss mitigation application. Such steps may include requirements imposed on the servicer by third parties, such as mortgage insurance companies, guarantors, owners, or assignees. For example, if a servicer can determine a borrower's eligibility for all available loss mitigation options based on an evaluation of the borrower's complete loss mitigation application subject only to approval from the mortgage insurance company, § 1024.41(c)(1)(i) requires the servicer to do so within 30 days of receiving the complete loss mitigation application notwithstanding the need to obtain such approval before offering the borrower any loss mitigation options.

2. *Offers not prohibited.* Section 1024.41(c)(4)(ii)(A)(*2*) permits a servicer to deny a complete loss mitigation application (in accordance with applicable investor requirements) if, after exercising reasonable diligence to obtain the required documents or information from a party other than the borrower or the servicer, the servicer has been unable to obtain such documents or information for a significant period of time and the servicer cannot complete its determination without the required documents or information. Section 1024.41(c)(4)(ii)(A)(*2*) does not require a servicer to deny a complete loss mitigation application and permits a servicer to offer a borrower a loss mitigation option, even if the servicer does not obtain the requested documents or information.

* * * * *

41(g) Prohibition on foreclosure sale.

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3. *Interaction with foreclosure counsel.* The prohibitions in § 1024.41(g) against moving for judgment or order of sale or conducting a sale may require a servicer to act through foreclosure counsel retained by the servicer in a foreclosure proceeding. If a servicer has received a complete loss mitigation application, the servicer must instruct counsel promptly not to make a dispositive motion for foreclosure judgment or order of sale; where such a dispositive motion is pending, to avoid a ruling on the motion or issuance of an order of sale; and, where a sale is scheduled, to prevent conduct of a foreclosure sale, unless one of the conditions in § 1024.41(g)(1) through (3) is met. A servicer is not relieved of its obligations because foreclosure counsel's actions or inaction caused a violation.

* * * * *

5. *Conducting a sale prohibited.* Section 1024.41(g) prohibits a servicer from conducting a foreclosure sale, even if a person other than the servicer administers or conducts the foreclosure sale proceedings. Where a foreclosure sale is scheduled, and none of the conditions under § 1024.41(g)(1) through (3) are applicable, conduct of the sale violates § 1024.41(g).

* * * * *

41(i) Duplicative requests.

1. *Applicability of loss mitigation protections.* Under § 1024.41(i), a servicer must comply with § 1024.41 with respect to a loss mitigation application unless the servicer has previously done so for a complete loss mitigation application submitted by the borrower and the borrower has been delinquent at all times since submitting the prior complete application. Thus, for example, if the borrower has previously submitted a complete loss mitigation application and the servicer complied fully with § 1024.41 for that application, but the borrower then ceased to be delinquent and later became delinquent again, the servicer again must comply with § 1024.41 for any subsequent loss mitigation application submitted by the borrower. When a servicer is required to comply with the requirements of § 1024.41 for such a subsequent loss mitigation application, the servicer must comply with all applicable requirements of § 1024.41. For example, in such a case, the servicer's provision of the notice of determination of which loss mitigation options, if any, it will offer to the borrower under § 1024.41(c)(1)(ii) regarding the borrower's prior complete loss mitigation application does not affect the servicer's obligations to provide a new notice of complete application under § 1024.41(c)(3)(i) regarding the borrower's subsequent complete loss mitigation application.

2. *Servicing transfers.* Section 1024.41(i) provides that a servicer need not comply with § 1024.41 for a subsequent loss mitigation application

from a borrower where certain conditions are met. A transferee servicer and a transferor servicer, however, are not the same servicer. Accordingly, a transferee servicer is required to comply with the applicable requirements of § 1024.41 upon receipt of a loss mitigation application from a borrower whose servicing the transferee servicer has obtained through a servicing transfer, even if the borrower previously received an evaluation of a complete loss mitigation application from the transferor servicer.

41(k) Servicing transfers.

1. *Pending loss mitigation application.* For purposes of § 1024.41(k), a loss mitigation application is pending if it was subject to § 1024.41 and had not been fully resolved before the transfer date. For example, a loss mitigation application would not be considered pending if a transferor servicer had denied a borrower for all options and the borrower's time for making an appeal, if any, had expired prior to the transfer date, such that the transferor servicer had no continuing obligations under § 1024.41 with respect to the application. A pending application is considered a pending complete application if it was complete as of the transfer date under the transferor servicer's criteria for evaluating loss mitigation applications.

41(k)(1) In general.

41(k)(1)(i) Timing of compliance.

1. *Obtaining loss mitigation documents and information.* i. In connection with a transfer, a transferor servicer must timely transfer, and a transferee servicer must obtain from the transferor servicer, documents and information submitted by a borrower in connection with a loss mitigation application, consistent with policies and procedures adopted pursuant to § 1024.38(b)(4). A transferee servicer must comply with the applicable requirements of § 1024.41 with respect to a loss mitigation application received as a result of a transfer, even if the transferor servicer was not required to comply with § 1024.41 with respect to that application (for example, because § 1024.41(i) precluded applicability of § 1024.41 with respect to the transferor servicer). If an application was not subject to § 1024.41 prior to a transfer, then for purposes of § 1024.41(b) and (c), a transferee servicer is considered to have received the loss mitigation application on the transfer date. Any such application is subject to the timeframes for compliance set forth in § 1024.41(k).

ii. A transferee servicer must, in accordance with § 1024.41(b)(1), exercise reasonable diligence to complete a loss mitigation application, including a facially complete application, received as a result of a transfer. In the transfer context, reasonable diligence includes ensuring that a borrower is informed of any changes to the application process, such as a change in the address to which the borrower should submit documents and information to complete the application, as well as ensuring that the borrower is informed about which documents and information are necessary to complete the application.

iii. A borrower may provide documents and information necessary to complete an application to a transferor servicer after the transfer date. Consistent with policies and procedures maintained pursuant to § 1024.38(b)(4), the transferor servicer must timely transfer, and the transferee servicer must obtain, such documents and information.

2. *Determination of rights and protections.* For purposes of § 1024.41(c) through (h), a transferee servicer must consider documents and information that constitute a complete loss mitigation application for the transferee servicer to have been received as of the date such documents and information were received by the transferor servicer, even if such documents and information were received by the transferor servicer after the transfer date. *See* comment 41(k)(1)(i)–1.iii. An application that was facially complete under § 1024.41(c)(2)(iv) with respect to the transferor servicer remains facially complete under § 1024.41(c)(2)(iv) with respect to the transferee servicer as of the date it was facially complete with respect to the transferor servicer. If an application was complete with respect to the transferor servicer, but is not complete with respect to the transferee servicer, the transferee servicer must treat the application as facially complete under § 1024.41(c)(2)(iv) as of the date the application was complete with respect to the transferor servicer.

3. *Duplicative notices not required.* A transferee servicer is not required to provide notices under § 1024.41 with respect to a particular loss mitigation application that the transferor servicer provided prior to the transfer. For example, if the transferor servicer provided the notice required by § 1024.41(b)(2)(i)(B) prior to the transfer, the transferee servicer is not required to provide the notice again for that application.

41(k)(1)(ii) Transfer date defined.

1. *Transfer date.* Section 1024.41(k)(1)(ii) provides that the transfer date is the date on which the transferee servicer will begin accepting payments relating to the mortgage loan, as disclosed on the notice of transfer of loan servicing pursuant to § 1024.33(b)(4)(iv). The transfer date is the same date as that on which the transfer of the servicing responsibilities from the transferor servicer to the transferee servicer occurs. The transfer date is not necessarily the same date as either the effective date of the transfer of servicing as disclosed on the notice of transfer of loan servicing pursuant to § 1024.33(b)(4)(i) or the sale date identified in a servicing transfer agreement.

41(k)(2) Acknowledgment notices.

41(k)(2)(ii) Prohibitions.

1. *Examples of prohibitions.* Section 1024.41(k)(2)(ii)(A) and (B) adjusts the timeframes for certain borrower rights and foreclosure protections where § 1024.41(k)(2)(i) applies. These provisions are illustrated as follows: Assume a transferor servicer receives a borrower's initial loss mitigation application on October 1, and the loan is transferred five days (excluding legal public holidays, Saturdays, or Sundays) later, on October 8. Assume that Columbus Day, a legal public holiday, occurs on October 14, and the transferee servicer provides the notice required by § 1024.41(b)(2)(i)(B) 10 days (excluding legal public holidays, Saturdays, or Sundays) after the transfer date, on October 23. Assume the transferee servicer discloses a 30-day reasonable date, November 22, under § 1024.41(b)(2)(ii).

i. If the transferor servicer receives the borrower's initial loss mitigation application when the borrower's mortgage loan is 101 days delinquent, the borrower's mortgage loan would be 123 days delinquent on October 23, the date the transferee servicer provides the notice required by § 1024.41(b)(2)(i)(B). Pursuant to § 1024.41(k)(2)(ii)(A), the transferee servicer cannot make the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process until after November 22, the reasonable date disclosed under § 1024.41(b)(2)(ii), and then only if the borrower has not submitted a complete application by that date.

ii. If the transferor servicer receives the borrower's initial loss mitigation application 55 days before the foreclosure sale, the date that the transferee servicer provides the notice required by § 1024.41(b)(2)(i)(B), October 23, is 33 days before the foreclosure sale. Pursuant to § 1024.41(k)(2)(ii)(B), the transferee servicer must comply with § 1024.41(c), (d), and (g) if the borrower submits a complete loss mitigation application on or before November 22, the reasonable date disclosed under § 1024.41(b)(2)(ii).

2. *Applicability of loss mitigation provisions.* Section 1024.41(k)(2)(ii)(A) prohibits a servicer from making the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process until a date that is after the reasonable date disclosed to the borrower pursuant to § 1024.41(b)(2)(ii), notwithstanding § 1024.41(f)(1). Section 1024.41(k)(2)(ii)(B) requires a servicer to comply with § 1024.41(c), (d), and (g) if a borrower submits a complete loss mitigation application on or before the reasonable date disclosed in the notice required by § 1024.41(b)(2)(i)(B), even if the servicer would otherwise not be required to comply with § 1024.41(c), (d), and (g) because the application is submitted 37 days or fewer before a foreclosure sale. Section 1024.41(k)(2)(ii) provides additional protections for borrowers but does not remove any protections. Servicers remain subject to the requirements of § 1024.41 as applicable and so, for example, must comply with § 1024.41(h) if the servicer receives a complete loss mitigation application 90 days or more before a foreclosure sale. Similarly, a servicer is prohibited from making the first notice or filing before the borrower's mortgage loan obligation is more than 120 days delinquent, even if that is after the reasonable date disclosed to the borrower pursuant to § 1024.41(b)(2)(ii).

3. *Reasonable date when no milestones remain.* Generally, a servicer does not provide the notice required under § 1024.41(b)(2)(i)(B) after the date that is 38 days before a foreclosure sale, so at least one milestone specified in comment 41(b)(ii)–1 always remains applicable. When § 1024.41(k)(2)(i) applies, however, the transferee servicer may sometimes provide the notice after the date that is 38 days before a foreclosure sale. When this occurs, the transferee servicer must determine the reasonable date when none of the four specified milestones remain. The other requirements of § 1024.41(b)(2)(ii) continue to apply. In this circumstance, a reasonable date may occur less than 30 days, but not less than seven days, after the date the transferee servicer provides the written notice pursuant to § 1024.41(b)(2)(i)(B).

41(k)(3) Complete loss mitigation applications pending at transfer.

1. *Additional information or corrections to a previously submitted document.* If a transferee servicer acquires the servicing of a mortgage loan for which a complete loss mitigation application is pending as of the transfer date and the transferee servicer determines that additional information or a correction to a previously submitted document is required based upon its criteria for evaluating loss mitigation applications, the application is considered facially complete under § 1024.41(c)(2)(iv) as of the date it was first facially complete or complete, as applicable, with respect to the transferor servicer. Once the transferee servicer receives the information or corrections necessary to complete the application, § 1024.41(c)(3) requires the transferee servicer to provide a notice of complete application.

2. *Applications first complete upon transfer.* If the borrower's loss mitigation application was incomplete based on the transferor servicer's criteria prior to transfer but is complete based upon the transferee servicer's criteria, the application is considered a pending loss mitigation application complete as of the transfer date for purposes of § 1024.41(k)(3). Consequently, the transferee servicer must comply with the applicable requirements of § 1024.41(c)(1) and (4) within 30 days of the transfer date. For purposes of § 1024.41(c) through (h), the application is complete as of the date the transferor servicer received the documents and information constituting the complete application. *See* comment 41(k)(1)(i)–2. In such circumstances, § 1024.41(c)(3) requires the transferee servicer to provide a notice of complete application that discloses the date the transferor servicer received the documents and information constituting the complete application.

41(k)(4) Applications subject to appeal process.

1. *Obtaining appeal.* A borrower may submit an appeal of a transferor servicer's determination pursuant to § 1024.41(h) to the transferor servicer after the transfer date. Consistent with policies and procedures maintained pursuant to § 1024.38(b)(4), the transferor servicer must timely transfer, and the transferee servicer must obtain, documents and information regarding such appeals.

2. *Servicer unable to determine appeal.* A transferee servicer may be unable to make a determination on an appeal when, for example, the transferor servicer denied a borrower for a loan modification option that the transferee servicer does not offer or when the transferee servicer receives the mortgage loan through an involuntary transfer and the transferor servicer failed to maintain proper records such that the transferee servicer lacks sufficient information to review the appeal. In that circumstance, the transferee servicer is required to treat the appeal as a pending complete application, and it must permit the borrower to accept or reject any loss mitigation options offered by the transferor servicer, even if it does not offer the loss mitigation options offered by the transferor servicer, in addition to the loss mitigation options, if any, that the transferee servicer determines to offer the borrower based on its own evaluation of the borrower's complete loss mitigation application. For example, assume a transferor servicer denied a borrower for all loan modification options but offered the borrower a short sale option, and assume that the borrower's appeal of the loan modification denial was pending as of the transfer date. If the transferee servicer is unable to determine the borrower's appeal, the transferee servicer must evaluate the borrower for all available loss mitigation options in accordance with § 1024.41(c) and (k)(3). At the conclusion of such evaluation, the transferee servicer must permit the borrower to accept the short sale option offered by the transferor servicer, even if the transferee servicer does not offer the short sale option, in addition to any loss mitigation options the transferee servicer determines to offer the borrower based upon its own evaluation.

41(k)(5) Pending loss mitigation offers.

1. *Obtaining evidence of borrower acceptance.* A borrower may provide an acceptance or rejection of a pending loss mitigation offer to a transferor servicer after the transfer date. Consistent with policies and procedures maintained pursuant to § 1024.38(b)(4), the transferor servicer must timely transfer, and the transferee servicer must obtain, documents and information regarding such acceptances and rejections, and the transferee servicer must provide the borrower with any timely accepted loss mitigation option, even if the borrower submitted the acceptance to the transferor servicer.

Appendix MS to Part 1024—Mortgage Servicing Model Forms and Clauses

* * * * *

2. *Permissible changes.* Servicers may make certain changes to the format or content of the forms and clauses and may delete any disclosures that are inapplicable without losing the protection from liability so long as those changes do not affect the substance, clarity, or meaningful sequence of the forms and clauses. Servicers making revisions to that effect will lose their protection from civil liability. Except as otherwise specifically required, acceptable changes include, for example:

i. Use of ''borrower'' and ''servicer'' instead of pronouns.

ii. Substitution of the words ''lender'' and ''servicer'' for each other.

iii. Addition of graphics or icons, such as the servicer's corporate logo.

iv. Modifications to remove language that could suggest liability under the mortgage loan agreement if such language is not applicable. For example, in the case of a confirmed successor in interest who has not assumed the mortgage loan obligation under State law and is not otherwise liable on the mortgage loan obligation, this could include:

A. Use of ''the mortgage loan'' or ''this mortgage loan'' instead of ''your mortgage loan'' and ''the monthly payments'' instead of ''your monthly payments.''

B. Use of ''Payments due on or after [Date] may be sent to'' instead of ''Send all payments due on or after [Date] to'' in notices of transfer.

C. Use of ''We will charge the loan account'' instead of ''You must pay us'' in notices relating to force-placed insurance.

* * * * *

PART 1026—TRUTH IN LENDING (REGULATION Z)

■ 18. The authority citation for part 1026 continues to read as follows:

Authority: 12 U.S.C. 2601, 2603–2605, 2607, 2609, 2617, 5511, 5512, 5532, 5581; 15 U.S.C. 1601 *et seq.*

Subpart A—General

■ 19. Effective April 19, 2018, § 1026.2 is amended by revising paragraph (a)(11) and adding paragraph (a)(27) to read as follows:

§ 1026.2 Definitions and rules of construction.

* * * * *

(a) * * *

(11) *Consumer* means a cardholder or natural person to whom consumer credit is offered or extended. However, for purposes of rescission under §§ 1026.15 and 1026.23, the term also includes a natural person in whose principal dwelling a security interest is or will be retained or acquired, if that person's ownership interest in the dwelling is or will be subject to the security interest. For purposes of §§ 1026.20(c) through (e), 1026.36(c), 1026.39, and 1026.41, the term includes a confirmed successor in interest.

* * * * *

(27)(i) *Successor in interest* means a person to whom an ownership interest in a dwelling securing a closed-end consumer credit transaction is transferred from a consumer, provided that the transfer is:

(A) A transfer by devise, descent, or operation of law on the death of a joint tenant or tenant by the entirety;

(B) A transfer to a relative resulting from the death of the consumer;

(C) A transfer where the spouse or children of the consumer become an owner of the property;

(D) A transfer resulting from a decree of a dissolution of marriage, legal separation agreement, or from an incidental property settlement agreement, by which the spouse of the consumer becomes an owner of the property; or

(E) A transfer into an *inter vivos* trust in which the consumer is and remains a beneficiary and which does not relate to a transfer of rights of occupancy in the property.

(ii) *Confirmed successor in interest* means a successor in interest once a servicer has confirmed the successor in interest's identity and ownership interest in the dwelling.

* * * * *

Subpart C—Closed-End Credit

■ 20. Effective April 19, 2018, § 1026.20 is amended by adding paragraph (f) to read as follows:

§ 1026.20 Disclosure requirements regarding post-consummation events.

* * * * *

(f) *Successor in interest.* If, upon confirmation, a servicer provides a confirmed successor in interest who is not liable on the mortgage loan obligation with a written notice and acknowledgment form in accordance with Regulation X, § 1024.32(c)(1) of this chapter, the servicer is not required to provide to the confirmed successor in interest any written disclosure required by paragraphs (c), (d), and (e) of this section unless and until the confirmed successor in interest either assumes the mortgage loan obligation under State law or has provided the servicer an executed acknowledgment in accordance with Regulation X, § 1024.32(c)(1)(iv) of this chapter, that the confirmed successor in interest has not revoked.

Subpart E—Special Rules for Certain Home Mortgage Transactions

■ 21. Section 1026.36 is amended by revising the introductory text of paragraphs (c)(1) and (2) to read as follows:

§ 1026.36 Prohibited acts or practices and certain requirements for credit secured by a dwelling.

* * * * *

(c) * * *

(1) *Payment processing.* In connection with a closed-end consumer credit transaction secured by a consumer's principal dwelling:

* * * * *

(2) *No pyramiding of late fees.* In connection with a closed-end 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:

* * * * *

■ 22. Effective April 19, 2018, § 1026.39 is amended by adding paragraph (f) to read as follows:

§ 1026.39 Mortgage transfer disclosures.

* * * * *

(f) *Successor in interest.* If, upon confirmation, a servicer provides a confirmed successor in interest who is not liable on the mortgage loan obligation with a written notice and acknowledgment form in accordance with Regulation X, § 1024.32(c)(1) of this chapter, the servicer is not required to provide to the confirmed successor in interest any written disclosure required by paragraph (b) of this section unless and until the confirmed successor in interest either assumes the mortgage loan obligation under State law or has provided the servicer an executed acknowledgment in accordance with Regulation X, § 1024.32(c)(1)(iv) of this chapter, that the confirmed successor in interest has not revoked.

■ 23. Section 1026.41 is amended by:

■ a. Revising paragraphs (d)(8)(i) and (e)(4)(iii)(A);

■ b. Adding paragraphs (e)(4)(iii)(D) and (e)(6); and

■ c. Effective April 19, 2018:

■ i. Revising paragraph (e)(5); and

■ ii. Adding paragraphs (f) and (g).

The revisions and additions read as follows:

§ 1026.41 Periodic statements for residential mortgage loans.

* * * * *

(d) * * *

(8) * * *

(i) The length of the consumer's delinquency;

* * * * *

(e) * * *

(4) * * *

(iii) * * *

(A) Mortgage loans voluntarily serviced by the servicer for a non-affiliate of the servicer and for which the servicer does not receive any compensation or fees.

* * * * *

(D) Transactions serviced by the servicer for a seller financer that meets all of the criteria identified in § 1026.36(a)(5).

(5) *Certain consumers in bankruptcy*—(i) *Exemption.* Except as provided in paragraph (e)(5)(ii) of this section, a servicer is exempt from the

requirements of this section with regard to a mortgage loan if:

(A) Any consumer on the mortgage loan is a debtor in bankruptcy under title 11 of the United States Code or has discharged personal liability for the mortgage loan pursuant to 11 U.S.C. 727, 1141, 1228, or 1328; and

(B) With regard to any consumer on the mortgage loan:

(*1*) The consumer requests in writing that the servicer cease providing a periodic statement or coupon book;

(*2*) The consumer's bankruptcy plan provides that the consumer will surrender the dwelling securing the mortgage loan, provides for the avoidance of the lien securing the mortgage loan, or otherwise does not provide for, as applicable, the payment of pre-bankruptcy arrearage or the maintenance of payments due under the mortgage loan;

(*3*) A court enters an order in the bankruptcy case providing for the avoidance of the lien securing the mortgage loan, lifting the automatic stay pursuant to 11 U.S.C. 362 with regard to the dwelling securing the mortgage loan, or requiring the servicer to cease providing a periodic statement or coupon book; or

(*4*) The consumer files with the court overseeing the bankruptcy case a statement of intention pursuant to 11 U.S.C. 521(a) identifying an intent to surrender the dwelling securing the mortgage loan and a consumer has not made any partial or periodic payment on the mortgage loan after the commencement of the consumer's bankruptcy case.

(ii) *Reaffirmation or consumer request to receive statement or coupon book.* A servicer ceases to qualify for an exemption pursuant to paragraph (e)(5)(i) of this section with respect to a mortgage loan if the consumer reaffirms personal liability for the loan or any consumer on the loan requests in writing that the servicer provide a periodic statement or coupon book, unless a court enters an order in the bankruptcy case requiring the servicer to cease providing a periodic statement or coupon book.

(iii) *Exclusive address.* A servicer may establish an address that a consumer must use to submit a written request under paragraph (e)(5)(i)(B)(*1*) or (e)(5)(ii) of this section, provided that the servicer notifies the consumer of the address in a manner that is reasonably designed to inform the consumer of the address. If a servicer designates a specific address for requests under paragraph (e)(5)(i)(B)(*1*) or (e)(5)(ii) of this section, the servicer shall designate the same address for purposes of both paragraphs (e)(5)(i)(B)(*1*) and (e)(5)(ii) of this section.

(iv) *Timing of compliance following transition*—(A) *Triggering events for transitioning to modified and unmodified periodic statements.* A servicer transitions to providing a periodic statement or coupon book with the modifications set forth in paragraph (f) of this section or to providing a periodic statement or coupon book without such modifications when one of the following three events occurs:

(*1*) A mortgage loan becomes subject to the requirements of paragraph (f) of this section;

(*2*) A mortgage loan ceases to be subject to the requirements of paragraph (f) of this section; or

(*3*) A servicer ceases to qualify for an exemption pursuant to paragraph (e)(5)(i) of this section with respect to a mortgage loan.

(B) *Transitional single-billing-cycle exemption.* A servicer is exempt from the requirements of this section with respect to a single billing cycle when the payment due date for that billing cycle is no more than 14 days after the date on which one of the events listed in paragraph (e)(5)(iv)(A) of this section occurs.

(C) *Timing of first modified or unmodified statement after transition.* When one of the events listed in paragraph (e)(5)(iv)(A) of this section occurs, a servicer must provide the next modified or unmodified periodic statement or coupon book that complies with the requirements of this section by delivering or placing it in the mail within a reasonably prompt time after the first payment due date, or the end of any courtesy period for the payment's corresponding billing cycle, that is more than 14 days after the date on which the applicable event listed in paragraph (e)(5)(iv)(A) of this section occurs.

(6) *Charged-off loans.* (i) A servicer is exempt from the requirements of this section for a mortgage loan if the servicer:

(A) Has charged off the loan in accordance with loan-loss provisions and will not charge any additional fees or interest on the account; and

(B) Provides, within 30 days of charge-off or the most recent periodic statement, a periodic statement, clearly and conspicuously labeled ''Suspension of Statements & Notice of Charge Off—Retain This Copy for Your Records.'' The periodic statement must clearly and conspicuously explain that, as applicable, the mortgage loan has been charged off and the servicer will not charge any additional fees or interest on the account; the servicer will no longer provide the consumer a periodic statement for each billing cycle; the lien on the property remains in place and the consumer remains liable for the mortgage loan obligation and any obligations arising from or related to the property, which may include property taxes; the consumer may be required to pay the balance on the account in the future, for example, upon sale of the property; the balance on the account is not being canceled or forgiven; and the loan may be purchased, assigned, or transferred.

(ii) *Resuming compliance.* (A) If a servicer fails at any time to treat a mortgage loan that is exempt under paragraph (e)(6)(i) of this section as charged off or charges any additional fees or interest on the account, the obligation to provide a periodic statement pursuant to this section resumes.

(B) *Prohibition on retroactive fees.* A servicer may not retroactively assess fees or interest on the account for the period of time during which the exemption in paragraph (e)(6)(i) of this section applied.

(f) *Modified periodic statements and coupon books for certain consumers in bankruptcy.* While any consumer on a mortgage loan is a debtor in bankruptcy under title 11 of the United States Code, or if such consumer has discharged personal liability for the mortgage loan pursuant to 11 U.S.C. 727, 1141, 1228, or 1328, the requirements of this section are subject to the following modifications with regard to that mortgage loan:

(1) *Requirements not applicable.* The periodic statement may omit the information set forth in paragraphs (d)(1)(ii) and (d)(8)(i), (ii), and (v) of this section. The requirement in paragraph (d)(1)(iii) of this section that the amount due must be shown more prominently than other disclosures on the page shall not apply.

(2) *Bankruptcy notices.* The periodic statement must include the following:

(i) A statement identifying the consumer's status as a debtor in bankruptcy or the discharged status of the mortgage loan; and

(ii) A statement that the periodic statement is for informational purposes only.

(3) *Chapter 12 and chapter 13 consumers.* In addition to any other provisions of this paragraph (f) that may apply, with regard to a mortgage loan for which any consumer with primary liability is a debtor in a chapter 12 or chapter 13 bankruptcy case, the requirements of this section are subject to the following modifications:

(i) *Requirements not applicable.* In addition to omitting the information set forth in paragraph (f)(1) of this section, the periodic statement may also omit the information set forth in paragraphs (d)(8)(iii), (iv), (vi), and (vii) of this section.

(ii) *Amount due.* The amount due information set forth in paragraph (d)(1) of this section may be limited to the date and amount of the post-petition payments due and any post-petition fees and charges imposed by the servicer.

(iii) *Explanation of amount due.* The explanation of amount due information set forth in paragraph (d)(2) of this section may be limited to:

(A) The monthly post-petition payment amount, including a breakdown showing how much, if any, will be applied to principal, interest, and escrow;

(B) The total sum of any post-petition fees or charges imposed since the last statement; and

(C) Any post-petition payment amount past due.

(iv) *Transaction activity.* The transaction activity information set forth in paragraph (d)(4) of this section must include all payments the servicer has received since the last statement, including all post-petition and pre-petition payments and payments of post-petition fees and charges, and all post-petition fees and charges the servicer has imposed since the last statement. The brief description of the activity need not identify the source of any payments.

(v) *Pre-petition arrearage.* If applicable, a servicer must disclose, grouped in close proximity to each other and located on the first page of the statement or, alternatively, on a separate page enclosed with the periodic statement or in a separate letter:

(A) The total of all pre-petition payments received since the last statement;

(B) The total of all pre-petition payments received since the beginning of the consumer's bankruptcy case; and

(C) The current balance of the consumer's pre-petition arrearage.

(vi) *Additional disclosures.* The periodic statement must include, as applicable:

(A) A statement that the amount due includes only post-petition payments and does not include other payments that may be due under the terms of the consumer's bankruptcy plan;

(B) If the consumer's bankruptcy plan requires the consumer to make the post-petition mortgage payments directly to a bankruptcy trustee, a statement that the consumer should send the payment to the trustee and not to the servicer;

(C) A statement that the information disclosed on the periodic statement may not include payments the consumer has made to the trustee and may not be consistent with the trustee's records;

(D) A statement that encourages the consumer to contact the consumer's attorney or the trustee with questions regarding the application of payments; and

(E) If the consumer is more than 45 days delinquent on post-petition payments, a statement that the servicer has not received all the payments that became due since the consumer filed for bankruptcy.

(4) *Multiple obligors.* If this paragraph (f) applies in connection with a mortgage loan with more than one primary obligor, the servicer may provide the modified statement to any or all of the primary obligors, even if a primary obligor to whom the servicer provides the modified statement is not a debtor in bankruptcy.

(5) *Coupon books.* A servicer that provides a coupon book instead of a periodic statement under paragraph (e)(3) of this section must include in the coupon book the disclosures set forth in paragraphs (f)(2) and (f)(3)(vi) of this section, as applicable. The servicer may include these disclosures anywhere in the coupon book provided to the consumer or on a separate page enclosed with the coupon book. The servicer must make available upon request to the consumer by telephone, in writing, in person, or electronically, if the consumer consents, the information listed in paragraph (f)(3)(v) of this section, as applicable. The modifications set forth in paragraphs (f)(1) and (f)(3)(i) through (iv) and (vi) of this section apply to a coupon book and other information a servicer provides to the consumer under paragraph (e)(3) of this section.

(g) *Successor in interest.* If, upon confirmation, a servicer provides a confirmed successor in interest who is not liable on the mortgage loan obligation with a written notice and acknowledgment form in accordance with Regulation X, § 1024.32(c)(1) of this chapter, the servicer is not required to provide to the confirmed successor in interest any written disclosure required by this section unless and until the confirmed successor in interest either assumes the mortgage loan obligation under State law or has provided the servicer an executed acknowledgment in accordance with Regulation X, § 1024.32(c)(1)(iv) of this chapter, that the confirmed successor in interest has not revoked.

■ 24. Appendix H to part 1026 is amended by:

■ a. Revising the entry for H–30(C) in the table of contents at the beginning of the appendix;

■ b. Adding entries for H–30(E) and H–30(F) in the table of contents at the beginning of the appendix;

■ c. Revising H–4(C), H–14, and H–30(C); and

■ d. Adding H–30(E) and H–30(F).

The additions and revisions read as follows:

Appendix H to Part 1026—Closed-End Model Forms and Clauses

* * * * *

* * * * *

H–4(C)—Variable Rate Model Clauses

This disclosure describes the features of the adjustable-rate mortgage (ARM) program you are considering. Information on other ARM programs is available upon request.

How Your Interest Rate and Payment Are Determined

• Your interest rate will be based on [an index plus a margin] [a formula].

• Your payment will be based on the interest rate, loan balance, and loan term.

—[The interest rate will be based on (identification of index) plus our margin. Ask for our current interest rate and margin.]

—[The interest rate will be based on (identification of formula). Ask us for our current interest rate.]

—Information about the index [formula for rate adjustments] is published [can be found] ______.

—[The initial interest rate is not based on the (index) (formula) used to make later adjustments. Ask us for the amount of current interest rate discounts.]

How Your Interest Rate Can Change

• Your interest rate can change (frequency).

• [Your interest rate cannot increase or decrease more than ____ percentage points at each adjustment.]

• Your interest rate cannot increase [or decrease] more than ____ percentage points over the term of the loan.

How Your Payment Can Change

• Your payment can change (frequency) based on changes in the interest rate.

• [Your payment cannot increase more than (amount or percentage) at each adjustment.]

• [You will be notified at least 210, but no more than 240, days before first payment at the adjusted level is due after the initial interest rate adjustment of the loan. This notice will contain information about the adjustment, including the interest rate, payment amount, and loan balance.]

• [You will be notified at least 60, but no more than 120, days before first payment at the adjusted level is due after any interest rate adjustment resulting in a corresponding payment change. This notice will contain information about the adjustment, including the interest rate, payment amount, and loan balance.]

• [For example, on a $10,000 [term] loan with an initial interest rate of ____ [(the rate shown in the interest rate column below for the year 19 ____)] [(in effect (month) (year)], the maximum amount that the interest rate can rise under this program is ____ percentage points, to ____%, and the monthly payment can rise from a first-year payment of $____ to a maximum of $____ in the ____ year. To see what your payments would be, divide your mortgage amount by $10,000; then multiply the monthly payment by that amount. (For example, the monthly payment for a mortgage amount of $60,000 would be: $60,000 ÷ $10,000 = 6; 6 × ____ = $____ per month.)]

[Example

The example below shows how your payments would have changed under this ARM program based on actual changes in the index from 1982 to 1996. This does not necessarily indicate how your index will change in the future.

The example is based on the following assumptions:

Amount	$10,000.
Term	——.
Change date	——.
Payment adjustment	(frequency).
Interest adjustment	(frequency).
[Margin] *	——.

Caps ____ [periodic interest rate cap].
____ [lifetime interest rate cap.
____ [payment cap].
[Interest rate carryover].
[Negative amortization].
[Interest rate discount].**
Index(identification of index or formula).

* This is a margin we have used recently, your margin may be different.
** This is the amount of a discount we have provided recently; your loan may be discounted by a different amount.]

Year	Index (%)	Margin (percentage points)	Interest rate (%)	Monthly payment ($)	Remaining balance ($)
1982					
1983					
1984					
1985					
1986					
1987					
1988					
1989					
1990					
1991					
1992					
1993					
1994					
1995					
1996					

Note: To see what your payments would have been during that period, divide your mortgage amount by $10,000; then multiply the monthly payment by that amount. (For example, in 1996 the monthly payment for a mortgage amount of $60,000 taken out in 1982 would be: $60,000 ÷ $10,000 = 6; 6 × ____ = $____ per month.)

* * * * *

H–14—Variable Rate Mortgage Sample

This disclosure describes the features of the adjustable-rate mortgage (ARM) program you are considering. Information on other ARM programs is available upon request.

How Your Interest Rate and Payment Are Determined

• Your interest rate will be based on an index rate plus a margin.

• Your payment will be based on the interest rate, loan balance, and loan term.

—The interest rate will be based on the weekly average yield on United States Treasury securities adjusted to a constant maturity of 1 year (your index), plus our margin. Ask us for our current interest rate and margin.

—Information about the index rate is published weekly in the Wall Street Journal.

• Your interest rate will equal the index rate plus our margin unless your interest rate ''caps'' limit the amount of change in the interest rate.

How Your Interest Rate Can Change

• Your interest rate can change yearly.

• Your interest rate cannot increase or decrease more than 2 percentage points per year.

• Your interest rate cannot increase or decrease more than 5 percentage points over the term of the loan.

How Your Monthly Payment Can Change

• Your monthly payment can increase or decrease substantially based on annual changes in the interest rate.

• [For example, on a $10,000, 30-year loan with an initial interest rate of 12.41 percent in effect in July 1996, the maximum amount that the interest rate can rise under this program is 5 percentage points, to 17.41 percent, and the monthly payment can rise from a first-year payment of $106.03 to a maximum of $145.34 in the fourth year. To see what your payment is, divide your mortgage amount by $10,000; then multiply the monthly payment by that amount. (For example, the monthly payment for a mortgage amount of $60,000 would be: $60,000 ÷ $10,000 = 6; 6 × 106.03 = $636.18 per month.)]

• [You will be notified at least 210, but no more than 240, days before first payment at the adjusted level is due after the initial interest rate adjustment of the loan. This notice will contain information about the adjustment, including the interest rate, payment amount, and loan balance.]

• [You will be notified at least 60, but no more than 120, days before first payment at the adjusted level is due after any interest rate adjustment resulting in a corresponding payment change. This notice will contain information about the adjustment, including the interest rate, payment amount, and loan balance.]

[Example

The example below shows how your payments would have changed under this ARM program based on actual changes in the index from 1982 to 1996. This does not necessarily indicate how your index will change in the future. The example is based on the following assumptions:

Amount	$10,000.
Term	30 years.
Payment adjustment	1 year.
Interest adjustment	1 year.
Margin	3 percentage points.

Caps ____ 2 percentage points annual interest rate.
____ 5 percentage points lifetime interest rate.
Index ____ Weekly average yield on U.S. Treasury securities adjusted to a constant maturity of one year.

Year (as of 1st week ending in July)	Index	Margin * (percentage points)	Interest rate (%)	Monthly payment ($)	Remaining balance ($)
1982	14.41	3	17.41	145.90	9,989.37
1983	9.78	3	** 15.41	129.81	9,969.66
1984	12.17	3	15.17	127.91	9,945.51
1985	7.66	3	** 13.17	112.43	9,903.70
1986	6.36	3	*** 12.41	106.73	9,848.94
1987	6.71	3	*** 12.41	106.73	9,786.98
1988	7.52	3	*** 12.41	106.73	9,716.88
1989	7.97	3	*** 12.41	106.73	9,637.56
1990	8.06	3	*** 12.41	106.73	9,547.83
1991	6.40	3	*** 12.41	106.73	9,446.29
1992	3.96	3	*** 12.41	106.73	9,331.56
1993	3.42	3	*** 12.41	106.73	9,201.61
1994	5.47	3	*** 12.41	106.73	9,054.72
1995	5.53	3	*** 12.41	106.73	8,888.52
1996	5.82	3	*** 12.41	106.73	8,700.37

* This is a margin we have used recently; your margin may be different.
** This interest rate reflects a 2 percentage point annual interest rate cap.
*** This interest rate reflects a 5 percentage point lifetime interest rate cap.
Note: To see what your payments would have been during that period, divide your mortgage amount by $10,000; then multiply the monthly payment by that amount. (For example, in 1996 the monthly payment for a mortgage amount of $60,000 taken out in 1982 would be: $60,000 ÷ $10,000 = 6; 6 × $106.73 = $640.38.)]

- [You will be notified at least 210, but no more than 240, days before first payment at the adjusted level is due after the initial interest rate adjustment of the loan. This notice will contain information about the adjustment, including the interest rate, payment amount, and loan balance.]
- [You will be notified at least 60, but no more than 120, days before first payment at the adjusted level is due after any interest rate adjustment resulting in a corresponding payment change. This notice will contain information about the adjustment, including the interest rate, payment amount, and loan balance.]

* * * * *

BILLING CODE 4810–AM–P

H–30(C) Sample Form of Periodic Statement for a Payment-Option Loan

Springside Mortgage

Customer Service: 1-800-555-1234
www.springsidemortgage.com

Mortgage Statement
Statement Date: 3/20/2012

Jordan and Dana Smith
4700 Jones Drive
Memphis, TN 38109

Account Number		**1234567**
Payment Due Date		**4/1/2012**
Amount Due	**Option 1 (Full):**	**$1,829.71**
	Option 2 (Interest-Only):	**$1,443.25**
	Option 3 (Minimum):	**$1,156.43**

If payment is received after 4/15/12, $160 late fee will be charged.

Account Information	
Outstanding Principal	$260,000.00
Interest Rate (Until October 2012)	4.75%
Prepayment Penalty	Yes

Explanation of Amount Due

	Option 1 (Full)	Option 2 (Interest-Only)	Option 3 (Minimum)
Principal	$386.46	$0	$0
Interest	$1,048.07	$1,048.07	$761.25
Escrow (Taxes and Insurance)	$235.18	$235.18	$235.18
Regular Monthly Payment	**$1,669.71**	**$1,283.25**	**$996.43**
Total Fees and Charges	$160.00	$160.00	$160.00
Total Amount Due	**$1,829.71**	**$1,443.25**	**$1,156.43**
If you make this payment...	... your principal balance will decrease, and you will be closer to paying off your loan.	... your principal balance will stay the same, and you will not be closer to paying off your loan.	... **your principal balance will increase.** You will be borrowing more money and losing equity in your home.

Transaction Activity (2/20 to 3/19)

Date	Description	Charges	Payments
3/16/12	Late Fee (charged because payment was received after 3/15/2012)	$160.00	
3/19/12	Payment Received – Thank you		$1,669.71

Past Payments Breakdown

	Paid Last Month	Paid Year to Date
Principal	$384.93	$1,150.25
Interest	$1,049.60	$3,153.34
Escrow (Taxes and Insurance)	$235.18	$705.54
Fees	$0.00	$0.00
Total	**$1,669.71**	**$5,009.13**

Springside Mortgage

Springside Mortgage
P.O. Box 11111
Los Angeles, CA 90010

Amount Due

Due By 4/1/2012:	❑ **Option 1 (Full):**	**$1,829.71**
	❑ **Option 2 (Interest-Only):**	**$1,443.25**
	❑ **Option 3 (Minimum):**	**$1,156.43**

$160 late fee will be charged after 4/15/12

Additional Principal	$.
Additional Escrow	$.
Total Amount Enclosed	**$.**

Make check payable to Springside Mortgage.

1234567 34571892 342359127 P

* * * * *

H–30(E) Sample Form of Periodic Statement for Consumer in Chapter 7 or Chapter 11 Bankruptcy

Springside Mortgage

Customer Service: 1-800-555-1234
www.springsidemortgage.com

Mortgage Statement

Statement Date: 8/20/2015

Jordan and Dana Smith
4700 Jones Drive
Memphis, TN 38109

Account Number	**1234567**
Payment Date	**9/1/2015**
Payment Amount	**$3,839.13**

Bankruptcy Message
Our records show that either you are a debtor in bankruptcy or you discharged personal liability for your mortgage loan in bankruptcy.
We are sending this statement to you for informational and compliance purposes only. It is not an attempt to collect a debt against you.
If you want to stop receiving statements, write to us.

Explanation of Payment Amount	
Principal	$386.46
Interest	$1,048.07
Escrow (Taxes and Insurance)	$235.18
Regular Monthly Payment	**$1,669.71**
Total Fees and Charges	$160.00
Past Unpaid Amount	$2,009.42
Total Payment Amount	**$3,839.13**

Account Information	
Outstanding Principal	$265,544.78
Interest Rate (Until October 2015)	4.75%
Prepayment Penalty	Yes

Transaction Activity (7/20 to 8/19)

Date	Description	Charges	Payments
8/13/15	Partial Payment Received*		$1,000.00
8/16/15	Late Fee (charged because full payment not received by 8/15/2015)	$160.00	

Past Payments Breakdown

	Paid Last Month	Paid Year to Date
Principal	$0.00	$2,268.95
Interest	$0.00	$6,338.23
Escrow (Taxes and Insurance)	$0.00	$1,411.08
Fees	$0.00	$160.00
Partial Payment (Unapplied)*	$1,000.00	$1,490.00
Total	**$1,000.00**	**$11,668.26**

****Account History****

Recent Account History

- Payment due 5/1/15: Fully paid on time
- Payment due 6/1/15: Fully paid on 7/3/15
- Payment due 7/1/15: Unpaid balance of $339.71
- Payment due 8/1/15: Unpaid balance of $1829.71
- Current payment date 9/1/15: $1,669.71
- **Total: $3,839.13 unpaid amount that, if paid, would bring your loan current.**

If You Are Experiencing Financial Difficulty: See back for information about mortgage counseling or assistance.

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.

Springside Mortgage

Springside Mortgage
P.O. Box 11111
Los Angeles, CA 90010

Payment Amount		
Payment Date:		**9/1/2015**
Payment Amount:		**$3,839.13**
Additional Principal	$	.
Additional Escrow	$	.
Total Amount Enclosed	**$**	**.**

If you are making a payment, make your check payable to *Springside Mortgage*.

1234567 34571892 342359127 DN

H–30(F) Sample Form of Periodic Statement for Consumer in Chapter 12 or Chapter 13 Bankruptcy

Springside Mortgage

Customer Service: 1-800-555-1234
www.springsidemortgage.com

Mortgage Statement

Statement Date: 8/20/2015

Jordan and Dana Smith
4700 Jones Drive
Memphis, TN 38109

Account Number	**1234567**
Payment Date	**9/1/2015**
Payment Amount	**$3,569.88**

Bankruptcy Message

Our records show that you are a debtor in bankruptcy. We are sending this statement to you for informational and compliance purposes only. It is not an attempt to collect a debt against you.

If your bankruptcy plan requires you to send your regular monthly mortgage payments to the Trustee, you should pay the Trustee instead of us. Please contact your attorney or the Trustee if you have questions.

If you want to stop receiving statements, write to us.

Explanation of Payment Amount (Post-Petition Payment)	
Principal	$511.63
Interest	$1,053.31
Escrow (Taxes and Insurance)	$375.00
Regular Monthly Payment	**$1,939.94**
Total Fees and Charges	$190.00
Past Unpaid Amount	$1,439.94
Total Payment Amount	**$3,569.88**

The Payment Amount does not include any amount that was past due before you filed for bankruptcy.

Account Information	
Outstanding Principal	$269,126.91
Interest Rate (Until October 2015)	4.75%
Prepayment Penalty	Yes

Transaction Activity (7/20 to 8/19)

Date	Description	Charges	Payments
8/10/15	Partial Payment Received*		$336.43
8/13/15	Partial Payment Received*		$500.00
8/16/15	Late Fee (charged because full payment not received by 8/15/15)	$190.00	

Breakdown of Past Payments

	Paid Last Month	Paid Year to Date
Principal	$0.00	$3,926.91
Interest	$0.00	$8,592.62
Escrow (Taxes and Insurance)	$0.00	$3,000.00
Fees	$0.00	$0.00
Partial Payment (Unapplied)*	$836.43	$1,251.53
Total	**$836.43**	**$16,771.06**

Important Messages

We have not received all of your mortgage payments due since you filed for bankruptcy.

This statement may not show recent payments you sent to the Trustee that the Trustee has not yet forwarded to us. Please contact your attorney or the Trustee if you have questions.

***Partial Payments:** Any partial payments listed here are not applied to your mortgage, but instead are held in one or more separate suspense accounts. Once we receive funds equal to a full monthly payment, we will apply those funds to your mortgage.

Summary of Amounts Past Due Before Bankruptcy Filing (Pre-Petition Arrearage)

Paid Last Month	$336.43
Total Paid During Bankruptcy	$1,345.72
Current Balance	$10,765.88

This box shows amounts that were past due when you filed for bankruptcy. It may also include other allowed amounts on your mortgage loan. The Trustee is sending us the payments shown here. These are separate from your regular monthly mortgage payment.

Springside Mortgage

Springside Mortgage
P.O. Box 11111
Los Angeles, CA 90010

If your bankruptcy plan requires you to send your regular monthly mortgage payments to the Trustee, do not send your payment to us. Instead, you should send your payment to the Trustee.

Payment Amount	
Payment Date:	**9/1/2015**
Payment Amount:	**$3,569.88**
Additional Principal	$.
Additional Escrow	$.
Total Amount Enclosed	**$.**

If you are sending us a payment, make your check payable to *Springside Mortgage.*

1234567 34571892 342359127 DN

BILLING CODE 4810–AM–C

■ 25. In supplement I to part 1026:

■ a. Effective April 19, 2018, under *Section 1026.2—Definitions and Rules of Construction:*

■ i. Under 2(a)(11) Consumer, paragraph 4 is added.

■ ii. After the entry for 2(a)(25) Security Interest, the heading Paragraph 2(a)(27), the heading 2(a)(27)(i) Successor in interest, and paragraphs 1 and 2 under that heading are added.

■ b. Effective April 19, 2018, under *Section 1026.20—Disclosure requirements regarding post-consummation events,* under *20(e)(4) Form of disclosures,* paragraph 3 is added.

■ c. Under *Section 1026.36—Prohibited Acts or Practices and Certain Requirements for Credit Secured by a Dwelling:*

■ i. Under Paragraph 36(c)(1)(i), paragraphs 4 and 5 are added.

■ ii. Effective April 19, 2018, under Paragraph 36(c)(1)(iii), paragraph 2 is revised.

■ d. Under Section 1026.41—Periodic Statements for Residential Mortgage Loans:

■ i. Under *41(a) In general,* paragraph 1 is revised.
■ ii. Under *41(c) Form of the periodic statement,* paragraph 5 is added.
■ iii. Under *41(d) Content and layout of the periodic statement,* paragraph 1 is revised, and paragraphs 4 and 5 are added.
■ iv. After the entry for *41(d),* the heading *41(d)(1) Amount due* is added, and paragraphs 1 through 3 under that heading are added.
■ v. The heading *41(d)(2) Explanation of amount due* is added, and paragraphs 1 and 2 under that heading are added.
■ vi. After the entry for *41(d)(4),* the heading *41(d)(8) Delinquency information* is added, and paragraphs 1 and 2 under that heading are added.
■ vii. After the entry for *41(d)(8),* the heading *41(e) Exemptions* is added.
■ viii. The heading for *41(e)(5)* is revised, and under that heading paragraphs 1 through 3 are revised, and paragraph 4 is added.
■ ix. The heading *41(e)(5)(i) Exemption* is added, and paragraph 1 under that heading is added.
■ x. The heading *Paragraph 41(e)(5)(i)(B)(2)* is added, and paragraph 1 under that heading is added.
■ xi. The heading *Paragraph 41(e)(5)(i)(B)(4)* is added, and paragraph 1 under that heading is added.
■ xii. The heading *41(e)(5)(ii) Reaffirmation or consumer request to receive statement or coupon book* is added, and paragraph 1 under that heading is added.
■ xiii. The heading *41(e)(5)(iv) Timing of compliance following transition* is added.
■ xiv. The heading *41(e)(5)(iv)(A) Triggering events for transitioning to modified or unmodified statement or coupon book* is added, and paragraphs 1 and 2 under that heading are added.
■ xv. The heading *41(e)(5)(iv)(B) Transitional single-billing-cycle exemption* is added, and paragraph 1 under that heading is added.
■ xvi. The heading *41(e)(5)(iv)(C) Timing of first modified or unmodified statement or coupon book after transition* is added, and paragraphs 1 through 3 under that heading are added.
■ xvii. The heading *41(e)(6) Charged-off loans* is added, and paragraphs 1 and 2 under that heading are added.
■ xviii. Under *41(e)(6) Charged-off loans,* the heading *Paragraph 41(e)(6)(i)(B)* is added, and paragraph 1 under that heading is added.
■ xix. The heading *41(f) Modified periodic statements and coupon books for certain consumers in bankruptcy* is added, and paragraphs 1 through 6 under that heading are added.
■ xx. The heading *41(f)(3) Chapter 12 and chapter 13 consumers* is added, and paragraphs 1 through 3 under that heading are added.
■ xxi. The heading *41(f)(3)(ii) Amount due* is added, and paragraph 1 under that heading is added.
■ xxii. The heading *41(f)(3)(iii) Explanation of amount due* is added, and paragraph 1 under that heading is added.
■ xxiii. The heading *41(f)(3)(v) Pre-petition arrearage* is added, and paragraph 1 under that heading is added.
■ xxiv. The heading *41(f)(4) Multiple obligors* is added, and paragraphs 1 and 2 under that heading are added.

The additions and revisions read as follows:

Supplement I to Part 1026—Official Interpretations

* * * * *

Subpart A—General

* * * * *

§ 1026.2 Definitions and Rules of Construction.

* * * * *

2(a)(11) Consumer

* * * * *

4. *Successors in interest.* i. *Assumption of the mortgage loan obligation.* A servicer may not require a confirmed successor in interest to assume the mortgage loan obligation to be considered a consumer for purposes of §§ 1026.20(c) through (e), 1026.36(c), 1026.39, and 1026.41. If a successor in interest assumes a mortgage loan obligation under State law or is otherwise liable on the mortgage loan obligation, the protections the successor in interest enjoys under this part are not limited to §§ 1026.20(c) through (e), 1026.36(c), 1026.39, and 1026.41.

ii. *Communications with confirmed successors in interest.* Communications in compliance with this part to a confirmed successor in interest as defined in § 1026.2(a)(27)(ii) do not violate section 805(b) of the Fair Debt Collection Practices Act (FDCPA) because consumer for purposes of FDCPA section 805 includes any person who meets the definition in this part of confirmed successor in interest.

iii. *Treatment of transferor consumer.* Even after a servicer's confirmation of a successor in interest, the servicer is still required to comply with all applicable requirements of §§ 1026.20(c) through (e), 1026.36(c), 1026.39, and 1026.41 with respect to the consumer who transferred an ownership interest to the successor in interest.

iv. *Multiple notices unnecessary.* Except as required by Regulation X, 12 CFR 1024.36, a servicer is not required to provide to a confirmed successor in interest any written disclosure required by § 1026.20(c), (d), or (e), § 1026.39, or § 1026.41 if the servicer is providing the same specific disclosure to another consumer on the account. For example, a servicer is not required to provide a periodic statement required by § 1026.41 to a confirmed successor in interest if the servicer is providing the same periodic statement to another consumer; a single statement may be sent in that billing cycle. If a servicer confirms more than one successor in interest, the servicer need not send any disclosure required by § 1026.20(c), (d), or (e), § 1026.39, or § 1026.41 to more than one of the confirmed successors in interest.

* * * * *

Paragraph 2(a)(27)

2(a)(27)(i) Successor in interest

1. *Joint tenants and tenants by the entirety.* If a consumer who has an ownership interest as a joint tenant or tenant by the entirety in a dwelling securing a closed-end consumer credit transaction dies, a surviving joint tenant or tenant by the entirety with a right of survivorship in the property is a successor in interest as defined in § 1026.2(a)(27)(i).

2. *Beneficiaries of* inter vivos *trusts.* In the event of a transfer into an *inter vivos* trust in which the consumer is and remains a beneficiary and which does not relate to a transfer of rights of occupancy in the property, the beneficiaries of the *inter vivos* trust rather than the *inter vivos* trust itself are considered to be the successors in interest for purposes of § 1026.2(a)(27)(i). For example, assume Consumer A transfers her home into such an *inter vivos* trust for the benefit of her spouse and herself. As of the transfer date, Consumer A and her spouse are considered successors in interest and, upon confirmation, are consumers for purposes of certain provisions of this part. If the creditor has not released Consumer A from the loan obligation, Consumer A also remains a consumer more generally for purposes of this part.

* * * * *

Subpart C—Closed-End Credit

* * * * *

§ 1026.20 Disclosure requirements regarding post-consummation events.

* * * * *

20(e)(4) Form of disclosures.

* * * * *

3. *Modifications of disclosures.* The requirements of § 1026.20(e)(4) to

provide the § 1026.20(e) disclosures with the headings, content, order, and format substantially similar to model form H–29 in appendix H to this part do not preclude creditors and servicers from modifying the disclosures to accommodate particular consumer circumstances or transactions not addressed by the form or from adjusting the statement required by § 1026.20(e)(2)(ii)(A), concerning consequences if the consumer fails to pay property costs, to the circumstances of the particular consumer.

* * * * *

Subpart E—Special Rules for Certain Home Mortgage Transactions

* * * * *

§ 1026.36 Prohibited acts or practices and certain requirements for credit secured by a dwelling.

* * * * *

Paragraph 36(c)(1)(i).

* * * * *

4. *Temporary loss mitigation programs.* If a loan contract has not been permanently modified but the consumer has agreed to a temporary loss mitigation program, a periodic payment under § 1026.36(c)(1)(i) is the amount sufficient to cover principal, interest, and escrow (if applicable) for a given billing cycle under the loan contract, regardless of the payment due under the temporary loss mitigation program.

5. *Permanent loan modifications.* If a loan contract has been permanently modified, a periodic payment under § 1026.36(c)(1)(i) is an amount sufficient to cover principal, interest, and escrow (if applicable) for a given billing cycle under the modified loan contract.

* * * * *

Paragraph 36(c)(1)(iii).

* * * * *

2. *Payment requirements—Limitations.* Requirements for making payments must be reasonable; it should not be difficult for most consumers and potential successors in interest 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.

* * * * *

§ 1026.41 Periodic Statements for Residential Mortgage Loans.

* * * * *

41(a) In general.

1. *Recipient of periodic statement.* When two consumers are joint obligors with primary liability on a closed-end consumer credit transaction secured by a dwelling subject to § 1026.41, the periodic statement may be sent to either one of them. For example, if spouses jointly own a home, the servicer need not send statements to both spouses; a single statement may be sent.

* * * * *

41(c) Form of the periodic statement.

* * * * *

5. *Permissible changes.* Servicers may modify the sample forms for periodic statements provided in appendix H–30 of this part to remove language that could suggest liability under the mortgage loan agreement if such language is not applicable. For example, in the case of a confirmed successor in interest who has not assumed the mortgage loan obligation under State law and is not otherwise liable on the mortgage loan obligation, a servicer may modify the forms to:

i. Use ''this mortgage'' or ''the mortgage'' instead of ''your mortgage.''

ii. Use ''The payments on this mortgage are late'' instead of ''You are late on your mortgage payments.''

iii. Use ''This is the amount needed to bring the loan current'' instead of ''You must pay this amount to bring your loan current.''

41(d) Content and layout of the periodic statement.

1. *Close proximity.* Section 1026.41(d) requires several disclosures to be provided in close proximity to one another. To meet this requirement, the items to be provided in close proximity must be grouped together, and set off from other groupings of items. This may 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 unrelated text between them. Text is unrelated if it does not explain or expand upon the required disclosures.

* * * * *

4. *Temporary loss mitigation programs.* If the consumer has agreed to a temporary loss mitigation program, the disclosures required by § 1026.41(d)(2), (3), and (5) regarding how payments were and will be applied must identify how payments are applied according to the loan contract, regardless of the temporary loss mitigation program.

5. *First statement after exemption terminates.* Section 1026.41(d)(2)(ii), (d)(3)(i), and (d)(4) requires the disclosure of the total sum of any fees or charges imposed since the last statement, the total of all payments received since the last statement, including a breakdown of how payments were applied, and a list of all transaction activity since the last statement. For purposes of the first periodic statement provided to the consumer following termination of an exemption under § 1026.41(e), the disclosures required by § 1026.41(d)(2)(ii), (d)(3)(i), and (d)(4) may be limited to account activity since the last payment due date that occurred while the exemption was in effect. For example, if mortgage loan payments are due on the first of each month and the servicer's exemption under § 1026.41(e) terminated on January 15, the first statement provided to the consumer after January 15 may be limited to the total sum of any fees or charges imposed, the total of all payments received, a breakdown of how the payments were applied, and a list of all transaction activity since January 1.

41(d)(1) Amount due.

1. *Acceleration.* If the balance of a mortgage loan has been accelerated but the servicer will accept a lesser amount to reinstate the loan, the amount due under § 1026.41(d)(1) must identify only the lesser amount that will be accepted to reinstate the loan. The periodic statement must be accurate when provided and should indicate, if applicable, that the amount due is accurate only for a specified period of time. For example, the statement may include language such as ''as of [date]'' or ''good through [date]'' and provide an amount due that will reinstate the loan as of that date or good through that date, respectively.

2. *Temporary loss mitigation programs.* If the consumer has agreed to a temporary loss mitigation program, the amount due under § 1026.41(d)(1) may identify either the payment due under the temporary loss mitigation program or the amount due according to the loan contract.

3. *Permanent loan modifications.* If the loan contract has been permanently modified, the amount due under § 1026.41(d)(1) must identify only the amount due under the modified loan contract.

41(d)(2) Explanation of amount due.

1. *Acceleration.* If the balance of a mortgage loan has been accelerated but the servicer will accept a lesser amount to reinstate the loan, the explanation of amount due under § 1026.41(d)(2) must list both the reinstatement amount that is disclosed as the amount due and the accelerated amount but not the monthly payment amount that would otherwise be required under § 1026.41(d)(2)(i). The periodic statement must also include an explanation that the reinstatement amount will be accepted to reinstate the loan through the ''as of [date]'' or ''good through [date],'' as applicable, along

with any special instructions for submitting the payment. The explanation should be on the front page of the statement or, alternatively, may be included on a separate page enclosed with the periodic statement. The explanation may include related information, such as a statement that the amount disclosed is ''not a payoff amount.''

2. *Temporary loss mitigation programs.* If the consumer has agreed to a temporary loss mitigation program and the amount due identifies the payment due under the temporary loss mitigation program, the explanation of amount due under § 1026.41(d)(2) must include both the amount due according to the loan contract and the payment due under the temporary loss mitigation program. The statement must also include an explanation that the amount due is being disclosed as a different amount because of the temporary loss mitigation program. The explanation should be on the front page of the statement or, alternatively, may be included on a separate page enclosed with the periodic statement or in a separate letter.

* * * * *

41(d)(8) Delinquency information.

1. *Length of delinquency.* For purposes of § 1026.41(d)(8), the length of a consumer's delinquency is measured as of the date of the periodic statement or the date of the written notice provided under § 1026.41(e)(3)(iv). A consumer's delinquency begins on the date an amount sufficient to cover a periodic payment of principal, interest, and escrow, if applicable, becomes due and unpaid, even if the consumer is afforded a period after the due date to pay before the servicer assesses a late fee. A consumer is delinquent if one or more periodic payments of principal, interest, and escrow, if applicable, are due and unpaid.

2. *Application of funds.* For purposes of § 1026.41(d)(8), if a servicer applies payments to the oldest outstanding periodic payment, a payment by a delinquent consumer advances the date the consumer's delinquency began. For example, assume a mortgage loan obligation under which a consumer's periodic payment is due on the first of each month. A consumer fails to make a payment on January 1 but makes a periodic payment on February 3. The servicer applies the payment received on February 3 to the outstanding January payment. On February 4, the consumer is three days delinquent, and the next periodic statement should disclose the length of the consumer's delinquency using February 2 as the first day of delinquency.

41(e) Exemptions.

* * * * *

41(e)(5) Certain consumers in bankruptcy.

1. *Consumer's representative.* If an agent of the consumer, such as the consumer's bankruptcy counsel, submits a request under § 1026.41(e)(5)(i)(B)(*1*) or (e)(5)(ii), the request is deemed to be submitted by the consumer.

2. *Multiple requests.* A consumer's most recent written request under § 1026.41(e)(5)(i)(B)(*1*) or (e)(5)(ii) that the servicer cease or continue, as applicable, providing a periodic statement or coupon book determines whether the exemption in § 1026.41(e)(5)(i) applies.

3. *Effective upon receipt.* A consumer's written request under § 1026.41(e)(5)(i)(B)(*1*) or (e)(5)(ii) is effective as of the date of receipt by the servicer.

4. *Bankruptcy case revived.* If a consumer's bankruptcy case is revived, for example, if the court reinstates a previously dismissed case or reopens a case, § 1026.41(e)(5) may apply again, including the timing requirements in § 1026.41(e)(5)(iv).

41(e)(5)(i) Exemption.

1. *Multiple obligors.* When two or more consumers are joint obligors with primary liability on a mortgage loan subject to § 1026.41, § 1026.41(e)(5)(i) applies if any one of the consumers meets its criteria. For example, assume that two spouses jointly own a home and are primary obligors on the mortgage loan. One spouse files for chapter 13 bankruptcy and has a bankruptcy plan that provides for surrendering the dwelling that secures the mortgage loan. In part, § 1026.41(e)(5)(i) exempts the servicer from providing a periodic statement with regard to that mortgage loan, unless one of the spouses requests in writing that the servicer provide a periodic statement or coupon book pursuant to § 1026.41(e)(5)(ii). If either spouse, including the one who is not a debtor in bankruptcy, submits a written request to receive a periodic statement or coupon book, the servicer must provide a periodic statement or coupon book for that mortgage loan account.

Paragraph 41(e)(5)(i)(B)(2).

1. *Bankruptcy plan.* For purposes of § 1026.41(e)(5)(i)(B)(*2*), bankruptcy plan refers to the consumer's most recently filed bankruptcy plan under the applicable provisions of title 11 of the United States Code, regardless of whether the court overseeing the consumer's bankruptcy case has confirmed or approved the plan.

Paragraph 41(e)(5)(i)(B)(4).

1. *Statement of intention.* For purposes of § 1026.41(e)(5)(i)(B)(*4*), the statement of intention refers to the consumer's most recently filed statement of intention. For example, if a consumer files a statement of intention on June 1 identifying an intent to surrender the dwelling securing the mortgage loan but files an amended statement of intention on June 15 identifying an intent to retain the dwelling, the consumer's June 15 statement of intention is the relevant filing for purposes of § 1026.41(e)(5)(i)(B)(*4*).

41(e)(5)(ii) Reaffirmation or consumer request to receive statement or coupon book.

1. *Form of periodic statement or coupon book.* Section 1026.41(e)(5)(ii) generally requires a servicer, notwithstanding § 1026.41(e)(5)(i), to resume providing a periodic statement or coupon book if the consumer in bankruptcy reaffirms personal liability for the mortgage loan or any consumer on the mortgage loan requests in writing that the servicer provide a periodic statement or coupon book. Whether a servicer provides a periodic statement or coupon book as modified by § 1026.41(f) or an unmodified periodic statement or coupon book depends on whether or not § 1026.41(f) applies to that mortgage loan at that time. For example, § 1026.41(f) does not apply with respect to a mortgage loan once the consumer has reaffirmed personal liability; therefore, following a consumer's reaffirmation, a servicer generally would provide a periodic statement or coupon book that complies with § 1026.41 but without the modifications set forth in § 1026.41(f). *See* comment 41(f)–6. Section 1026.41(f) does apply, however, with respect to a mortgage loan following a consumer's written request to receive a periodic statement or coupon book, so long as any consumer on the mortgage loan remains in bankruptcy or has discharged personal liability for the mortgage loan; accordingly, following that written request, a servicer must provide a periodic statement or coupon book that includes the modifications set forth in § 1026.41(f).

41(e)(5)(iv) Timing of compliance following transition.

41(e)(5)(iv)(A) Triggering events for transitioning to modified and unmodified periodic statements.

1. *Section 1026.41(f) becomes applicable or ceases to apply.* Section 1026.41(e)(5)(iv) sets forth the time period in which a servicer must provide

a periodic statement or coupon book for the first time after a mortgage loan either becomes subject to the requirements of § 1026.41(f) or ceases to be subject to the requirements of § 1026.41(f). A mortgage loan becomes subject to the requirements of § 1026.41(f) when, for example, any consumer on the mortgage loan becomes a debtor in bankruptcy or discharges personal liability for the mortgage loan. A mortgage loan may cease to be subject to the requirements of § 1026.41(f) when, for example, the consumer in bankruptcy reaffirms personal liability for a mortgage loan or the consumer's bankruptcy case is closed or dismissed without the consumer having discharged personal liability for the mortgage loan. *See* comment 41(f)–6.

2. *Servicer ceases to qualify for an exemption.* Section 1026.41(e)(5)(iv) sets forth the time period in which a servicer must provide a periodic statement or coupon book for the first time after a servicer ceases to qualify for an exemption pursuant to § 1026.41(e)(5)(i) with respect to a mortgage loan. A servicer ceases to qualify for an exemption pursuant to § 1026.41(e)(5)(i) with respect to a mortgage loan when, for example:

i. The consumer's bankruptcy case is dismissed or closed without the consumer having discharged personal liability for the mortgage loan;

ii. The consumer files an amended bankruptcy plan or statement of intention that provides, as applicable, for the maintenance of payments due under the mortgage loan and the payment of pre-petition arrearage or that the consumer will retain the dwelling securing the mortgage loan;

iii. A consumer makes a partial or periodic payment on the mortgage loan despite the consumer in bankruptcy having filed a statement of intention identifying an intent to surrender the dwelling securing the mortgage loan, thus making § 1026.41(e)(5)(i)(B)(*4*) inapplicable;

iv. The consumer in bankruptcy reaffirms personal liability for the mortgage loan; or

v. The consumer submits a written request pursuant to § 1026.41(e)(ii) that the servicer resume providing a periodic statement or coupon book.

41(e)(5)(iv)(B) Transitional single-billing-cycle exemption.

1. An exemption under § 1026.41(e)(5)(iv) applies for only the first billing cycle that occurs after one of the events listed in § 1026.41(e)(5)(iv)(A) occurs. If a servicer is required to provide a periodic statement or coupon book, the servicer must do so beginning with the next billing cycle in accordance with the timing provisions of § 1026.41(e)(5)(iv)(C).

41(e)(5)(iv)(C) Timing of first modified or unmodified statement or coupon book after transition.

1. *Reasonably prompt time.* Section 1026.41(e)(5)(iv)(C) requires that, when one of the events listed in § 1026.41(e)(5)(iv)(A) occurs, a servicer must provide the next periodic statement or coupon book by delivering or placing it in the mail within a reasonably prompt time after the next payment due date, or the end of any courtesy period for the payment's corresponding billing cycle, that is more than 14 days after the date on which the applicable event listed in § 1026.41(e)(5)(iv)(A) occurs. Delivering, emailing, or placing the periodic statement or coupon book in the mail within four days after the payment due date or the end of the courtesy period generally would be considered reasonably prompt. *See* comment 41(b)–1.

2. *Subsequent periodic statements or coupon books.* Section 1026.41(e)(5)(iv)(C) applies to the timing of only the first periodic statement or coupon book a servicer provides after one of the events listed in § 1026.41(e)(5)(iv)(A) occurs. For subsequent billing cycles, a servicer must provide a periodic statement or coupon book in accordance with the timing requirements of § 1026.41(a)(2) and (b), as applicable.

3. *Duplicate coupon books not required.* With respect to coupon books, § 1026.41 requires a servicer to provide a new coupon book after one of the events listed in § 1026.41(e)(5)(iv)(A) occurs only to the extent the servicer has not previously provided the consumer with a coupon book that covered the upcoming billing cycle.

41(e)(6) Charged-off loans.

1. *Change in ownership.* If a charged-off mortgage loan is subsequently purchased, assigned, or transferred, § 1026.39(b) requires a covered person, as defined in § 1026.39(a)(1), to provide mortgage transfer disclosures. *See* § 1026.39.

2. *Change in servicing.* A servicer may take advantage of the exemption in § 1026.41(e)(6)(i), subject to the requirements of that paragraph, and may rely on a prior servicer's provision to the consumer of a periodic statement pursuant to § 1026.41(e)(6)(i)(B) unless the servicer provided the consumer a periodic statement pursuant to § 1026.41(a).

Paragraph 41(e)(6)(i)(B).

1. *Clearly and conspicuously.* Section 1026.41(e)(6)(i)(B) requires that the periodic statement be clearly and conspicuously labeled ''Suspension of Statements & Notice of Charge Off—Retain This Copy for Your Records'' and that it clearly and conspicuously provide certain explanations to the consumer, as applicable, but no minimum type size or other technical requirements are imposed. The clear and conspicuous standard generally requires that disclosures be in a reasonably understandable form and readily noticeable to the consumer. *See* comment 41(c)–1.

41(f) Modified periodic statements and coupon books for certain consumers in bankruptcy.

1. *Compliance after the bankruptcy case ends.* Except as provided in § 1026.41(e)(5), § 1026.41(f) applies with regard to a mortgage loan for which any consumer with primary liability is a debtor in a case under title 11 of the United States Code. After the debtor exits bankruptcy, § 1026.41(f) continues to apply if the consumer has discharged personal liability for the mortgage loan, but § 1026.41(f) does not apply if the consumer has reaffirmed personal liability for the mortgage loan or otherwise has not discharged personal liability for the mortgage loan.

2. *Terminology.* With regard to a periodic statement provided under § 1026.41(f), a servicer may use terminology other than that found on the sample periodic statements in appendix H–30, so long as the new terminology is commonly understood. *See* comment 41(d)–3. For example, a servicer may take into account terminology appropriate for consumers in bankruptcy and refer to the ''amount due'' identified in § 1026.41(d)(1), as the ''payment amount.'' Similarly, a servicer may refer to an amount past due identified in § 1026.41(d)(2)(iii) as ''past unpaid amount.'' Additionally, a servicer may refer to the delinquency information required by § 1026.41(d)(8) as an ''account history,'' and to the amount needed to bring the loan current, referred to in § 1026.41(d)(8)(vi) as ''the total payment amount needed to bring the account current,'' as ''unpaid amount.''

3. *Other periodic statement requirements continue to apply.* The requirements of § 1026.41, including the content and layout requirements of § 1026.41(d), apply unless modified expressly by § 1026.41(e)(5) or (f). For example, the requirement under § 1026.41(d)(3) to disclose a past payment breakdown applies without modification with respect to a periodic statement provided to a consumer in bankruptcy.

4. *Further modifications.* A periodic statement or coupon book provided under § 1026.41(f) may be modified as necessary to facilitate compliance with title 11 of the United States Code, the Federal Rules of Bankruptcy Procedure, court orders, and local rules, guidelines, and standing orders. For example, a periodic statement or coupon book may include additional disclosures or disclaimers not required under § 1026.41(f) but that are related to the consumer's status as a debtor in bankruptcy or that advise the consumer how to submit a written request under § 1026.41(e)(5)(i)(B)(*1*). *See* comment 41(f)(3)–1.ii for a discussion of the treatment of a bankruptcy plan that modifies the terms of the mortgage loan, such as by reducing the outstanding balance of the mortgage loan or altering the applicable interest rate.

5. *Commencing compliance.* A servicer must begin to provide a periodic statement or coupon book that complies with paragraph (f) of this section within the timeframe set forth in § 1026.41(e)(5)(iv).

6. *Reaffirmation.* For purposes of § 1026.41(f), a consumer who has reaffirmed personal liability for a mortgage loan is not considered to be a debtor in bankruptcy.

41(f)(3) Chapter 12 and chapter 13 consumers.

1. *Pre-petition payments and post-petition payments.* i. For purposes of § 1026.41(f)(3), pre-petition payments are payments made to cure the consumer's pre-bankruptcy defaults, and post-petition payments are payments made to satisfy the mortgage loan's periodic payments as they come due after the bankruptcy case is filed. For example, assume a consumer is $3,600 in arrears as of the bankruptcy filing date on a mortgage loan requiring monthly periodic payments of $2,000. The consumer's most recently filed bankruptcy plan requires the consumer to make payments of $100 each month for 36 months to pay the pre-bankruptcy arrearage, and $2,000 each month to satisfy the monthly periodic payments. Assuming the consumer makes the payments according to the plan, the $100 payments are the pre-petition payments and the $2,000 payments are the post-petition payments for purposes of the disclosures required under § 1026.41(f)(3).

ii. If a consumer is a debtor in a case under chapter 12 or if a consumer's bankruptcy plan modifies the terms of the mortgage loan, such as by reducing the outstanding balance of the mortgage loan or altering the applicable interest rate, the disclosures under § 1026.41(d)(1) and (2) and (f)(3)(ii) and (iii) may disclose either the amount payable under the original terms of the mortgage loan, the amount payable under the remaining secured portion of the adjusted mortgage loan, or a statement that the consumer should contact the trustee or the consumer's attorney with any questions about the amount payable. In such cases, the remaining disclosures under § 1026.41(d) or (f)(3), as applicable, may be limited to how payments are applied to the remaining secured portion of the adjusted mortgage loan.

2. *Post-petition fees and charges.* For purposes of § 1026.41(f)(3), post-petition fees and charges are those fees and charges imposed after the bankruptcy case is filed. To the extent that the court overseeing the consumer's bankruptcy case requires such fees and charges to be included as an amendment to a servicer's proof of claim, a servicer may include such fees and charges in the balance of the pre-petition arrearage under § 1026.41(f)(3)(v)(C) rather than treating them as post-petition fees and charges for purposes of § 1026.41(f)(3).

3. *First statement after exemption terminates.* Section § 1026.41(f)(3)(iii) through (v) requires, in part, the disclosure of certain information regarding account activity that has occurred since the last statement. For purposes of the first periodic statement provided to the consumer following termination of an exemption under § 1026.41(e), those disclosures regarding account activity that has occurred since the last statement may be limited to account activity since the last payment due date that occurred while the exemption was in effect. *See* comment 41(d)–5.

41(f)(3)(ii) Amount due.

1. *Amount due.* The amount due under § 1026.41(d)(1) is not required to include any amounts other than post-petition payments the consumer is required to make under the terms of a bankruptcy plan, including any past due post-petition payments, and post-petition fees and charges that a servicer has imposed. The servicer is not required to include in the amount due any pre-petition payments due under a bankruptcy plan or other amounts payable pursuant to a court order. The servicer is not required to include in the amount due any post-petition fees and charges that the servicer has not imposed. A servicer that defers collecting a fee or charge until after complying with the Federal Rule of Bankruptcy Procedure 3002.1 procedures, and thus after a potential court determination on whether the fee or charge is allowed, is not required to disclose the fee or charge until complying with such procedures. However, a servicer may include in the amount due other amounts due to the servicer that are not post-petition payments or fees or charges, such as amounts due under an agreed order, provided those other amounts are also disclosed in the explanation of amount due and transaction activity.

41(f)(3)(iii) Explanation of amount due.

1. *Explanation of amount due.* The explanation of amount due under § 1026.41(d)(2) is not required to include any amounts other than the post-petition payments, including the amount of any past due post-petition payments and post-petition fees and charges that a servicer has imposed. Consistent with § 1026.41(d)(3)(i), the post-petition payments must be broken down by the amount, if any, that will be applied to principal, interest, and escrow. The servicer is not required to disclose, as part of the explanation of amount due, any pre-petition payments or the amount of the consumer's pre-bankruptcy arrearage. However, a servicer may identify other amounts due to the servicer provided those amounts are also disclosed in the amount due and transaction activity. *See* comment 41(d)–4.

41(f)(3)(v) Pre-petition arrearage.

1. *Pre-petition arrearage.* If the pre-petition arrearage is subject to dispute, or has not yet been determined by the servicer, the periodic statement may include a statement acknowledging the unresolved amount of the pre-petition arrearage. A servicer may omit the information required by § 1026.41(f)(3)(v) from the periodic statement until such time as the servicer has had a reasonable opportunity to determine the amount of the pre-petition arrearage. The servicer may not omit the information required by § 1026.41(f)(3)(v) from the periodic statement after the date that the bankruptcy court has fixed for filing proofs of claim in the consumer's bankruptcy case.

41(f)(4) Multiple obligors.

1. *Modified statements.* When two or more consumers are joint obligors with primary liability on a mortgage loan subject to § 1026.41, a servicer may send the periodic statement to any one of the primary obligors. *See* comment 41(a)–1. Section 1026.41(f)(4) provides that a servicer may provide a modified statement under § 1026.41(f), if applicable, to any or all of the primary obligors, even if a primary obligor to whom the servicer provides the modified statement is not a debtor in bankruptcy. The servicer need not provide an unmodified statement to any

of the primary obligors. For example, assume that two spouses jointly own a home and are both primarily liable on the mortgage loan. One spouse files for chapter 13 bankruptcy, and that spouse's chapter 13 bankruptcy plan provides that the same spouse will retain the home by making pre-petition and post-petition payments. The servicer complies with § 1026.41 by providing the modified periodic statement under § 1026.41(f) to either spouse.

2. *Obligors in different chapters of bankruptcy.* If two or more consumers are joint obligors with primary liability on a mortgage loan subject to § 1026.41 and are debtors under different chapters of bankruptcy, only one of which is subject to § 1026.41(f)(3), a servicer may, but need not, include the modifications set forth in § 1026.41(f)(3). For example, assume one joint obligor is a debtor in a case under chapter 7 and another joint obligor is a debtor in a case under chapter 13, and that the servicer is not exempt from the periodic statement requirement under § 1026.41(e)(5). The periodic statement or coupon book is subject to the modifications set forth in § 1026.41(f)(1) and (2), but the servicer may determine whether it is appropriate to include the modifications set forth in § 1026.41(f)(3).

* * * * *

Dated: August 2, 2016.

Richard Cordray,

Director, Bureau of Consumer Financial Protection.

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45 CFR Part 170

ONC Health IT Certification Program: Enhanced Oversight and Accountability; Final Rule

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

45 CFR Part 170

RIN 0955–AA00

ONC Health IT Certification Program: Enhanced Oversight and Accountability

AGENCY: Office of the National Coordinator for Health Information Technology, Department of Health and Human Services.

ACTION: Final rule.

SUMMARY: This final rule finalizes modifications and new requirements under the ONC Health IT Certification Program (''Program''), including provisions related to the Office of the National Coordinator for Health Information Technology (ONC)'s role in the Program. The final rule creates a regulatory framework for ONC's direct review of health information technology (health IT) certified under the Program, including, when necessary, requiring the correction of non-conformities found in health IT certified under the Program and suspending and terminating certifications issued to Complete EHRs and Health IT Modules. The final rule also sets forth processes for ONC to authorize and oversee accredited testing laboratories under the Program. In addition, it includes provisions for expanded public availability of certified health IT surveillance results.

DATES: These regulations are effective December 19, 2016.

The incorporation by reference of the publication listed in the rule is approved by the Director of the Federal Register as of December 19, 2016.

FOR FURTHER INFORMATION CONTACT: Michael Lipinski, Office of Policy, Office of the National Coordinator for Health Information Technology, 202–690–7151.

SUPPLEMENTARY INFORMATION:

Commonly Used Acronyms

CAP Corrective Action Plan
CEHRT Certified Electronic Health Record Technology
CFR Code of Federal Regulations
CHPL Certified Health IT Product List
EHR Electronic Health Record
HHS Department of Health and Human Services
HIT Health Information Technology
ISO/IEC International Organization for Standardization/International Electrotechnical Commission
NVLAP National Voluntary Laboratory Accreditation Program
OMB Office of Management and Budget
ONC Office of the National Coordinator for Health Information Technology
ONC–ACB ONC-Authorized Certification Body
ONC–ATCB ONC-Authorized Testing and Certification Body
ONC–ATL ONC-Authorized Testing Laboratory
PoPC Principles of Proper Conduct

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I. Executive Summary

A. Purpose of Regulatory Action

The ONC Health IT Certification Program (''Program'') was first established as the Temporary Certification Program in a final rule published on June 24, 2010 (''Temporary Certification Program final rule'' (75 FR 36158)). It was later transitioned to the Permanent Certification Program in a final rule published on January 7, 2011 (''Permanent Certification Program final rule'' (76 FR 1262)). Since that time, we have updated the Program and made modifications to the Program through subsequent rules as discussed below.

In November 2011, a final rule established a process for ONC to address instances where the ONC-Approved Accreditor (ONC–AA) has engaged in improper conduct or has failed to perform its responsibilities under the Program (76 FR 72636). In September 2012, a final rule (''2014 Edition final rule'' (77 FR 54163)) established an edition of certification criteria and modified the Program to, among other things, provide clear implementation direction to ONC-Authorized Certification Bodies (ONC–ACBs) for certifying Health IT Modules to new certification criteria. On September 11, 2014, a final rule provided certification flexibility through the adoption of new certification criteria and further improvements to the Program (''2014 Edition Release 2 final rule'' (79 FR 54430)). On October 16, 2015, the Department of Health and Human Services (HHS) published a final rule that identified how health IT certification can support the establishment of an interoperable nationwide health information infrastructure through the certification and adoption of new and updated vocabulary and content standards for the structured recording and exchange of health information (''2015 Edition final rule'' (80 FR 62602)). The 2015 Edition final rule modified the Program to make it open and accessible to more types of health IT, and health IT that supports various care and practice settings. It also included enhanced surveillance, disclosure, and other requirements. These requirements were designed to support the reliability of health IT certified under the Program and increase the transparency of information about such health IT (referred to as ''certified health IT'' throughout this final rule).

With each Program modification and rule, we continue to address stakeholder concerns, provide additional guidance, and improve oversight. In keeping with this approach, in the ''ONC Health IT Certification Program: Enhanced Oversight and Accountability'' proposed rule (81 FR 11056) (''Proposed Rule'') we put forth several new proposals for comment, based on feedback from stakeholders and our own experience administering the Program. Importantly, we explained that the adoption and use of certified health IT has increased significantly since the Program was established, and that this trend will continue, including for settings and use cases beyond the Medicare and Medicaid EHR Incentive Programs (''EHR Incentive Programs''). As certified health IT becomes more integral to the delivery of care, and as certified capabilities increasingly interact with other capabilities in certified health IT and with other products, we seek to strengthen oversight of the performance of certified health IT capabilities and ensure that concerns within the scope of the Program continue to be appropriately addressed.

We explained in the Proposed Rule that we had delegated authority to ONC–ACBs to issue certifications for health IT on our behalf through the Permanent Certification Program final rule (81 FR 11057). In addition to issuing and administering certifications, ONC–ACBs are responsible for conducting ongoing surveillance to assess whether certified health IT continues to conform to the requirements of the Program. An ONC–ACB's surveillance encompasses conformity assessments based on adopted certification criteria as well as certain other regulatory requirements (*e.g.,* §§ 170.523(k) and (l)). However, under this approach, which is consistent with customary certification programs and International Organization for Standardization/International Electrotechnical Commission 17065:2012 (ISO/IEC 17065),[1] ONC–ACBs do not have the responsibility to address the full range of requirements applicable to health IT certified under the Program. For example, an ONC–ACB's conformity assessment may not encompass certain interactions among certified capabilities and other capabilities or products that are not certified under the Program. Similarly, an ONC–ACB's assessment of certified capabilities may be limited to certain functional outcomes and may not encompass the combined or overall performance of certified health IT in accordance with Program requirements. Separately, in some instances an ONC–ACB may be responsible for administering Program requirements but may be unable to do so effectively due to practical challenges. In contrast, ONC is well-positioned to review certified health IT against the full range of requirements under the Program. Therefore, to enhance Program oversight and the reliability and safety of certified health IT, we have finalized provisions of the Proposed Rule that set forth a regulatory framework for ONC to directly review certified health IT and take appropriate responsive actions to address potential non-conformities and non-conformities.

The direct review processes included in this final rule will enhance the National Coordinator's ability to discharge his or her responsibilities under the Health Information Technology for Economic and Clinical Health (HITECH) Act. The HITECH Act amended the Public Health Service Act (PHSA) and created ''Title XXX—Health Information Technology and Quality'' (Title XXX) to improve health care quality, safety, and efficiency through the promotion of health IT and electronic health information exchange. Section 3001(b) of the PHSA requires that the National Coordinator for Health Information Technology (National Coordinator) perform specified statutory duties, including keeping or recognizing a program or programs for the voluntary certification of health information technology (section 3001(c)(5) of the PHSA), in a manner consistent with the development of a nationwide health information technology infrastructure that allows for the electronic use and exchange of information and that: (1) Ensures that each patient's health information is secure and protected, in accordance with applicable law; (2) improves health care quality, reduces medical errors, reduces health disparities, and advances the delivery of patient-centered medical care; (3) reduces health care costs resulting from inefficiency, medical errors, inappropriate care, duplicative care, and incomplete information; (4) provides appropriate information to help guide medical decisions at the time and place of care; (5) ensures the inclusion of meaningful public input in such development of such infrastructure; (6) improves the coordination of care and information among hospitals, laboratories, physician offices, and other entities through an effective infrastructure for the secure and authorized exchange of health care information; (7) improves public health activities and facilitates the early identification and rapid response to public health threats and emergencies, including bioterror events and infectious disease outbreaks; (8) facilitates health and clinical research and health care quality; (9) promotes early detection, prevention, and management of chronic diseases; (10) promotes a more effective marketplace, greater competition, greater systems analysis, increased consumer choice, and improved outcomes in health care services; and (11) improves efforts to reduce health disparities. Consistent with these statutory requirements, this final rule establishes a regulatory framework for ONC's direct review of health IT certified under the Program.

This final rule also sets forth processes for ONC to timely and directly

[1] The international standard to which ONC–ACBs are accredited (*see also* 45 CFR 170.599(b)(3)).

address testing issues. These processes do not currently exist under the Program structure and would serve to align the testing structure with ONC's authorization and oversight of ONC–ACBs. In addition, this final rule would increase the transparency and availability of information about certified health IT through the publication of identifiable surveillance results. The publication of identifiable surveillance results will support further accountability of health IT developers to their customers and users of certified health IT.

B. Summary of Major Provisions

1. ONC Direct Review of Certified Health IT

This final rule provides a regulatory framework for ONC to directly review certified health IT to determine whether it conforms to the requirements of the Program. Under this framework, ONC's review of certified health IT will be independent of, and may be in addition to, ONC–ACBs' surveillance and other functions under the Program. ONC's review will focus on capabilities and aspects of health IT that are certified under the Program (referred to throughout this final rule as ''certified capabilities''), taking into consideration other relevant functionalities or products to the extent necessary to determine whether certified health IT is functioning in a manner consistent with Program requirements.

While the PHSA provides authority for ONC to directly review certified health IT in a broad range of circumstances, at this time we have finalized a regulatory framework for the exercise of such review in a more limited set of circumstances. This scope of review reflects the need to focus ONC's resources in areas that, at this time, are most vital to ensuring the integrity and effectiveness of the Program. It also complements the existing oversight and enforcement responsibilities of other government departments, agencies, and offices (referred to throughout this final rule as ''agencies'' or ''agency,'' as the context requires) that encourage compliance with Program requirements and promote accountability for the reliability and performance of health IT.

Specifically, this final rule establishes regulatory processes for ONC to exercise direct review of certified health IT, and take appropriate responsive actions, in two distinct sets of circumstances.

First, ONC may elect to directly review certified health IT when it has reason to believe that the certified health IT may not conform to the requirements of the Program because the certified health IT is causing or contributing to serious risks to public health or safety. Addressing the full range of these suspected non-conformities is beyond the scope of an ONC–ACB's expertise and responsibilities under the Program. In contrast, ONC has the authority to address the full range of requirements under the Program and, as we explained in the Proposed Rule, can effectively respond to these issues, quickly bringing to bear needed expertise and resources and coordinating activities with federal counterparts and other relevant entities to ensure a coordinated review and response (81 FR 11061).

Second, in addition to serious risks to public health or safety, ONC may elect to directly review certified health IT on the basis of other suspected non-conformities that, while within the scope of an ONC–ACB's responsibilities, present practical challenges that may prevent the ONC–ACB from effectively investigating the suspected non-conformity or providing an appropriate response. In particular, ONC may directly review certified health IT if a suspected non-conformity presents issues that may require access to certain confidential or other information that is unavailable to an ONC–ACB; may require concurrent or overlapping reviews by multiple ONC–ACBs; or may exceed the scope of an ONC–ACB's resources or expertise. We believe that ONC's review of certified health IT in these situations will help ensure the continued effective oversight and administration of the Program.

In response to comments received on the Proposed Rule, we have not at this time finalized regulatory processes by which ONC would directly review certified health IT solely on the basis of circumstances distinct from public health or safety concerns or in cases where practical challenges prevent an ONC–ACB from effectively investigating the suspected non-conformity or providing an appropriate response, as discussed above (*compare* 81 FR 11061). For example, at this time, the processes set forth in this rule do not establish that ONC will directly review certified health IT solely on the basis of a threat to the security or protection of patients' health information in violation of applicable law (*see* section 3001(b)(1) of the PHSA) or the risk of increasing health care costs resulting from, for example, inefficiency or incomplete information (*see* section 3001(b)(3) of the PHSA). We believe that other agencies are currently in the best position to provide effective oversight and enforcement with respect to such potential exigencies. We will continue to assess the need to exercise direct review in these additional circumstances, as necessary.

As mentioned above, in this final rule, we seek to align ONC's direct review of certified health IT with oversight and enforcement responsibilities of other agencies. We therefore clarify that ONC may decline to exercise review of certified health IT for any reason, including if it believes that other agencies may be better situated to respond to a suspected non-conformity. Additionally, to the extent permitted by law, ONC may coordinate and share information with other agencies, including agencies with applicable oversight or enforcement responsibilities, and may engage other persons and entities, as appropriate, to effectively respond to suspected problems or issues with certified health IT. We note that to the extent ONC engages in any efforts to identify or address non-conformities, such efforts and any resulting remediation (or the absence of such efforts or remediation) are not intended to impact the materiality of any non-conformity in a matter addressed by another agency; and nothing in this final rule is intended to supplant, delay, or in any way limit oversight or enforcement by other agencies, including any investigation, decision, legal action, or proceeding.

The final rule addresses actions ONC will take and procedures it will follow in the event that ONC's direct review of certified health IT substantiates a non-conformity. ONC will require corrective action for non-conformities and, when necessary, suspend, or terminate a certification issued to a Complete EHR or Health IT Module. Health IT developers will have the opportunity to appeal determinations by ONC to suspend or terminate certifications issued to health IT under the Program. Further, to protect the integrity of the Program and users of certified health IT, we have finalized a Certification Ban on the future certification of any of a health IT developer's health IT when the certification of one or more of the health IT developer's current Complete EHRs or Health IT Modules is: (1) Terminated by ONC; (2) withdrawn by an ONC–ACB because the health IT developer requested it to be withdrawn when the health IT developer's health IT was the subject of a potential non-conformity or non-conformity as determined by ONC; (3) withdrawn by an ONC–ACB because of a non-conformity with any of the certification criteria adopted by the Secretary at subpart C of this part; or (4) withdrawn by an ONC–ACB because the health IT developer requested it to be withdrawn when the health IT developer's health IT was the subject of surveillance for a certification criterion or criteria adopted by the Secretary at subpart C of this part, including pending surveillance (*e.g.,* the health IT developer received notice of pending randomized surveillance).

We emphasize that ONC's role in reviewing certified health IT will support greater accountability for health IT developers under the Program and provide greater confidence that health IT conforms to Program requirements when it is implemented, maintained, and used. We further emphasize that our first and foremost goal is to work with health IT developers to remedy any identified non-conformities of certified health IT in a timely manner.

2. ONC-Authorized Testing Laboratories

ONC will conduct direct oversight of testing labs under the Program in order to ensure that ONC oversight can be similarly applied at all stages of the Program. Unlike the processes already established for ONC–ACBs, we had not established a similar process for testing labs. Instead, we required in the Principles of Proper Conduct (PoPC) for ONC–ACBs that ONC–ACBs only accept test results from National Voluntary Laboratory Accreditation Program (NVLAP)-accredited testing labs. This requirement for ONC–ACBs has had the effect of requiring testing labs to be accredited by NVLAP to International Organization for Standardization/International Electrotechnical Commission 17025:2005 (General requirements for the competence of testing and calibration laboratories) (ISO/IEC 17025). As a result, there has effectively been no direct ONC oversight of NVLAP-accredited testing labs like there is for ONC–ACBs.

This final rule establishes means for ONC to have direct oversight of NVLAP-accredited testing labs by having them apply to become ONC-Authorized Testing Labs (ONC–ATLs). Specifically, the final rule establishes processes for authorizing, retaining, suspending, and revoking ONC-Authorized Testing Lab (ONC–ATL) status under the Program. These processes are similar to current ONC–ACB processes. The finalized changes will enable ONC to oversee and address testing and certification performance issues throughout the entire continuum of the Program in a precise and direct manner.

3. Transparency and Availability of Identifiable Surveillance Results

In furtherance of our efforts to increase the transparency and availability of information related to certified health IT, we have finalized an approach that will now require ONC–ACBs to make identifiable surveillance results publicly available on the Certified Health IT Product List (CHPL) on a quarterly basis. Posting identifiable surveillance results on the CHPL provides stakeholders with a more readily available means for accessing the results. The information required to be reported for identifiable surveillance results includes information specified in the Proposed Rule and the relevant information already required to be posted on the CHPL, when appropriate, as part of a corrective action plan (CAP).

The publication of identifiable surveillance results will enhance transparency and the accountability of health IT developers to their customers. The public availability of identifiable surveillance results will provide customers and users with valuable information about the continued conformity of certified health IT. While we expect that the prospect of publicly available identifiable surveillance results will motivate some health IT developers to improve their maintenance efforts, we believe that most published results will reassure customers and users of certified health IT. This is because, based on ONC–ACB surveillance results to date, certified health IT and health IT developers are maintaining conformity with certification criteria and Program requirements. The publishing of identifiable surveillance results will also provide more complete information by illuminating good performance and continued conformity; rather than only sharing non-conforming results, and when applicable, CAPs.

C. Costs and Benefits

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). A regulatory impact analysis (RIA) must be prepared for major rules with economically significant effects ($100 million or more in any one year). It has been determined that this final rule is an economically significant rule as the potential costs associated with this final rule could be greater than $100 million per year. Accordingly, we have prepared an RIA that to the best of our ability presents the costs and benefits of the final rule.

1. Costs

We have identified and estimated the potential monetary costs of this final rule for health IT developers, ONC–ATLs, the federal government (*i.e.,* ONC), and health care providers. We have categorized and addressed costs as follows: (1) Costs for health IT developers to correct non-conformities identified by ONC; (2) costs for ONC and health IT developers related to an ONC inquiry into certified health IT non-conformities and ONC direct review, including costs for the new ''proposed termination'' step; (3) costs for health IT developers and ONC associated with the appeal process following a suspension/termination of a Complete EHR's or Health IT Module's certification; (4) costs for health care providers to transition to another certified health IT product when the certification of a Complete EHR or Health IT Module that they currently use is terminated; (5) costs for ONC–ATLs and ONC associated with ONC–ATL accreditation, application, renewal, and reporting requirements; (6) costs for ONC–ATLs and ONC related to revoking ONC–ATL status; and (7) costs for ONC–ACBs to publicly report (submit) identifiable surveillance results to the CHPL. We also provide an overall annual monetary cost estimate for this final rule. We note that we have rounded all estimates to the nearest dollar and all estimates are expressed in 2016 dollars.

This final rule may: (1) Lead health IT developers to reassess whether their certified health IT is in conformity with Program requirements; and (2) require health IT developers to correct non-conformities found by ONC in their certified health IT. If ONC were to find a non-conformity with a certified capability under the direct review processes outlined in this final rule, then the costs to correct the non-conformity are a result of this final rule. However, due to the difficulty of projecting such instances given the underlying need to correct non-conformities, we have not been able to include these costs in our quantitative cost estimates, as discussed in greater detail in section VI.C.1.a.(1) of this final rule.

We have estimated the costs for ONC and health IT developers related to an ONC inquiry into certified health IT non-conformities and ONC direct review. We estimate the cost for a health IT developer to cooperate with an ONC review and inquiry into certified health IT would, on average, range from $9,819 to $98,192. We estimate the cost for ONC to review and conduct an inquiry into certified health IT would, on average, range from $2,455 to $147,288.

We have estimated the costs for health IT developers and ONC associated with the appeal process following a suspension/termination of a Complete EHR's or Health IT Module's certification. We estimate the cost for a health IT developer to appeal a suspension or termination would, on average, range from $9,819 to $29,458. We estimate the cost for ONC to conduct an appeal would, on average, range from $24,548 to $98,192.

We have estimated the costs for health care providers to transition to another certified health IT product if the certification of a Complete EHR or Health IT Module that they currently use is terminated. Specifically, we estimate the cost impact of certification termination on health care providers would range from $33,000 to $649,836,000 with a median cost of $792,000 and a mean cost of $6,270,000. We note, however, that it is very unlikely that the high end of our estimated costs would ever be realized. To date, there have been only a few terminations of certified health IT under the Program, which have only affected a small number of providers. Further, we have stated in this final rule our intent to work with health IT developers to correct non-conformities ONC finds in a developer's certified health IT under the provisions in this final rule. We provide a more detailed discussion of past certification terminations and the potential impacts of certification termination on providers in section VI.C.1.a.(4) of this final rule.

We have estimated the costs for ONC–ATLs and ONC associated with ONC–ATL accreditation, application, renewal, and reporting requirements. We estimate the annualized cost for ONC–ATL accreditation, application, and the first proposed three-year authorization period to be approximately $48,832. We estimate the annualized cost for an ONC–ATL to renew its accreditation, application, and authorization during the first three-year ONC–ATL authorization period to be approximately $73,053. In addition, we estimate the total annual cost for ONC–ATLs to meet the reporting requirements of proposed § 170.524(d) to be approximately $3,276.

We estimate ONC's annualized cost for administering the entire application process to be approximately $992. This cost will be the same for a new applicant or ONC–ATL renewal. We would also post the names of applicants granted ONC–ATL status on our Web site. We estimate the potential cost for posting and maintaining the information on our Web site to be approximately $446 annually. We estimate an annual cost to the federal government of $743 to record and maintain updates and changes reported by ONC–ATLs.

We have estimated the costs for ONC–ATLs and ONC related to revoking ONC–ATL status. We estimate the costs for an ONC–ATL to comply with ONC requests per § 170.565 would, on average, range from $2,455 to $19,638. We estimate the cost for ONC would, on average, range from $4,910 to $39,277.

We have estimated the costs for ONC–ACBs to submit identifiable surveillance results to the CHPL on a quarterly basis. We estimate the annual cost for each ONC–ACB to report surveillance results to the CHPL to be $1,024 and the total cost for all three ONC–ACBs to be $3,072.

We estimate the overall annual cost for this final rule, based on the cost estimates outlined above, will range from $171,011 to $650,352,050 with an average annual cost of $6,597,033. For a more detailed explanation of our methodology and estimated costs, please see section VI.C.1.a of this final rule.

2. Benefits

While we do not have available means to quantify the benefits of this final rule, we believe there are many qualitative benefits. This final rule's provisions for ONC direct review of certified health IT promote health IT developers' accountability for the performance, reliability, and safety of certified health IT; and facilitate the use of safer and reliable health IT by health care providers and patients. Specifically, ONC's direct review of certified health IT will facilitate ONC's assessment of non-conformities and ability to require comprehensive corrective actions for health IT developers to address non-conformities determined by ONC, including notifying affected customers. As previously stated, our first and foremost goal is to work with health IT developers to remedy any non-conformities with certified health IT in a timely manner and across all customers. If ONC ultimately suspends and/or terminates a certification issued to a Complete EHR or Health IT Module under the processes established in this final rule, such action will serve to protect the integrity of the Program, patients, and users of health IT. In sum, ONC's direct review of certified health IT supports the National Coordinator in fulfilling his or her responsibilities under the HITECH Act, instills public confidence in the Program, and protects public health and safety.

This final rule's provisions will also provide other benefits. ONC's authorization and oversight of testing labs (ONC–ATLs) will promote further public confidence in testing and certification by facilitating ONC's ability to timely and directly address testing issues for health IT. The public availability of identifiable surveillance results will enhance transparency and the accountability of health IT developers to their customers. It will provide customers and users of certified health IT with valuable information about the continued conformity of certified health IT. Further, the public availability of identifiable surveillance results will likely benefit health IT developers by providing a more complete context of surveillance in the certified health IT industry by illuminating good performance and the continued conformity of certified health IT with Program requirements. Overall, we believe this final rule will improve Program conformity as well as further public confidence in certified health IT.

II. Provisions of the Final Rule

A. ONC's Role Under the ONC Health IT Certification Program

In initially developing the Program, ONC consulted with the National Institute of Standards and Technology (NIST) and created the Program structure based on industry best practice. This structure includes the use of two separate accreditation bodies: (1) An accreditor that evaluates the competency of a health IT testing laboratory to operate a testing program in accordance with international standards; and (2) an accreditor that evaluates the competency of a health IT certification body to operate a certification program in accordance with international standards (*see* the Permanent Certification Program final rule).

This final rule updates the structure of the Program to provide enhanced Program oversight, accountability, and transparency. The rule establishes a regulatory framework that will help facilitate ONC's direct review of certified health IT in current priority areas, including by setting forth processes for such review and describing certain actions ONC may take to enforce Program requirements in appropriate circumstances. The rule also provides for direct ONC oversight of testing laboratories. These and other related provisions of the final rule are described in detail below.

1. Review of Certified Health IT

a. Authority and Scope

We proposed to adopt a regulatory framework that would help facilitate ONC's direct review of certified health IT in certain circumstances and enhance oversight and accountability in the Program (81 FR 11058). This review would be independent of, and could be in addition to, an ONC–ACB's surveillance and other functions under the Program and would complement the role of ONC–ACBs.

In the Proposed Rule, we explained that under the current structure of the Program, ONC–ACBs are responsible for issuing and administering certifications for health IT on behalf of ONC (81 FR 11057). In addition, ONC–ACBs are responsible for conducting ongoing surveillance to assess whether certified health IT continues to conform to the requirements of the Program. An ONC–ACB's surveillance encompasses conformity assessments based on adopted certification criteria as well as certain other regulatory requirements (*e.g.,* § 170.523(k) and (l)). However, under this approach, which is consistent with other certification programs and ISO/IEC 17065,[2] ONC–ACBs do not have the responsibility to address the full range of requirements applicable to health IT certified under the Program. For example, an ONC–ACB's conformity assessments may not encompass certain interactions among certified capabilities and other capabilities or products that are not certified under the Program. Similarly, an ONC–ACB's assessment of certified capabilities may address certain functional outcomes and may not encompass the combined or overall performance of certified health IT in accordance with Program requirements. Separately, in some instances an ONC–ACB may be responsible for administering Program requirements but ONC may be better suited to do so due to practical challenges.[3]

In the Proposed Rule, we outlined several situations in which, for these reasons, an ONC–ACB may be unable to provide oversight necessary to ensure that certified health IT meets Program requirements. We stated, for example, that ONC may be better situated to respond to certain types of non-conformities arising from interactions of certified and uncertified capabilities or from systemic, widespread, or complex issues that could quickly consume or exceed an ONC–ACB's resources or capacity (81 FR 11061). We also observed that in some instances ONC may have access to information about a putative non-conformity that is confidential and cannot be shared with an ONC–ACB (81 FR 11061). We explained that in some cases non-conformities with certified health IT may arise that pose risks to public health or safety or present other exigencies that may warrant ONC's direct review and action (81 FR 11061). Additionally, we noted that a suspected non-conformity may involve health IT or capabilities that have been certified by more than one ONC–ACB. In such a situation, we stated that ONC would be better suited to handle the review of the certified health IT as ONC–ACBs only have oversight of the health IT they certify, while ONC could ensure a more coordinated review and consistent determination. We explained that ONC is well-placed to effectively respond to these potential issues because of its broad authority to administer the full range of requirements under the Program, its ability to quickly marshal and deploy resources and specialized expertise, and its ability to provide a coordinated review and response that may involve other agencies. Therefore, to support ONC's oversight in these areas, we proposed to establish a framework and processes in rulemaking under which ONC may exercise its discretion to directly review certified health IT and take appropriate responsive action.

In the Proposed Rule, we stated that ONC's review of certified health IT could be based on any applicable Program requirements and as such would not be limited to requirements that ONC–ACBs are responsible for enforcing. We proposed that, while ONC would have broad discretion, it would consider the following factors in determining whether to initiate direct review of certified health IT:

- The potential nature, severity, and extent of the suspected non-conformity or non-conformities, including the likelihood of systemic or widespread issues and impact.
- The potential risk to public health or safety or other exigent circumstances.
- The need for an immediate and coordinated governmental response.
- Whether investigating, evaluating, or addressing the suspected non-conformity would require access to confidential or other information that is unavailable to an ONC–ACB; would present issues outside the scope of an ONC–ACB's accreditation; would exceed the resources or capacity of an ONC–ACB; or would involve novel or complex interpretations or application of certification criteria or other requirements.
- The potential for inconsistent application of certification requirements in the absence of direct review.

(*see* 81 FR 11061). We anticipated that ONC's direct review of certified health IT would be relatively infrequent and would focus on situations that pose a risk to public health or safety as well as other situations that present unique challenges or issues that ONC–ACBs may be unable to effectively address without ONC's assistance or intervention (based on consideration of the factors listed above). We stressed that our first and foremost desire would be to work with developers to address any non-conformities identified as a result of ONC's review.

Comments. We received mixed comments on our proposal to establish regulatory processes that would help facilitate ONC's direct review of certified health IT. Some commenters supported the proposal, emphasizing that direct review would address potential gaps in the Program, improve the safety and performance of health IT, and improve the effectiveness of the Program. Other commenters supported ONC's direct review of certified health IT, but within a narrower or more defined scope.

A significant number of commenters were opposed to the proposal or voiced strong concerns. Many of these commenters were opposed to ONC's reviewing the interaction of certified capabilities and uncertified capabilities. Commenters also stated that our proposal would create uncertainty by providing ONC with discretion to review certified health IT in a broad range of circumstances, without clear and predictable rules for assessing conformity to Program requirements. Commenters expressed fear that this broad discretion could lead to inconsistent or arbitrary application of requirements, create uncertainty for developers and other stakeholders, and impede progress and innovation in health IT. Some commenters also contested the authority for ONC to directly review certified health IT in the manner proposed.

Response. We thank commenters for their detailed feedback on this proposal.

[2] The international standard to which ONC–ACBs are accredited (*see also* 45 CFR 170.599(b)(3)).

[3] In certain circumstances, an ONC–ACB may encounter practical challenges that could prevent it from effectively investigating a suspected non-conformity or providing an appropriate response. This may occur where, for example, a suspected non-conformity presents issues that may require access to certain confidential or other information that is unavailable to an ONC–ACB; may require concurrent or overlapping reviews by multiple ONC–ACBs; or may exceed the scope of an ONC–ACB's resources or expertise. For a more detailed discussion of these circumstances, we refer readers to section II.A.1.a.(3) of this final rule and to the section II.B (''Summary of Major Provisions'').

We have finalized the proposal subject to the changes and clarifications summarized here for the convenience of the reader and described in more detail in our responses to the specific comments that follow.

The policy and approach we have finalized respond to emerging challenges identified by stakeholders, through consultation with NIST, and as a result of our experience administering the Program. In the more than six years since the Program was established, certified health IT has become widely adopted and is now integral to the delivery of patient care. At the same time, in response to growing market and regulatory demands for the exchange and use of electronic health information, the capabilities of certified health IT have become more varied, more advanced, and more interdependent with other health IT products and capabilities. These developments are encouraging and signal progress towards a more connected health system that can help transform health and care; yet for that to occur, the public must trust and have confidence in the nation's health IT infrastructure.

To effectively respond to these challenges, and for the National Coordinator to continue to meet his or her responsibilities under section 3001 of the PHSA, we are adopting a regulatory framework in this final rule to enhance the Program. As noted in the Proposed Rule, there are several areas in which ONC–ACBs may lack the responsibility, expertise, or resources to provide effective oversight of certified health IT. Importantly, certain kinds of non-conformities may be difficult to substantiate through technical conformity assessments of the kind ONC–ACBs are currently responsible for administering under the Program. In addition, practical challenges may arise for ONC–ACBs when non-conformities span multiple health IT products whose certifications are administered by more than one ONC–ACB; or where a failure of certified capabilities to perform in an acceptable manner occurs only in the context of the capabilities' interaction with other capabilities or products that are not certified under the Program. For example, some non-conformities may be so systemic, complex, or widespread that to isolate or effectively address them would quickly exceed an ONC–ACB's resources or expertise. In some cases, an ONC–ACB may be unaware of a non-conformity or may be unable to obtain the information necessary to effectively investigate and respond to a suspected non-conformity, such as when doing so would require access to certain confidential information that may be known to ONC but cannot be disclosed to the ONC–ACB.

These reasons support the need for ONC to directly administer Program requirements in appropriate circumstances. Further, the need is all the more compelling when one considers that certified capabilities may be impaired by failures or deficiencies that are not only beyond the reach of ONC–ACBs, but could cause or contribute to serious risks to public health or safety or lead to other outcomes that could significantly undermine public confidence in the health IT infrastructure, the successful development of which is the overriding purpose of the Program itself and of the duties of the National Coordinator under section 3001(c) of the PHSA.

For all of these reasons, we have finalized a regulatory framework that will facilitate ONC's direct review of certified health IT to determine whether it conforms to the requirements of the Program. In doing so, however, we have carefully considered and, where appropriate, accommodated concerns raised by commenters. In particular, while the PHSA provides authority for ONC to directly review certified health IT in a broad range of circumstances, the direct review processes finalized in this rule apply to a more limited set of circumstances in which ONC intends to focus its oversight at this time. This approach will concentrate ONC's resources in areas that at this time are most vital to ensuring the integrity and effectiveness of the Program. In addition, it will complement the existing oversight and enforcement responsibilities of other agencies, provide guidelines that will encourage compliance with Program requirements, and provide accountability for the performance and reliability of health IT. Specifically, this final rule establishes regulatory processes for ONC to exercise direct review of certified health IT, and take appropriate responsive actions, in two distinct sets of circumstances.

First, ONC may elect to directly review certified health IT when it has reason to believe that the certified health IT may not conform to the requirements of the Program because the certified health IT is causing or contributing to conditions that pose a serious risk to public health or safety. Addressing the full range of these suspected non-conformities is beyond the scope of an ONC–ACB's expertise and responsibilities under the Program. In contrast, ONC has the authority to address the full range of requirements under the Program and, as we explained in the Proposed Rule, can effectively respond to these issues, quickly bringing to bear needed expertise and resources and coordinating activities with federal counterparts and other relevant entities to ensure a coordinated review and response (81 FR 11061).

Second, in addition to serious risks to public health or safety, ONC may elect to directly review certified health IT on the basis of other suspected non-conformities that, while they are within the scope of an ONC–ACB's responsibilities, present practical challenges that may prevent the ONC–ACB from effectively investigating the suspected non-conformity or providing an appropriate response. In particular, ONC may directly review certified health IT if a suspected non-conformity presents issues that may require access to certain confidential or other information that is unavailable to an ONC–ACB; may require concurrent or overlapping reviews by multiple ONC–ACBs; or may exceed the scope of an ONC–ACB's resources or expertise. We believe that ONC's review of certified health IT in these circumstances is integral to ensuring the effective oversight and administration of the Program.

In response to comments received on the Proposed Rule, we have not at this time finalized a regulatory framework under which ONC would directly review certified health IT in circumstances other than those that raise public health or safety concerns, or those in which practical challenges prevent an ONC–ACB from effectively investigating a suspected non-conformity or providing an appropriate response, as discussed above (*compare* 81 FR 11061). For example, at this time, the regulatory framework set forth in this rule does not provide that ONC will directly review certified health IT solely on the basis of a threat to the security or protection of patients' health information in violation of applicable law (*see* section 3001(b)(1) of the PHSA) or the risk of increasing health care costs resulting from, for example, inefficiency or incomplete information (*see* section 3001(b)(3) of the PHSA). We believe that other agencies are currently in the best position to provide effective oversight and enforcement with respect to such potential exigencies. We will continue to assess the need to exercise direct review in these additional circumstances, as necessary.

Finally, in response to commenters' requests for additional clarity on certain provisions of the Proposed Rule, this final rule explains three key principles ONC will apply when deciding whether to initiate direct review of certified health IT and in determining whether certified health IT conforms to the requirements of the Program.

First, ONC's direct review of certified health IT—and any subsequent determination of non-conformity by ONC—would be based on a reasonable belief that health IT may be or is in violation of Program requirements. Contrary to the assertions of some commenters, these requirements have been clearly and consistently communicated to developers and do not impose new obligations under the Program. Indeed, in the 2015 Edition final rule, we explained that to comply with applicable certification criteria, developers must not only demonstrate required capabilities in a controlled testing environment but must also make those capabilities available in ways that enable them to be implemented and used in production environments for their intended purposes (80 FR 62711). That includes making certified capabilities available in a manner that does not cause or contribute to serious risks to public health or safety or to other outcomes that are inconsistent with the National Coordinator's responsibilities under section 3001(b) of the PHSA.

Second, while several commenters objected to our proposal to review uncertified capabilities, we believe that many of these commenters misunderstood the scope of what was proposed. We proposed and have finalized regulatory processes for ONC to review capabilities and aspects of health IT that are certified under the Program. Our consideration of uncertified capabilities would be ancillary to our review of certified capabilities and would be limited to the extent necessary to determine whether certified capabilities are functioning in a manner consistent with Program requirements.

Last, as we have previously explained in the context of an ONC–ACB's surveillance of certified health IT, a developer of certified health IT cannot be held responsible under the Program for putative non-conformities that are not reasonably within its ability to influence or control. This limiting principle applies with equal force to ONC's direct review of certified health IT under the Program.

The foregoing principles are consistent with those that have previously been established under the Program and ensure that ONC's review of certified health IT is consistent, follows clear and predictable guidelines, and is limited to issues that are within the scope of the Program. These principles and other aspects of ONC's direct review under this final rule are explained in greater detail in the responses to specific comments below. We also have included numerous examples to assist readers in understanding these concepts and the manner in which ONC would apply them in various circumstances.

(1) Requirements of the Program

Comments. Some commenters, primarily health IT developers, posited that ONC may lack the requisite authority to directly review or enforce Program requirements, or to do so in the manner proposed. Several of these commenters criticized our invocation of section 3001(b) of the PHSA, which expressly enumerates the core principles and requirements inherent to the purpose of ONC. Some commenters suggested that the provisions of section 3001(b) are general and aspirational and that Congress did not intend for them to have any operative effect. Alternatively, some commenters supposed that these provisions operate ''in the aggregate'' or on the performance of ONC's functions on the whole but are not relevant to the National Coordinator's responsibility to oversee the Program or to perform other specific duties enumerated in section 3001(c). In support of this view, commenters asserted that other sections of the PHSA speak directly to the scope of the Program and the rules by which it should operate. In particular, section 3001(c)(5)(A) directs the National Coordinator to keep or recognize a program or programs for the voluntary certification of health IT as being in compliance with applicable certification criteria; and sections 3002 through 3004 establish the HIT Policy Committee (HITPC) and HIT Standards Committee (HITSC) and a consultative process for developing, endorsing, and adopting standards, implementation specifications, and certification criteria for inclusion in the Program. According to some of these commenters, this statutory design precludes ONC from enforcing requirements under the Program unless those requirements are expressed in certification criteria adopted through the processes noted above.

In contrast to these comments, several commenters recognized ONC's authority to directly review certified health IT in the manner proposed. Multiple commenters explicitly recognized ONC's broad authority to establish certification programs and to directly review certified health IT against a wide range of requirements. One commenter stated that our proposal was an appropriate exercise of this authority because it did not take a broad brush approach and limited oversight to areas where there is a potential risk to health or safety or a gap in oversight that could result in harm.

Response. We agree that ONC's role under the Program must comport with the National Coordinator's statutory authority under the HITECH Act. As we stated in the Proposed Rule, direct review helps enable the National Coordinator to fulfill the statutory duties specified in section 3001(b) and (c)(5) of the PHSA as they relate to keeping a certification program for the voluntary certification of health IT that allows for the electronic use and exchange of information consistent with ONC's purposes. This includes ensuring that each patient's health information is secure and protected, in accordance with applicable law; improving health care quality; reducing medical errors; reducing health care costs resulting from inefficiency, medical errors, inappropriate care, duplicative care, and incomplete information; and promoting a more effective marketplace, greater competition, greater systems analysis, increased consumer choice, and improved outcomes in health care services (*see* section 3001(b) of the PHSA).

We respectfully disagree with the interpretation advanced by some commenters that the National Coordinator is not bound to observe these statutory dictates in the administration and oversight of the Program. By its plain language, section 3001(b) is an express mandate to the National Coordinator to perform the duties delegated to him or her in a manner consistent with the core principles and requirements enumerated in that section.

It is true that some of the core principles and requirements in section 3001(b) are more relevant to the performance of some of the National Coordinator's duties than others, and that not every one of them is relevant to the performance of all of the National Coordinator's duties at all times or in the same way. It is also true that many of the core principles are stated broadly and permit substantial latitude in determining how corresponding requirements are to be met. But neither of these observations indicates that section 3001(b) was intended to be inoperative, as some commenters have suggested. To the contrary, section 3001(b) is a logical and expedient way to give effect to the purpose of ONC, by enumerating the core principles and requirements that in turn provide the basic parameters by which the National Coordinator must perform his or her duties and functions.

Even were that premise open to question, there is another reason to doubt that Congress would have intended the National Coordinator to administer and oversee the Program in a manner divorced from section 3001(b) of the PHSA. The purpose of ONC and the core principles and requirements expressed in section 3001(b), and the language and structure of the HITECH Act as a whole, leave no doubt that Congress intended a critical role for health IT and the use and exchange of electronic health information in improving health, transforming care, and enabling new frontiers in research and scientific discovery. To achieve these ends, Congress, through the HITECH Act, established the EHR Incentive Programs to encourage the meaningful use of EHR technology certified by ONC. As commenters point out, Congress also specified formal processes and an advisory committee apparatus to assist the National Coordinator in endorsing and adopting certification criteria for use in the Program. Having placed the Program and the certification of health IT at the center of this plan for developing and advancing the goals of a nationwide health IT infrastructure, Congress would have expected the National Coordinator to ensure that the Program furthers those goals and does not permit certified health IT to perform in ways that subvert them.

Finally, we reject the assertion that ONC is precluded from enforcing requirements of the Program other than those expressed in certification criteria adopted under section 3004 of the PHSA. As we explained most recently in the 2015 Edition final rule, the established requirements of the Program are not limited to compliance with certification criteria (80 FR 62710). For example, developers must disclose known material information about limitations and additional types of costs associated with their certified health IT (§ 170.523(k)(1)); comply with rules governing the use of the ONC Certification and Design Mark (§ 170.523(l)); submit user complaints to ONC–ACBs (§ 170.523(n)); make certified capabilities available in ways that enable them to be implemented and used in production environments for their intended purposes (80 FR 62710); cooperate with an ONC–ACB's surveillance of their certified health IT (80 FR 62716); and cooperate with and not seek to prevent or discourage an ONC–ACB from reporting the results of its surveillance activities (80 FR 62718). We have also explained that certification under the Program is conditioned on a health IT developer's compliance with certain Program requirements—independent of any particular certification criteria—that are necessary to the basic integrity and effectiveness of the Program (80 FR 62710, n.170). We discuss these requirements and their regulatory history immediately below in response to requests from commenters for additional clarification of the Program's requirements.

The foregoing considerations and our experience implementing the statutory provisions at issue leave no question that the National Coordinator has a duty to ensure that the certification of health IT under the Program furthers and does not subvert the core principles and requirements directly applicable to the National Coordinator's duties as enumerated in section 3001(b) of the PHSA. At a minimum, that includes updating the Program as necessary to provide effective oversight over problems or deficiencies with certified health IT that could lead to risks to public health or safety or to other outcomes that are inconsistent with the National Coordinator's responsibilities. We believe that the regulatory approach to direct review set forth in this rule is integral to fulfilling that duty.

Comments. Many commenters stated that there is a need for greater clarity and consistency concerning the requirements to which developers will be held under the Program. Several commenters asked us to define the requirements of the Program more explicitly, including by providing a clear definition of non-conformity. Commenters noted that unpublished or generalized Program requirements could be a source of confusion for developers or of capricious application by ONC. This could have unintended consequences such as discouraging investment and innovation in health IT because developers and investors may be reluctant to pursue innovative technologies if regulatory requirements are unclear.

Response. We agree that it is important to clearly communicate the requirements of the Program so that developers can design and make their certified health IT available in a manner that consistently meets Program requirements and the expectations of purchasers and users of certified health IT. In response to the comments, we explain in greater detail the sources of those requirements and the principles that ONC and ONC–ACBs apply when assessing whether they have been met.

In the 2015 Edition Final Rule, we explained that a non-conformity arises when certified health IT fails to conform to the requirements of its certification under the Program (80 FR 62710). Those requirements take various forms and may apply to aspects of the design and performance of the health IT, the ability of the health IT to support required capabilities and uses, and the responsibility of developers to make certified capabilities available in ways that enable them to be implemented and used in production environments for their intended purposes (80 FR 62710).

The certification criteria adopted under section 3004 of the PHSA form the core of the Program. In the 2010 interim final rule entitled Health Information Technology: Initial Set of Standards, Implementation Specifications, and Certification Criteria for Electronic Health Record Technology (75 FR 2013) (''Interim Final Rule''), we defined certification criteria as criteria to establish that health IT meets applicable standards and implementation specifications adopted by the Secretary or that are used to test and certify that health IT includes required capabilities (75 FR 2021–22; *see also* § 170.102). To meet these certification criteria, health IT must be able to perform required specifications and capabilities and, more generally, to do so in an accurate and reliable manner. For example, health IT certified to § 170.315(a)(1) (Computerized provider order entry—medications) must ''[e]nable a user to record, change, and access medication orders.'' Satisfying this criterion also plainly requires that the health IT perform this function accurately and reliably. For example, when a user enters a medication order for a patient, the health IT must accurately record the medication ordered and associate it with the patient selected by the user. Similarly, when a user accesses a list of medication orders for a particular patient, the health IT must not display medication orders for a different patient.

While certification criteria define the required capabilities of certified health IT, ensuring that health IT can perform certified capabilities is not the only requirement of the Program. In the 2015 Edition final rule, we adopted Program requirements under which developers must disclose on an ongoing basis any known material information about limitations and additional types of costs associated with any certified capabilities of their health IT (80 FR 62720). We have also adopted other Program requirements such as those related to the use of the ONC Certification and Design Mark and the submission of complaints to ONC–ACBs (§ 170.523(l) and (n), respectively). Developers must also submit information that is required to be included on the CHPL (80 FR 62725).

Finally, in previous rulemakings we have highlighted that there are certain overarching requirements of the Program, in addition to those described above, that are necessary to ensuring its basic integrity and effectiveness (*see, e.g.,* 80 FR 62710 n.170), thereby ensuring that the National Coordinator can meet his or her responsibilities under section 3001(b) of the PHSA. These requirements are part of the bases on which other requirements of the Program are understood and assessed.

A prime example is the duty of developers who participate in the Program to cooperate with the surveillance of their certified health IT. The Permanent Certification Program final rule incorporated requirements for ONC–ACBs to conduct surveillance to ensure that certified health IT continues to conform to the requirements of certification when it is implemented ''in the field'' (76 FR 1282). More recently, in the 2015 Edition final rule, we expanded these surveillance requirements and also stated our expectations for the performance of certified health IT in production environments. We explained that health IT developers have a responsibility to make their certified capabilities available to purchasers and users in a manner that allows them to be used for their intended purposes, including any uses reasonably within the scope of the health IT's certification (80 FR 62710). We stated that health IT would no longer conform to the requirements of its certification if customers or users were restricted from successfully implementing and using the technology for any purpose contemplated by the certification criteria to which the technology was certified (80 FR 62711). As an illustration, we said that a developer's failure to supply training materials and instructions necessary to access and successfully use data export capabilities described by § 170.315(b)(6) would constitute a non-conformity (80 FR 62711). Similarly, technical or other limitations that substantially interfere with the ability to access or use certified capabilities (or any aspect or intended uses of such capabilities) would give rise to a non-conformity (80 FR 62711). Further, even in the absence of any actual impairment, if a developer's actions would be likely to substantially impair the ability of one or more users (or prospective users) to implement or use certified capabilities for any purpose within the scope of applicable certification criteria, the technology would no longer conform to the requirements of its certification (80 FR 62711). Thus, we explained that the failure to disclose known material information about limitations or types of costs associated with certified health IT not only violates the express disclosure requirements at § 170.523(k)(1), but also constitutes a non-conformity to the certification criteria associated with the potentially affected capabilities (80 FR 62711).

Consistent with these established principles under the Program, certified health IT must be designed and made available to users in ways that allow certified capabilities to be used in an accurate and reliable manner, including in a manner that does not cause or contribute to serious risks to public health or safety or to other outcomes that are inconsistent with the National Coordinator's responsibilities under section 3001(b) of the PHSA. This requirement applies to the use of certified capabilities individually and in combination with other certified and uncertified capabilities of health IT. Just as the failure to disclose known material limitations or types of costs may impair the use of certified capabilities, the failure to design and make certified capabilities available so that they perform in an accurate and reliable manner impairs the safe and effective use of certified capabilities and is a non-conformity under the Program.

It is important to note that the foregoing examples and analysis assume that the putative non-conformity is a result of the actions of the developer or factors that are reasonably within the developer's ability to influence or control. As we have explained on prior occasions, a non-conformity does not arise when certified health IT fails to perform in an acceptable manner but where the failure is the result of factors that are far removed from the control or responsibility of the developer (80 FR 62710).

These principles are further elaborated and applied in the responses to specific comments throughout the remainder of this section (II.A.1.a) of the final rule. We have also included numerous examples to assist readers in understanding these principles and how ONC would apply them in particular circumstances.

Comments. Many commenters believed that ONC should review certified health IT against specific standards, implementation specifications, certification criteria, or other express requirements, preferably developed through formal rulemaking; otherwise, developers would have insufficient guidance to design and implement their products in a manner that complies with Program requirements, and any determinations made by ONC could be ad hoc and have the potential to be unfairly applied. For these reasons, several commenters urged us to initiate separate rulemaking to identify and adopt new certification criteria that would prescribe specific requirements that ONC would apply when reviewing certified health IT and determining whether it conforms to Program requirements.

Response. These comments raise many of the same concerns expressed in comments on the 2015 Edition proposed rule regarding then-proposed requirements for ONC–ACBs to conduct in-the-field surveillance of certified health IT. As we explained in finalizing those requirements, we understand the desire for bright-line rules; yet experience suggests that the fast-paced nature of technological change in the health IT landscape makes it impracticable to anticipate and prescribe detailed rules for every conceivable situation in which health IT may not conform to Program requirements (*see* 80 FR 62709). In practice, certified health IT may be integrated with a wide range of other systems, processes, and workflows and may be customized and used in many different ways. These circumstances, which are inherent to the production environment, are too numerous and varied to anticipate or to reduce to simple rules of universal application.

For the same reasons, we do not believe that adopting certification criteria would provide the clarity or certainty sought by advocates of that approach. We believe that clarity and predictability are best achieved by articulating and explaining the basic principles that govern our review of certified health IT, as we have done in our previous response above and in the examples and discussion of potential non-conformities throughout this section of the preamble. These principles are consistent with those that govern an ONC–ACB's surveillance of certified health IT in the field (80 FR 62709). As such, they will ensure that ONC's review of certified health IT is consistent and based on clear and predictable principles.

Comments. Multiple commenters stated that a non-conformity should be defined as occurring only when certified health IT can no longer complete or repeat the certification test procedures against which it was previously tested and on the basis of which the health IT was certified.

Response. We expressly rejected these arguments in the preamble to the 2015 Edition final rule (80 FR 62709). There, we explained that an ONC–ACB's assessment of certified health IT in the field is not limited to aspects of the technology that were tested in a controlled environment. Rather, an ONC–ACB must consider the unique circumstances and context in which the certified health IT is implemented and used in order to properly assess whether it continues to perform in a manner that complies with its certification.

Testing is an important part of an ONC–ACB's overall analysis of health IT under the Program. For practical reasons, however, testing focuses on particular use cases and necessarily reflects assumptions about how capabilities will be implemented and used in practice. Thus, while test results provide a preliminary indication that health IT meets the requirements of its certification and can support the capabilities required by the certification criteria to which the technology was certified, that determination is always subject to an ONC–ACB's ongoing surveillance, including the ONC–ACB's evaluation of certified capabilities in the field. Indeed, a fundamental purpose of in-the-field surveillance is to identify deficiencies that may be difficult to anticipate or that may not become apparent until after certified health IT is implemented and used in a production environment. That purpose would be entirely frustrated if an ONC–ACB's assessment of technology in the field were confined to those aspects of the technology's performance specifically delineated in test procedures.

For these same reasons, we again reject the position that Program requirements should be rigidly defined by test procedures instead of more meaningful performance outcomes. In assessing putative non-conformities in the course of ONC direct review, we consider the unique circumstances and context in which the certified health IT is implemented and used in order to properly assess whether it continues to perform in a manner that complies with the Program (*see,* 80 FR 62709).

Comments. Several commenters observed that the performance of health IT may be impacted by providers' implementation choices or other factors that the developer of the health IT may be unable to reasonably anticipate or control. One commenter explained that health IT developers do not necessarily control which third-party products their customers may deploy in conjunction with the developer's certified health IT and that it is not unusual for interface issues to arise because of updates to these unsupported products or uses. Commenters noted that developers may find it particularly difficult to anticipate and address interactions of their certified health IT with third-party products that are not certified under the Program or with capabilities or aspects of certified health IT that are not directly governed by certification criteria.

Response. In the 2015 Edition final rule, we recognized there may be instances in which the failure of certified health IT to perform required capabilities in the field may be due to factors that are beyond the ability of the health IT's developer to reasonably influence or control (80 FR 62710). Because the requirements of the Program focus on the responsibilities of health IT developers and those aspects of their technology that they can reasonably influence or control, we explained that the failure of health IT to perform in an acceptable manner would not constitute a non-conformity if the failure was caused exclusively by factors far removed from the control or responsibility of the developer.[4] We also explained that, in evaluating non-conformities in the field, ONC–ACBs are required to determine the reasons for the failure of health IT to function in an acceptable manner, taking into account the roles of the technology as well as the health IT developer, users, and other parties. If an ONC–ACB finds that the developer or its technology were a substantial cause of the failure, the ONC–ACB would conclude that the health IT does not meet the requirements of its certification. By contrast, if the ONC–ACB finds that the failure was caused exclusively by factors far removed from the control or responsibility of the developer, the ONC–ACB would regard those factors as beyond the scope of the health IT's certification and would not find a non-conformity.

These same principles apply equally to ONC's review of certified health IT. If in the course of reviewing certified health IT, ONC determines that the failure of the health IT to perform in an acceptable manner is the result of factors that, because they are far removed from the control or responsibility of the developer, were not within its ability to reasonably influence or control, ONC would not conclude that the certified health IT is non-conforming.

(2) Review of Uncertified Capabilities

In the Proposed Rule, we proposed that ONC could review the interaction of certified capabilities of health IT with uncertified capabilities. As defined earlier in section II.A.1.a of this final rule, we use the term ''certified capabilities'' to refer to any capabilities or other aspects of health IT that are certified under the Program. In contrast, other aspects of health IT are referred to as ''uncertified capabilities'' throughout this final rule. Uncertified capabilities may be integrated with certified capabilities within a single certified health IT product (*i.e.,* a certified Complete EHR or certified Health IT Module) or may be part of other health IT products or services that are not certified under the Program.

Comments. Several commenters supported our proposal to review certified health IT in a manner that recognizes that, in practice, certified capabilities frequently interact with uncertified capabilities, whether because a developer of certified health IT includes additional capabilities in its certified health IT product or because the developer's certified health IT product is deployed with or configured to work with other health IT products that are not certified under the Program. One commenter stated that a significant limitation of the Program to date has been the lack of an effective means to evaluate how certified capabilities of health IT are performing once they are deployed in the field and interact with other capabilities or products that are not certified under the Program.

In contrast, some commenters, including one health IT developer, suggested that it would be appropriate for ONC to review uncertified capabilities, but only in certain limited circumstances. One commenter recommended that such review be limited to situations in which a developer integrates uncertified ''components'' with its certified health IT in a manner that directly causes a material adverse impact on the ability of the certified health IT to function in accordance with certification requirements.

Other commenters categorically opposed this aspect of our proposal. Some of these commenters assumed, however, that ONC would review and make determinations about the performance of capabilities or products

[4] For example, in the 2015 Edition final rule we provided a hypothetical scenario in which a health IT developer's certified health IT could not demonstrate required capabilities in the field due to factors that were far removed from the developer's control or responsibility (80 FR 62710). In the scenario, a customer had instructed the developer to configure the certified health IT to use clinical decision support content from a third-party vendor with whom the developer had no sublicensing agreement. The customer agreed that it would be responsible for maintaining the necessary licenses for access to the third-party vendor's content. Despite the developer's warning, the customer failed to maintain the necessary licenses and access to the content was suspended, which prevented the certified health IT from functioning as expected.

that the commenters regarded as clearly beyond the scope of the Program. Some commenters even assumed that ONC would review health IT products that are not certified under the Program at all. According to these commenters, ONC's review of uncertified capabilities or other products would be inconsistent with the voluntary nature of the Program and would be a significant overstep of ONC's authority. One commenter, for example, stated that ONC had no authority to investigate uncertified ''components'' of certified health IT or to dictate how a developer builds and modifies a product in response to market mandates.

Response. It appears that many commenters interpreted this aspect of our proposal in a manner that was more far-reaching than we had either contemplated or proposed. The confusion appears to have resulted from our summary of the major provisions of the Proposed Rule, which stated that ONC's direct review ''may include certified capabilities and non-certified capabilities of the certified health IT'' and ''would extend to the interaction of certified and uncertified capabilities within the certified health IT and to the interaction of a certified health IT's capabilities with other products'' (81 FR 11058).

In explaining the purpose of the Proposed Rule, we stated that as certified capabilities of health IT interact with other capabilities in certified health IT and with other products, ONC's direct review would ensure that concerns *within the scope of the Program* can be appropriately addressed (81 FR 11057). As this statement suggests, the purpose of direct review is to evaluate and determine whether capabilities and other aspects of health IT that are certified under the Program conform to the Program's requirements. Nevertheless, because certified capabilities are frequently integrated or deployed with uncertified capabilities, evaluating whether a certified capability under review (the ''target capability'') conforms to the requirements of the Program may require understanding how the target capability is interacting with other capabilities of health IT. Those other capabilities may be certified under the Program or they may be uncertified capabilities. In the case of an uncertified capability, the capability may be part of the same ''product'' as the target capability or it may be part of a different product, which may or may not be certified under the Program. Whatever the case, to ensure that ONC can properly evaluate whether the target capability is functioning in an acceptable manner, we proposed that ONC may have to consider the interaction of the target capability with other capabilities that affect its performance, which could include uncertified capabilities, as discussed above. We did *not* propose, however, that uncertified capabilities would themselves become a target of ONC's review. In this sense, our statement that ONC's ''review'' would extend to the uncertified capabilities was somewhat inexact because ONC would be concerned with only the effects of the uncertified capabilities on the target capability, not with the performance of the uncertified capabilities in isolation. In other words, ONC's consideration of uncertified capabilities would be ancillary to its review of certified capabilities and limited to the extent necessary to determine whether those certified capabilities are functioning in a manner consistent with Program requirements.

As an illustration, consider a Health IT Module designed for ambulatory settings and that is certified to, among other criteria, § 170.314(b)(5) (Incorporate laboratory tests and values/results). Under the process established by this final rule, ONC could initiate direct review if, for example, it had reliable information that the Health IT Module were receiving and incorporating lab results incorrectly in a manner that was causing or contributing to missed diagnoses or improper management of serious medical conditions. ONC's review of the Health IT Module would be based on the Health IT Module's certified capabilities, which include the capability to incorporate lab results according to the standard specified in § 170.205(j) and, at a minimum, the version of the standard specified in § 170.207(c)(2). However, it may be that the lab results are being corrupted before they are received by the certified capability. To determine whether that is the case, it may be necessary for ONC to examine the capabilities of upstream health IT systems from which the Health IT Module receives lab results. This may include examining certified capabilities or uncertified capabilities of the upstream systems to the extent that those capabilities could be causing or contributing to incorrect data being transmitted to the receiving Health IT Module.

We reiterate that ONC does not intend to review the functioning of uncertified capabilities except to the extent that an uncertified capability interacts with and affects the performance of a certified capability that is under review. If ONC commenced review of certified health IT based on a reasonable belief that the certified health IT may not conform to the requirements of the Program, but subsequently determined that the problem or deficiency was related solely to the functioning of uncertified capabilities in isolation, ONC would cease its review of the certified health IT. We note that, as discussed subsequently in section II.A.1.a.(3) of this preamble, ONC may share any information obtained in connection with its review with other relevant agencies, to the extent permitted by law, including agencies with applicable federal oversight or enforcement authority.

With these clarifications, we believe the concerns raised in connection with this aspect of our proposal are misplaced. Contrary to those concerns, this final rule does not establish a process for ONC to make determinations about uncertified capabilities, nor to dictate how developers design uncertified capabilities within certified health IT or other technologies. ONC's consideration of uncertified capabilities will be ancillary to ONC's review of certified capabilities and limited to aspects of uncertified capabilities that interact with certified capabilities and are relevant to evaluating the performance of those certified capabilities. Further, we reiterate our expectation that direct review will occur relatively infrequently and will focus on situations that pose a risk to public health or safety or where ONC–ACBs may be unable to respond effectively.

Comments. A number of commenters raised concerns that the application of direct review to uncertified capabilities would be contrary to ONC's policy of encouraging flexibility in the way that health IT systems are configured and used. Commenters also expressed concern that direct review of uncertified capabilities could create regulatory uncertainty and would diminish innovation. Noting that developers regard the uncertified aspects of their health IT as a key area of differentiation from their competitors, commenters expressed fear that direct review of uncertified capabilities would crowd out innovation in this important area and diminish overall incentives to innovate and improve health IT capabilities.

Response. We are sensitive to the competition and innovation concerns raised by commenters. We believe that those concerns can be effectively addressed by clearly communicating the scope of ONC's direct review under this final rule and the limited extent to which it will impact developers of uncertified capabilities. We have explained the potential scope of ONC's review under the processes established by this final rule, including the extent to which ONC would consider the impact of uncertified capabilities on the performance of certified capabilities. In addition, section II.A.1.a.(3) of this preamble describes the types of circumstances in which ONC may invoke the processes for direct review set forth in this final rule.

To further communicate our intent and address the concerns raised by commenters, we reiterate that the purpose of direct review is to ensure that certified health IT functions in a manner that is consistent with the requirements of the Program. In the event that ONC determines that an uncertified capability is causing a certified capability to function in a manner inconsistent with Program requirements, ONC's determination would relate to the functioning of the certified capability at issue. Even in the event that an uncertified capability is identified as the cause of, or a contributing factor toward, certified health IT functioning in a manner inconsistent with Program requirements, direct review would not dictate whether or in what manner the uncertified capability should be modified. Any corrective action to be taken by the developer in response to a determination of non-conformity by ONC would relate to bringing the certified capability or capabilities into conformity. For example, appropriate corrective action might involve the developer taking steps to ensure that the certified capability does not interact with the uncertified capability that is causing it to function in an unsafe manner.

Comments. A number of commenters expressed concern that extending ONC's review to uncertified capabilities or to uncertified products would conflict with or duplicate oversight of health IT by other federal agencies.

Response. We acknowledge that the investigatory and enforcement authorities of other federal agencies might apply, in certain circumstances, to the performance and functioning of certified health IT. For several reasons, however, we disagree that ONC's review will conflict with or duplicate other oversight of health IT.

First, as discussed above, while ONC's review may encompass uncertified capabilities, ONC would only be concerned with aspects of the uncertified capabilities that interact with the certified capabilities that are the subject of ONC's review, and only to the extent necessary to assess whether the certified capabilities are functioning in accordance with Program requirements. This limited and ancillary consideration of uncertified capabilities would be unlikely to create any significant conflict with or duplication of any other agency's authority. Moreover, to the extent that ONC's review does uncover issues that fall within the purview of other agencies with relevant oversight or enforcement responsibilities, ONC could coordinate with and share any information or evidence it has obtained with such agencies, to the extent permitted by federal law, and, if appropriate, could pause or end its review.

Second, as discussed below in section II.A.1.a.(3) of this preamble, we have narrowed the scope of direct review under this final rule based in part on the ability of other agencies to provide appropriate oversight of certain types of non-conformities that would otherwise warrant ONC's review. For example, at this time, we have not finalized in this rule processes for ONC direct review of a suspected non-conformity solely on the basis that certified health IT may be compromising the security or protection of patients' health information (*see* section 3001(b)(1) of the PHSA) or increasing health care costs as a result of, for example, inefficiency or incomplete information (*see* section 3001(b)(3) of the PHSA). Our decision not to establish regulatory processes for such oversight at this time is based in part on the recognition that other agencies have the ability to investigate and respond to these types of issues and our desire to make the most efficient use of limited federal resources.

Third, far from conflicting with or duplicating the efforts of other agencies, we expect direct review to promote greater alignment in the oversight of health IT. Direct review allows ONC to coordinate with and provide expertise to other agencies, and to share any information or evidence ONC has obtained, as permitted by federal law. For example, ONC could quickly marshal and deploy resources and specialized expertise while working with federal counterparts to ensure a coordinated review and response to potential non-conformities. This approach is consistent with our inter-agency efforts to avoid regulatory duplication and promote appropriate, risk-based oversight of health IT, including efforts described in the Draft Food and Drug Administration Safety and Innovation Act (FDASIA) Health IT Report,[5] published jointly with the Food and Drug Administration (FDA) and the Federal Communications Commission (FCC). Indeed, the need for effective coordination could be especially important in responding to serious risks to public health or safety that arise from the complex interaction of health IT products that may include certified capabilities regulated by ONC as well as uncertified capabilities that may be subject to FDA, FCC, or another agency's oversight.

Finally, we note that ONC may elect to not initiate direct review (or, if it has initiated direct review, to cease such review) at any time and for any reason, including if ONC believes that another agency is better situated to investigate or address a suspected non-conformity, or if ONC believes that direct review could duplicate or interfere with the oversight or enforcement activities of other agencies. ONC may also coordinate with and share any information or evidence it has obtained, through its direct review or otherwise, with other agencies, to the extent permitted by federal law. We also anticipate that ONC may coordinate with ONC–ACBs, ONC–ATLs, the ONC–AA, and other entities in appropriate circumstances and consistent with applicable federal law.

(3) Scope of Review

We proposed that ONC may exercise direct review of certified health IT when there is reason to believe that the certified health IT may not conform to the requirements of the Program. We explained that ONC's review could be in response to concerns that certified health IT may be leading to medical errors or other outcomes that are inconsistent with the National Coordinator's responsibilities under section 3001 of the PHSA. We also stated there could also be other exigencies, distinct from public health or safety concerns, that for similar reasons would warrant ONC's direct review and action. In addition, we proposed that ONC may directly review certified health IT in situations that present unique challenges or issues that ONC–ACBs may be unable to effectively address without ONC's assistance or intervention. We listed a variety of factors in this regard that could help inform ONC's decision whether to initiate direct review in individual cases, specifically:

- The potential nature, severity, and extent of the suspected non-conformity or non-conformities, including the likelihood of systemic or widespread issues and impact.

[5] Draft FDASIA Health IT Report: Proposed Strategy and Recommendations for a Risk-Based Framework (April 2014), available at *https://www.healthit.gov/sites/default/files/fdasia_healthitreport_final.pdf.*

• The potential risk to public health or safety or other exigent circumstances.

• The need for an immediate and coordinated governmental response.

• Whether investigating, evaluating, or addressing the suspected non-conformity would require access to confidential or other information that is unavailable to an ONC–ACB; would present issues outside the scope of an ONC–ACB's accreditation; would exceed the resources or capacity of an ONC–ACB; or would involve novel or complex interpretations or application of certification criteria or other requirements.

• The potential for inconsistent application of certification requirements in the absence of direct review.

(*see* 81 FR 11061). We anticipated that ONC's direct review of certified health IT would be relatively infrequent and would focus on situations that pose a risk to public health or safety as well as other situations that present unique challenges or issues that ONC–ACBs may be unable to effectively address without ONC's assistance or intervention (based on consideration of the factors listed above). We stressed that our first and foremost desire would be to work with developers to address any non-conformities identified as a result of ONC's review.

Comments. A majority of commenters agreed that ONC should directly review certified health IT that could be leading to medical errors or other risks to public health or safety. One commenter representing health care professionals noted a strong need for ONC to adjust the Program to focus on the safety, usability, and interoperability of certified health IT, citing widespread concerns among the medical community about these issues. The commenter stated that ONC could play a valuable role in ensuring that the appropriate parties are identifying, analyzing, and correcting health IT safety concerns by quickly resolving non-conformity issues.

Several commenters who otherwise opposed direct review, including health IT developers, stated that it may be reasonable for ONC to review non-conformities as a ''true last resort'' when risks to patient safety are sufficiently compelling or when there is a gap or overlap in the ability of ONC–ACBs to effectively address the risk.

A small number of commenters categorically opposed this aspect of our proposal and stated that whether certified health IT is leading to medical errors or other risks to public health or safety is either beyond the scope of current certification criteria, other Program requirements, or section 3001(c)(5) of the PHSA. A few commenters, including one ONC–ACB, stated that health IT-related safety risks should not be addressed through the Program because there might be other channels, such as the proposed Health IT Safety Collaborative,[6] through which these issues could be more effectively dealt with, including by identifying health IT safety-related issues, defining appropriate best practices and criteria, and making objective assessments. Commenters also urged ONC to continue to support existing private-public initiatives that are developing a framework for the identification of health IT safety incidents to expand knowledge for all stakeholders.

Response. We thank commenters for their feedback and suggestions on this aspect of our proposal. Based on the comments, and consistent with the focus of the Proposed Rule, we continue to believe that direct review by ONC is necessary to address potential non-conformities and non-conformities in certified health IT that may be leading to medical errors or contributing to other risks to public health or safety. As we have explained, although ONC–ACBs play an important role in the Program, addressing the full range of these suspected non-conformities is beyond the scope of their responsibilities under the Program. In addition, ONC–ACBs may as a practical matter lack the expertise and resources to effectively respond to certain types of non-conformities, such as widespread or systemic problems with certified capabilities. Other agencies may similarly be unable to effectively respond to these issues, especially when the underlying causes are unclear or involve complex interactions among multiple health IT capabilities or products. As the capabilities of certified health IT evolve and become ubiquitous in the delivery of care, the National Coordinator has a responsibility to continually update and enhance oversight of the Program so that certified health IT continues to improve, and does not compromise, patient safety.

Addressing these types of issues will promote greater confidence in the safety of certified health IT and protect the integrity and effectiveness of the Program. Accordingly, § 170.580(a)(2) addresses the process for ONC to directly review certified health IT when the health IT may be causing or contributing to conditions that pose a serious risk to public health or safety. We note that the policy we have finalized is consistent with the general sentiment expressed by commenters, as we understand it, that ONC should exercise direct review judiciously, focusing on risks to public health or safety that are serious and on non-conformities that cannot be effectively addressed by ONC–ACBs. As we stated in the Proposed Rule, we expect that ONC's exercise of direct review will be relatively infrequent. We discuss these considerations in detail in our responses to the comments summarized immediately below.

We agree with commenters that advancing health IT safety is a shared responsibility and will require a concerted commitment by all relevant stakeholders, including through current public-private efforts and proposed initiatives such as the Health IT Safety Collaborative. We continue to strongly support these efforts and recognize the vital role they play in promoting the safety of health IT and the use of health IT to improve the safety and quality of care. We regard ONC's direct review as complementary to these efforts.

We disagree with the view expressed by some commenters that concerns related to the safety of certified health IT are beyond the scope of current certification criteria, other Program requirements, or section 3001(c)(5) of the PHSA. We refer commenters to our discussion of these issues in section II.A.1.a.(1) of this preamble.

Comments. We received relatively broad support for our proposal to enhance oversight of non-conformities that pose a risk to public health or safety, including through the direct review of such issues by ONC. A significant number of commenters urged us to prioritize public health and safety over other concerns by narrowing the scope of ONC's review to focus exclusively or primarily on non-conformities that pose serious risks to public health or safety. Commenters stated that this narrower focus would

[6] *See* Department of Health and Human Services, *Justification of Estimates for Appropriations Committee (Office of the National Coordinator for Health Information Technology),* app. IV, *https://www.healthit.gov/sites/default/files/final_onc_cj_fy_2017_clean.pdf* (2016) (proposing that Congress provide ONC with authority to establish a Health IT Safety Collaborative and provide adequate confidentiality protections). *See also* ONC, *Health IT Safety Center Roadmap, http://www.healthitsafety.org/uploads/4/3/6/4/43647387/roadmap.pdf* (2015) (containing task force recommendations for the development of a national Health IT Safety Center); Food and Drug Administration, *Draft FDASIA Health IT Report, https://www.healthit.gov/sites/default/files/fdasia_healthitreport_final.pdf* (2014) (recommending establishment of a Health IT Safety Center as a key component of a risk-based approach to health IT safety oversight and efforts to create a sustainable, integrated health IT learning system that avoids regulatory duplication and leverages and complements existing public and private sector activities to improve the safety and safe use of health IT).

allow ONC to concentrate its resources and provide more effective oversight of safety issues.

Many commenters also recognized the need for and supported ONC's review of non-conformities that, for other reasons, would be difficult for ONC–ACBs to effectively address.

Commenters were less supportive of applying ONC oversight of the Program to the other areas we had proposed, such as widespread non-conformities that could compromise the security or protection of patients' health information in violation of applicable law, or that could lead to inappropriate claims for reimbursement under federal health care programs. A substantial majority of commenters urged us to significantly narrow and more clearly define the types of non-conformities that ONC could potentially review. Commenters were concerned that, as proposed, ONC could conceivably review non-conformities that implicate any of a wide and diverse range of potential subjects, from security breaches, to anti-competitive practices, to conditions giving rise to health disparities. This could lead to regulatory uncertainty or arbitrary enforcement, and could discourage innovation in health IT.

For many of the same reasons, commenters urged us to clarify the specific types of circumstances or situations in which ONC would be likely to initiate direct review of certified health IT. While we had proposed several factors that ONC would consider in determining whether to initiate direct review, a number of commenters stated that these factors were too numerous or open-ended to provide useful guidance to stakeholders. Several commenters urged us to provide guidelines or examples explaining when ONC would be likely to initiate direct review. One commenter explained that by clarifying our methodology we could make the direct review process fairer and more equitable and establish confidence both in the process and its outcomes.

Response. We agree with commenters that the types of non-conformities ONC may review and, equally important, the types of circumstances in which ONC will take action to enforce Program requirements should be made as clear as possible and should be applied in a consistent and judicious manner. Such clarity and consistency help enable developers to design and make their certified health IT available in a manner that consistently meets Program requirements and the expectations of purchasers, licensees, and users of certified health IT. We also appreciate that uncertain or unnecessary regulation can have unintended consequences, including reducing incentives to invest in and to innovate the technologies that will make it possible to use health IT and health information to improve health and the delivery of care.

In light of these and other considerations described below, we have reconsidered and revised our proposal in several key respects. Importantly, while the PHSA provides the National Coordinator the authority to directly review certified health IT in the broad range of circumstances we proposed, at this time we have finalized a regulatory framework for the exercise of such review in a more limited set of circumstances. This scope of review is consistent with our expectation stated in the Proposed Rule that direct review will be relatively infrequent and will focus primarily on issues that pose a risk to public health or safety (81 FR 11058) or that ONC–ACBs may be unable to effectively address without ONC's assistance or intervention (81 FR 11061). While we stated that there could be other exigencies in addition to risks to public health and safety that could also warrant ONC's review, we agree with commenters that the need for additional ONC oversight in these areas is less pronounced at this time. In particular, we note the active oversight in these areas by other agencies, as discussed below. In light of this existing oversight and the limited resources at ONC's disposal, we agree with commenters that it is advisable to focus ONC's resources in areas in which, at this time, additional and direct oversight by ONC is most vital to ensuring the integrity and effectiveness of the Program. We believe that focusing ONC's review in these areas will help foster alignment and coordination with other agencies and promote confidence in the performance of certified health IT and the nation's health IT infrastructure, which will in turn support innovations and investments in health IT.

For all of these reasons, we have finalized processes in this rule for ONC to exercise direct review of certified health IT in two distinct sets of circumstances.

First, ONC may elect to directly review certified health IT when there is reason to believe that the certified health IT may be causing or contributing to serious risks to public health or safety. In these circumstances, ONC's direct review of certified health IT may be necessary to protect the public from certified health IT that is unsafe and to ensure the basic integrity and effectiveness of the Program. As explained in section II.A.1.a.(1) of this preamble, it is a requirement of the Program that certified health IT be made available in a manner that does not cause or contribute to serious risks to public health or safety. However, responding to the full range of these suspected non-conformities is beyond the scope of an ONC–ACB's expertise and responsibilities under the Program. In contrast, ONC is well-placed to respond to these issues, through the direct review processes established by this final rule, bringing to bear needed expertise and resources and coordinating activities with federal counterparts and other relevant entities to ensure a coordinated review and response to public health and safety concerns (81 FR 11061).

Second, in addition to serious risks to public health or safety, ONC may elect to directly review certified health IT on the basis of other suspected non-conformities that, while within the scope of an ONC–ACB's responsibilities, present practical challenges that may prevent the ONC–ACB from effectively investigating the suspected non-conformity or providing an appropriate response. In particular, ONC may directly review certified health IT if a suspected non-conformity presents issues that may require access to certain confidential or other information that is unavailable to an ONC–ACB; may require concurrent or overlapping reviews by multiple ONC–ACBs; or may exceed the scope of an ONC–ACB's resources or expertise. We believe that ONC's review of certified health IT in these situations will help ensure the continued effective oversight and administration of the Program.

The circumstances described above do not encompass all possible non-conformities of certified health IT. For example, certified health IT may not conform to the requirements of the Program if it is causing or contributing to other outcomes—distinct from risks to public health or safety—that are inconsistent with the National Coordinator's responsibilities, such as compromising the security or protection of patients' health information in violation of applicable law (*see* section 3001(b)(1) of the PHSA) or increasing health care costs resulting from, for example, inefficiency or incomplete documentation (*see* section 3001(b)(3) of the PHSA). At this time, however, we believe that other agencies are in the best position to provide effective federal oversight and enforcement in these areas. For example, within HHS, the Office for Civil Rights' (OCR) enforces the Privacy, Security, and Breach Notification Rules promulgated under the Health Insurance Portability and

Accountability Act of 1996 (HIPAA) and amended by the HITECH Act, and the Office of Inspector General (OIG) enforces a range of federal laws related to fraud, waste, and abuse. Therefore, we have not at this time finalized regulatory processes by which ONC would directly review certified health IT solely on the basis of circumstances distinct from public health or safety concerns or in cases where practical challenges prevent an ONC–ACB from effectively investigating the suspected non-conformity or providing an appropriate response, as discussed above (*compare* 81 FR 11061). We will continue to assess the need to exercise direct review in these additional circumstances, as necessary

As mentioned above, in this final rule, we seek to align ONC's direct review of certified health IT with oversight and enforcement responsibilities of other agencies. We therefore clarify that ONC may decline to exercise review of certified health IT for any reason, including if it believes that other agencies may be better situated to respond to a suspected non-conformity. Additionally, to the extent permitted by law, ONC may coordinate and share information with other agencies, including agencies with applicable oversight or enforcement responsibilities, and may engage other persons and entities, as appropriate, to effectively respond to suspected problems or issues with certified health IT.[7] Such agencies could include, for example, the Centers for Medicare and Medicaid Services, the Food and Drug Administration, the HHS Office for Civil Rights, the HHS Office of Inspector General, the Department of Veterans Affairs, the Federal Communications Commission, or state Medicaid agencies. We note that to the extent ONC exercises its discretion to engage in any efforts to identify or address non-conformities, such efforts and any resulting remediation (or the absence of such efforts or remediation) are not intended to impact the materiality of any non-conformity in a matter addressed by another agency; and nothing in this final rule is intended to supplant, delay, or in any way limit oversight or enforcement by other agencies, including any investigation, decision, legal action, or proceeding.

Finally, our decision to focus ONC's review, at this time, on the types of non-conformities described above allows us to provide a more structured decision-making regulatory framework to support the exercise of ONC's discretion to initiate review of certified health IT in the circumstances we have described. In contrast to the framework set forth in the Proposed Rule, we have simplified and defined with greater specificity the factors ONC will consider in determining whether to initiate direct review of a suspected non-conformity. The updated regulatory framework, which we have finalized at § 170.580(a)(2), provides a more sequential and targeted set of factors that ONC will consider when determining whether to initiate direct review. We have also eliminated duplicative or redundant factors included in the Proposed Rule, as discussed in more detail in our responses to comments on those factors below. These revisions will provide clear and predictable guidelines that will promote compliance with Program requirements while preserving incentives to develop and adopt new and innovative technologies.

Comments. Several commenters suggested that ONC should focus its oversight on risks to public health or safety that are ''clear,'' ''severe,'' ''immediate,'' ''extreme,'' or otherwise compelling. A few commenters stated that ONC should not exercise direct review unless the risk to patient safety or public health poses imminent risks to public health or safety. Commenters stated that focusing on these types of risks would ensure that ONC's limited resources are used to mitigate the problems or issues with certified health IT that pose the most serious risks of harm to patients and the public. Separately, some commenters stated that exercising direct review of all potential risks could be counter-productive in that it may discourage efforts to implement and use health IT to improve patient safety and care.

Relatedly, commenters requested additional specificity regarding the types of risks to public health or safety that could trigger ONC's review or give rise to a non-conformity. One commenter requested that ONC provide examples to illustrate how certified health IT might contribute to risks to patient safety and public health.

Response. We agree that not every risk to public health or safety necessitates ONC's direct review. We are also cognizant of the need to prioritize ONC's limited resources by focusing on the kinds of problems and other issues that, if not addressed through ONC's direct review, are most likely to lead to harm to patients or the public and undermine confidence in health IT and the integrity of the Program.

As described in section II.A.1.a.(1) of this preamble, to conform to the requirements of the Program certified health IT must be designed and made available to users in a way that allows certified capabilities to be used in an accurate and reliable manner. This includes making capabilities available in a manner that does not cause or contribute to medical errors or other conditions that give rise to serious risks to public health or safety. Direct review would be appropriate if ONC had reason to believe that certified health IT were causing or contributing to conditions that present a serious risk to public health or safety, including conditions that could result in serious injury or death, whether to a patient or to any other person.

Our focus on risks to public health or safety that are ''serious'' is consistent with the Proposed Rule, in which we suggested that ONC's direct review would be appropriate in response to certified health IT causing or contributing to medical errors or other exigent circumstances that call for an immediate or coordinated governmental response (81 FR 11058; *compare* proposed § 170.580(a)(1)(ii) through (iii) at 81 FR 11082). This focus also aligns with the general sentiment expressed by commenters that ONC's review of matters involving public health or safety should focus on risks that are ''clear,'' ''severe,'' ''immediate,'' ''extreme,'' or otherwise compelling. We note that these terms are not self-defining and that assessing whether certified health IT poses serious risks to public health or safety will necessarily involve a careful consideration of the relevant facts and circumstances in each case. To this end, ONC would consider the nature, extent, and severity of the risk and the conditions giving rise to it, in light of the information available to ONC at the time. In addition to any other factors that may be relevant, ONC would consider the apparent severity of the harm that might result, or has resulted, from the suspected unsafe conditions, including the likelihood of death or serious injury; the number of persons who may be harmed in the event that the harm were to materialize; and the likelihood that harm will in fact materialize if appropriate action is not taken. ONC would also consider the extent to which the risk of harm may be imminent such that an immediate or coordinated governmental response is necessary to significantly reduce the likelihood of actual harm occurring or recurring (§ 170.580(a)(2)(i)(B)). In evaluating whether the risk of harm may be imminent, ONC would also take into

[7] Example E in section II.A.1.a.(3) of this preamble illustrates the complementary roles of ONC's direct review and the activities of other agencies.

account any actions being taken to mitigate the risk, to the extent that ONC is aware of those actions. We have declined to adopt commenters' suggestions that ONC should focus exclusively on the ''imminence'' of a potential risk to public health or safety when determining whether to exercise direct review. While the nature of public health or safety risks dictates that in most cases they will be imminent, we can envision scenarios in which a risk might not be strictly ''imminent'' at the time ONC determines that it will initiate its review but might nonetheless lead to serious harm if not addressed. For example, ONC might decide to exercise direct review if it became aware of information about a serious safety risk that a developer, in concert with its healthcare provider customers, is managing by way of a complex series of manual ''work-arounds'' until the scheduled release of the developer's next software update. While the developer may assert that the risk to patients is not imminent because of the existence of the manual work-arounds, it may be necessary—both to protect patients and the integrity and effectiveness of the Program—for ONC to review the safety risk at issue immediately and not have to wait until such time as the manual work-arounds fail. ONC may, as part of direct review in this instance, determine that the risk to patient safety is such that, for the health IT to remain certified, the developer must rectify the deficiency by way of a patch and not wait until the developer's next scheduled software release.

Separate from information about unsafe conditions in particular, ONC could conclude that certified health IT poses a serious risk to public health or safety were it aware of information calling into question the validity of the health IT's certification. Such information might include, for example, credible allegations that a health IT developer obtained or maintained any part of the certification of its health IT by means of false or misleading statements or representations to an ONC–ACB; misrepresented or made false or misleading statements to customers or users about the certification or certified capabilities of the health IT; concealed problems, deficiencies, or potential non-conformities; or took other actions that would be likely either to compromise or to circumvent processes under the Program for testing, certifying, and conducting ongoing surveillance and review of certified health IT. These circumstances present a serious risk to public health or safety because obtaining and maintaining a valid certification is fundamental to ensuring that health IT meets Program requirements, including requirements essential to providing basic assurance that health IT is able to perform required capabilities in an accurate and reliable manner. Indeed, customers, implementers, and users rely on the certifications issued on behalf of ONC to provide this basic assurance so that they can select appropriate technologies and capabilities, identify potential implementation or performance issues, and implement certified health IT in a predictable, reliable, and successful manner (80 FR 62709). Where the validity of a certification is called into question, these and other persons are unknowingly deprived of this basic assurance upon which they rely.

To further illustrate these principles and how they would be applied in practice, we offer the following contrasting examples.

Example A: ONC receives multiple, detailed reports that a cloud-based EHR system (certified to the 2015 Edition) has become so slow that it may take up to five minutes to load a patient's record or to display information within a patient's record, such as the patient's medication and medication allergy lists. When providing emergency treatment, clinicians cannot wait five minutes for this information and must order medications with incomplete information about patients' current medications and medication allergies. Even when treatment is not urgent, the system's delays in responding lead many clinicians to assume that the EHR is not working and to order medications based on their best recollection of patients' current medications and allergies.

Clinicians at several hospitals in multiple states are experiencing these problems. There is no indication that these hospitals are maintaining substandard hardware or network infrastructure below the recommendations from the health IT developer, nor that they have customized their health IT in a way that would adversely affect system performance. The health IT did not behave this way when it was installed, but as the clinical data and number of records has grown the speed of the EHR's responsiveness has decreased.

In this example, ONC may initiate direct review of the certified health IT. The facts suggest that several capabilities of the certified health IT are implicated, including § 170.315(a)(6) (Problem list) and § 170.315(a)(7) (Medication list). The capabilities as implemented appear to be performing or interacting in a way that is causing or contributing to a serious risk of harm to public health or safety. The risk of harm is serious for several reasons. First, clinicians are abandoning use of the capabilities and resorting to memory to order medications for patients, which could result in severe harm to patients, including serious injury or death. Moreover, the risk is imminent because it is likely that harm will occur soon unless immediate action is taken to address the unsafe conditions. Further, the extent of the risk is large because the unsafe conditions have been reported at several hospitals in multiple states and may therefore put at risk a large number of patients.

Assuming ONC were to initiate direct review, it would examine the certified capabilities to determine why they are not performing in an accurate and reliable manner and whether the cause of the problem was within the ability of the health IT developer to reasonably influence or control. The facts suggest that the problem is common across multiple customers and is not the result of any actions of the developer's customers or users. Because the problem developed over time, the developer would have been aware of the problem and could have prevented it by employing best software practices to prevent a system related slow-down under load. If this were established, ONC would find a non-conformity.

Example B: ONC receives credible information from multiple sources that a large hospital's EHR system, which is certified to the 2015 Edition, is dropping medication orders. While the cause of the dropped orders is not yet clear, data in patients' records is not being recorded in a consistent and reliable manner, which is leading to patients not receiving medications.

Based on the information it has received, ONC believes that the EHR system's computerized provider order entry (CPOE) capability for medications (§ 170.315(a)(1)) may be interacting with other capabilities within the EHR or within other health IT in a way that is causing or contributing to orders not arriving when they are needed. This poses a serious risk to public health or safety because there is an imminent risk that patients will not receive needed or even life-saving medications that have been ordered for them, which could result in severe harm.

Accordingly, ONC initiates review of the certified health IT. However, during the course of its review, ONC determines that the hospital had chosen not to install and maintain the minimum specified hardware and network requirements published by the developer of the certified health IT. As a direct result of the substandard hardware and network connectivity, the certified health IT is suffering system timeouts, losing network packets, and not operating correctly. Based on these findings, ONC finds that while the certified capability is not performing in an acceptable manner, the reason for the substandard performance is that the hospital has chosen not to follow the developer's minimum hardware and network recommendations. The hospital's decision to intentionally disregard the developer's clear instructions regarding the safe use of its technology is a factor that is beyond the ability of the developer to reasonably influence or control. Therefore, ONC would not find a non-conformity and would cease its review. ONC may, however, refer the matter (and information or evidence obtained as a result of its review) to other agencies with applicable oversight or enforcement responsibilities, as discussed above in this section of the preamble.

Example C: ONC receives multiple reports from a large hospital concerning a potential problem with its EHR. Over the past week, several patients with congestive heart failure (CHF) had to be readmitted because of CHF exacerbations. Clinical and IT staff at the hospital have investigated the problem and believe that it is due to an error in the hospital's EHR, which is certified to the 2015 Edition. The hospital reports that its CHF patients are all given electronic scales that record their weight and automatically transmit the daily weight back to the hospital's EHR. The weight can be tracked and the patients can be alerted if they are gaining too much weight (from excess fluid, one of the signs of a CHF exacerbation) and need to adjust their CHF medications accordingly. The readmissions happened due to inaccurate weight data being presented to clinicians, which caused the clinicians to not adjust diuretic medication to manage patients' fluid status appropriately.

Based on these facts, ONC may initiate direct review of the certified health IT. ONC could form a reasonable belief that the certified health IT may be causing or contributing to serious risks to public health or safety, in violation of Program requirements. A number of certified capabilities appear to be implicated, including § 170.315(e)(3) (Patient Health Information Capture) and certified capabilities that interact with vital signs data (which is part of the Common Clinical Data Set (§ 170.102)). Although the cause of the problem is not yet clear, it is reasonable to believe that it may be a result of one or more of these certified capabilities or of their interaction with other uncertified capabilities or products. Meanwhile, the occurrence of multiple readmissions in the past week suggests that, if the certified health IT is causing or contributing to these risks to public health or safety, the risks are sufficiently serious as to constitute a non-conformity and to warrant ONC's review.

Example D: ONC becomes aware of a patient safety hazard at a large area hospital. In one reported case, a patient with chest pain entered the emergency department (ED) of the hospital. In the ED, nurses enter protocol orders for patients with chest pain on behalf of the attending physician. On this occasion, an attending physician accessed the patient's record in the EHR and, observing that no blood tests had been ordered, proceeded to order the tests from the standard order set. Contemporaneously, a nurse was in the process of entering the same tests from the same order set. The nurse completed her order a few seconds before the physician completed hers. Neither the nurse nor physician recall any duplicate order alerts, although hospital IT staff state that clinical decision support (CDS) was active in the EHR system and had been configured to intercept and display alerts when duplicate orders are entered. The duplicate orders were noticed later when the physician was reviewing the patient's record in the EHR. At that time, the physician cancelled the nurse's order, which thereafter was no longer displayed in the EHR. The EHR continued to display the physician's order with a status of ''pending collection.'' The lab system assumed that the identical lab requests for the same patient were duplicates and cancelled the physician's request because the nurse's request had arrived first. The lab system, however, did not create an outgoing interface message to the ordering EHR indicating that the physician's ''duplicate'' request had been cancelled. As a result, the physician's order continued to be displayed in the EHR with a status of ''pending collection.''

Back in the ED, alert staff noticed that the labs had not been drawn within the expected time frame, and reordered the tests. Fortunately no harm resulted to the patient. However, the hospital's clinical staff and leadership believe the EHR presents a serious patient safety hazard. The clinicians report the incident to ONC and note that in a large and busy ED it is not uncommon for clinicians to enter contemporaneous orders; and that they expect the EHR to alert them when this occurs and to intercept duplicate orders before they are transmitted. The hospital's IT staff and the EHR developer, with whom the IT staff have been working to analyze this incident, believe that the EHR was configured to provide these CDS interventions. Neither the hospital's IT staff nor the EHR developer has been able to ascertain why these safeguards appear to have failed in this case. Based on these facts, ONC could form a reasonable belief that the certified health IT may be causing or contributing to a serious risk to public health or safety. As noted by the hospital's clinical staff and leadership, duplicate orders are not uncommon, especially in a large and busy ED. If not detected, the duplicate orders may lead to a wide range of serious hazards, such as administration of unnecessary tests or excessive medication dosages. And as illustrated by this example, the failure to detect and intercept duplicate orders may also have downstream effects that could prevent the fulfillment of orders and result in patients not receiving timely test results and treatment. The severity and extent of the harm that could occur is significant and is likely to materialize unless the cause of the problem is isolated and resolved. That the hospital's IT staff and the EHR developer are cooperating and yet have been unable to ascertain the cause of the problem is also relevant to ONC's consideration because it suggests that the problem could reoccur and that the full extent of the problem, including for other hospitals or facilities that use the developer's EHR, is not known.

While the risk to public health or safety is clear, to initiate direct review, ONC must have a reasonable belief that the certified health IT may be causing or contributing to that risk. Here, there are at least two certified capabilities that are potentially implicated: CPOE (§ 170.315(a)(3)) and CDS (§ 170.315(a)(9)). This nexus to certified capabilities is sufficient for ONC to initiate direct review.

Concurrently, ONC might direct the responsible ONC–ACB to perform surveillance of issues that are within the scope of its responsibilities and expertise. Here, an ONC–ACB could conduct in-the-field surveillance of the CPOE and CDS capabilities to determine whether there is a non-conformity to the requirements of § 170.315(a)(3) or (a)(9). For example, the ONC–ACB would be well-positioned to determine through in-the-field surveillance whether the certified CDS capability, when properly configured to intercept and alert users to duplicate orders, consistently triggers those interventions in a reliable manner in a production environment.

On the other hand, an ONC–ACB may be unable to analyze other possible non-conformities. For example, it may be that the CDS reliably displays alerts as intended but that the alerts are designed in a way that makes them susceptible to being inadvertently overridden. These usability considerations are within the scope of the Program's requirements but may be best suited for ONC to review. ONC could also examine the interaction of the certified capabilities with the receiving lab system (which may or may not be certified under the Program), which in this example is critical to isolating and understanding the nature of the problem and assessing whether the certified health IT conforms to Program requirements. In reaching that determination, ONC would consider whether the EHR developer could have reasonably anticipated that the lab system would cancel the orders without sending a notification of the cancellation and whether it could have taken reasonable steps to mitigate this risk (such as warning users to manually confirm the orders or providing a bi-directional interface that ensures that users are able to view when orders are in fact received and filled). This may require analyzing the EHR developer's interfaces and contractual agreements with the lab system as well as the EHR developer's field testing and quality assurance procedures. Again, these factors may be beyond the expertise of the ONC–ACB and better suited for ONC's review.

As the foregoing examples illustrate, the particular facts and circumstances that may trigger ONC's review of certified health IT will be unique to each case, as will be the analysis of the issues relevant to determining whether the certified health IT conforms to Program requirements. Nevertheless, we believe the examples above will help stakeholders understand the types of risks to public health or safety that may prompt ONC's review and that may lead to a finding of non-conformity. We anticipate issuing additional guidance on these and other aspects of this final rule as appropriate.

Comments. A small number of commenters distinguished between risks to patient safety and those related to broader public safety or public health. Some commenters stated that direct review would not be appropriate in circumstances that pose a risk of harm to public health but not specifically to patient safety. In contrast, one commenter posited that public health considerations may justify or weigh in favor of direct review in certain situations, such as where problems with certified health IT may adversely impact socially or medically vulnerable populations.

Response. We intend the term public health or safety to encompass risks to both patients and other persons. Given the central role of health IT in delivering care, it is likely that ONC's oversight will focus on risks of harm to patients. However, we would be no less concerned if certified health IT were causing or contributing to risks of harm to persons other than patients, and we believe that the National Coordinator's responsibility to provide for effective oversight of certified health IT so that it does not create unreasonable risks of harm to patient safety applies with equal force to risks involving public health.

We note that under the approach we have finalized, ONC would consider the potential nature of a public health or safety risk when reaching a determination whether to initiate direct review. Thus ONC's determination would take into account the impact that the potential risk is having, or might have, on a patient(s). This determination would necessarily involve an analysis of the risk as it relates to the affected patient population.

Comments. A number of commenters voiced concerns about the factors that ONC would consider when determining whether to initiate direct review, characterizing those factors as overly broad and creating a risk of arbitrary application. Commenters noted in particular that the phrase ''other exigent circumstances'' was ambiguous. Some commenters suggested that ONC's potential reliance on such an open ended factor would enable ONC to exercise direct review in an unaccountable manner. Commenters requested clarification or reconsideration of the inclusion of ''other exigent circumstances'' as a factor to be considered by ONC when initiating direct review.

Response. We identified a number of factors in the Proposed Rule that ONC might consider when determining whether to exercise its discretion to initiate direct review. These factors were included to provide health IT developers with some comfort that while ONC's authority to initiate direct review is broad, ONC's use of direct review would be guided by principles that focus ONC's limited resources on the oversight of non-conformities that pose substantial risks to the integrity and effectiveness of the Program. Indeed, the inclusion in the proposal of the phrase ''other exigent circumstances'' was intended to narrow ONC's discretion rather than, as suggested by commenters, provide ONC with a degree of flexibility that would make ONC's exercise of direct review unaccountable. Notwithstanding this, we acknowledge commenters' concerns regarding the open-ended nature of the phrase ''other exigent circumstances.'' We maintain that there could be other exigencies, distinct from public health or safety concerns, that pose risks to the integrity and effectiveness of the Program and warrant ONC's direct review and action. However, at this time, our decision to focus on public health and safety risks (in addition to non-conformities over which, for practical or other reasons, ONC–ACBs may be unable to provide effective oversight) at this stage of our administration of the Program has enabled us to omit any reference in the final rule to ONC considering ''other exigent circumstances'' when determining whether to exercise direct review.

We clarify that while under the processes established by this final rule ONC would not, at this time, initiate direct review solely on the basis of exigencies other than serious risks to public health or safety, and while ONC's review would focus on aspects of health IT that are certified under the Program, ONC would not be precluded from sharing, to the extent permitted by federal law, any information or evidence (including about other exigent circumstances or problems with uncertified capabilities of health IT) with other relevant agencies, including law enforcement or other agencies who may be able to address such matters. Conversely, ONC may receive information about potential non-conformities or non-conformities from other agencies in the course of their oversight, enforcement, or other activities. As an illustration, consider the following example.

Example E: A Health IT Module certified to the 2015 Edition (''the EHR'') is the subject of a ''ransomware'' attack. The attacker gained unauthorized access to the EHR at multiple health care facilities and deployed malicious software that rendered patients' electronic health information completely inaccessible to clinicians and other users of the EHR. Several of these facilities have reverted to backup systems, including in some cases paper records and manual workflows that significantly increase the risks of medical errors and harm to patients. Several federal agencies (''the Agencies'') are currently investigating the attack. The Agencies request the assistance and expertise of ONC's Chief Privacy Officer to better understand the role of the EHR in contributing to the incident. The investigation quickly reveals that the attacker exploited a vulnerability in the operating system software (OS) used in conjunction with the EHR. The OS was out of date and no longer receiving security updates. The Agencies, concerned about the prospect of additional security breaches, share this information confidentially with ONC.

For the reasons stated earlier in section II.A.1.a.(3) of this preamble, ONC would not initiate direct review of the certified health IT solely on the basis of security incidents or other exigencies that are distinct from risks to public health or safety. At this time, we believe that other agencies are currently best positioned to provide effective oversight and enforcement of health IT with respect to these potential exigencies. Nevertheless, as the facts of this example make clear, these exigencies may also give rise to serious risks to public health or safety. Where certified health IT may be causing or contributing to risks of this kind, ONC may initiate direct review to protect the public and the integrity and effectiveness of the Program.

Here, ONC initiates direct review based on the information received from the Agencies. To ensure that ONC's review assists and does not in any way hinder the ongoing investigation, ONC carefully coordinates with the Agencies and shares information and evidence it obtains during its review. ONC's review confirms that the developer of the EHR requires users to install and use a version of the OS that is no longer supported by the OS manufacturer and is not receiving security updates. All certified capabilities of the EHR are affected by this requirement, which exposes users to vulnerabilities and attacks that could compromise patient data and result in serious harm to patients. At the same time, ONC finds that the developer could have reasonably anticipated, and avoided, these risks because the OS manufacturer had published many notices that the version of the OS was being retired and would no longer receive security updates. Based on these findings, ONC issues a notice of non-conformity to the developer.

By contrast, if ONC had found that the health IT developer offers an upgrade path to the latest versions of the operating system software, and encourages its users to upgrade, ONC would not find a non-conformity if users decided to not install the upgrade.

Comments. Commenters suggested that we clarify our proposed methodology for assessing the ''nature, severity, and extent'' of a suspected non-conformity and the significance of this factor to ONC's determination whether to initiate direct review.

Response. In response to the concerns raised by commenters, we have made a number of adjustments in the final rule that will create greater predictability for the process that ONC will use to determine when to initiate direct review.

The proposals in the Proposed Rule outlined a direct review process in which ONC would exercise wide latitude to consider and weigh factors when determining whether to initiate direct review. As proposed, ONC might evaluate a number of factors that could be relevant to the particular circumstances at issue at the same time. However, at this time, we have chosen to narrow the scope of potential non-conformities and non-conformities ONC will review as described above. Given this narrower scope, we are able to delineate the specific factors that ONC will consider and apply when determining whether to initiate direct review of certified health IT.

Under the final rule, the nature, severity, and extent of a non-conformity would be relevant if ONC were to initiate review of a suspected non-conformity on the basis of public health or safety concerns. In that instance, ONC would have a reasonable belief that certified health IT may be causing or contributing to conditions that pose a serious risk to public health or safety. The potential nature, severity, and extent of the suspected conditions giving rise to that risk would be directly relevant to this determination, as would the need for an immediate or coordinated governmental response. These considerations are described in greater detail earlier in section II.A.1.a.(3) of this preamble. We have expressly included these considerations as factors that ONC will consider when determining whether certified health IT may be causing or contributing to risks that are sufficiently serious as to suspect that the certified health IT does not conform to the requirements of the Program and ONC's direct review.

Separately, and as also discussed in section II.A.1.a.(3) of this preamble, ONC may directly review certified health IT when a suspected non-conformity, while based on requirements of the Program that are generally within the scope of an ONC–ACB's responsibilities to administer and enforce, presents issues that may prevent the ONC–ACB from effectively investigating or responding. The nature, severity, and extent of a suspected non-conformity may be relevant to this determination. For example, the suspected non-conformity may be so systemic, complex, or widespread that an ONC–ACB would lack the resources or expertise to effectively investigate or respond to it. On this basis, ONC may directly review the suspected non-conformity.

Comments. One commenter suggested that ONC include additional factors for assessing when to exercise its direct review. This commenter recommended that ONC develop an additional factor that ensures that ONC's decision to initiate direct review takes into account the impact of non-conformities on socially and medically vulnerable populations.

Response. Under the final rule, ONC will consider the potential nature, severity, and extent of a public health or safety risk when reaching a determination as to whether to initiate direct review. This determination would take into account the potential impact the risk is having, or might have, on a patient(s) or the public. We anticipate that an analysis of the affected population could be relevant to that determination. For example, an issue might present a less serious risk of harm to patients at a large tertiary hospital with in-house IT staff and robust quality assurance processes than to patients served by a safety-net provider with no in-house IT expertise and less extensive quality controls and resources than might be available to a large institution.

Comments. Many commenters expressed support for ONC direct review in situations where ONC–ACBs may be unable to effectively investigate or respond to potential non-conformities. Several commenters recognized that there may be a variety of situations in which ONC–ACBs are unable to effectively investigate and respond to non-conformities, such as where doing so would require access to confidential or other information that is unavailable to an ONC–ACB, would exceed the resources or capacity of an ONC–ACB, or would involve novel or complex interpretations or application of certification criteria or other Program requirements. One commenter recommended that ONC invest in and empower ONC–ACBs to enable them to investigate and address non-conformities that are currently beyond the scope of their responsibilities under the Program.

All three ONC–ACBs commented on this aspect of our proposal. One ONC–ACB related that in its own surveillance it had encountered scenarios in which

ONC's direct oversight would have proven beneficial to the situation and its resolution. Another ONC–ACB stated that it had received complaints from users of certified health IT that raised issues (including issues related to patient safety) that were beyond the scope of the ONC–ACBs' accreditation and ability to address but that could be governed by the broader requirements of the Program. The remaining ONC–ACB did not believe that ONC should enforce any Program requirements that ONC–ACBs themselves could not administer in accordance with their accreditation; however, the ONC–ACB did support ONC's direct review of non-conformities whose nature, severity, or extent would be likely to quickly consume or exceed an ONC–ACB's resources or capacity.

Some commenters suggested that ONC should only intervene due to ONC–ACB limitations in very limited circumstances and that ONC should use its discretion in this respect as a ''last resort.'' One commenter suggested that ONC refine the factors that it will consider when determining whether to initiate direct review on this basis. Another commenter suggested that ONC should only initiate direct review on the basis of ONC–ACB limitations when clearly defined criteria are met; the commenter provided the example of a non-conformity involving the interaction of two health IT products certified by separate ONC–ACBs and having a proven and urgent impact on patient safety.

Response. We thank commenters for their support and thoughtful comments on this aspect of our proposal. We have adopted the proposed approach to ONC direct review when ONC–ACBs may lack necessary expertise or resources, with the following clarifications. ONC may exercise direct review on the basis of suspected non-conformities that, while generally within the scope of an ONC–ACB's responsibilities and expertise, may present issues that could prevent an ONC–ACB from effectively investigating or providing an effective response. In these circumstances, ONC's direct review of the certified health IT is appropriate to help ensure consistency in the effective oversight and administration of the Program. Specifically, under the processes established in this final rule, ONC may directly review certified health IT if investigating or responding to a suspected non-conformity may require access to confidential or other information that is unavailable to an ONC–ACB (§ 170.580(a)(ii)(A)); may require concurrent or overlapping reviews by multiple ONC–ACBs (§ 170.580(a)(ii)(B)); or may exceed the scope of an ONC–ACB's resources or expertise (§ 170.580(a)(ii)(C)).

In response to the comments and to provide additional clarity regarding the types of circumstances that may exceed an ONC–ACB's resources or expertise, we provide the following example, which includes three alternative scenarios. The scenarios, which are mutually exclusive, illustrate how variations in facts and circumstances may give rise to different issues that necessitate different levels of involvement and forms of collaboration between ONC and ONC–ACBs.

Example F: An EHR system certified to the 2015 Edition is in use by several major hospitals and health systems, including their ambulatory clinics, in multiple states. During a span of two weeks, over a dozen users at multiple health care facilities report to ONC and to the ONC–ACB that the EHR is displaying inaccurate or missing diagnoses (problems) and that, as a result, patients are not receiving appropriate care. In one reported instance, a patient was diagnosed with renal impairment, and this diagnosis was entered into the patient's active problem list in the EHR by her primary care physician (PCP). The PCP then referred the patient to an orthopedist for an unrelated musculoskeletal issue. The orthopedist is affiliated with the same health system as the PCP and has access to the same instance of the EHR. When the orthopedist accessed the patient's problem list, the diagnosis for renal impairment was missing from any relevant sections as displayed in the EHR. Unaware of this diagnosis, the orthopedist prescribed a medication for musculoskeletal pain that should either be avoided or minimized in patients with renal impairment. As a result, the patient suffered acute renal failure. Similar instances involving other missed or inaccurate diagnoses and resulting harm to patients have also been reported to ONC and the ONC–ACB.

Based on the information described above, the ONC–ACB initiates in-the-field surveillance of the certified health IT, as required by § 170.556(b), to assess whether the problem list capability continues to conform to the requirements of the certification criterion at § 170.315(a)(6) (Problem list). Separately, because the certified health IT may be performing in a manner that is causing or contributing to a serious risk to public or health or safety, ONC also initiates direct review of the certified health IT on this basis. ONC does not exercise exclusive [8] review under the Program at this time.

Scenario 1

The ONC–ACB's in-the-field surveillance reveals that the cause of the issue is a software error that is only found in one EHR ''workflow.'' The EHR presents the user with multiple ways, or screens, to accomplish the same task. In this case, the PCP modified the problem list from a ''quick summary screen,'' which due to a software error did not write the updated diagnosis (problem) back to the database. This led to a situation where the PCP thought the diagnosis had been updated, but in fact on the back end, the list had not been updated. The EHR, when tested for certification, had presented the ''standard office visit'' screen for diagnosis list modification but not the ''quick summary screen,'' which is an alternate workflow available only in production.

The ONC–ACB concludes that the failure of the problem list capability to function in accordance with § 170.315(a)(6) was reasonably within the control of the developer, who should have anticipated the risk during the course of normal software development. Any additional read/write/display functionality may initially contain code errors, and all functions of certified health IT should be subjected to adequate testing. The developer could have reasonably taken actions to avoid the risk by employing an adequate software regression testing methodology.

Based on the surveillance and analysis above, the ONC–ACB finds a non-conformity to § 170.315(a)(6) and requires the developer to take corrective action, pursuant to § 170.556(d), including by submitting a CAP in accordance with §§ 170.556(d)(1)–(4) that addresses how the developer will resolve the identified non-conformity and related deficiencies across all of the developer's customers and users. ONC, in coordination with the ONC–ACB, concurs with the ONC–ACB's finding of non-conformity and, at this time, forbears from taking any action against the developer because the non-conformity involves a straightforward violation of a certification criterion, which is well within the scope of the

[8] Under the final provisions, ONC may assert exclusive review of certified health IT as to any matters under its review and any similar matters under surveillance by an ONC–ACB. In determining if matters are similar, ONC will, as proposed, consider whether the matters are so intrinsically linked that divergent determinations between ONC and an ONC–ACB would be inconsistent with the effective administration or oversight of the Program.

ONC–ACB's responsibilities and does not appear to exceed the ONC–ACB's resources. ONC continues to closely monitor the situation and coordinate with the ONC–ACB. If at any time ONC were to believe that the ONC–ACB could not effectively administer the necessary corrective action or that ONC's direct intervention were necessary to more quickly and effectively mitigate the risk to public health or safety, ONC could immediately issue a notice of non-conformity and notice of suspension, as described in section II.A.1.c of this preamble.

Scenario 2

The ONC–ACB's in-the-field surveillance reveals that the missing diagnosis was due to a system workflow implementation that the healthcare organization had customized. Contrary to the developer's recommendations, the healthcare organization had removed the problem list from the ''quick visit'' EHR workflow that is presented to ambulatory PCPs. This resulted in the PCP not being able to quickly and easily update the problem list properly, resulting in incomplete problem lists.

In contrast to scenario 1, the ONC–ACB finds that there is no non-conformity because these factors are beyond the developer's ability to reasonably influence or control. ONC concurs with the ONC–ACB's determination and ceases its direct review of the certified Health IT Module(s).

Scenario 3

Based on its in-the-field surveillance, the ONC–ACB finds that the problem list capability is functioning in accordance with § 170.315(a)(6). Specifically, the ONC–ACB concludes that the issue is not the result of any technical or functional deficiencies with the problem list capability but rather the manner in which the problem list's user interface has been designed, which is unintuitive and appears to have contributed to problems being recorded incorrectly or not at all. The ONC–ACB shares its findings with ONC and states that these usability issues are beyond the scope of the ONC–ACB's expertise and its responsibilities under the Program because a complete assessment of these issues would appear to require an assessment of the developer's software development processes in light of current software usability and human factors best practices.

ONC agrees that these issues are beyond the scope of the ONC–ACB's expertise and responsibilities under the Program. However, the issues are not beyond the scope of the Program. ONC concludes that the problem list capability was designed in a way that does not adhere to commonly accepted usability guidelines. In this case, ONC finds that in order to add a diagnosis to the problem list, a user is forced to navigate through an excessive series of windows, confirmation dialogues, and an inordinate amount of clicks to properly select the correct diagnosis. This in turn results in incomplete problem lists due to clinicians' difficulty navigating the overly complex workflow, inability to complete the laborious series of steps due to time constraints, or a combination of both factors.

On the basis of these findings, ONC concludes that the certified health IT does not conform to the requirements of the Program. As discussed in section II.A.1.a.(1) of this preamble, certified health IT must be designed and made available to users in ways that allow certified capabilities to be used in an accurate and reliable manner, including in a manner that does not cause or contribute to serious risks to public health or safety. Where certified capabilities do not perform in such a manner due to factors that the developer could have reasonably influenced or controlled, the certified capabilities do not conform to the requirements of the Program. Here, the developer could have reasonably anticipated the risk through an understanding of software usability and human factors best practices, and the developer could have reasonably taken actions to avoid the risk, such as by ensuring adequate usability testing prior to software release. ONC would follow the processes discussed in section II.A.1.c of this preamble to notify the developer of the non-conformity and to work with the developer to expeditiously and comprehensively correct the non-conformity and prevent similar safety risks from recurring. This might include, for example, instituting corrective actions to assist the developer in improving its user-centered design and other quality assurance processes.

The example and scenarios above illustrate our intent that ONC's direct review complement and provide a ''backstop'' to the surveillance and other activities of ONC–ACBs so that suspected non-conformities requiring attention do not go unaddressed. To this end, ONC may consult with the ONC–AA, ONC–ACB(s), and other persons or entities, as appropriate, when determining whether to exercise direct review and in conducting such review. ONC may also share relevant information with the ONC–AA, ONC–ACB(s), and other relevant persons and entities as appropriate to assist ONC–ACB surveillance and other activities to address issues with certified health IT, to the extent that the sharing of such information is permitted by law. We believe that such communication will help ONC–ACBs as well as ONC accurately and effectively assess certain issues with certified health IT products. We continue to maintain that reviews by ONC–ACBs and ONC will be complementary and will support comprehensive and consistent review of certified health IT.

Comments. Multiple commenters stated that ONC should not review certified health IT on the basis that a potential non-conformity raises novel or complex interpretations or applications of certification criteria (*see* proposed § 170.580(a)(1)(iv)(D)) or could lead to inconsistent application of certification requirements in the absence of direct review (*see* proposed § 170.580(a)(1)(v)). The commenters stated that if certification criteria pose issues that are novel, complex, or likely to lead to inconsistent application, these issues should be addressed during the testing and certification process, not by reviewing certified health IT after it has been certified.

Response. Commenters may have misunderstood the purpose of these proposed factors and the situations in which they would be relevant to determining whether ONC should initiate direct review. In the 2015 Edition final rule, we explained that to comply with applicable certification criteria, developers must not only demonstrate required capabilities in a controlled testing environment but must also make those capabilities available in ways that enable them to be implemented and used in production environments for their intended purposes (80 FR 62711). As ONC–ACBs increase their surveillance of the performance of certified health IT in production environments, we anticipate that ONC–ACBs may be presented with performance and functionality that might require the analysis of unfamiliar and difficult problems or deficiencies in certified health IT that require significant resources and expertise to properly investigate and assess under existing certification criteria. In some instances, the resources required to undertake this assessment may exceed the resources available to the ONC–ACB.

The factors proposed at § 170.580(a)(1)(iv)(D) and (a)(1)(v) were not intended to suggest, as some commenters seem to have misunderstood, that ONC could use direct review to engage in novel interpretations of certification criteria. Rather, these factors were intended to cover situations, such as those described above, that could exceed an ONC–ACB's resources or expertise. To avoid any confusion, we have removed these factors from the final rule's regulation text on the basis that they are duplicative of ONC's consideration of whether an ONC–ACB has sufficient ''resources or expertise'' to evaluate a suspected non-conformity.

Comments. A few commenters, including one ONC–ACB, suggested that ONC–ACBs are in the best position to know their own capabilities and as such ONC should not initiate direct review unless invited by an ONC–ACB. One commenter suggested that ONC should be ''on call'' to assist ONC–ACBs to respond to suspected non-conformities that exceed the ONC–ACBs capacity or expertise.

Response. We thank commenters for their comments. In response to commenter concerns, we have adapted the final rule to provide ONC with an opportunity to consult with ONC–ACBs, as well as the ONC–AA and any other persons or entities, as ONC deems appropriate. In order for ONC to exercise direct review under § 170.580(a)(2)(ii)(C), ONC must necessarily make a judgment about the resources and expertise of an ONC–ACB. ONC would only very rarely be in a position to make such a judgment without first consulting with the relevant ONC–ACB. However, because ONC is the Program owner and administrator, it would be inappropriate if an ONC–ACB were able to prevent ONC from initiating direct review if ONC has formed a reasonable belief that the ONC–ACB lacks the resources or expertise to investigate and address the suspected non-conformity at issue.

Comments. Commenters urged us to clarify the types of information that ONC would rely on in deciding whether to initiate direct review, including when ONC would deem information ''reliable and actionable'' so as to warrant further inquiry into certified health IT's conformity to Program requirements (*see* 81 FR 11062).

Response. In the 2015 Edition final rule, we provided guidance on the circumstances that would trigger an ONC–ACB's duty to initiate reactive surveillance (80 FR 62712). We said that in determining whether to initiate reactive surveillance, an ONC–ACB must consider and weigh the volume, substance, and credibility of complaints and other information received against the type and extent of the alleged non-conformity, in light of the ONC–ACB's expertise and experience with the particular capabilities, health IT, and certification requirements at issue. As an example, we supposed that where an ONC–ACB receives a number of anonymous complaints alleging general dissatisfaction with a particular certified health IT, the ONC–ACB would not be required to initiate surveillance (though it would not be precluded from doing so). In contrast, upon receiving several complaints alleging specific non-conformities, the ONC–ACB must initiate surveillance of the certified health IT unless a reasonable person in the ONC–ACB's position would doubt the credibility or accuracy of the complaints. By way of example, we explained that a reasonable basis for doubt might exist if the ONC–ACB had recently responded to the very same issue and determined through in-the-field surveillance of the certified health IT at several different locations that the reported problem was due to a ''bug'' arising from an unsupported use of the certified health IT that the developer had specifically cautioned users about in advance.

We anticipate applying these same principles in determining whether information about a potential non-conformity is sufficiently reliable and actionable to warrant ONC's direct review. We note, however, that in contrast to an ONC–ACB's affirmative duty to initiate surveillance, ONC is not required to initiate direct review. As such, ONC may require additional information before initiating review or may choose not to exercise review for any reason.

Comments. Commenters made a range of suggestions about criteria that ONC could adopt, or indicia ONC could use, to determine the veracity or credibility of information received by ONC when making a determination on whether or not to commence direct review. A number of commenters suggested that ONC should not initiate direct review of an alleged non-conformity unless the complainant has first notified the developer and given the developer an opportunity to rectify the deficiency.

Response. We thank commenters for their constructive suggestions. Because most issues that are the subject of direct review will concern risks to public health or safety, we anticipate that it will be very rare for information about such risks to be reported to ONC without first being brought to the developer's attention. However, we have determined that it would not be appropriate for ONC to be inhibited from initiating direct review on the basis that a health IT user had not first notified the health IT developer of the issue and provided the developer with an opportunity to rectify the deficiency. Consistent with a number of comments received from health IT developers, we note that a large number of health IT users do not have a direct business relationship with the developer of the health IT product they use. This is because many small healthcare practices receive their health IT via a sublicensing arrangement entered into with a large health care network. Similarly, other health IT stakeholders, such as health information exchanges, are positioned to identify deficiencies in certified health IT products they interact with but would not necessarily have a recognized process through which to raise issues or grievances with the developer concerned. Because ONC will weigh the volume, substance, and credibility of any information received, in light of all relevant circumstances, we do not believe it is necessary or appropriate to exclude from consideration any particular types or sources of information or to decide in advance what if any weight should be assigned to them.

Comments. One commenter also suggested that ONC would need to receive a threshold number of complaints by multiple distinct users in respect to the same certified health IT version number before the information in ONC's possession was actionable.

Response. ONC respectfully disagrees that there is a threshold number of complaints that would apply in all circumstances to ensure that direct review was triggered in only appropriate cases. Indeed, we can envision public health or safety risks for which a single complaint supported by detailed information and/or evidence would be sufficiently reliable and actionable to trigger ONC's exercise of discretion to initiate direct review.

Comments. A commenter suggested that a provider's timeliness in implementing all applicable and available releases and ''hot fixes'' for the certified health IT should be taken into consideration by ONC when assessing the veracity and credibility of information ONC has received.

Response. We thank this commenter for their comment. If a health IT developer issued customers with a new release, patch, or ''hot fix'' to address a deficiency in the developer's certified health IT, but their recommendation to implement the update within a specified period is ignored, ONC may determine that the deficiency at issue was caused by factors removed from the control or responsibility of the developer (*see* discussion above in section II.A.1.a.(1) of this preamble).

However, ONC may determine that it may nevertheless initiate review of the affected certified health IT in order to make a proper determination of the cause of any suspected non-conformity and to make an assessment of whether the remedial action implemented by the developer is appropriate in the circumstances.

b. ONC–ACB's Role

We proposed that ONC's review of certified health IT would be independent of, and may be in addition to, any review conducted by an ONC–ACB, even if ONC and the ONC–ACB were to review the same certified health IT, and even if the reviews occurred concurrently. To ensure consistency and clear accountability, we also proposed that ONC, if it deems necessary, could assert exclusive review of certified health IT as to any matters under review by ONC and any other matters that are so intrinsically linked that divergent determinations between ONC and an ONC–ACB would be inconsistent with the effective administration or oversight of the Program. Finally, we proposed that in such instances, ONC's determinations on these matters would take precedent and a health IT developer would be subject to the proposed ONC direct review provisions in the Proposed Rule, including having the opportunity to appeal an ONC determination, as applicable.

We clarified in the Proposed Rule that, in matters where ONC does not assert direct and/or exclusive review or ceases its direct and/or exclusive review, an ONC–ACB would be permitted to issue its own determination on the matter. We further clarified that any resulting determination to suspend or terminate a certification issued to a Complete EHR or Health IT Module by an ONC–ACB would not be subject to ONC review under the provisions proposed in the Proposed Rule. We also stated that in those instances, there would be no opportunity to appeal the ONC–ACB's determination(s) under the provisions proposed in the Proposed Rule. We emphasized that ONC–ACBs are accredited, authorized, and entrusted to issue and administer certifications under the Program consistent with adopted certification criteria and other specified Program requirements. Therefore, they have the necessary expertise and capacity to effectively administer these specific requirements.

We proposed in the Proposed Rule that ONC could initiate review of certified health IT on its own initiative based on information from an ONC–ACB, which could include a specific request from the ONC–ACB to conduct a review. In exercising its review of certified health IT, we proposed that ONC would be entitled to any information it deems relevant to its review that is available to the ONC–ACB responsible for administering the health IT's certification. We proposed that ONC could contract with an ONC–ACB to conduct facets of an ONC direct review within an ONC–ACB's scope of expertise, such as surveillance of certified capabilities.

We proposed that ONC could also share information with an ONC–ACB that may lead the ONC–ACB, at its discretion and consistent with its accreditation, to conduct in-the-field surveillance of the certified health IT at particular locations. We further proposed that ONC could, at any time, end all or any part of its review of certified health IT under the processes proposed and refer the applicable part of the review to the relevant ONC–ACB(s), if doing so would be in the best interests of efficiency or the effective administration and oversight of the Program. We stated that the ONC–ACB would be under no obligation to proceed further, but would have the discretion to review and evaluate the information provided and proceed in a manner it deems appropriate. As noted above, this may include processes and determinations (*e.g.,* suspension or termination) not governed by the proposed review and appeal processes.

We requested comment on our proposed approach and the role of an ONC–ACB.

Comments. Multiple commenters supported our proposals regarding the ONC–ACB's role and responsibilities for reviewing certifications of Complete EHRs and Health IT Modules. Commenters agreed that there are situations when ONC should have authority to independently review or assist an ONC–ACB in reviewing certified health IT. Other commenters questioned our rationale for allowing ONC direct review to be independent of, and in addition to, ONC–ACB review. These commenters contended that ONC–ACBs are qualified to review all non-conformities. A few commenters requested clarification regarding the scope of review responsibilities for ONC and ONC–ACBs, respectively.

Response. We have finalized our proposals regarding the ONC–ACB's role and responsibilities in relation to ONC direct review as proposed with the following clarifications and a revision as discussed in the response below. As stated above, reviews by ONC–ACBs and ONC would be complementary, but independent as well. As discussed in detail under section II.A.1.a, we believe that ONC should exercise direct review over matters outside of an ONC–ACB's resources and expertise as well as matters that pose a serious risk to public health or safety.

We clarify that ONC–ACB review after a certification is issued is limited to surveillance. This clarification is consistent with the requirements of ISO/IEC 17065 [9] and our discussion of ONC–ACB surveillance in the 2015 Edition final rule (*see* 80 FR 62605). Thus, we refer to this ''review'' by the ONC–ACB as surveillance in this final rule.

Comments. Commenters, including an ONC–ACB, expressed agreement with our proposal that as the scheme owner and regulator, ONC's determinations should take precedent. Other commenters were concerned that there could be conflicts between ONC and ONC–ACB determinations and questioned why ONC's determination should take precedent. Commenters also suggested that the proposed approach to review could cause mixed messaging by ONC and ONC–ACBs and duplication of efforts by health IT developers (*e.g.,* document production and interviews). Commenters encouraged ONC and ONC–ACBs to share relevant information and coordinate review in order to avoid duplication.

Response. We believe the final provisions will facilitate sound determinations by the appropriate body and help avoid duplicative review. Under the final provisions, ONC may assert exclusive review of certified health IT as to any matters under its review and any similar matters under surveillance by an ONC–ACB. In determining if matters are similar, ONC will, as proposed, consider whether the matters are so intrinsically linked that divergent determinations between ONC and an ONC–ACB would be inconsistent with the effective administration or oversight of the Program.

A determination by ONC on matters under its review will be controlling and supersede any determination by an ONC–ACB. We believe these steps will help avoid conflicts in determinations and permit ONC, as the administrator of the Program, to reach appropriate outcomes consistent with Program requirements on matters within its review.

Under the final provision in § 170.580(a)(3)(v), ONC may end all or any part of its review of certified health IT and refer the applicable part of the review to the relevant ONC–ACB(s) if

[9] The international standard to which ONC–ACBs are accredited. 45 CFR 170.599(b)(4).

ONC determines that doing so would serve the effective administration or oversight of the Program. The ONC–ACB would be under no obligation to proceed further, but would have the discretion to review and evaluate the information provided and proceed in a manner it deems appropriate.

We are finalizing this provision by revising it for clarity. We had proposed that ONC may end its review based on the best interests of efficiency or the administration and oversight of the Program (81 FR 11083). We have revised that proposal to be that ONC may determine to end its review if that would serve the effective administration or oversight of the Program. We believe the revision eliminates duplicative bases for ending review and remains consistent with the intent of the proposed provision. In addition, for further clarity, we have added that ONC may cease its review at any time. We indicated in the Proposed Rule that we could cease our review, but we did not make clear that it could be at any time during the direct review process (*see also* section II.A.1.a.(2) of this preamble). We further note that in the discussion of the direct review processes, we provide clarity regarding the steps ONC would take throughout direct review, including after receiving health IT developer responses to notices.

We appreciate commenters' suggestion that ONC increase coordination and sharing of information with ONC–ACBs. ONC and ONC–ACBs regularly communicate and we anticipate this communication would continue when ONC initiates direct review of certified health IT. As noted by commenters, such communication will benefit the Program and minimize the possibility of mixed messaging or duplicative review. In furtherance of collaboration between ONC and ONC–ACBs, we have finalized the proposed requirement that ONC–ACBs must provide ONC with any available information that ONC deems relevant to its review of certified health IT. We have also included ONC–ATLs in this information sharing provision as we have finalized the ONC–ATL processes in this final rule. We note that we could share information with an ONC–ACB that may lead the ONC–ACB, at its discretion and consistent with its accreditation, to conduct in-the-field surveillance of the health IT at a particular location.

Comment. A commenter expressed concern that the Proposed Rule did not propose appeal rights for ONC–ACB determinations. The commenter explained that, if there are two different enforcement bodies (ONC and ONC–ACBs) that may make determinations, there should be equal rights for a health IT developer to appeal those determinations.

Response. Health IT developers that have their certifications terminated by an ONC–ACB can appeal that determination to the ONC–ACB, similar to how an ONC termination can be appealed to the National Coordinator under the processes finalized in this final rule. The ONC–ACB will process the appeal in accordance with the requirements of ISO/IEC 17065 and the ONC–ACB's procedures. Appeal procedures may vary among ONC–ACBs, so health IT developers should familiarize themselves with the appeal procedures provided by their ONC–ACB(s). If the health IT developer is not satisfied with the result of the appeal, the health IT developer can submit the matter to the Approved Accreditor for certification under the Program, American National Standards Institute (ANSI), for consideration.

In consideration of the ONC–ACB appeals process outlined above and our belief that ONC–ACBs have the necessary expertise and capacity to effectively administer certifications under the Program consistent with the certification criteria and other specified Program requirements, we have not established a process for health IT developers to appeal ONC–ACB determinations to ONC.

c. Review Processes

We stated in the Proposed Rule that ONC could become aware of information from the general public, interested stakeholders, ONC–ACBs, or by any other means that indicates that certified health IT may not conform to the requirements of its certification or is, for example, leading to medical errors or other outcomes that do not align with the National Coordinator's responsibilities under section 3001 of the PHSA. We proposed that, if ONC deems the information to be reliable and actionable, it would conduct further inquiry into the certified health IT. We further stated that ONC could also initiate an independent inquiry into the certified health IT that could be conducted by ONC or a third party(ies) on behalf of ONC (*e.g.,* contractors or inspection bodies under the certification scheme). If information reveals that there is a potential non-conformity (through substantiation or omission of information to the contrary) or confirms a non-conformity in the certified health IT, we stated that ONC would proceed to notify the health IT developer of its findings, as applicable, and work with the health IT developer to address the matter.

We proposed that correspondence and communication with ONC and/or the National Coordinator for all processes proposed under this section (section II.A.1.c) of the preamble shall be conducted by email, unless otherwise necessary or specified. We proposed to modify § 170.505 accordingly.

Comments. Commenters supported the ONC direct review processes as proposed. A commenter emphasized that the review processes would promote greater accountability of health IT developers for the performance, reliability, and safety of certified health IT. A few commenters, however, expressed concern about frivolous complaints. These commenters and other commenters requested clarification regarding the type of information that would warrant ONC direct review and requested that ONC explain what constitutes ''reliable and actionable'' information. A commenter requested that ONC establish clear requirements for what information must be presented as part of a complaint or allegation of non-conformity and who would be eligible to make such a complaint.

Response. We have finalized the process and criteria for identifying non-conformities that would warrant ONC direct review as proposed with clarifications in response to comments. We clarify that in order to determine the reliability of the information, ONC will consider and weigh the volume, substance, and credibility of complaints and other information received against the type and extent of the alleged non-conformity. We note that this reliability standard aligns with the ONC–ACB standard for initiating surveillance in the 2015 Edition final rule (80 FR 62713). We also clarify that if information ONC receives does not provide adequate detail, specificity, or clarity regarding the suspected non-conformity, ONC will, as necessary, contact the party(ies) who submitted the complaint to gather additional information and make a decision as to whether the complaint is actionable. To avoid confusion, we have removed ''reliable and actionable'' from the relevant provisions of § 170.580. We believe the above clarification is responsive to commenters and clarifies the type of information that would give ONC a ''reasonable belief'' that the certified health IT may not or does not conform to the requirements of the Program.

In section II.A.1.a.(3) of this final rule, we describe factors ONC should consider when deciding whether to exercise direct review. These factors afford ONC discretion to evaluate information on a case-by-case basis. Considering the wide range of information ONC may receive regarding non-conformities in certified health IT, and that ONC has specialized expertise to evaluate the reliability and accuracy of such information, it is essential that ONC have discretion in making direct review decisions.

Comments. Many commenters suggested that correspondence throughout the review processes should be issued by mail.

Response. We have finalized the requirements for correspondence with additional regulation revisions and processes. Section 170.505 states that correspondence and communication with ONC or the National Coordinator shall be conducted by email, unless otherwise necessary or specified. We note that email correspondence and communication of protected health information by HIPAA covered entities and business associates must employ safeguards in compliance with the HIPAA Rules.

Section 170.505 provides the flexibility to use means other than email as ''necessary or specified.'' As stated in the Proposed Rule, we intend to send notice of suspension and termination via certified mail. We also intend to send notices of potential non-conformity, notices of non-conformity, and notices of proposed termination via certified mail. We have, therefore, revised § 170.505 to clearly state the potential use of certified mail in addition to regular and express mail. Section 170.505 specifies that the official date of receipt of any form of mail will be the date of the delivery confirmation. We have revised the language of this provision to clarify that it applies to all parties and that delivery confirmation is to the address on record. The address on record is the most recently provided address to ONC or an ONC–ACB, as applicable. We believe this will clarify the process in situations where an entity, such as a health IT developer, moves its place of business or goes out of business without notifying ONC or the relevant ONC–ACB.

(1) Notice of Potential Non-Conformity or Non-Conformity

We proposed that if information suggests to ONC that certified health IT is not performing consistent with Program requirements and a non-conformity exists with the certified health IT, ONC would send a notice of potential non-conformity or non-conformity to the health IT developer. We explained in the Proposed Rule that the notice would specify ONC's reasons for the notification, explain ONC's findings, and request that the health IT developer respond to the potential/alleged non-conformity (and potentially a corrective action request) or be subject to further action (*e.g.,* corrective action, suspension, and/or the termination of the certification in question, as appropriate).

We proposed that ONC should have the ability to access and share within HHS, with other federal agencies, and with appropriate entities, a health IT developer's relevant records related to the development, testing, certification, implementation, maintenance, and use of its product, as well as any complaint records related to the product. We stated that this proposal would ensure a complete and comprehensive review of the certified health IT product. We noted that much of this information already must be disclosed as required by the Program and described in the 2015 Edition final rule. We proposed, however, that ONC be granted access to, and be able to share within HHS, with other federal agencies, and with appropriate entities (*e.g.,* a contractor or ONC–ACB) any additional records not already disclosed that may be relevant and helpful in ONC's fact-finding and review. If we determined that the health IT developer was not cooperative with the fact-finding process, we proposed that we would have the ability to suspend or terminate the certification of any encompassed Complete EHR or Health IT Module of the certified health IT as outlined later in sections II.A.1.c.(3) and (4) of this final rule.

We stated in the Proposed Rule that we understood that health IT developers may have concerns regarding disclosure of proprietary, trade secret, competitively sensitive, or other confidential information. To address these concerns, we further stated that ONC would implement appropriate safeguards to ensure, to the extent permissible with federal law, that any proprietary business information or trade secrets that ONC might encounter by accessing the health IT developer's records would be kept confidential by ONC.[10] For instance, ONC would ensure that, if it obtains proprietary or trade secret information, that information would not be included in the CHPL. We noted, however, that the safeguards we would adopt would be prophylactic and would not create a substantive basis for a health IT developer to refuse to comply with the proposed requirements. Thus, a health IT developer would not be able to avoid providing ONC access to relevant records by asserting that such access would require it to disclose trade secrets or other proprietary or confidential information.

We proposed that unless otherwise specified in the notice, the health IT developer would be required to respond within 30 days of receipt of the notice and, if necessary, submit a proposed CAP as outlined below in section II.A.1.c.(2) of this final rule. We proposed that ONC may require a health IT developer to respond and/or submit a proposed CAP in more or less time than 30 days based on factors such as, but not limited to: (1) The type of health IT and health IT certification in question; (2) the type of non-conformity to be corrected; (3) the time required to correct the potential non-conformity or non-conformity; and (4) issues of public health and safety and other exigencies related to the National Coordinator carrying out his or her duties in accordance with sections 3001(b) and (c) of the PHSA. We proposed that ONC would have discretion in deciding the appropriate timeframe for a response and proposed CAP from the health IT developer.

We proposed that if the health IT developer contends that the certified health IT in question conforms to Program requirements, the health IT developer must include in its response all appropriate documentation and explain in writing why the health IT is conforming.

We requested comment on our proposed processes described above, including whether the timeframe for responding to a notice of potential non-conformity or non-conformity is reasonable and whether there are additional factors that we should consider.

Comments. Many commenters supported the proposed processes for notices of potential non-conformity and non-conformity. Multiple commenters, however, requested discussion between ONC and the health IT developer, which could also include the ONC–ACB, regarding a complaint or surveillance issue prior to the issuance of a notice of potential non-conformity or non-conformity. Commenters stated that such discussion would help ensure the appropriateness of, and necessity for, the issuance of a notice of potential non-conformity or non-conformity. A commenter also recommended that ONC engage with end-users of certified health IT and establish a process in which end-

[10] The Freedom of Information Act, 18 U.S.C. 1905, and the Uniform Trade Secrets Act generally govern the disclosure and descriptions of these types of information.

users can offer feedback on certified health IT to help alert ONC to potential and actual non-conformities.

Many commenters requested that ONC clarify the circumstances that would cause ONC to send a notice of potential non-conformity or non-conformity to a health IT developer. These commenters also expressed concerns that, as proposed, ONC could issue a notice of non-conformity without first issuing a notice of potential non-conformity. Commenters opined that a notice of non-conformity should not be the first instance of notification to a health IT developer in the ONC direct review process. A commenter recommended that ONC provide a model notification to industry and stakeholders of the content of a notice of potential non-conformity and non-conformity.

Response. We thank commenters for their thoughtful comments on this aspect of the proposed direct review processes. We have finalized the proposed processes for notices of potential non-conformity and non-conformity with the following clarifications and revisions discussed below and finalized in § 170.580(b)(1) through (3).

We agree with commenters regarding the benefits of open discussion between ONC, health IT developers, and as applicable, ONC–ACBs, during the direct review process. While we encourage discussions between ONC and health IT developers prior to the issuance of a notice of potential non-conformity or non-conformity, we cannot guarantee that such discussions will always precede a notice because ONC may need to take immediate steps to expedite direct review and corrective action or have other reasons for not first discussing the matter. We emphasize that our first and foremost goal is to work with health IT developers to address any non-conformities in certified health IT in a timely manner and across all customers, and we encourage discussion as early as possible in the process to help achieve this goal.

We also appreciate the suggestion that ONC engage with end-users and we encourage end-users to contact us with their concerns. Specifically, end-users can submit a complaint through the ONC-established complaint process at: *https://www.healthit.gov/healthitcomplaints.*

While we do not believe we could develop a model notice that would be of value to health IT developers because each instance of potential non-conformity or non-conformity will likely be unique, we do offer the following clarifications. ONC may issue a notice of non-conformity without first issuing a notice of potential non-conformity if supported by the circumstances and information available to ONC. ONC must be able to issue a notice of non-conformity in situations where information establishes and ONC determines that there is an actual non-conformity in order to put the health IT developer on notice and begin the corrective action process without delay. In comparison, ONC may issue a notice of potential non-conformity when it has a reasonable belief, based on information at its disposal, that there may be a non-conformity with the certified health IT. We further note that a notice of potential non-conformity and notice of non-conformity are separate and distinct notices, and ONC can issue them concurrently, as necessary. In such situations, each notice will include the appropriate timeframe for the health IT developer to submit a response. As stated above, we will send notices of potential non-conformity and non-conformity by certified mail and the official date of receipt will be the date of the delivery confirmation to the address on record consistent with § 170.505.

Developer Response

We have restructured and revised the requirements for health IT developer responses to notices of potential non-conformity and non-conformity (*see* § 170.580(b)(1)(ii) and (b)(2)(ii)). These revisions are intended to clarify ONC's expectations regarding health IT developer responses and to emphasize that the proposed and finalized ''Records Access'' provision (§ 170.580(b)(3)) is a separate requirement.

Health IT developers must respond to a notice of potential non-conformity by (1) cooperating with ONC and/or a third party acting on behalf of ONC, (2) providing ONC and/or a third party acting on behalf of ONC access to the certified health IT under review, and (3) providing ONC with a written explanation, within 30 days, unless adjusted by ONC, addressing the potential non-conformity, including all appropriate documentation.

Health IT developers must respond to a notice of non-conformity in the same fashion as described for a notice of potential non-conformity above *and,* in addition, must submit a proposed CAP (*see* § 170.580(b)(2)(ii)(A)(*4*)). We note that we did not propose in the Proposed Rule that the health IT developer could respond to a notice of non-conformity through a written explanation addressing the non-conformity in addition to submitting a proposed CAP. We have, however, finalized this new provision in the final rule to allow health IT developers to explain, agree with, or refute the notice of non-conformity, which parallels a health IT developer's opportunity to respond to a notice of potential non-conformity. This opportunity to respond is in addition to submitting a proposed CAP and will not delay or prolong the CAP process. In addition, we note that ONC may still propose termination under § 170.580(e), as necessary, despite a written explanation from the health IT developer that refutes the notice of non-conformity. We further note that a health IT developer may choose to contest the notice of potential non-conformity or not cooperate with ONC or a third party acting on behalf of ONC. However, we again emphasize that in such situations ONC may take action under the proposed termination provisions (*see* § 170.580(e)).

Comments. We received numerous comments on the proposed 30-day default response period for notice of potential non-conformity or non-conformity. This includes the requirement, which is also stated in section II.A.1.c.(2) of this final rule below, that a health IT developer must submit a proposed CAP to ONC within 30 days of the date that ONC notifies the health IT developer of an actual non-conformity, unless ONC specifies a different timeframe. A few commenters supported our proposal and response timeframe. Many commenters suggested that the 30-day default response period should be the minimum time period to respond to a notice. Other commenters stated that a 30-day default response period is too short, particularly when corrective action is required, because non-conformities may be complex and difficult to resolve. One commenter suggested that the 30-day default response period is too long. The commenter stated that, based on past experience working with numerous certified systems to address non-conformities, 30 days is a long time for the problem to be addressed, much less to develop a plan to address the problem. Many commenters requested clarification about instances when the response period would be ''more or less'' time than 30 days, as proposed. Many commenters also suggested that the response period be measured in business days.

Response. We have finalized this requirement as proposed for responding to both a notice of potential non-conformity and a notice of non-conformity with clarifications in response to comments. We maintain that 30 days is an appropriate default response period that will afford health IT developers ample time to respond to a notice and ensure that health IT developers address non-conformities in a timely fashion. We provide clear guidance regarding the factors ONC will use to determine whether the health IT developer should submit a response and/or CAP in more or less time than 30 days (§ 170.580(b)(1)(ii)(B) and (b)(2)(ii)(B)). ONC must retain discretion to increase or decrease the 30-day period when necessary due to the wide range and complexity of non-conformities. We emphasize that ONC will work with health IT developers to develop acceptable CAPs with reasonable timeframes for completion. We also clarify that health IT developers may request an extension for submittal of a CAP. In order to make this extension request, a health IT developer must submit a written statement to ONC that explains and justifies the request.

For clarity, we previously adopted the definition of ''day or days'' in § 170.102 to mean calendar day or calendar days (Temporary Certification Program final rule; 75 FR 36162 and 36203).

We clarify, as noted above, that a health IT developer's response to a notice of potential non-conformity or non-conformity includes providing ONC, and/or a third party acting on behalf of ONC, with access to the certified health IT under review (§ 170.580(b)(1)(ii) and (b)(2)(ii)). We note that this is a clarification of the requirement in the Proposed Rule and does not introduce a new requirement for health IT developers (81 FR 11058). We proposed in the ''Authority and Scope'' section of the Proposed Rule that this rulemaking was intended to address ONC's direct review of certified health IT and provide ONC with access to the certified health IT and relevant records (''records access'' proposal) to assist in determining whether a non-conformity exists and addressing a found non-conformity.

ONC Determination

We have added and finalized provisions that specify how ONC would respond to a health IT developer's response to a notice of potential non-conformity and notice of non-conformity. These provisions provide further transparency and clarification of the review processes, particularly with regard to ONC actions. However, we emphasize that, as specified under the ''ONC–ACB's Role'' section of this final rule above, ONC may end its review at any time.

We have finalized a provision that addresses ONC's options after receiving the health IT developer's written explanation in response to a notice of potential non-conformity. ONC will do one of the following (§ 170.580(b)(1)(iii)): (1) Issue a written determination ending its review (which, may also include a rescission of a suspension (*see* the ''suspension'' section of this final rule for further discussion)); (2) request additional information and continue its review in accordance with a new timeframe it establishes (*see* § 170.580(b)(1)(ii)(A)(*3*) and (b)(1)(ii)(B)); (3) substantiate a non-conformity and issue a notice of non-conformity; or (4) issue a notice of proposed termination.

We have also finalized a similar provision that addresses ONC's options after receiving the health IT developer's written response to a notice of non-conformity. ONC will either issue a written determination ending its review or continue with its review under the provisions of this section. The continuation of ONC's review would likely be to proceed through the CAP process as outlined in this final rule, but may instead be to issue a proposed termination or take other appropriate action under the provisions of this final rule.

Comments. Many commenters expressed concern that the proposed records access requirement is too broad, extends beyond what is required for ONC–ACB surveillance, and could require health IT developers to produce large amounts of information. Commenters suggested that the proposed language should be more narrowly focused on records that directly bear on the specific certified capabilities affected by the non-conformity(ies) and materials relevant to the issue under review. Commenters were also concerned about protecting the confidentiality of health IT developer records. Commenters questioned the necessity of sharing records with other federal agencies and appropriate entities.

A commenter noted that documents or records obtained by ONC during the course of direct review could contain protected health information (PHI), trade secrets, or other sensitive information without a sufficient basis or adequate assurances that this information would be protected from further disclosure.

Response. We have finalized this requirement as proposed with the following clarifications. This approach to records access and sharing of records is necessary for ONC to conduct a comprehensive review of certified health IT, and will supplement ONC's access to the certified health IT under review. This approach supports the review of uncertified capabilities that interact with certified capabilities and will assist ONC in determining whether certified health IT conforms to applicable Program requirements. Further, the relevant records and federal departments, agencies, and offices will be determined on a case-by-case basis with consideration of the matter under review. We clarify that ''complaint records'' under the records access requirements include, but are not limited to, issue logs and help desk tickets.

As stated and outlined in the Proposed Rule (81 FR 11063), we are committed to implementing appropriate safeguards to ensure that any proprietary business information or trade secrets that ONC might encounter would be kept confidential by ONC to the extent permissible by federal law. To that end, we strongly recommend that health IT developers clearly mark, as described in HHS Freedom of Information Act regulations at 45 CFR 5.65(c), any information they regard as trade secret or confidential commercial or financial information prior to disclosing the information to ONC.

Regarding the disclosure of PHI to ONC, we refer to our previous guidance provided on this issue in consultation with the HHS Office for Civil Rights. Specifically, in the 2015 Edition Final Rule, we explained that a health care provider is permitted, without patient authorization, to disclose PHI to an ONC–ACB for purposes of the ONC–ACB's authorized surveillance activities (80 FR 62716). Health care providers are permitted to make disclosures to a health oversight agency (as defined in 45 CFR 164.501) for oversight activities (as described in 45 CFR 164.512(d)) authorized by law, including activities to determine compliance with program standards, and ONC may delegate its authority to ONC–ACBs to perform surveillance of certified health IT under the Program.[11] This disclosure of PHI to an ONC–ACB does not require a business associate agreement with the ONC–ACB since the ONC–ACB is not performing a function on behalf of the covered entity. In the same way, a provider, health IT developer, or other person or entity is permitted to disclose PHI directly to ONC, without patient authorization and without a business associate agreement, for purposes of ONC's direct review of certified health IT or the performance of any other

[11] *See:* 45 CFR 164.512(d)(1)(iii); 80 FR 62716; and ONC Regulation FAQ #45 [12–13–045–1] available at *http://www.healthit.gov/policy-researchers-implementers/45-question-12-13-045.*

oversight responsibilities of ONC to determine compliance under the Program.

We further clarify that, as we contemplated in the Proposed Rule, it may be necessary for ONC to engage additional resources and specialized expertise to timely and effectively respond to potential non-conformities or non-conformities (81 FR 11058), and that this may include engaging outside experts, consultants, or other persons or entities (consultants) for the purpose of assisting ONC in its direct review of certified health IT. In the same way that ONC authorizes ONC–ACBs to conduct surveillance of certified health IT under the Program, ONC may authorize such consultants to perform fact-finding, analyses, and/or other functions that support ONC's direct review of the certified health IT; and pursuant to ONC's health oversight authority (as defined in 45 CFR 164.512(d)(1)(iii)), persons and entities are permitted to disclose PHI to such consultants for the purpose of carrying out these authorized activities, without patient authorization and without a business associate agreement.

We note that subsequent disclosures of identifiable patient health information by ONC, or persons or entities acting on ONC's behalf, are limited to those expressly allowed by law—such as under the Privacy Act of 1974 and/or the Freedom of Information Act (FOIA), as applicable.

(2) Corrective Action

We proposed in the Proposed Rule that if ONC finds that certified health IT does not conform to Program requirements, ONC would take appropriate action with the health IT developer to remedy the non-conformity as outlined below.

We proposed that ONC would require a health IT developer to submit a proposed CAP to ONC. The CAP would provide a means to correct the identified non-conformities across all the health IT developer's customer base.

We proposed, as described above in section II.A.1.c.(1) of this preamble and in the Proposed Rule, that a health IT developer must submit a proposed CAP to ONC within 30 days of the date that ONC notifies the health IT developer of the non-conformity, unless ONC specifies a different timeframe. We explained in the Proposed Rule that this approach aligns with and does not change the corrective action process specified in § 170.556(d) and used by ONC–ACBs. The primary difference between this approach and the approach specified § 170.556(d) is that in § 170.556(d) the health IT developer must submit a CAP to an ONC–ACB within 30 days of being notified of the potential non-conformity. We proposed in the Proposed Rule that this 30-day period be the default for receiving a response/CAP, but that ONC may alter the response period based on non-conformities that may pose a risk to public health or safety, or other exigencies related to the National Coordinator carrying out his or her duties in accordance with sections 3001(b) and (c) of the PHSA (81 FR 11063).

We proposed in the Proposed Rule that ONC would provide direction to the health IT developer as to the required elements of the CAP and would work with the health IT developer to develop an acceptable CAP. We proposed that a CAP must include, at a minimum, for each non-conformity:

- A description of the identified non-conformity;
- An assessment of the nature, severity, and extent of the non-conformity, including how widespread they may be across all of the health IT developer's customers of the certified health IT;
- How the health IT developer will address the identified non-conformity, both at the locations where the non-conformity was identified and for all other potentially affected customers;
- A detailed description of how the health IT developer will assess the scope and impact of the non-conformity(ies), including identifying all potentially affected customers, how the health IT developer will promptly ensure that all potentially affected customers are notified of the non-conformity and plan for resolution, how and when the health IT developer will resolve issues for individual affected customers, and how the health IT developer will ensure that all issues are in fact resolved; and
- The timeframe under which corrective action will be completed.

We proposed that when ONC receives a proposed CAP (or a revised proposed CAP) it shall either approve the proposed CAP or, if the plan does not adequately address all required elements, instruct the health IT developer to submit a revised proposed CAP. In addition to the required elements above, we proposed that a health IT developer would be required to submit an attestation to ONC. We explained that the attestation would follow the form and format specified by the CAP and would be a binding official statement by the health IT developer that it has fulfilled all of its obligations under the CAP, including curing the identified non-conformities and related deficiencies and taking all reasonable steps to prevent their recurrence.

We stated in the Proposed Rule that based on this attestation and all other relevant information, ONC would determine whether the non-conformity(ies) had been cured and, if so, would lift the CAP. However, we proposed that if it were later discovered that the health IT developer had not acted in the manner attested, ONC could reinstitute the CAP or proceed to suspend or terminate the certification of any encompassed Complete EHR or Health IT Module of the certified health IT.

We proposed that ONC would report the CAP and related data to the publicly accessible CHPL. The purpose of this reporting requirement, as it is for ONC–ACBs under current regulations, would be to ensure that health IT users, implementers, and purchasers are alerted to potential conformity issues in a timely and effective manner. This approach is consistent with the public health and safety, program integrity, and transparency objectives described previously in the Proposed Rule (81 FR 11064) and in the 2015 Edition final rule (80 FR 62725–26).

We requested comment on our proposed CAP processes as described above.

Comments. Many commenters stated that ONC should use the same construct for CAPs as was established in § 170.566(d) for non-conformities found by ONC–ACBs. A few commenters noted that the proposed corrective action requirements and the ''ONC–ACB CAP'' requirements are consistent concerning the authority of ONC and ONC–ACBs to provide direction on required elements of the CAP, but are inconsistent with regard to the proposed ability of ONC to ''*prescribe*'' such corrective action as may be appropriate to fully address the identified non-conformity(ies). Some commenters suggested that ONC clarify this language so that ONC is able to ''prescribe'' the elements required of the CAP, but not health IT developer actions.

Response. We thank commenters for their thoughtful comments on this aspect of the proposed corrective action process. In consideration of these comments, we have finalized the corrective action requirement and CAP elements at § 170.580(c)(2), subject to the following changes and clarification discussed below. As discussed above, our approach to corrective action aligns with the corrective action process specified in § 170.556(d) for ONC–ACB actions. Section 170.556(d) does not, however, ''prescribe'' corrective action. Therefore, to further align with

§ 170.556(d) and in response to comments, we have removed ''prescribe'' from the regulation text. We emphasize that this change is only a clarification of the proposed language and does not represent a narrower policy than proposed.

Our goal with CAPs under ONC direct review and ONC–ACB surveillance is to remedy the non-conformity(ies) as quickly and effectively as possible. Therefore, we will include such required elements as part of a CAP as we determine is necessary to comprehensively and expeditiously resolve the identified non-conformity(ies). We will, however, work with health IT developers to determine the most appropriate elements for CAPs and strive to assist in the creation of CAPs that are no more or less prescriptive than necessary to remedy the non-conformity(ies) quickly and effectively.

Comments. Multiple commenters suggested that CAPs as a result of ONC direct review should be based only on non-conformities with existing certification criteria of the Program.

Response. In this final rule, a non-conformity is a failure of certified health IT or its developer to conform to the requirements of the Program. We emphasize, as discussed in detail in section II.A.1.a.(1) of this preamble, that Program requirements are not limited to compliance with certification criteria. A CAP will be based on a finding and notice of non-conformity, which necessarily involves a failure to meet Program requirements (§ 170.580(c)). Similarly, the elements of the CAP will address the actions a health IT developer must take to correct the identified non-conformity(ies) (*i.e.,* bring its certified health IT back into conformity with the Program requirements that are the basis of the non-conformity(ies)).

Comments. A commenter requested that we clarify the criteria necessary for resolving non-conformities under a CAP. Commenters requested that we specify the criteria that would lead to the rejection of a proposed CAP and recommended that we not reject a proposed CAP without giving the health IT developer an opportunity to discuss the issue(s) with ONC. One commenter suggested that ONC institute a process for health IT developers to respond to a rejection of a CAP.

Response. We cannot define the specific criteria necessary for resolving non-conformities under a CAP because such criteria will be determined on a case-by-case basis. However, as noted above and in the Proposed Rule, ONC will provide direction to health IT developers as to the required elements of a CAP and will work with health IT developers to develop acceptable CAPs. We note that we have restructured and reordered the required elements for a CAP in the final rule for clarity and to avoid inclusion of redundant factors (*see* § 170.580(c)(2)). We have also adopted two new elements for CAPs that serves to clarify how a health IT developer would demonstrate the resolution of all non-conformities and issues (a proposed CAP element) and prevent the non-conformity from re-occurring. We discuss these CAP elements below.

Comments. A commenter suggested that we allow a health IT developer to request an extension for submitting and completing corrective action in certain cases.

Response. ONC will permit health IT developers to submit requests for extension of the 30-day period to submit a CAP and the period ONC allocates for completion of the CAP. In order to make these requests, a health IT developer must submit a written statement to ONC that explains and justifies the extension request. ONC will evaluate each request individually and will make decisions on a case-by-case basis. We have added a provision at § 170.580(c)(5) to reflect this policy. We clarify, however, that ONC may propose to terminate the certification of the health IT under review if, after 90 days of notifying the health IT developer of a non-conformity, ONC is unable to approve a CAP because the health IT developer has not submitted a CAP, proposed or revised, that adequately addresses all required elements of the CAP as determined by ONC (§ 170.580(c)(4)). This clarification of the 90-day time limit for approving a CAP aligns with the CAP requirement for ONC–ACBs (§ 170.556(d)(5)(ii)).

Comments. A few commenters requested that we revise the proposed required CAP elements so that health IT developers are not required to ensure that all issues are resolved. Commenters stated that health IT developers cannot guarantee the absolute resolution regarding a provider's implementation within the required timeframe because some providers may not immediately implement the software update or modify their workflows in all ways necessary to ensure resolution.

Response. We have finalized this requirement to ensure that all issues are resolved. The requirement is consistent with the corrective action requirements in § 170.556(d)(3)(iv) and is a necessary requirement for corrective action. In response to the comment recited below regarding the need for more than just reliance on a health IT developer's attestation for verification of a CAP's completion, we have included a new required CAP element that clarifies how health IT developers are expected to meet the requirement to ensure that the non-conformity and all issues are resolved. A health IT developer must include in a CAP a detailed description of the supporting documentation that will be provided to demonstrate that the identified non-conformities and all issues are resolved. When ONC approves the CAP, we may require the supporting documentation to include testing results, independent expert analysis and verification, and/or other appropriate documentation to provide assurance that all issues have been resolved. Further, we understand that provider cooperation and actions must be taken into consideration. Therefore, we clarify that we expect a health IT developer will take and document the reasonable steps it took to ensure that all non-conformities and issues are resolved.

We proposed elements that, at a minimum, must be included in a CAP. We received comments regarding the consequences of certification termination and our 'certification ban' and 'heightened scrutiny' proposals (*see* the ''Consequences of Certification Termination'' section below) requesting that we ensure sufficient protection for providers affected by non-conformities as well as supporting some form of heightened scrutiny of health IT that had a non-conformity and was subsequently terminated. In consideration of these comments and our stated goals in the Proposed Rule to promote public confidence in certified health IT and ensure the integrity of the Program, we have added a prospective element for CAPs. All CAPs must provide an explanation of, and agreement to execute, the steps that will be prevent the non-conformity from re-occurring. We believe this specific element of a CAP will help prevent reoccurrences of circumstances that led to the non-conformity(ies). This will support the integrity of the Program by addressing not only current problems, but also instituting ''safeguards'' against further problems. Equally important, this CAP element will promote public confidence in certified health IT, including health IT that had a non-conformity. For example, a health IT developer can offer its customers reassurance that not only was the non-conformity corrected, but that steps have also been taken to prevent it from re-occurring.

Comments. A commenter suggested that ONC review a Complete EHR or Health IT Module following the completion of a CAP, rather than accepting the attestation as proof of conformity.

Response. We have finalized the attestation requirement as proposed. We appreciate the commenter's concern, but believe attestation is an appropriate means for confirming that the health IT developer has fulfilled all of its obligations under the CAP, including curing the identified non-conformities and related deficiencies for all affected customers and taking all reasonable steps to prevent their recurrence. In addition, we emphasize three points. As specified above, a health IT developer must submit, and have approved by ONC, a CAP that includes a detailed description of the supporting documentation that the health IT developer will provide to demonstrate that the identified non-conformities and all issues are resolved. Second, an attestation serves as a binding official statement by the health IT developer. Third, if we later discover that the health IT developer had not acted in the manner attested, we may reinstitute the CAP or proceed to suspend or terminate the certification of the Complete EHR or Health IT Module (*see* § 170.580(c)(7), (d)(1), and (e)(1)(vi)).

Comments. Commenters generally supported reporting CAPs to the CHPL. Multiple commenters stated, however, that the CHPL alone is not an effective means for notifying customers because purchasers will not be in the habit of looking at the CHPL regularly. Commenters suggested that health IT developers should utilize more direct forms of notification. Commenters suggested that health IT developers send ''push'' alerts and notifications. One commenter disagreed with reporting CAPs to the CHPL and expressed concern regarding the disclosure of trademark and proprietary software capabilities and/or functionalities, as well as the potential damage to health IT developers' reputations.

Response. We thank commenters for their support of this proposal and for expressing their concerns. We have finalized this requirement as proposed. The reporting of CAP information to the CHPL is already required as specified in the 2015 Edition final rule (80 FR 62714) and at § 170.556(e)(3) and we will continue this approach with CAPs that are a result of ONC direct review. This reporting will alert health IT users, implementers, and purchasers to potential conformity issues in a timely and effective manner. Further, as mentioned above, health IT developers must notify all potentially affected customers of the non-conformity and plan for resolution as part of a CAP.

We understand that health IT developers may have concerns regarding disclosure of trademark and proprietary software capabilities and/or functionalities and potential damage to their reputations. To address these concerns, as discussed in the ''Notice of Potential Non-Conformity or Non-Conformity'' section of this final rule above, we will implement safeguards to keep trademark or proprietary information confidential to the extent permissible by federal law.

(3) Suspension

We proposed in the Proposed Rule that ONC may suspend a certification for similar reasons as allowed for ONC–ACBs, which were discussed in the 2015 Edition final rule (80 FR 62759). Specifically, we proposed that ONC would be permitted to initiate certification suspension procedures for a Complete EHR or Health IT Module for any one of the following reasons:

- Based on information it has obtained, ONC believes that the certified health IT poses a potential risk to public health or safety or other exigent circumstances exist. More specifically, ONC would suspend a certification issued to any encompassed Complete EHR or Health IT Module of the certified health IT if the certified health IT was, but not limited to: Contributing to a patient's health information being unsecured and unprotected in violation of applicable law; increasing medical errors; decreasing the detection, prevention, and management of chronic diseases; worsening the identification and response to public health threats and emergencies; leading to inappropriate care; worsening health care outcomes; or undermining a more effective marketplace, greater competition, greater systems analysis, and increased consumer choice. Such results would conflict with section 3001(b) of the PHSA, which instructs the National Coordinator to perform the duties in keeping or recognizing a certification program that, among other requirements, ensures patient health information is secure and protected in accordance with applicable law, reduces medical errors, increases efficiency, and leads to improved care and health care outcomes. As discussed in the ''Termination'' section below, we proposed that ONC could terminate a certification on the same basis *if* it concludes that a certified health IT's non-conformity(ies) cannot be cured;
- The health IT developer fails to timely respond to any communication from ONC, including, but not limited to: Fact-finding, a notice of potential non-conformity, or a notice of non-conformity;
- The information provided by the health IT developer in response to any ONC communication, including, but not limited to: Fact-finding, a notice of potential non-conformity, or a notice of non-conformity is insufficient or incomplete;
- The health IT developer fails to timely submit a proposed CAP that adequately addresses the elements required by ONC; or
- The health IT developer does not fulfill its obligations under the CAP.

We also proposed that ONC may suspend the certification of a Complete EHR or Health IT Module *at any time* when ONC believes that the certified health IT poses a potential risk to public health or safety, other exigent circumstances exist concerning the product, or due to certain actions or inactions by the product's health IT developer as detailed above. We noted that the processes for ONC–ACBs, as detailed in the 2015 Edition final rule (80 FR 62759), would not be altered by our proposals in the Proposed Rule.

Comments. We received many comments regarding our proposed suspension criteria. Multiple commenters supported the suspension criteria as proposed and emphasized the need to protect public health and safety. Other commenters expressed concerns regarding ONC's proposed criteria for suspending the certification of a Complete EHR or Health IT Module. These commenters urged ONC to more clearly define the standards and criteria for suspension and to reserve suspension for particular cases of significant risk to patient health and safety. Commenters also stated that ONC should not suspend certification(s) when a health IT developer is working with ONC and acting in good faith to remedy the non-conformity through a CAP.

Response. We thank commenters for their thoughtful comments on this aspect of our proposed suspension process. We agree with commenters that suspension should be limited to situations involving a serious risk to public health or safety, as these are the situations that would require immediate action. Therefore, in consideration of these comments, we have finalized a more limited basis for suspension than proposed. Specifically, ONC may *only* suspend a certification when ONC has a reasonable belief that the certified health IT may present a serious risk to public health or safety. As explained in section II.A.1.a.(3) of this preamble, in assessing whether there is a serious risk to public health or safety, ONC would consider the nature, extent, and severity of the risk and the conditions giving rise to it, in light of the information available to ONC at the time. Separately, ONC could conclude that certified health IT poses a serious risk to public health or safety were it aware of information calling into question the validity of the health IT's certification.

We clarify that ONC would still be able to suspend the certification of the health IT after the health IT developer begins corrective action if it identifies a serious risk to public health or safety.

Comments. A commenter suggested that we not have the discretion to suspend a certification of a Complete EHR or Health IT Module at any time. The commenter stated that the reasons provided for suspending certification were too broad and that suspension, in the absence of a final legal or regulatory ruling, confers a presumption of guilt and responsibility on the health IT developer.

Response. We have finalized the ability to suspend at any time if such action is necessary to protect public health or safety. We note our response to the previous comment which emphasizes the now limited scope of suspension focusing on risks to public health and safety. We further note, in response to the commenter, that suspension is part of the finalized regulation.

Comments. A few commenters requested clarification regarding the distinction between criteria for suspension and termination and how to decide which is appropriate in certain situations. Another commenter recommended that ONC should, as a matter of process, issue a notice of suspension before issuing a notice of termination.

Response. As stated in our responses above, at this time, we are choosing to limit our discretion to only suspend a certification when we believe that certified health IT presents a serious risk to public health or safety. This change not only clarifies why ONC would suspend a certification, but also draws a clear distinction between the reasons to suspend and the reasons to terminate a certification as described later in this final rule. This change also means that if ONC finds grounds for suspension, ONC will always first take the step to suspend the certification before initiating termination proceedings. We emphasize, however, that we may proceed with termination without first suspending a certification for other matters as outlined under the ''Scope of Review'' section and the termination provisions in this final rule.

Suspension Process

We proposed that ONC would issue a notice of suspension when appropriate. We stated that ONC's process for obtaining information to support a suspension could involve, but would not be limited to: Fact-finding; requesting information from an ONC–ACB; contacting users of the health IT; and/or reviewing complaints. We proposed that a suspension would become effective upon the health IT developer's receipt of the notice of suspension.

We proposed that the notice of suspension would include, but not be limited to: ONC's explanation for the suspension; the information ONC relied upon to reach its determination; the consequences of suspension for the health IT developer and the Complete EHR or Health IT Module under the Program; and instructions for appealing the suspension. We also stated that the notice of suspension would be sent via certified mail and the official date of receipt would be the date of the delivery confirmation consistent with § 170.505.

Comments. Multiple commenters supported the suspension process as proposed. One commenter suggested that ONC implement intermediate solutions short of suspension, such as: Fines or other financial penalties; a requirement that health IT developers bear the costs of repair or transition to another system; or, a clear statement of health IT developers' tort liability for the consequences of non-conformities.

Response. We have decided not to implement intermediate ''solutions'' as suggested by the commenter because the purpose of suspension as proposed is to enable ONC to act swiftly to address non-conforming certified health IT that present a serious risk to public health or safety and intermediate ''solutions'' or ''penalties'' would delay such action. Additionally, at present, ONC does not have authority to level fines or other financial penalties in these situations and the liability of a health IT developer to customers, other parties, or other matters is outside the scope of this final rule.

Clarifications Regarding Notice of Suspension

A notice of suspension will be effective on the date listed in the notice of suspension. We clarify that ONC will issue a notice of potential non-conformity or non-conformity at the same time it issues the notice of suspension. These notices will provide the health IT developer opportunities to respond to the basis for suspension. We further clarify the contents of a notice of suspension. We stated in the Proposed Rule that a notice of suspension would include the information ONC relied upon to reach its determination. We clarify, including in regulation, that the information we were referencing is information ONC provides with, and in support of, its determination.

Notification and Publication of Suspension

We proposed that a health IT developer would be required to notify its affected and potentially affected customers of the certification suspension in a timely manner. We also proposed that ONC would publicize the suspension on the CHPL to alert interested parties, such as purchasers of certified health IT or programs that require the use of certified health IT. We requested comments on these processes, including how timely a health IT developer should notify affected and potentially affected customers of a suspension and what other means we should consider using for publicizing certification suspensions.

Comments. We received many comments on the proposed requirements for notifying affected and potentially affected customers of a suspension. Commenters suggested that a health IT developer should not be required to notify its affected and potentially affected customers of a certification suspension until ONC reaches a final determination and concludes the appeal process. Some commenters requested we clarify the meaning of ''timely manner'' in the context of customer notification. One commenter suggested ONC require health IT developers to notify customers within 10 business days after receipt of the suspension notice. Some commenters supported publicizing suspensions on the CHPL and suggested other mechanisms for notifying customers, such as real-time electronic notifications.

A few commenters suggested changes regarding the party that should make a notification of suspension and the party(ies) that should be notified. A commenter suggested that ONC should notify customers of a suspension, as opposed to the health IT developer notifying customers as proposed. The commenter also suggested that ONC notify customers of a health IT developer whose Complete EHR or Health IT Module is being *considered* for suspension. Another commenter suggested that if notifications of suspension are required, they should be sent to all customers of the product, not just those affected and potentially affected by the non-conformity.

Response. We have finalized the notification requirements as proposed with the following clarification. We require that a health IT developer must notify ''all potentially affected customers'' as opposed to ''all affected and potentially affected'' customers as we proposed. We removed ''affected'' in this final rule because all ''affected'' customers would also be considered ''potentially affected'' customers; thus the language was redundant. All potentially affected customers should be notified of suspensions in a timely manner after the effective date of the suspension, regardless of whether a health IT developer is appealing the determination. We believe that ''potentially affected customers'' is the appropriate population for health IT developers to notify and is broad enough to protect customers that are or may be affected by the suspension.

We believe a health IT developer is the appropriate party to alert its customers of a suspension as it would know best the potentially affected customers. It would be inappropriate to alert customers of a health IT developer whose Complete EHR or Health IT Module is being considered for suspension because such action might unfairly disadvantage a health IT developer whose Complete EHR or Health IT Module may not warrant suspension after further investigation and consideration.

As suspension would be based on a serious risk to public health or safety, we believe it is imperative that customers be aware of the suspension. The notification will permit customers to take immediate action to protect public health and safety; and if the suspension is appealed, provide customers with additional time to consider their options and next steps. We believe ''timely'' is an appropriate term because the timeliness of the notification to all potentially affected customers may vary based on the circumstances of the case. While we believe that ONC must have discretion to address each situation accordingly, we agree with the commenter that notification within 10 days or less of the effective date of the suspension may be reasonable in many circumstances.

Last, we maintain that notification via the CHPL is an appropriate and effective step for widespread dissemination of a suspension determination to all stakeholders as the CHPL serves as the authoritative, comprehensive listing of health IT that has been tested and certified under the Program. We will further consider whether other forms of publication and dissemination, such as use of the ONC listserv, would be an appropriate and effective communication tool under the circumstances.

Consequences of Suspension

We proposed that ONC would issue a cease and desist notice to health IT developers to immediately stop the marketing and sale of the Complete EHR or Health IT Module as ''certified'' under the Program when it suspends the Complete EHR's or Health IT Module's certification. We proposed that in cases of a certification suspension, inherited certified status for the Complete EHR or Health IT Module would not be permitted. We requested comment on whether a health IT developer should only be permitted to certify new Complete EHRs or Health IT Modules while the certification in question is suspended, if such new certification of other Complete EHRs or Health IT Modules would correct the non-conformity for all affected customers. We also requested comment as to whether correcting the non-conformity for a certain percentage of all affected customers or certain milestones demonstrating progress in correcting the non-conformity (*e.g.,* a percentage of customers within a period of time) should be sufficient to lift the prohibition.

Comments. Multiple commenters supported our proposed prohibition on the marketing and sale of a Complete EHR or Health IT Module during a suspension. One commenter noted that such a restriction is supportive of safe information systems. Other commenters stated that the prohibition on marketing and sale of the suspended Complete EHR or Health IT Module as ''certified'' is inappropriate and represents significant ''overreach,'' while some commenters stated that it would not be an ''overreach'' if there were a valid patient safety concern.

Response. We thank commenters for their thoughtful comments and have finalized the 'consequences of suspension' in relation to the Program with the following revision and clarifications. As noted above and in the Proposed Rule, we proposed that ONC would issue a cease and desist notice to health IT developers to immediately stop the marketing and sale of a Complete EHR or Health IT Module as ''certified'' under the Program when it suspends the Complete EHR's or Health IT Module's certification (81 FR 11064). We did not specifically include ''licensing'' as part of this prohibition. However, we believe licensing is a form of product sale as in both cases a health IT developer likely receives some type of compensation. We also note that we specifically discuss licensing of certified health IT in the ''Corrective Action'' section of the Proposed Rule (*see* 81 FR 11063). Our intention with this cease and desist notice was to protect the health and safety of users by completely prohibiting health IT developers from representing suspended health IT as ''certified.'' Therefore, we have specifically listed ''licensing'' as part of this prohibition to provide additional clarity. Affirmatively adding ''licensing'' to this section is consistent with ONC's intent to cover all the ways in which health IT software is made available to customers in the health IT marketplace, as well as our stated goal throughout the ''Suspension'' section in the Proposed Rule (81 FR 11064) and this final rule to protect public health and safety.

As discussed earlier in this section, we have finalized a more limited basis for suspension than proposed, which is that we may only suspend a certification when we believe that the certified health IT presents a serious risk to public health or safety. Thus, by definition, in cases of suspension, ONC will only prohibit the marketing, licensing, and sale of a Complete EHR or Health IT Module when it presents serious risk to public health or safety. We believe this approach is consistent with comments and supports public health and safety.

Comments. A few commenters expressed disagreement with our proposal to prohibit inherited status certification for a suspended Complete EHR or Health IT Module, while more commenters expressed disagreement with the possibility of a prohibition on the certification of a health IT developer's new Complete EHRs and Health IT Modules while the certification in question is suspended. Commenters stated that such restrictions are too far-reaching and suspension should only apply to the health IT under review. Some commenters suggested that a prohibition on new testing and certifications should only apply if a product is affected by the non-conforming product or there is reason to believe there is a wider, more pervasive deficiency with the health IT developer. A commenter suggested that our basis for determining progress for lifting the prohibition should be measured against what the health IT developer does to implement corrected products with providers.

Response. We have added a provision at § 170.580(d)(5) that bans the certification (which includes all types of certification, such as inherited certified status and gap certification) of any of a health IT developer's health IT if the health IT developer has the certification on one of its products suspended. The suspension would only be lifted if, as determined by ONC, all affected customers have been provided appropriate remediation. As discussed in the Proposed Rule, a ban may incentivize the health IT developer to cure the non-conformity in an efficient manner. As the basis for suspension is now limited to a reasonable belief that the certified health IT presents a serious risk to public health or safety, we believe the ban is now even more essential to motivating a health IT developer to quickly address and correct what we believe to be a serious risk to public health or safety. We refer readers to section II.1.d.(1) of this final rule for further details on meeting the requirement for providing all affected customers with appropriate remediation.

Clarification Regarding ''Rescission'' of a Suspension

We proposed in the Proposed Rule that ONC would only ''rescind'' a certification suspension if the health IT developer completes all elements of an approved CAP and/or ONC confirms that all non-conformities have been corrected. We have renamed this provision as ''cancellation.'' A suspension can be canceled, at any time, if ONC no longer has a reasonable belief that the certified health IT presents a serious risk to public health or safety. We believe this revised provision for canceling a suspension is appropriate because suspension is limited to situations in which ONC has a reasonable belief that the certified health IT may present a serious risk to public health or safety; therefore, the basis for cancellation is the opposite of the basis for suspension. The basis for establishing that there is no longer reason to believe that the certified health IT presents a serious risk to public health or safety may be based on information ONC obtains or information provided by a health IT developer. It could be for the same reasons as proposed (*i.e.,* the health IT developer completes all elements of an approved CAP and/or ONC confirms that all non-conformities have been corrected) or possibly for other reasons.

(4) Termination

We proposed that ONC may terminate certifications issued to Complete EHRs or Health IT Modules under the Program if: (1) The health developer fails to timely respond to any communication from ONC, including, but not limited to: (a) Fact-finding; and (b) a notice of potential non-conformity or non-conformity; (2) the information provided by the health IT developer in response to fact-finding, a notice of potential non-conformity, or a notice of non-conformity is insufficient or incomplete; (3) the health IT developer fails to timely submit a proposed CAP that adequately addresses the elements required by ONC as described in section II.A.1.c.(2) of this preamble; (4) the health IT developer does not fulfill its obligations under the CAP developed in accordance with proposed § 170.580(c); or (5) ONC concludes that the certified health IT's non-conformity(ies) cannot be cured. We requested comment on the proposed reasons for termination and on any additional circumstances for which commenters believe termination of a certification would be warranted.

Proposed Termination and Termination

Comments. A few commenters suggested less severe alternatives to termination, such as a probation period or implementation of intermediate solutions short of termination.

Response. We thank commenters for their thoughtful comments. We explain in section II.A.1.c.(1) and (2) of this final rule (and also explained in the Proposed Rule (81 FR 11062–64)) that, prior to termination, ONC affords the health IT developer multiple opportunities to address and correct a non-conformity(ies) through responses to notices of potential non-conformity and/or non-conformity and a CAP. We believe that, if the health IT developer fails to address and correct the non-conformity(ies) at these stages in the direct review process, termination is an appropriate next step. A probation period would not adequately address the non-conforming health IT and/or non-responsive health IT developer in such situations. We emphasize once again that our goal is to work with health IT developers to correct non-conformities and that termination is a last resort.

In response to the comments and due to the severity of termination of a certification, we have added a new, intermediate step in the direct review process called ''proposed termination.'' The proposed termination step will provide health IT developers with an additional opportunity to resolve issues regarding a non-conformity prior to termination. We emphasize that the bases for ''proposed termination'' in this final rule are nearly identical to the bases for ''termination'' in the Proposed Rule (81 FR 11084). The only differences are that in this final rule we have clarified that a health IT developer's failure to cooperate with ONC and/or a third party acting on behalf of ONC and a failure to timely submit in writing a proposed CAP are also bases for termination. We clearly stated in the Proposed Rule that these actions are required of health IT developers (*see* 81 FR 11062–63); therefore, non-compliance with these requirements will serve as a basis for proposed termination.

As stated previously in this preamble under the discussion of § 170.505, we will send any notice of proposed termination by certified mail and the official date of receipt will be the date of the delivery confirmation to the address on record. A health IT developer may respond to a notice of proposed termination, but must do so within 10 days of receiving the proposed termination notice and must include appropriate documentation explaining in writing why its certification should not be terminated. ONC will have up to 30 days to review the information submitted by the health IT developer and reach a decision. ONC may extend this timeframe if the complexity of the case requires additional time for ONC review.

We have also finalized a provision that requires ONC to respond to the health IT developer's response to a notice of proposed termination within 30 days, unless ONC extends this timeframe due to the complexity of the case. The ONC response will either be to proceed with direct review, cease direct review, or proceed to termination (§ 170.580(e)(4)). This requirement aligns with our stated goals in the Proposed Rule of promoting transparency and enhanced communication by providing health IT developers with information about ONC's progress during the direct review process.

We refer readers to § 170.580(e) in this final rule for the specific provisions of proposed termination.

Comments. Multiple commenters supported the criteria for termination as proposed. Some commenters requested clearer and more substantive standards for termination of a certification.

Response. We thank commenters for their support. As discussed in the preceding response, we have finalized the steps health IT developers must take to avoid termination as proposed in the Proposed Rule (81 FR 11065). We believe these criteria are substantive and clear as they describe specific situations of health IT developer inaction and incurable non-conformities in the health IT that would warrant termination by ONC. We also believe these criteria will incentivize health IT developers to cooperate in the direct review process and address non-conformities. Further, in regard to cooperation, we have specifically included, consistent with our proposals in the Proposed Rule, the failure of a health IT developer to cooperate with ONC direct review as a basis for certification termination. Additionally, we believe the addition of the proposed termination step further clarifies our process for terminating a certification. We emphasize that the National Coordinator may terminate a certification if: (i) A determination is made that termination is appropriate after considering the information provided by the health IT developer in response to the proposed termination notice; or (ii) the health IT developer does not respond in writing to a proposed termination notice within the timeframe specified above. We note that the termination provisions have been finalized at § 170.580(f) because of the addition of the ''proposed termination'' step, which has been added to the final regulation at § 170.580(e).

Comments. A commenter requested that we define ''timely'' in the context of termination.

Response. ''Timely'' is the appropriate term because it accounts for the timeframe for a health IT developer to respond to ONC, submit a CAP, and contact customers. The timeliness of these actions will vary based on the circumstances of the case. Therefore, ONC must have discretion to address each situation on a case by case basis.

Termination Process, Notification, and Publication

We proposed that a termination would be issued consistent with the processes outlined below, but noted that the proposed termination processes do not change the certification termination processes for ONC–ACBs in § 170.556(6).[12] We stated that a notice of termination would include, but may not be limited to: ONC's explanation for the termination; the information ONC relied upon to reach its determination; the consequences of termination for the health IT developer and the Complete EHR or Health IT Module under the Program; and instructions for appealing the termination. We proposed that ONC would send a written notice of termination to the agent of record for the health IT developer of the Complete EHR or Health IT Module. We stated that the written termination notice would be sent via certified mail and the official date of receipt would be the date of the delivery confirmation.

As we proposed for suspension of a certification, the health IT developer must notify the affected and potentially affected customers of the identified non-conformity(ies) and termination of certification in a timely manner. Additionally, we proposed that ONC would publicize the termination on the CHPL to alert interested parties, such as purchasers of certified health IT or entities administering programs that require the use of health IT certified under the Program. We requested comments on these processes, including how timely a health IT developer should notify affected and potentially affected customers of a termination of a Complete EHR's or Health IT Module's certification and what other means we should consider for publicizing certification terminations.

Comments. Multiple commenters suggested changes for the proposed process for notifying customers of a termination. Some commenters recommended that health IT developers should not notify customers until ONC reaches a final determination and concludes all appeals. One commenter suggested that health IT developers should send notification to all customers, not just those affected and potentially affected by the non-conformity. Some commenters noted that reporting terminations to the CHPL is not effective and suggested that health IT developers use real-time electronic notifications in addition to reporting to the CHPL.

Response. We thank commenters for their thoughtful comments on this aspect of the proposed termination process. We have, however, finalized the notification requirements as proposed with the following clarification. As we clarified for the ''Suspension'' portion of the direct review processes, we require that a health IT developer must notify ''all potentially affected customers'' as opposed to ''all affected and potentially affected'' customers as we proposed. We removed ''affected'' in this final rule because all ''affected'' customers would also be considered ''potentially affected'' customers. All ''potentially affected customers'' should be notified of terminations in a timely manner, regardless of whether a health IT developer is appealing the determination. We believe that this is the appropriate population for health IT developers to notify and is broad enough to protect customers that are or may be affected by the termination. The notification will permit customers to take immediate action, as they deem necessary, coinciding with the termination; and if the termination is appealed, provide customers with additional time to consider their options and next steps.

We believe that notification via the CHPL is an appropriate and effective step for widespread dissemination of a termination determination to all stakeholders as the CHPL serves as the authoritative, comprehensive listing of health IT that has been tested and certified under the Program. We will further consider whether other forms of publication and dissemination, such as use of the ONC listserv, would be an appropriate and effective communication tool under the circumstances.

We clarify the contents of a notice of termination and, similarly, a notice of proposed termination. We stated in the Proposed Rule that a notice of termination would include the information ONC relied upon to reach its determination. We clarify, including in regulation, that the information we were referencing is information ONC provides with, and in support of, its determination. In addition, as to only the notice of termination, we clarify that the 'consequences of termination' in relation to the Program are the consequences specified in § 170.580(f)(3) (notifying potentially affected customers) and in § 170.581 (discussed in more detail in the ''Consequences of Certification Termination'' section of this final rule).

Termination Effective Date and Appeal

We proposed that the termination of a certification would be effective either upon: (1) The expiration of the 10-day period for filing an appeal as specified in section II.A.1.c.(5) of this preamble, if the health IT developer does not file an appeal; or, if a health IT developer files an appeal, (2) upon a final determination to terminate the certification as described below in the ''Appeal'' section of this preamble.

Comments. Many commenters stated that the proposed 10 days to file an appeal following a termination is insufficient, especially if no new information can be included as part of a hearing on appeal.

Response. We refer readers to the ''Appeal'' section of this preamble below for our response to this concern.

Rescission of a Notice of Termination

We have finalized a provision that permits ONC to rescind a determination to terminate a certification before it becomes effective if ONC determines that termination is no longer appropriate. To illustrate, ONC may rescind the determination to terminate on its own initiative or based on information provided by the developer

[12] We note that ONC–ACB ''termination'' actions are technically referred to as ''withdrawals'' of certifications. We explain this distinction in detail in section II.A.d.(1) of this final rule.

that convinces ONC that the termination decision was made in error or is otherwise no longer appropriate. We have included this provision as part of the termination process in order to address situations where a certification was terminated, but it would be inefficient to proceed through the appeals process or inappropriate to effectuate the termination. This requirement aligns with our stated goals in the Proposed Rule of working with health IT developers, ensuring the integrity of the Program, and promoting transparency.

(5) Appeal

We proposed that if ONC suspends or terminates a certification for a Complete EHR or Health IT Module, the health IT developer of the Complete EHR or Health IT Module may appeal the determination to the National Coordinator in accordance with the proposed processes outlined below. We proposed that a health IT developer may appeal an ONC determination to suspend or terminate a certification issued to a Complete EHR or a Health IT Module if the health IT developer asserts: (1) ONC incorrectly applied Program methodology, standards, or requirements for suspension or termination; or (2) ONC's determination was not sufficiently supported by the information used by ONC to reach the determination to suspend or terminate a certification.

We proposed that a request for appeal of a suspension or termination must be submitted in writing by an authorized representative of the health IT developer whose certified Complete EHR or certified Health IT Module was subject to the determination being appealed. We also proposed that the request for appeal must be filed in accordance with the instructions specified in the notice of termination or notice of suspension. We stated that these instructions for filing a request may include, but would not be limited to, requiring the health IT developer to: (1) Provide a copy of the written determination by ONC to suspend or terminate the certification and any supporting documentation; and (2) explain the reasons for the appeal.

We proposed that the appeal request must be submitted to ONC within 10 days of the health IT developer's receipt of the notice of suspension or notice of termination. We proposed that an appeal request would stay the termination of a certification issued to a Complete EHR or Health IT Module until a final determination is reached on the appeal. However, we noted that a request for appeal would not stay a suspension of a Complete EHR or Health IT Module. We proposed that, while an appeal would stay a termination, a Complete EHR or Health IT Module would be prohibited from being marketed or sold as ''certified'' during the stay. This was similar to the proposed effects of a suspension.

We proposed that the National Coordinator would assign the appeal to a hearing officer who would adjudicate the appeal on his or her behalf. We stated that the hearing officer may not preside over an appeal in which he or she participated in the initial suspension or termination determination by ONC or has a conflict of interest in the pending matter.

We stated in the Proposed Rule that there would be two parties involved in an appeal: (1) The health IT developer that requests the appeal; and (2) ONC. We proposed that the hearing officer would have the discretion to make a determination based on two options: (1) The written record as submitted to the hearing officer by the health IT developer with the appeal filed in accordance with proposed requirements, which would include ONC's written statement and supporting documentation, if provided; or (2) the information described in option 1 and a hearing conducted in-person, via telephone, or otherwise. We specified that the hearing officer would have the discretion to conduct a hearing if he or she: (1) Requires clarification by either party regarding the written record; (2) requires either party to answer questions regarding the written record; or (3) otherwise determines a hearing is necessary. We specified that the hearing officer would neither receive testimony nor accept any new information that was not presented with the appeal request or was specifically and clearly relied upon to reach the determination to suspend or terminate the certification by ONC. We specified that the default process for the hearing officer would be a determination based on option 1 described above.

We proposed that once the health IT developer requests an appeal, ONC would have an opportunity to provide the hearing officer with a written statement and supporting documentation on its behalf (*e.g.,* a brief). We stated that the failure of ONC to submit a written statement would not result in any adverse findings against ONC and may not in any way be taken into account by the hearing officer in reaching a determination.

We proposed that the hearing officer would issue a written determination to the health IT developer within 30 days of receipt of the appeal, unless the health IT developer and ONC agree to a finite extension approved by the hearing officer. We proposed that the National Coordinator's determination, as issued by the hearing officer, would be the agency's final determination and not subject to further review.

We requested comments on the proposed appeal processes. Specifically, we requested comment on whether the allotted time for the hearing officer to issue a written determination should be lessened or lengthened, such as 15, 45, or 60 days. We also requested comment on whether an extension should be permitted and whether it should only be permitted under the extension circumstances proposed or for other reasons and circumstances.

Clarification Regarding the Appeal of Concurrent Suspension and Termination

We clarify that there may be situations where a certification is both suspended and terminated. For instance, ONC may suspend a certified Complete EHR or Health IT Module because it presents a serious risk to public health or safety. With the certification suspended pending corrective action, ONC may later propose to terminate and subsequently terminate the certification on the basis that the health IT developer did not cooperate with the direct review. In such a situation, the health IT developer must submit two separate statements of intent to appeal and requests for appeal in writing to ONC in accordance with § 170.580(g)(2) in order to appeal the suspension *and* the termination. We note that, in most cases, a health IT developer's opportunity to appeal a suspension in accordance with § 170.580(g)(3) would lapse prior to ONC's decision to terminate the certification.

In these cases (a suspension and termination of the same certification), the hearing officer would issue separate final determinations for the suspension and termination. For instance, the hearing officer may find that ONC terminated the certification prematurely and therefore reverse the termination on that basis, which would reinstate the certification. At the same time, however, the hearing officer may uphold ONC's decision to suspend the certified health IT because, for instance, it posed a serious risk to public health or safety or because the health IT developer failed to timely appeal the suspension.

Comments. A commenter stated that the health IT developer should be able to appeal an initial assessment of non-conformity, a CAP, and/or the terms of a CAP.

Response. We have finalized an approach that only permits appeals of ONC determinations to suspend or terminate a certification of a Complete EHR or Health IT Module. ONC has the authority to determine whether health IT remains in conformity with voluntary Program requirements. A notice of non-conformity and CAP are remedial steps designed to bring certified health IT back into conformity with Program requirements. Upon an ONC determination to suspend or terminate a certification, we believe a health IT developer should be afforded the opportunity to appeal the determination because of the consequences health IT developers and certified health IT face due to these actions (*i.e.,* the prohibition on the marketing, licensing, and sale of suspended health IT as ''certified'' and the consequences of termination specified in § 170.581) and the likely negative impact this will have on the ability of a health IT developer to sell or license its health IT to providers and consumers, as many HHS programs require participants to have and/or use certified health IT.

Comments. Multiple commenters questioned the proposed bases for appeal and suggested that we clarify the requirements. Some commenters requested more specificity in the first basis for appeal. Commenters requested that in order to meet this basis for appeal ONC must first identify and state specifically how it applied Program methodology, standards, and requirements for suspension or termination findings. Commenters also requested that ONC clarify the meaning of ''sufficient support'' in the second basis for appeal.

Response. We appreciate the comments on this proposal. We have removed the redundancy in the first basis for appeal by simply stating ''Program requirements.'' We believe that the proposed bases for appealing ONC decisions are now clear and appropriate. The two bases for appeal require that an ONC decision is based on Program requirements for health IT developers and certified health IT and is supported by sufficient information. We describe in the ''Suspension'' and ''Termination'' sections of this final rule that ONC will provide an explanation of the suspension or termination determination in a notice of suspension or notice of termination, as applicable. ONC will also provide information to support its determination and the consequences for the health IT developer and the Complete EHR or Health IT Module under the Program. This information will enable the health IT developer to assess whether ONC has correctly applied Program requirements and whether ONC's determination was sufficiently supported by information provided with the determination. We maintain that ''sufficiently supported'' is an appropriate term to use in the second basis for appeal because information provided with the determination will vary on a case-by-case. We clarify, as we have similarly done in the ''Suspension'' and ''Termination'' sections of this final rule, that this standard conveys that ONC's determination must be supported by information provided with the determination. Accordingly, we have finalized the bases for appeal in § 170.580(g)(1) with the revisions discussed above.

Comments. We received many comments regarding the appeal timeframes. Commenters stated that the proposed 10 days to file an appeal following a termination is insufficient, particularly if, as proposed, no new information can be included as part of an appeal hearing. The commenters asserted that collecting appropriate records for the appeal would be time consuming. Many commenters also proposed a two-step process for filing an appeal: (1) Filing a statement of intent to appeal; and (2) filing a request for appeal with supporting documentation. Commenters generally supported the 30-day timeframe for the hearing officer to make a final determination, while some commenters recommended that this timeframe be flexible based on the complexity of each case.

Response. We understand commenters' concerns regarding the 10-day period to file an appeal and, therefore, have accepted the commenters' recommendations for a two-step process for filing a statement of intent to appeal and then filing the appeal and supporting documentation. Specifically, in § 170.580(g)(3), we include requirements that a statement of intent to appeal must be filed within 10 days of receipt of the notice of suspension or notice of termination; and an appeal, including all supporting documentation, must be filed within 30 days of the filing of the intent to appeal.

In accordance with this two-step process, a termination will become effective upon: (1) The expiration of the 10-day period for filing a statement of intent to appeal if the health IT developer does not file a statement of intent to appeal; (2) the expiration of the 30-day period for filing an appeal if the health IT developer files a statement of intent to appeal, but does not file a timely appeal; or (3) a final determination to terminate the certification if a health IT developer files an appeal (§ 170.580(f)(2)(ii)).

We thank commenters for their support of the 30-day timeframe for the hearing officer to make a final determination. To provide flexibility for complex cases and unforeseen circumstances, we have finalized the proposal to permit the hearing officer to extend the timeframe for issuing a decision if the health IT developer and ONC agree to a finite extension and it is approved by the hearing officer. We believe this will provide the parties and the hearing officer with necessary flexibility as recommended by commenters.

We have revised the proposed 'determination by the hearing officer' provision to clarify that the hearing officer will not issue a written determination to the health IT developer if ONC cancels the suspension or rescinds the termination determination (§ 170.580(g)(7)). We have described ONC's ability to cancel a suspension and rescind termination determination, as well as ONC's rationale for allowing such actions, in sections II.A.1.c.(3) and (4) of this preamble, respectively.

Comments. Multiple commenters disagreed with our proposal that a request for appeal would not stay a suspension of a Complete EHR or Health IT Module. Specifically, commenters stated that the inability of a health IT developer to market and sell a product as ''certified'' while the product is suspended is overly punitive and could have untoward impacts on end-users.

Response. We have finalized this requirement as proposed. A request for appeal will not stay a suspension. As discussed in the ''Suspension'' section of this preamble, ONC may now only suspend the certification of health IT if it has a reasonable belief that the certified health IT may present a serious risk to public health or safety. In such situations, ONC must take immediate action to protect customers and incentivize the health IT developer to correct the non-conformity as soon as possible. A stay of a suspension would be inappropriate because it would delay this immediate action.

Comments. Many commenters expressed concerns regarding the appointment and qualifications of the hearing officer. Commenters asserted that the hearing officer should not be assigned by the National Coordinator or be selected from within ONC, as this could cause a conflict of interest and raise questions about the impartiality of the hearing officer. Commenters suggested that we clarify the required qualifications for the hearing officer. Commenters also opined that the hearing officer should not make the sole determination on whether to hold a hearing and should not be able to make a determination without a hearing.

Response. We have finalized the 'appointment of a hearing officer' provisions as proposed with an added requirement and clarifications in response to comments. We understand commenters' concerns regarding the impartiality of the hearing officer and agree that the hearing officer must be an impartial arbiter of appeals. The hearing officer will be chosen by the National Coordinator as the National Coordinator is best situated to identify a hearing officer, whether from within or outside ONC, that can represent him or her and have the requisite skills, qualifications, and knowledge to adjudicate these appeals. As proposed, in order to reduce the potential for conflicts of interest, the hearing officer will not be able to preside over an appeal in which he or she participated in the initial suspension or termination determination by ONC or has a conflict of interest in the pending matter. Additionally, in consideration of commenters' concerns and our commitment to an impartial appeals process, we have added a requirement at § 170.580(g)(5)(ii) that requires a hearing officer to be trained in a nationally recognized ethics code that articulates nationally recognized standards of conduct for hearing officers/officials. For example, an acceptable nationally recognized ethics code is, but is not limited to, the *National Association of Hearing Officials' Model Code of Ethics.*

The decision as to whether to hold a hearing will be left to the discretion of the hearing officer, as he or she will be most familiar with the facts of the case and will be best equipped to make such a determination.

Comments. Commenters disagreed with the proposed requirement that the hearing officer will neither receive testimony nor accept any new information that was not presented with the appeal request or was included with the determination. Another commenter suggested we revise the regulation text to clarify that the hearing officer will not receive certain testimony and information.

Response. We have finalized the requirement as proposed. This requirement will facilitate the appropriate development of the record prior to appeal, encourage health IT developers to submit a thorough and comprehensive appeal request, and facilitate expeditious resolutions of appeals. However, in consideration of comments, we have finalized a two-step process for filing a statement of intent to appeal and then filing the appeal and supporting documentation, which will afford health IT developers additional time to compile information and records to support their appeals. This process is discussed in more detail above in response to other comments.

In consideration of the commenter's request for revised regulation text, we have revised the relevant appeal provision (§ 170.580(g)(6)(iii)) to clarify that the hearing officer will not receive witness testimony and new information beyond that which is permitted with filing an appeal and given at a hearing. We have also made clear that the written record includes the ONC determination to suspend or terminate a certification and information to support the issued determination (§ 170.580(g)(6)(i)).

Comments. Commenters recommended that ONC implement a more formal, multi-round appeals process.

Response. Because we provide multiple opportunities for health IT developers to address the bases for ONC actions to suspend and/or terminate the certification of a Complete EHR or Health IT Module, we do not believe a more elaborate appeals process is generally necessary. However, for terminations, we have added another opportunity to resolve the matter through a ''proposed termination'' step that we have finalized in this final rule. The review, determination, and appeal processes in this final rule provide sufficient and equitable opportunities for health IT developers to address non-conformities found in their certified health IT, while ensuring the timely resolution of matters that may pose a serious risk to public health or safety.

Comments. Commenters disagreed with the proposal that ONC's failure to submit a written statement will not result in any adverse findings against ONC and may not in any way be taken into account by the hearing officer in reaching a determination. The commenters stated that ONC should be obligated to provide a written statement, including any and all information, analysis, and documentation it used to come to its determination. Additionally, the commenters asserted that this statement should be made available to the health IT developer.

Response. We have finalized the requirement substantially as proposed with the following revisions and clarifications. To clarify, if ONC suspends or terminates a certification, ONC will send a notice of suspension or termination, respectively, to the health IT developer (*see* § 170.580(d)(2) and (f)(2)). As detailed in paragraphs (d)(2)(i) and (f)(2)(i), the notice will include an explanation and information to support ONC's determination. Therefore, we have revised this provision to clearly state that ONC will have an opportunity to provide the hearing officer with an additional written statement and supporting documentation on its behalf that clarifies, as necessary, its determination to suspend or terminate the certification. We have further revised the provision to clarify that not only would the written statement and supporting documentation be included as part of the written record, but it must also be provided to the health IT developer within 15 days of the health IT developer's filing of an intent to appeal.

Comments. A commenter stated that ONC's assertion that an appeal determination is final and not subject to further review misstates the reviewability of administrative decisions by federal courts.

Response. This provision does not address the reviewability of administrative decisions by federal courts. The purpose of this regulatory provision is to convey that there are no further administrative reviews of the determination.

Comments. A commenter expressed concern that health IT developers were not afforded appeal rights for ONC–ACB determinations. The commenter explained that, if there are two different enforcement bodies (ONC and ONC–ACBs) that may make determinations, there should be equal rights for a health IT developer to appeal those determinations.

Response. We refer readers to section II.A.1.b of this final rule for an explanation of our decision not to extend appeal rights for ONC–ACB determinations.

Comments. A commenter suggested that providers should be included in the appeals process because providers will often make the initial complaint concerning a non-conformity.

Response. We encourage providers and other interested stakeholders to contact ONC throughout ONC's direct review with information about non-conformities that would be relevant during ONC's direct review of certified health IT. We do not, however, believe providers should be parties to an appeal. The matters potentially under review relate to the continued conformity of certified health IT to Program requirements that health IT developers have voluntarily accepted as part of certification of their health IT.

d. Consequences of Certification Termination

We stated in the Proposed Rule that, in general, this rulemaking does not address the consequences of certification termination beyond requirements for recertification. We stated that any consequences of, and remedies for, termination beyond recertification requirements are outside the scope of this rulemaking.

Comments. A commenter emphasized that all users of certified health IT, not just those participating in the EHR Incentive Programs, should be taken into account when addressing the consequences of certification termination. Other commenters expressed concern about the impact certification termination could have on providers participating in the EHR Incentive Programs (*e.g.,* with attestation) and other affected programs. These commenters pointed out that providers using a health IT product with a terminated Complete EHR or Health IT Module certification or one under appeal would risk failing to comply with CMS regulations. Commenters recommended that ONC coordinate with CMS to ensure sufficient protection for affected providers.

Response. We thank commenters for their feedback. We reiterate as stated above and in the Proposed Rule, that any consequences of, and remedies for, termination beyond recertification requirements are outside the scope of this rulemaking (*i.e.,* final rule). We, however, emphasize that we, and HHS as a whole, are committed to working with all users and providers in cases of termination to mitigate the impact on participants of programs requiring the use of certified health IT, particularly participants in HHS programs. As mentioned earlier under the ''termination'' section of this preamble, we intend to use the CHPL and other appropriate forms of publication and dissemination to notify users of health IT certification terminations.[13] We will also coordinate with affected HHS programs to facilitate the notification of their participants and to identify and make available appropriate remedies for participants. As noted in the Proposed Rule, CMS has issued a FAQ [14] for the EHR Incentive Programs informing participants about their options if the health IT they are using to participate in the programs has its certification terminated.

We note that an ONC certification termination under appeal stays the termination. This means the health IT remains certified while the appeal is ongoing. Similarly, health IT with a suspended certification as a result of ONC direct review is still certified and could be identified as certified health IT for HHS program purposes. While our goals with this final rule are to enhance Program oversight and health IT developer accountability for the performance, reliability, and safety of certified health IT, we remind stakeholders that we have finalized methods (*e.g.,* CAPs) designed to identify and remedy non-conformities so that health IT can maintain its certification.

(1) Certification Ban, Recertification, and Heightened Scrutiny

We proposed in the Proposed Rule that a Complete EHR or Health IT Module that has had its certification terminated can be tested and recertified once all non-conformities have been adequately addressed. We proposed that the recertified Complete EHR or Health IT Module (or replacement version) must maintain a scope of certification that, at a minimum, includes all the previously certified capabilities. We proposed that the health IT developer must request permission from ONC to participate in the Program before submitting the Complete EHR or Health IT Module (or replacement version) for testing to an ONC–ATL and recertification (certification) by an ONC–ACB under the Program. As part of its request, we proposed that a health IT developer must submit a written explanation of what steps were taken to address the non-conformities that led to the termination. We also proposed that ONC would need to review and approve the request for permission to participate in the Program before testing and recertification (certification) of the Complete EHR or Health IT Module (or replacement version) can commence under the Program.

We proposed in the Proposed Rule that if the Complete EHR or Health IT Module (or replacement version) is recertified (certified), the certified health IT product should be subjected to some form of heightened scrutiny by ONC or an ONC–ACB for a minimum of one year. We requested comments on the forms of heightened scrutiny (*e.g.,* quarterly in-the-field surveillance) and length of time for the heightened scrutiny (more or less than one year, such as six months or two years) of a recertified Complete EHR or recertified Health IT Module (or replacement version) that previously had its certification terminated. We requested comment on whether heightened scrutiny (surveillance or other requirements) should apply for a period of time (*e.g.,* six months, one year, or two years) to all currently certified Complete EHRs or certified Health IT Modules, future versions of either type, and all new certified health IT of a health IT developer that has a product's certification terminated under the Program.

We proposed in the Proposed Rule that the testing and certification of any health IT of a health IT developer that has the certification of one of its health IT products terminated under the Program or withdrawn from the Program when the subject of a potential non-conformity (notice of potential non-conformity) or non-conformity would be prohibited (''Program Ban''). We stated that the only exceptions would be if: (1) The non-conformity is corrected and implemented to all affected customers; or (2) the certification and implementation of other health IT by the health IT developer would remedy the non-conformity for all affected customers. We noted in the Proposed Rule that prohibiting the certification of new products, unless it serves to correct the non-conformity for all affected customers, may incentivize a health IT developer to cure the non-conformity. In correcting the non-conformity for all affected customers, we stated that this would not include those customers that decline the correction or fail to cooperate. We requested comment on this proposal, including how the health IT developer should demonstrate to ONC that all necessary corrections were completed. We further requested comment as to whether correcting the non-conformity for a certain percentage of all affected customers or certain milestones demonstrating progress in correcting the non-conformity (*e.g.,* a percentage of customers within a period of time) should be sufficient to lift the prohibition.

We discuss the proposals, comments, and our responses below beginning with the ''Program Ban'' proposal. We note that we have renamed the proposed ''Program Ban'' as ''Certification Ban'' (also simply referred to as ''Ban'' in this final rule). This name more accurately aligns with the effect of the Ban, which is to prohibit the certification of health IT. This also assists in clarifying that testing of health IT may still occur, which as discussed below, may be necessary as part of the process of ''reinstatement and remediation of all

[13] As mentioned under the ''suspension'' section of this preamble, we will take the same steps to notify users of health IT that has its certification suspended under the Program.

[14] *See* CMS EHR Incentive Programs FAQ 12657: *https://questions.cms.gov/faq.php?isDept=0&search=decertified&searchType=keyword&submitSearch=1&id=5005.*

affected customers.'' We note that we address the ''recertification'' proposal as part of the ''Reinstatement and Remediation for All Affected Customers'' discussion. This approach provides the most clarity regarding the final policies of this final rule.

Certification Ban

Comments. Many commenters opposed the Ban, stating that it should only apply to health IT that has a non-conformity. Commenters stated that a Ban would prevent timely upgrades, such as delivery of new functionality or necessary enhancements to users. Other commenters supported the Ban. One commenter requested clarification on how health IT developers are defined for the purposes of the Ban, inquiring if the Ban includes corporate subsidiaries of health IT developers and if they are also subject to the Ban.

Response. We thank commenters for their input and have finalized this proposal, subject to revisions and clarifications in response to comments. We continue to believe, despite the potential impact on other customers of health IT developers, that prohibiting the certification of health IT, unless it serves to correct the non-conformity, may incentivize a health IT developer to cure non-conformities and remedy the situation for affected customers. Therefore, we have finalized a Certification Ban. We have, however, included revisions both for clarity and to provide more flexibility for health IT developers to meet the requirements for lifting a Certification Ban. These revisions are discussed directly below and in the ''Reinstatement and Remediation for All Affected Customers'' section that follows.

We first clarify that ''termination'' in this final rule means an ONC action to ''terminate'' or ''revoke'' the certification status of a Complete EHR or Health IT Module. Conversely, an action by an ONC–ACB to ''terminate,'' ''remove,'' or ''revoke'' the certificate of a Complete EHR or Health IT Module is referred to as ''withdrawal.'' ISO/IEC 17065 defines the requirements for conformity assessment by ONC–ACBs and defines ''withdrawal'' (as defined in ISO 17000) [15] as a revocation or cancellation of the statement of conformity.[16] This occurs in two situations: (1) When an ONC–ACB proactively removes a certification based on its own accord; or (2) when a health IT developer initiates the discontinuation of a product's certification and requests that the ONC–ACB remove the product's certificate. We make the distinction between ''termination'' and ''withdrawal'' to conform with ISO's use of ''withdrawal'' throughout the ISO standards. However, ONC retains use of the term ''termination'' in this final rule because we enforce Program requirements directly, not under delegated authority and not subject to ISO standards, as is the case for ONC–ACBs. We use this new terminology in our explanation of final Ban provisions below, throughout the new §§ 170.580 and 170.581, and in revisions to § 170.556(d)(6) that we are finalizing in this final rule to align with ISO/IEC 17065. In § 170.556(d)(6), we changed ''termination'' to ''withdrawal'' and ''terminating'' to ''withdrawing.''

We clarify that the certification of any of a health IT developer's health IT is prohibited when the certification of one or more of the health IT developer's Complete EHRs or Health IT Modules is (1) terminated by ONC under the Program; (2) withdrawn from the Program by an ONC–ACB because the health IT developer requested it to be withdrawn when the health IT developer's health IT was the subject of a potential non-conformity or non-conformity as determined by ONC; (3) withdrawn by an ONC–ACB because of a non-conformity with any of the certification criteria adopted by the Secretary under subpart C of this part; or (4) withdrawn by an ONC–ACB because the health IT developer requested it to be withdrawn when the health IT developer's health IT was the subject of surveillance for a certification criterion or criteria adopted by the Secretary under subpart C of this part, including pending surveillance (*e.g.,* the health IT developer received notice of pending randomized surveillance). This more detailed specification regarding when a Certification Ban applies is consistent with our proposals, including our proposal to apply the Certification Ban to withdrawals completed by ONC–ACBs. We clarify that for ONC–ACBs' withdrawals as specified in (3) and (4) above, the focus is on non-conformities with certification criteria and not non-conformities arising from §§ 170.523(k)(1) (disclosure of information about limitations and additional types of costs associated with their certified health IT), 170.523(l) (compliance with rules governing the use of the ONC Certification and Design Mark), or 170.523(n) (submit user complaints to ONC–ACBs).

We also clarify that the Certification Ban affects health IT developers participating in the Program, their subsidiaries, and their successors.

Reinstatement and Remediation for All Affected Customers

Comments. A commenter requested clarification on what qualifies as adequately addressing a non-conformity. We received mixed comments on whether a terminated health IT product (if presented for recertification) should be required to maintain a scope of certification that, at a minimum, includes all the previous certified capabilities. A few commenters supported our proposal, stating that any reduction in scope penalizes providers who may face significant financial penalties, and that physicians rely on their purchased product to best fulfill their practice needs. In contrast, some commenters expressed general opposition to our proposed approach.

One commenter recommended that the Certification Ban be lifted once ONC is satisfied with the corrective action rather than be dependent on customer acceptance or adoption of the corrected certified IT or other remedies. Similarly, a couple of other commenters recommended that all users must have the correction available (whether they choose to install or not). One of these commenters contended that decisions to implement patches may dictate when the customer's non-conforming health IT will be corrected for the customer.

Response. We have finalized the proposed requirements that a health IT developer must request permission to participate in the Program, explain the steps taken to address the non-conformities that led to the certification termination (or withdrawal), and receive approval from ONC to participate in the Program again. Specifically, for the Certification Ban to be lifted, we require that: (1) A health IT developer must request in writing ONC's permission to participate in the Program; (2) the request must demonstrate that the customers affected by the certificate termination or withdrawal have been provided appropriate remediation; and (3) ONC is satisfied with the health IT developer's demonstration that all affected customers have been provided with appropriate remediation and grants reinstatement into the Program. These requirements are consistent with our proposals and address our primary goal of addressing affected customers, particularly the requirement of appropriate remediation. We discuss the aspects of ''appropriate remediation'' in our responses to comments below.

We agree with some commenters that a reduction in scope unfairly penalizes customers who rely on their purchased or licensed certified health IT to best fulfill their practice needs. As stated in

[15] ISO/IEC 17000 (2004).

[16] We note that ISO does not explicitly define ''terminate.''

the Proposed Rule, health IT is tested and certified to meet adopted certification criteria and requirements. It should continue to meet those certification criteria and requirements when implemented. Therefore, in determining whether a health IT developer has demonstrated that all affected customers have been provided with appropriate remediation, we will require that the scope of certified health IT previously provided to the affected customers be maintained (*i.e.,* a health IT developer must demonstrate, and ONC is satisfied, that all the necessary certified health IT has been made available to affected customers). We note, as discussed in more detail below, that an affected customer can choose alternative means of remediation, which would be sufficient for lifting the Ban.

We agree with commenters that the Certification Ban may be lifted once ONC is satisfied that all non-conformities have been addressed and the correction is *made available* for all affected customers. However, in providing appropriate remediation to affected customers, we acknowledge that there may be other ways for health IT developers to correct situations for customers short of correcting the certified version or providing a replacement certified version. Therefore, we provide that, as determined by ONC, other certified health IT may be made available by the health IT developer that would remedy the non-conformity for all affected customers. This certified health IT may be the health IT of another health IT developer.

We also agree with commenters that there may be reasons why a customer does not implement the corrected certified version or other available certified health IT in a timely manner or at all. As noted in the Proposed Rule (81 FR 11066), we will take into consideration customers' responses (*e.g.,* the customer declines or postpones the correction or signs a release of obligation, which may be the result of a financial settlement) when we determine whether a health IT developer has demonstrated that appropriate remediation has been provided to all affected customers.

We clarify that ONC has sole discretion to lift a Certification Ban. The Certification Ban shall remain in effect until ONC is satisfied that the health IT developer has taken the required steps to lift the Certification Ban, as described above. If ONC chooses not to lift the Certification Ban, the health IT developer may reapply for reinstatement after taking the necessary actions to address the conditions for reinstatement.

Comments. Commenters requested clarification regarding what would be tested and certified upon applying for ''recertification.''

Response. As part of ONC's considerations as to whether to lift the Certification Ban, ONC, or a third party acting on its behalf, may require the health IT presented as replacement certified health IT for affected customers to be tested by an ONC–ATL, particularly if the replacement health IT is a version of the health IT that previously had the non-conformity that led to termination or withdrawal. This may also be the case when one of multiple Health IT Modules used to maintain the same scope of the terminated or withdrawn certified health IT was never the subject of ONC direct review or ONC–ACB surveillance but includes the same capabilities that were connected to the non-conformity (*e.g.,* CPOE capabilities). After passing necessary testing, the health IT could be certified by an ONC–ACB.

Comments. A commenter recommended that a health IT developer be required to provide their customer list to ONC and ONC could verify that the correction has been completed for a random selection of users. This commenter also suggested that ONC could alternatively rely on the health IT developer to attest that all installed products have been corrected or are available to users.

Response. We agree with the commenter that either approach could be used by ONC to verify that appropriate remediation has been provided for all affected customers. However, as noted above, we will require the health IT developer to *demonstrate* that all affected customers have been provided with appropriate remediation, which would include listing the form of remediation. We may also randomly or methodically verify this information with affected customers.

Heightened Scrutiny

Comments. A few commenters recommended that heightened scrutiny only apply to the functionality that was subject of the alleged non-conformity and not to all health IT of a health IT developer. Some commenters requested that we further define heightened scrutiny. A couple of commenters suggested that heightened scrutiny should vary based on the scope of the non-conformity. One commenter supported using multiple forms of heightened scrutiny, including in-the-field surveillance. Two commenters recommended going beyond randomized in-the-field surveillance where the health IT developer would be surveilled more frequently.

We received mixed comments as to the length of heightened scrutiny. Some commenters recommended six months, while others recommended one year.

Response. We have not finalized our proposal for applying heightened scrutiny at this time because, after consideration of the public comments, we believe that existing procedures already adequately result in ''heightened scrutiny,'' where appropriate. As noted above, it is possible that remediation for customers affected by a termination or withdrawal could consist of providing certified health IT that never had a non-conformity. In such instances, there would be no need for any form of heightened scrutiny. Further and again as noted above, the process of reinstatement will provide an opportunity for ONC to scrutinize any health IT presented for recertification. We also believe that surveillance conducted by ONC–ACBs as part of their routine activities can provide additional scrutiny of ''recertified'' health IT. To this point, ONC–ACBs conducting reactive surveillance (*e.g.,* complaints-based) can take into account whether the health IT at issue was ''recertified'' health IT and whether the nature of the complaint correlates with a prior non-conformity found in the health IT. As for in-the-field surveillance, it could be weighted towards health IT that was ''recertified.''

We note that we have added an element to a CAP that addresses steps to prevent a non-conformity from re-occurring (*see* the ''Corrective Action'' section earlier in this final rule).

(2) ONC–ACB Response to a Non-Conformity

We stated in the Proposed Rule that ONC–ACBs are accredited to ISO/IEC 17065. Section 7.11.1 of ISO/IEC 17065 instructs certification bodies to consider and decide upon the appropriate action to address a non-conformity found, through surveillance or otherwise, in the product the certification body certified.[17] Section 7.11.1 lists, among other appropriate actions, the reduction in scope of certification to remove non-conforming product variants or withdrawal of the certification. We stated in the Proposed Rule that these are not appropriate responses to a non-conformity under the Program.

We proposed in § 170.523 to revise the PoPC for ONC–ACBs, to prohibit

[17] 45 CFR 170.599(b)(3).

ONC–ACBs from reducing the scope of a certification when the health IT is under surveillance or a CAP. The proposed revision addressed two situations: (1) When health IT is suspected of a non-conformity (*i.e.,* under surveillance or surveillance is pending); and (2) when health IT has a non-conformity (*i.e.,* under a CAP). We proposed that a health IT developer's withdrawal of its certified health IT from the Program when the certified health IT is under surveillance, or surveillance is pending, by an ONC–ACB should not be without prejudice (*i.e.,* the health IT developer would be subject to a ''Certification Ban'' of its health IT). We further proposed that the same proposed consequences for health IT and health IT developers related to certification termination under ONC direct review (*i.e.,* all of the § 170.581 proposals) should apply to certification withdrawals issued by ONC–ACBs. We requested comment on these proposals.

Reduction in Scope

Comments. Some commenters opposed the proposed requirement to maintain the scope of a certification when the health IT is under surveillance or a CAP, while a few commenters supported our proposal. One commenter stated that they believe these requirements could potentially be too prescriptive and could stifle innovation among health IT developers. However, another commenter stated that providers rely on their certified health IT to provide the functionality as represented to them both in general and for the EHR Incentive Programs and allowing a reduction in scope of certification to remove non-conforming product variants after implementation unfairly penalizes providers.

Response. We thank commenters for their feedback. To ensure alignment between ONC review and actions and ONC–ACBs' surveillance and actions under the Program, we have finalized our proposal in § 170.523(o) to prohibit the reduction in scope of certified health IT (1) when the certified health IT is suspected of a non-conformity (*i.e.,* under surveillance or surveillance is pending); and (2) when health IT has a non-conformity (*i.e.,* under a CAP). We agree with commenters that, as we stated in the Proposed Rule, a reduction in scope would absolve a health IT developer from correcting a non-conformity. Health IT is tested and certified to meet adopted criteria and requirements. It should continue to meet those criteria and requirements when implemented. If not, the health IT developer should correct the health IT for affected customers or be subjected to certification withdrawal. While we expect that health IT developers would correct the non-conformity in most cases, we do permit various options for health IT developers to address the situation if the health IT certification is withdrawn.[18] Therefore, we do not agree that the approach is overly prescriptive or that it will stifle innovation.

Voluntary Withdrawal When Suspected of a Non-Conformity

Comments. One commenter stated that voluntary withdrawal by a health IT developer might be the most satisfactory action to enable the majority of the health IT to remain viable in the marketplace. Two commenters recommended that we state that a health IT developer's withdrawal of its certified health IT from the Program constitutes an admission of non-conformity.

Response. We thank commenters for their feedback. We agree with the commenters that a health IT developer's withdrawal of its certified health IT from the Program could be utilized to avoid a finding of non-conformity. Therefore, we have finalized the proposed consequences for a health IT developer's withdrawal of its certified health IT from the Program when the health IT is suspected of a non-conformity (*i.e.,* under surveillance or surveillance is pending) by an ONC–ACB. Specifically, a health IT developer's health IT would be subject to a Certification Ban as discussed under the ''Certification Ban'' section of the preamble above.

Application of § 170.581 to Certification Withdrawals Executed by ONC–ACBs

We have finalized the proposed ''Program Ban'' (now called ''Certification Ban''), including application to certification withdrawals executed by ONC–ACBs. We refer readers to the ''Certification Ban, Recertification, and Heightened Scrutiny'' section above for the comments we received on these proposals and the revisions we have made in response to comments.

[18] Please also see the options for health IT developers to address certification termination/withdrawal discussed under the ''Certification Ban'' section of the preamble above.

2. Establishing ONC Authorization for Testing Labs Under the Program; Requirements for ONC–ATL Conduct; and ONC Oversight and Processes for ONC–ATLs

a. General Comments on ONC–ATL Approach

Comments. Commenters overwhelmingly supported the proposals to establish ONC–ATLs and provide for ONC oversight of ONC–ATLs under the Program. Two commenters stated that they do not support ONC accreditation in addition to current NVLAP accreditation, but expressed support for establishing ''ONC administrative controls'' over the accredited testing labs similar to ONC's oversight of the ONC–ACBs. Some commenters recommended that we include more robust testing or consider outlining a testing framework with appropriate testing methodologies to be utilized by ONC–ATLs.

Response. We thank commenters for their support and have finalized the requirements for ONC–ATL status and the framework for ONC oversight of ONC–ATLs under the Program. In response to the two commenters stating that they do not support ''ONC accreditation'' in addition to current NVLAP accreditation, we believe these commenters misinterpreted our proposals as we did not propose any additional ONC accreditation requirements. To clarify, the proposals being finalized in this final rule do not require labs applying for ONC–ATL status to obtain additional accreditation beyond NVLAP accreditation for health IT testing. Further, these new provisions are in line with the commenters' recommendations by providing ONC with ''administrative controls'' over ONC–ATLs in a manner similar to ONC–ACBs by enabling ONC to authorize and have oversight of ONC–ATLs under the Program. We appreciate commenters' recommendations regarding more robust testing and testing frameworks, however, these recommendations are outside the scope of our proposals.

b. Regulatory Provisions for Inclusion of ONC–ATLs in the Program

The following sections detail each new and amended regulatory provision that we proposed and have finalized for subpart E of part 170, starting with 45 CFR 170.501, in order to include ONC–ATLs as part of the Program. As stated as our intention in the Proposed Rule, for authorization and other processes, we have followed and leveraged all of the processes established for ONC–ACBs.

(1) § 170.501 ''Applicability''

We proposed to revise paragraph (a) of § 170.501 to include references to ''applicants for ONC–ATL status,'' ''ONC–ATL,'' and ''ONC–ATL status.''

Comments. Commenters expressed support for the proposed revisions.

Response. We thank commenters for their support and have adopted the revisions to § 170.501 as proposed. The revisions make clear that ONC–ATLs are now part of the rules under this subpart. We have also revised § 170.501 to clearly state that this subpart includes requirements related to the direct review processes adopted in this final rule. These references were inadvertently left out of § 170.501 in the Proposed Rule, although they were included elsewhere in the preamble discussion and regulation text. Further, we revised § 170.501 to clarify that accreditation organizations only apply to become an ONC–AA under the Program and not the accreditor for testing under the Program. NVLAP is the permanent accreditor for testing under the Program (*see* 76 FR 1278). For regulatory clarity, we have reorganized the prior provisions and new provisions into four paragraphs.

(2) § 170.502 ''Definitions''

We proposed to revise the definition of the term ''applicant,'' in § 170.502, to include a corresponding reference to ONC–ATL in order for such term to have equal meaning in the case of a testing lab that is applying for ONC–ATL status.

We proposed to revise the definition of the term ''gap certification,'' in § 170.502, to include a corresponding reference to ONC–ATL in paragraph (1) of that definition in order to give equal weight to test results issued by an ONC–ATL. We also proposed to add ''under the ONC Health IT Certification Program'' to paragraphs (1) and (2) of the definition to improve the clarity of the definition.

We proposed in § 170.502 to define the term ''ONC–Authorized Testing Lab'' or ''ONC–ATL'' to mean an organization or consortium of organizations that has applied to and been authorized by the National Coordinator to perform the testing of Complete EHRs and Health IT Modules to certification criteria adopted by the Secretary in subpart C of this part.

Comments. Commenters expressed support for the proposed revisions and additions to § 170.502.

Response. We thank commenters for their support and have finalized the revisions and additions to § 170.502 as proposed.

(3) § 170.505 ''Correspondence''

We proposed to revise § 170.505 to include references to ONC–ATL as appropriate.

Comments. Commenters expressed support for the proposed revisions to this section.

Response. We thank commenters for their support and have finalized the revisions to § 170.505 as proposed. This will reflect the addition of an applicant for ONC–ATL status and ONC–ATLs to the Program framework. We also refer readers to section II.A.1.c (''Review Processes'') for further revisions to § 170.505 finalized in this final rule.

(4) § 170.510 ''Type of Certification''

We proposed to revise the section heading of § 170.510 to specifically reference the authorization scope of ONC–ACB status. We also proposed to revise the introductory text within this section to more clearly convey that this section is solely focused on applicants for ONC–ACB status.

Comments. Commenters expressed support for the proposed revisions.

Response. We thank commenters for their support and have finalized the revisions to § 170.510 as proposed.

(5) § 170.511 ''Authorization Scope for ONC–ATL Status''

We proposed to establish a new section (§ 170.511) to clearly define the scope of the authorization an ''applicant'' testing lab may be able to seek from the National Coordinator. We proposed that such authorization be limited to the certification criteria adopted by the Secretary in subpart C of this part. We proposed that an applicant for ONC–ATL status could seek for the scope of its authorization all certification criteria, a subset of all of the certification criteria (*e.g.,* to support only privacy and security testing), one certification criterion, or a portion of one certification criterion. We stated that the latter two options provide opportunities for entities that may perform industry testing of health IT for limited and/or distinct capabilities (*e.g.,* electronic prescribing) that align with certification criteria to participate in the Program.

Comments. Commenters expressed support for the new proposed section for ONC–ATLs. Some commenters recommended ONC permit the acceptance of certification results from an organization that has already performed testing and certification of health IT that are aligned with, or could be aligned with, ONC certification criteria.

Response. We thank commenters for their support for the new section and have finalized the section as proposed to support specialized testing and testing efficiencies for health IT. We stated in the Permanent Certification Program final rule, in response to comments, that we did not believe it was appropriate to rely on testing results from laboratories that were not NVLAP-accredited as we could not independently verify the accreditation processes for the testing labs (76 FR 1281). We believe our approach of requiring narrowly scoped NVLAP accreditation and ONC–ATL status for limited testing under the Program (*e.g.,* e-prescribing) provides the efficiencies (*i.e.,* avoid duplicative testing and reduces regulatory burden) that commenters requested, while maintaining ONC oversight and the integrity of certified health IT and the Program.

(6) § 170.520 ''Application''

We proposed to reorder the regulatory text hierarchy to reference the ONC–ACB application requirements under § 170.520(a) and then the ONC–ATL application requirements under § 170.520(b). For the ONC–ATL requirements, we proposed that an ONC–ATL applicant would need to seek authorization based on the scope proposed in § 170.511 and follow the proposed set of ONC–ATL application requirements. More specifically, we proposed that the application information include the same general identifying information as for ONC–ACB applicants; the same authorized representative designation; documentation that the applicant has been accredited by NVLAP to ISO/IEC 17025; and a written agreement executed by the authorized representative stating that the applicant will adhere to the PoPC for ONC–ATLs.

Comments. Commenters expressed support for the ONC–ATL application requirements. Some commenters noted that NVLAP bases its accreditation of testing labs under the Program on both ISO/IEC 17025 *and* elements specific to the Program (*e.g.,* test procedure requirements and competencies). One commenter requested that we establish a minimum set of testing documentation for test results. This commenter also requested that we require ONC–ATLs to submit a list of all received complaints on a quarterly basis, which would be the same as the requirement for ONC–ACBs.

Response. We thank commenters for their support and have finalized the ONC–ATL application requirements with one clarification based on the comments received. We clarify that ''documentation that confirms that the applicant has been accredited by

NVLAP to ISO/IEC 17025'' includes accreditation by NVLAP to health IT competencies and other Program-specific requirements as noted by commenters. To provide this clarity in § 170.520, we have revised paragraph (b)(3) to read ''documentation that confirms that the applicant has been accredited by NVLAP, including to ISO/IEC 17025.'' To ensure uniformity, ONC, NVLAP, the ONC–AA, ONC–ACBs, and accredited testing labs have collaborated and agreed upon a minimum set of documentation that ONC–ATLs shall provide the ONC–ACBs for their certification evaluation, review, and decision. Last, we note that the recommendation to require ONC–ATLs to submit quarterly reports on complaints is outside of the scope of our proposals as we did not propose such a requirement for ONC–ATLs as we did for ONC–ACBs in the 2015 Edition proposed rule.

(7) § 170.523 ''Principles of Proper Conduct for ONC–ACBs''

We proposed to revise paragraph (h)(1) of § 170.523 to explicitly include ONC–ATLs as an entity from whom ONC–ACBs would receive test results. We further proposed to modify paragraph (h)(2) of § 170.523 to include a six month time window from the authorization of the first ONC–ATL to permit the continued acceptance by ONC–ACBs of *any* test results from a NVLAP-accredited testing laboratory. As stated in the Proposed Rule, this approach would provide adequate transition time for ONC–ACBs to continue issuing certifications based on test results for new and revised certification criteria issued by a ''NVLAP-accredited testing laboratory'' and would also serve as a mobilizing date for a testing lab that has not yet applied for ONC–ATL status. We requested comment, however, on the transition period from NVLAP-accredited testing laboratories to ONC–ATLs. Specifically, we requested comment on whether we should alternatively establish that ONC–ACBs may only be permitted to accept *any* test results from a NVLAP-accredited testing laboratory for a period of time from the effective date of a subsequent final rule. We stated that this approach would provide a more certain timetable for ONC–ACBs compared to the proposed approach, but may not provide sufficient time for all NVLAP-accredited testing laboratories to transition to ONC–ATL status. We also requested comment on whether the transition period should be shorter than six months (*e.g.,* three months) or longer (*e.g.,* nine months) under either the proposed approach or the alternative approach.

We proposed in § 170.523(h)(2) to permit the use of test results from a NVLAP-accredited testing laboratory for certifying previously certified health IT to unchanged certification criteria (gap certification) because, as proposed, NVLAP-accredited testing laboratories would be replaced with ONC–ATLs. We stated that this proposal would permit the test results issued by NVLAP-accredited testing laboratories under the Program (*e.g.,* test results for health IT tested to the 2014 Edition) to continue to be used for gap certification. As a related proposal, we proposed to remove references to ONC–ATCBs in § 170.523(h). ONC–ATCBs tested and certified health IT to the 2011 Edition. The 2011 Edition has been removed from the Code of Federal Regulations and ONC–ACBs no longer maintain active certifications for health IT certified to the 2011 Edition.

Comments. Commenters expressed support for our proposed revisions to § 170.523 to accommodate inclusion of ONC–ATLs in the Program. One commenter commented on the proposed accredited testing lab to ONC–ATL transition timeframe. The commenter recommended that we adopt a specified timeframe from the effective date of this final rule for NVLAP-accredited testing labs to become authorized as ONC–ATLs rather than a six-month timeframe from the authorization of the first ONC–ATL. Another commenter stated that the removal of reference to ONC–ATCBs could imply that gap certification is not permitted based on the use of test results from a 2011 Edition certification issued by an ONC–ATCB. The commenter recommended that we clarify whether test results used for 2011 Edition certified health IT could be used for the purposes of gap certification.

Response. We appreciate commenters' support for our proposed revisions to § 170.523 and have finalized our revisions to include ONC–ATLs and remove references to ONC–ATCBs from the section. We agree with the commenter that the best approach to meet our goal stated in the Proposed Rule of establishing a certain timetable to facilitate the transition for accredited testing labs to ONC–ATLs would be to set a timeframe from the effective date of this final rule for the transition. Therefore, we have established a timeframe of ''six months from the effective date of this final rule'' to provide a more certain timeframe. We believe this timeframe, over eight months from the issuance of this final rule, provides sufficient time to account for any potential delays or unforeseen circumstances (*e.g.,* time and resource conflicts with significant requests for 2015 Edition testing and certification by health IT developers).

The removal of reference to ONC–ATCBs was not meant to imply that gap certification is not permitted based on the use of test results from a 2011 Edition certification issued by an ONC–ATCB. Therefore, we have revised the regulation text to add back in specific reference to ONC–ATCBs in § 170.523(h)(3). We believe this step will sufficiently clarify that these test results may still be used for gap certification. We emphasize, however, that granting gap certification has always been at the discretion of an ONC–ACB. We would, however, expect that an ONC–ACB would consider the temporal nature of test results and other relevant changes in the health IT brought forward for gap certification when determining whether to grant gap certification.

(8) § 170.524 ''Principles of Proper Conduct for ONC–ATLs''

We proposed to establish, in a new section (§ 170.524), a set of PoPC to which ONC–ATLs must adhere, which are similar to the set of rules and conditions for ONC–ACBs. We stated that adherence to these conduct requirements would be necessary for ONC–ATLs to maintain their authorization and to remain in good standing under the Program. As outlined and described in the Proposed Rule, many of the proposed PoPC for ONC–ATLs would remain consistent with those to which ONC–ACBs are already required to adhere.

Comments. Commenters expressed support for the new PoPC for ONC–ATLs.

Response. We thank commenters for their support and have adopted the new PoPC for ONC–ATLs in § 170.524. Consistent with the clarification we provided for § 170.520, we clarify that the requirement to maintain ''NVLAP accreditation to ISO/IEC 17025'' entails more than just accreditation to ISO/IEC 17025 as NVLAP accredits testing labs to other requirements under the Program. To provide this clarity in § 170.524, we have revised paragraph (a) to read ''Maintain its NVLAP accreditation, including accreditation to ISO/IEC 17025.''

Comments. One commenter stated, in regard to the proposed PoPC allowing ONC to periodically observe testing on site (unannounced or scheduled), that it would be more efficient for ONC staff to try and coordinate with the ONC–ATL for on-site visits since each testing session involves a significant amount of coordination and scheduling.

Response. We appreciate the commenter's point, but have retained the discretion in the final PoPC to observe, unannounced, on-site health IT testing. As with the PoPC for ONC–ACBs, we believe the prospect of unannounced visits supports Program compliance monitoring and the overall integrity of the Program. We note, however, that we intend to work with ONC–ATLs, as we do with ONC–ACBs, to provide the necessary notice to conduct useful and efficient on-site observation of health IT testing.

(9) § 170.525 ''Application Submission''

We proposed to include reference to an applicant for ONC–ATL status in paragraphs (a) and (b) of § 170.525 to clearly recognize that testing labs would be applying for ONC–ATL status. We proposed the same application rules that apply to applicants for ONC–ACB status.

Comments. Commenters expressed support for the proposed addition to this section.

Response. We thank commenters for their support and have finalized the inclusion of ''an applicant for ONC–ATL status'' in § 170.525 as proposed.

(10) § 170.530 ''Review of Application''

We proposed to revise paragraphs (c)(2), (c)(4), (d)(2), and (d)(3) of § 170.530 to include an ONC–ATL as part of the application review process. Further, in so doing, we proposed to follow all of the same application review steps and processes that we follow for applicants for ONC–ACB status.

Comments. Commenters expressed support for the proposed revisions to this section.

Response. We thank commenters for their support and have finalized the revisions to § 170.530 as proposed.

(11) § 170.535 ''ONC–ACB Application Reconsideration''

We proposed to revise the section heading of § 170.535 to include reference to ONC–ATLs. We also proposed to revise paragraphs (a) and (d)(1) of § 170.535 to equally reference that an ONC–ATL could be part of the application reconsideration process. Further, in so doing, we proposed to follow all of the same application reconsideration steps and processes that we require and follow for applicants for ONC–ACB status.

Comments. Commenters supported our proposed revisions to this section.

Response. We thank commenters for their support and have finalized the revisions to § 170.535 as proposed.

(12) § 170.540 ''ONC–ACB Status''

We proposed to revise the section heading of § 170.540 to include reference to ONC–ATLs. We also proposed to revise paragraphs (a) through (d) of § 170.540 to equally reference an ONC–ATL as part of the rules currently governing the achievement of ONC–ACB status. As stated in the Proposed Rule, these rules would include: The acknowledgement of ONC–ATL status; that an ONC–ATL must prominently and unambiguously identify the scope of its authorization; that ONC–ATL authorization must be renewed every three years; and that ONC–ATL status would expire three years from when it was granted unless renewed.

Comments. Commenters supported our proposed revisions to this section.

Response. We thank commenters for their support and have finalized the revisions to § 170.540 as proposed.

(13) § 170.557 ''Authorized Certification Methods''

We proposed to revise the section heading of § 170.557 to include a reference to ''testing.'' We also proposed to update the regulatory text hierarchy to have paragraph (a) be applicable to ONC–ATLs and paragraph (b) be applicable to ONC–ACBs.

Comments. Commenters expressed support for our proposed revisions to this section.

Response. We thank commenters for their support and have finalized the proposed revisions to make § 170.557 applicable to ONC–ATLs as we believe the requirement to provide for remote testing for both development and deployment sites is equally applicable to testing labs as it is to certification bodies.

(14) § 170.560 ''Good Standing as an ONC–ACB''

We proposed to revise the section heading of § 170.560 to include reference to ONC–ATLs. We also proposed to revise the paragraph hierarchy to make the paragraph (a) requirements applicable to ONC–ACBs (without modification) and to make the paragraph (b) requirements applicable to ONC–ATLs following the same set of three requirements as for ONC–ACBs.

Comments. Commenters supported our proposed revisions to the section.

Response. We thank commenters for their support and have finalized the revisions to § 170.560 as proposed. We believe mirroring the requirements of § 170.560 between ONC–ACBs and ONC–ATLs provides for consistent administration for both testing and certification under the Program.

(15) § 170.565 ''Revocation of ONC–ACB Status''

We proposed to revise the section heading of § 170.565 to include reference to ONC–ATLs. We also proposed to revise paragraphs (a) through (h) to include references to an ONC–ATL, as applicable. We proposed to apply the same oversight paradigm of Type-1 and Type-2 [19] violations to ONC–ATLs as we apply to ONC–ACBs. We further proposed to follow the same process for ONC–ATLs that is already included in this section for ONC–ACBs. We proposed to specifically add paragraph (d)(1)(iii) for ONC–ATL suspension provisions because the suspension provisions in paragraph (d)(1)(ii) are too specific to ONC–ACBs and simply referencing ONC–ATLs in that paragraph would cause confusion. Similarly, we proposed to specifically add paragraph (h)(3) related to the extent and duration of revocation to clearly divide the rules applicable to ONC–ACBs from those that would be applicable to ONC–ATLs. We explained that this proposed revision would place the current ONC–ACB applicable regulation text in paragraph (h)(2) of this section.

Comments. Commenters expressed support for the proposed revisions and additions to this section. One commenter requested clarification as to whether the timeframes proposed referenced calendar or business days. Another commenter stated that requiring an ONC–ATL or ONC–ACB to submit a written response within three days upon receipt of a notice of proposed suspension seems short since the National Coordinator has five days to respond to an ONC–ATL or ONC–ACB's written response to a notice of proposed suspension.

Response. We thank commenters for their support and have finalized the revisions and additions to § 170.565 as proposed. Our approach will enable ONC to treat similar fact-based non-compliance situations equitably among ONC–ACBs and ONC–ATLs. In regard

[19] Type-2 violations constitute non-compliance with 45 CFR 170.560 (Good standing as an ONC–ACB) (45 CFR 170.565(b)). An ONC–ACB must maintain good standing by: (a) Adhering to the Principles of Proper Conduct for ONC–ACBs; (b) Refraining from engaging in other types of inappropriate behavior, including an ONC–ACB misrepresenting the scope of its authorization, as well as an ONC–ACB certifying Complete EHRs and/or Health IT Module(s) for which it does not have authorization; and (c) Following all other applicable federal and state laws.

to the requested clarification for the use of ''days,'' we previously adopted the definition of ''day'' or ''days'' in § 170.102 to mean ''calendar day'' or ''calendar days'' (Temporary Certification Program final rule; 75 FR 36162, 36203). As stated in the Permanent Certification Program final rule, we believe suspension could be an effective way to protect purchasers of certified products and ensure patient health and safety. The requirements for an ONC–ATL or ONC–ACB to submit a written response to a proposed suspension within three days supports this goal, while still giving ONC–ACBs and ONC–ATLs an opportunity to respond. The National Coordinator has an additional two days to be able to consider the ONC–ATL or ONC–ACB response in conjunction with the reasons for proposing the suspension.

(16) § 170.570 Effect of Revocation on the Certifications Issued To Complete EHRs and Health IT Module(s)

We explained in the Proposed Rule that § 170.570 specifies rules applicable to certifications issued to Complete EHRs and/or Health IT Modules in the event that an ONC–ACB has had its status revoked. Section 170.570 includes steps that the National Coordinator can follow if a Type-1 violation occurred that called into question the legitimacy of certifications conducted by the former ONC–ACB. These provisions were put in place to provide clarity to the market about the impact that an ONC–ACB's status revocation would have on certified health IT in use as part of the EHR Incentive Programs.

In the context of an ONC–ATL having its status revoked, we did not specifically propose to modify § 170.570 to include a set of rules applicable to such a scenario. We stated that the same provisions were not necessary given the tangible differences between test results for a *not yet* certified Complete EHR and/or Health IT Module and an issued certification being used by hundreds or thousands of providers for participation in other programs, HHS or otherwise. We did, however, request comment on whether there would be any circumstances in which additional clarity around the viability of test results attributed to a not yet certified Complete EHR and/or Health IT Module would be necessary. We also requested comment as to whether we should include provisions similar to those already in this section to account for an instance where an ONC–ATL has its status revoked as a result of a Type-1 violation, which calls into question the legitimacy of the test results the ONC–ATL issued and, thus, could call into question the legitimacy of the subsequent certifications issued to Complete EHRs and/or Health IT Modules by a potentially unknowing or deceived ONC–ACB.

Comments. The majority of commenters agreed that § 170.570 did not need to be modified for a Complete EHR and/or Health IT Module *not yet* certified. Commenters stated that if a Complete EHR and/or Health IT Module had not yet been certified and its testing lab had its status revoked, the health IT developer could find another testing lab to complete its testing before certification. A couple of commenters recommended additional provisions for situations where an ONC–ATL is suspended for Type-1 violations (fraud or negligence) affecting the validity of the test results, but not for non-test-related issues (*e.g.* business practices or failure to report to ONC) that could also cause an ONC–ATL to have its status revoked. Several commenters also requested that we clarify how the National Coordinator would apply recertification requirements for ONC–ATL or ONC–ACB revocation due to a Type-2 violation.

Response. We thank commenters for their feedback. While we did not specifically propose to modify § 170.570 to include a set of rules applicable to an ONC–ATL having its status revoked, we did request comment on modifying § 170.570 to account for situations where an ONC–ATL has its status revoked as a result of a Type-1 violation, which calls into question the legitimacy of the test results the ONC–ATL issued and, thus, could call into question the legitimacy of the subsequent certifications issued to Complete EHRs and/or Health IT Modules by a potentially unknowing or deceived ONC–ACB. Given the feedback from commenters expressing the need for provisions to address certifications when ONC revokes an ONC–ATL's status and also determines that the test results are unreliable because of fraud or negligence or for other reasons that call into question the legitimacy of the test results the ONC–ATL issued, we have revised § 170.570 to address these situations.

We note that § 170.570 does not include the review of health IT certifications by the National Coordinator due to the revocation of ONC–ATL or ONC–ACB status for Type-2 violations. Under this section, the review of health IT certifications by the National Coordinator is limited to revocations based on a ''Type 1 violation that called into question the legitimacy of certifications issued to health IT.''

Comments. Several commenters requested clarification on how the National Coordinator would make an assessment on whether a health IT was ''improperly certified.'' Commenters also requested that ONC evaluate the likelihood that remaining ONC–ACBs would be able to accommodate all requests for recertification within the specified 120-day time period under § 170.570, noting that ONC–ACBs do not always have tremendous flexibility to schedule around other obligations, particularly during busy certification periods.

Response. As specified in § 170.570, the National Coordinator would review the facts surrounding the revocation and publish a notice on ONC's Web site if it was determined that Complete EHRs and/or Health IT Module(s) were ''improperly certified.'' We anticipate that this review would be case-specific and dependent on the basis of the revocation. To note, we have revised the regulation text to replace ''improperly certified'' with more accurate terminology. We believe use of ''unreliable testing or certification'' is more accurate and provides clarity for the situations under review as compared to ''improperly tested'' or ''improperly certified,'' particularly in situations where an ONC–ACB unknowingly uses unreliable test results.

In the Permanent Certification Program final rule (76 FR 1299–1300), we stated that programmatic steps, such as identifying ONC–ACB(s) that could be used for recertification, could be taken to assist health IT developers with achieving timely and cost effective recertifications. However, based on our accumulated knowledge of the time it takes for testing and certification under the Program and in response to comments, we acknowledge that there may be circumstances where it may not be possible for ONC–ATLs to accommodate all requests for retesting, as necessary, and ONC–ACBs to accommodate all requests for recertification within the 120-day time period. Accordingly, we have revised § 170.570 to permit the National Coordinator to extend the time that the certification status of affected Complete EHRs and/or Health IT Module(s) remains valid as necessary for the proper retesting and recertification of the affected health IT (*see* § 170.570(c)(2)).

B. Public Availability of Identifiable Surveillance Results

In the 2014 Edition final rule, for the purposes of increased Program transparency, we instituted a requirement for the public posting of the test results used to certify health IT (77 FR 54271). We also instituted a requirement that a health IT developer publicly disclose any additional types of costs that a provider would incur for using the health IT developer's certified health IT to participate in the EHR Incentive Programs (77 FR 54273–74). Building on these transparency and public accountability requirements for health IT developers, we took steps, in the 2015 Edition final rule, to increase the transparency related to certified health IT through required surveillance, broadened certified health IT disclosure requirements, and enhanced reporting requirements (80 FR 62719–25). For instance, we now require ONC–ACBs to report non-conforming findings and, when necessary, CAP information to the publicly accessible CHPL (80 FR 62725). The purpose of this reporting requirement, as described in the 2015 Edition final rule, is to ensure that health IT users, implementers, and purchasers are alerted to conformity issues in a timely and effective manner, consistent with the patient safety, program integrity, and transparency objectives of the 2015 Edition final rule (80 FR 62716–17).

In furtherance of our efforts to increase Program transparency and health IT developer accountability for their certified health IT we proposed in the Proposed Rule to revise § 170.523(i) of the PoPC for ONC–ACBs by adding language that would require ONC–ACBs to make identifiable surveillance results publicly available on their Web sites on a quarterly basis. We stated that these surveillance results would include information such as, but may not be limited to: Names of health IT developers; names of products and versions; certification criteria and Program requirements surveilled; and outcomes of surveillance. We further stated that this information is already collected by ONC–ACBs as part of their surveillance efforts under the Program and should be readily available for posting on their Web sites (81 FR 11070).

We clarified in the Proposed Rule that we do not require that publicly posted surveillance results include information that is proprietary, trade secret, or confidential (*e.g.,* ''screenshots'' that may include such information). We noted our expectation that health IT developers and ONC–ACBs would ensure that such information is not posted when making available the proposed information (*i.e.,* but not limited to, names of health IT developers; names of products and versions; certification criteria and Program requirements surveilled; and outcomes of surveillance).

We requested public comment on the publication of identifiable surveillance results. Specifically, we requested comment on the types of information to include in the surveillance results and the format (*e.g.,* summarized or unrefined surveillance results) that would be most useful to stakeholders. In addition to the proposal for ONC–ACBs to publish these results quarterly on their Web sites, we requested comment on the value of publishing hyperlinks on the ONC Web site to the surveillance results posted on the ONC–ACBs' Web sites (81 FR 11070).

Comments. We received overwhelming support for the publication of identifiable surveillance results by ONC–ACBs. A couple of commenters, however, questioned the benefit of posting conforming results, suggesting the number of results would be too low to be significant.

Response. We appreciate commenters' support for the publication of identifiable surveillance results by ONC–ACBs and are finalizing our proposal to make identifiable surveillance results of ONC–ACBs publicly available according to the form, manner, and frequency discussed below. We emphasize that these surveillance results will consist of findings of conformity, which are not currently published on the CHPL.

As we stated in the Proposed Rule, the publication of identifiable surveillance results with findings of conformity, much like the publication of non-conformities and CAPs on the CHPL under the 2015 Edition final rule, will help make health IT developers more accountable to the customers and users of their certified health IT. Customers and users will be provided with valuable information about the continued performance (*i.e.,* conformity under the Program) of certified health IT. The identifiable surveillance results will serve to inform providers and others currently using certified health IT as well as those that may consider switching their certified health IT or purchasing certified health IT for the first time. While we expect that the prospect of publicly identifiable surveillance results will motivate some health IT developers to improve their maintenance efforts, we continue to believe that published surveillance results will reassure customers and users of certified health IT that their health IT continues to conform to certification and Program requirements. This is because, based on ONC–ACB surveillance results to date, most of the surveilled certified health IT and health IT developers are maintaining conformity with certification criteria and Program requirements. The publishing of identifiable surveillance results will also provide a more complete context of surveillance in the certified health IT industry; rather than only sharing identifiable non-conforming results, and when applicable, CAPs (*see* § 170.523(f)).

We disagree with the commenters that suggested there may be little value in posting identifiable surveillance results because the number of results will be too low to be of significance. Such surveillance results will include both reactive (*e.g.,* complaints-based) and randomized surveillance results, which over time will establish a surveillance and conformity history of certified health IT.

Comments. Commenters generally agreed with the proposed list of information to be included in publicly available surveillance results (*i.e.,* the names of health IT developers; names of products and versions; certification criteria and Program requirements surveilled; and outcomes of surveillance). Several health IT developers suggested that the information listed for publication should be specifically limited to the information identified in the Proposed Rule, which should be a ''ceiling rather than a floor.'' Some commenters also recommended releasing the same type of surveillance results information that is required to be made public as part of CAPs under § 170.523(f)(1)(xxii). Commenters recommended this approach to ensure Program consistency, prevent interim work product or information obtained in the course of surveillance from being disclosed, and prevent the inclusion of proprietary or sensitive information.

Most commenters recommended ONC–ACBs provide summary identifiable surveillance results. Some commenters cautioned that ONC–ACBs should clearly indicate that surveillance of specific certified health IT should not imply a problem or potential problem with the health IT. One commenter encouraged ONC to share model forms of how results would be published so that a common understanding of the form, content, and structure is established in advance of their publication. The same commenter also recommended that we engage in outreach with industry, providers, health IT developers, and public interest stakeholders to help them understand and interpret public surveillance information.

Commenters expressed support for publishing hyperlinks on the ONC Web site to the quarterly identifiable surveillance results posted on the ONC–ACBs' Web sites. Several commenters also recommended posting the identifiable surveillance results on the CHPL, rather than having them spread across multiple ONC–ACB Web sites.

Response. Based on the comments received and the goals of our proposal, as stated above and in the Proposed Rule, we have finalized our proposed approach with the following clarifications. This approach requires the public posting of the information specified in the Proposed Rule (81 FR 11070–71) and the relevant information already required to be posted, when appropriate, on the CHPL as part of a CAP (80 FR 62725). Specifically, the information required to be reported for all surveillance results under this final rule will include: The names of health IT developers; names of products and versions; certification criteria and Program requirements surveilled; identification of the type of surveillance (*i.e.,* reactive or randomized); the dates surveillance was initiated and completed; and the number of sites that were used in randomized surveillance. This information is consistent with the proposed information, the types of information already required to be posted for CAPs (which is more information than we have specified above for quarterly reporting of all identifiable surveillance results), and with commenter feedback.

We did not specifically list the identification of the type of surveillance (*i.e.,* reactive or randomized), dates the surveillance was initiated and completed, or the number of sites surveilled as types of information to be reported in the Proposed Rule. However, the Proposed Rule refers to ''continued performance,'' which requires the identification of the dates surveillance was conducted in order to measure performance over a period of time. Additionally, we believe information regarding whether the surveillance was reactive or random and the number of sites that were surveilled will be useful to stakeholders in understanding surveillance results.

The Proposed Rule included the 'outcome of surveillance' as a specific type of information, but we have determined that it is unnecessary. We note that the outcome of surveillance is implied by definition (surveillance results). Furthermore, outcomes that include identifiable non-conforming surveillance results are already required to be posted on the CHPL.

We agree with commenters that requiring the surveillance information to be posted in one location will better serve stakeholders. Allowing ONC–ACBs to post identifiable surveillance results in different locations would create difficulties for stakeholders who would have to search all surveillance results across multiple ONC–ACBs' Web sites. Further, such an approach would not account for an ONC–ACB choosing to exit the Program. Alternatively, as commenters suggested, the CHPL would address these challenges and is consistent with our consideration in the Proposed Rule of having the hyperlinks on the ONC Web site as a means of providing stakeholders with a centralized and more readily available means for accessing the results. The CHPL is housed on the ONC Web site. The posting of surveillance results on the CHPL is responsive to commenter feedback and will prevent stakeholders from having to navigate multiple sites for the surveillance information. This approach will also decrease the burden for ONC–ACBs as they do not have to host and update the surveillance results on their own Web sites. To further reduce the burden for ONC–ACBs, we will also provide guidance to ONC–ACBs on how to most efficiently submit the information to the CHPL.

As suggested by comments and consistent with our goal of making identifiable surveillance results accessible and useful to customers and other stakeholders, we are modifying the CHPL. For example, we intend to include a disclaimer clearly indicating that the fact that surveillance was done does not imply a problem with the health IT. However, we note that conducting surveillance is a Program requirement and a required responsibility of an ONC–ACB and it may or may not be based on information indicating a potential problem with the certified health IT. We will make clear that a search of a particular product listed on the CHPL returning no surveillance results would mean that the product has never been surveilled. We also plan to provide other guidance as necessary, such as an explanation of the differences between reactive and random surveillance.[20]

Comments. Commenters expressed support for our proposal to not require the inclusion of certain information that is proprietary, trade secret, or confidential. One commenter stated, however, that it was unclear as to who decides what information is proprietary or a trade secret and suggested that it should be ONC's sole decision and the only reasonable grounds for exclusion should be threats to patient confidentiality. Another commenter expressed concerns that it was unclear how ONC can balance the needs of health IT developers to protect their proprietary information with the desire to provide meaningful information related to surveillance of health IT.

Response. We appreciate both the support and concerns raised by commenters. As discussed above, we have specified the types of surveillance results that must be submitted to the CHPL and made public. We do not believe that any of the required information would implicate the release of proprietary, trade secrets, or confidential information. Further, as noted in the Proposed Rule (81 FR 11063), we are confident that the concerns of commenters regarding the disclosure of proprietary or sensitive information will be adequately addressed through appropriate safeguards implemented at the discretion of ONC–ACBs. ONC–ACBs have already been directly and effectively submitting data to the CHPL on certified health IT. They have demonstrated the capability, working with health IT developers, to submit the requisite information while protecting health IT developers' proprietary, trade secret, and confidential information. We expect this will continue with the surveillance results information that must be disclosed as a result of this new requirement. For a more detailed discussion of the safeguards ONC will implement for proprietary information, trade secrets, or confidential information, please see section II.A.1.c.(1), ''Notice of Potential Non-Conformity or Non-Conformity,'' of this final rule.

Comments. The majority of commenters expressed support for the proposal that identifiable surveillance results be posted quarterly. One commenter encouraged us to set the quarterly timeframe as a minimum threshold and to consider the value of more frequent publication, such as monthly.

Response. We appreciate the comments in support of the proposed requirement that identifiable surveillance results be posted quarterly. We have adopted a quarterly posting requirement, as proposed, but with incorporation of the commenter's recommendation that quarterly posting be the minimum threshold. We believe that submission through the CHPL of the minimum set of data will support

[20] Program guidance can be found on the ONC Web site at *https://www.healthit.gov/policy-researchers-implementers/onc-health-it-certification-program-guidance.*

the efficient submission of the additional surveillance results and the submission of the results with other data on certified health IT that is required to be submitted more frequently. This will enable ONC–ACBs to submit identifiable surveillance results more frequently if they are available and ready for submission.

To provide sufficient time for implementation by ONC and the ONC–ACBs, including necessary revisions to the CHPL to support user-friendly display of the identifiable surveillance results, we anticipate that posting of the first identifiable surveillance results will occur by the end of the first quarter of 2017. This means the identifiable surveillance results for January through March of 2017 would be posted no later than in early April of 2017. As a reminder, certain identifiable non-conforming surveillance results are already submitted to the CHPL on a weekly basis (*see* § 170.523(f)). This requirement serves to provide consumers and end-users with prompt notification of non-conformities and corrective actions associated with certified health IT.

Comments. A few commenters expressed concern that the cost estimate for ONC–ACBs to post all identifiable surveillance results seemed too low, unless there is almost no change to what ONC–ACBs are already doing. The commenters asserted that the volume of updates would be significantly higher than currently required because it would include both conforming and non-conforming results.

Response. We appreciate the commenters' concerns. As discussed above, we believe that our adopted approach for making identifiable surveillance results public will be more efficient and less burdensome than proposed. We also refer readers to the ''Regulatory Impact Statement'' section of this final rule for our cost estimates for the reporting of identifiable surveillance results by ONC–ACBs.

Comments. A few commenters recommended that we include additional functionality on our Web site (CHPL) so that stakeholders may specifically learn how certified health IT products support interoperability. Commenters asserted that visible, comparative information will give health IT developers an opportunity to understand where performance can be improved to support providers electronically exchange health information.

Response. We appreciate the commenters' feedback and will consider the feedback as part of our efforts to support widespread interoperability and electronic health information exchange. While this comment is outside the scope of our proposal, we believe that the quarterly posting of identifiable surveillance results on the CHPL is consistent with the commenters' request. Further, the CHPL currently supports the searching and comparing of certified health IT based on certification criteria. For example, users can search certified health IT listed on the CHPL to determine which health IT is certified to the 2015 Edition ''transitions of care'' certification criterion (§ 170.315(b)(1)). This criterion and its included capabilities support interoperability.

Alignment of § 170.556(e)(1) With § 170.523(i)(2)

We proposed to revise § 170.556(e)(1) for clarity and consistency with § 170.523(i)(2) by adding that the ongoing submission of in-the-field surveillance results to the National Coordinator throughout the calendar year must, at a minimum, be done on a quarterly basis.

Comments. A few commenters suggested we adopt the same language in both § 170.523(i)(2) and § 170.556(e)(1), rather than saying both ''quarterly'' and ''rolling.''

Response. We agree with comments and have revised § 170.556(e)(1) to be consistent with § 170.523(i)(2) by stating that the results of in-the-field surveillance must be submitted to the National Coordinator, at a minimum, on a quarterly basis.

Annual Summative Report of Surveillance Results

We proposed to reestablish a requirement that ONC–ACBs submit an annual summative report of surveillance results to the National Coordinator. We noted in the Proposed Rule that this previous requirement was unintentionally removed in the 2015 Edition final rule when we established a quarterly reporting requirement for surveillance results.

Comments. One commenter stated that the annual summative report should function as a general overview of the surveillance activities and the quarterly report should contain more detailed findings.

Response. We appreciate the feedback on this proposal and have finalized it as proposed. We intend to provide, as necessary, more specific guidance to ONC–ACBs on submitting the annual summative surveillance report.

III. National Technology Transfer and Advancement Act and the Office of Management and Budget Circular A–119

The National Technology Transfer and Advancement Act (NTTAA) of 1995 (15 U.S.C. 3701 *et seq.*) and the Office of Management and Budget (OMB) Circular A–119 [21] require the use of, wherever practical, standards that are developed or adopted by voluntary consensus standards bodies to carry out policy objectives or activities, with certain exceptions. In the Proposed Rule, we proposed to ''adopt'' one voluntary consensus standard (ISO/IEC 17025) for use in the Program.

Comments. We received no comments on the ISO/IEC 17025 standard as it relates to the NTTAA and OMB Circular A–119.

Response. While we stated in the Proposed Rule that we proposed to ''adopt'' ISO/IEC 17025, we clarify that we were not proposing to adopt the standard under our authorities for the purposes of certifying health IT. Rather, consistent with the stated purpose of our proposal provided in the Proposed Rule, we have finalized the *use* of the ISO/IEC 17025 standard for the accreditation of testing laboratories in the Program. The use of this standard is consistent with the requirements of the NTTAA and OMB Circular A–119.

IV. Incorporation by Reference

The Office of the Federal Register has established requirements for materials (*e.g.,* standards and implementation specifications) that agencies incorporate by reference in the **Federal Register** (79 FR 66267; 1 CFR 51.5(b)). Specifically, § 51.5(b) requires agencies to discuss, in the preamble of a final rule, the ways that the materials they incorporate are reasonably available to interested parties and how interested parties can obtain the materials; and summarize, in the preamble of the final rule, the materials they incorporate by reference.

Anyone may purchase the standard and we provide a uniform resource locator (URL) for the standard. As required by § 51.5(b), we also provide a summary below of the standard we have adopted and incorporate by reference in the **Federal Register**.

ISO/IEC 17025:2005 General requirements for the competence of testing and calibration laboratories

URL: ISO/IEC 17025:2005 (ISO/IEC 17025) is available for purchase on the ISO Web site at: *http://www.iso.org/iso/catalogue_detail.htm?csnumber=39883.*

[21] *http://www.whitehouse.gov/omb/circulars_a119.*

Summary: Accreditation bodies that recognize the competence of testing and calibration laboratories should use ISO/IEC 17025 as the basis for their accreditation. Clause 4 specifies the requirements for sound management. Clause 5 specifies the requirements for technical competence for the type of tests and/or calibrations the laboratory undertakes.

The use of ISO/IEC 17025 will facilitate cooperation between laboratories and other bodies, and assist in the exchange of information and experience, and in the harmonization of standards and procedures.

Comments. We received one comment supporting our proposal to use and incorporate by reference the ISO/IEC 17025 standard.

Response. As noted under the NTTAA section above, we proposed to ''adopt'' ISO/IEC 17025. However, we clarify that we were not proposing to adopt the standard under our authorities for the purposes of certifying health IT. Rather, consistent with the stated purpose of our proposal provided in the Proposed Rule, we have finalized the *use* of the ISO/IEC 17025 standard for the accreditation of testing laboratories in the Program and have also incorporated by reference the standard in the **Federal Register**.

Address Change

We have updated the address for ONC in the ''incorporation by reference'' sections of the regulations at §§ 170.299(a) and 170.599(a) as ONC's address changed in 2015.

Reordering of § 170.599(b)

We have reordered the listing of standards in § 170.599(b). This reordering is consistent with the procedures of the Office of the Federal Register, which dictate that standards should be listed by the alphanumeric ID (excluding the date) for each standard, and then by the standard date.

V. Collection of Information Requirements

Under the Paperwork Reduction Act of 1995 (PRA), agencies are required to provide 60-day notice in the **Federal Register** and solicit public comment on a proposed collection of information before it is submitted to OMB for review and approval. In order to fairly evaluate whether an information collection should be approved by OMB, section 3506(c)(2)(A) of the PRA requires that we solicit comment on the following issues:

1. Whether the information collection is necessary and useful to carry out the proper functions of the agency;

2. The accuracy of the agency's estimate of the information collection burden;

3. The quality, utility, and clarity of the information to be collected; and

4. Recommendations to minimize the information collection burden on the affected public, including automated collection techniques.

We solicited comment on these issues in the Proposed Rule (81 FR 11071–11072) for the matters discussed in detail below.

A. ONC–AA and ONC–ACBs

Under the Program, accreditation organizations that wish to become the ONC-Approved Accreditor (ONC–AA) must submit certain information, organizations that wish to become an ONC–ACB must comply with collection and reporting requirements, and ONC–ACBs must comply with collection and reporting requirements, records retention requirements, and submit annual surveillance plans and annually report surveillance results. In the 2015 Edition proposed rule (80 FR 16894), we estimated fewer than ten annual respondents for all of the regulatory ''collection of information'' requirements that applied to the ONC–AA and ONC–ACBs, including those previously approved by OMB. In the 2015 Edition final rule (80 FR 62733), we concluded that the regulatory ''collection of information'' requirements for the ONC–AA and the ONC–ACBs were not subject to the PRA under 5 CFR 1320.3(c). We further note that the PRA (44 U.S.C. 3518(c)(1)(B)(ii)) exempts the information collections specified in 45 CFR 170.565 that apply to ONC–ACBs, which are collection activities that would occur during administrative actions or investigations involving ONC against an ONC–ACB.

Comments. We received no comments specific to the ONC–AA and ONC–ACBs regarding the ''collection of information'' requirements applicable to them or our past determinations.

Response. We continue to maintain our past determinations in that we estimate fewer than ten annual respondents for all of the regulatory ''collection of information'' requirements that apply to the ONC–AA and ONC–ACBs and that the ''collection of information'' requirements for the ONC–AA and the ONC–ACBs are not subject to the PRA under 5 CFR 1320.3(c). As previously noted, the PRA (44 U.S.C. 3518(c)(1)(B)(ii)) exempts the information collections specified in 45 CFR 170.565 that apply to ONC–ACBs, which are collection activities that would occur during administrative actions or investigations involving ONC against an ONC–ACB.

B. ONC–ATLs

In the Proposed Rule, we estimated fewer than ten annual respondents for all of the proposed regulatory ''collection of information'' requirements for ONC–ATLs under Part 170 of Title 45. As stated in the Proposed Rule, for this reason, the regulatory ''collection of information'' requirements for ONC–ATLs under the Program are not subject to the PRA under 5 CFR 1320.3(c). We further noted in the Proposed Rule that the PRA (44 U.S.C. 3518(c)(1)(B)(ii)) exempts the information collections specified in 45 CFR 170.565 that apply to ONC–ATLs, which are collection activities that would occur during administrative actions or investigations involving ONC against an ONC–ATL.

We explained in the Proposed Rule that since the establishment of the Program in 2010, there have never been more than six applicants or entities selected for ONC–ATCB or accredited testing lab status. We stated our expectations that there will be no more than eight ONC–ATLs participating in the Program, which included the five accredited testing labs currently operating under the Program and an estimated three more testing labs that may consider becoming accredited and seek ONC–ATL status because of our proposal to permit ONC–ATL status based on health IT testing accreditation to only one certification criterion or a partial certification criterion.

We requested comments on these conclusions and the supporting rationale on which they were based.

In the Proposed Rule, we specified that the ''collection of information'' requirements that apply to ONC–ATLs are found in § 170.520(b); proposed § 170.524(d) and (f); and § 170.540(c). We estimated the burden hours for these requirements in case our conclusions in the Proposed Rule were found to be misguided based on public comments or for other reasons and to seek comments on the burden hours as a means of informing our regulatory impact analysis (*see* section VI (''Regulatory Impact Statement'') of this preamble). The estimated total burden hours as specified in the Proposed Rule are expressed in Table 1 below. We explained in the Proposed Rule that the estimated total burden hours were based on an estimated eight respondents (ONC–ATLs) for the reasons noted above and in the Proposed Rule. With similar requirements to ONC–ACBs, we estimated the same number of burden hours for ONC–ATLs to comply with

§§ 170.520(b) and 170.540(c) as cited in the 2015 Edition proposed rule (80 FR 16894). In the Proposed Rule, we made the same determination for ONC–ATL records retention requirements under proposed § 170.524(f) as we did for the ONC–ACB records retention requirements (*i.e.,* no burden hours) (80 FR 16894). We also estimated two responses per year at one hour per response for ONC–ATLs to provide updated contact information to ONC per § 170.524(d).

TABLE 1—ESTIMATED ANNUALIZED TOTAL BURDEN HOURS

Type of respondent	Code of Federal Regulations section	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
ONC–ATL	45 CFR 170.520(b)	8	1	1	8
ONC–ATL	45 CFR 170.524(d)	8	2	1	16
ONC–ATL	45 CFR 170.524(f)	8	n/a	n/a	n/a
ONC–ATL	45 CFR 170.540(c)	8	1	1	8
Total burden hours for all collections of information.					32

Comments. We received one comment from an accredited testing lab suggesting that we increase the burden hours for application submission and general updates of accreditation by a factor of four or more to more accurately reflect time spent by the ONC–ATL due to time spent internally by the organization preparing for the submission.

Response. We have accepted the commenter's suggestion and increased the burden hour estimates by a factor of four for relevant requirements as reflected in Table 2 below. The revised estimated costs of these requirements can be found in section VI (''Regulatory Impact Statement'') of this final rule.

TABLE 2—ESTIMATED ANNUALIZED TOTAL BURDEN HOURS

Type of respondent	Code of Federal Regulations section	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
ONC–ATL	45 CFR 170.520(b)	8	1	4	32
ONC–ATL	45 CFR 170.524(d)	8	2	4	64
ONC–ATL	45 CFR 170.524(f)	8	n/a	n/a	n/a
ONC–ATL	45 CFR 170.540(c)	8	1	4	32
Total burden hours for all collections of information.					128

We continue to estimate fewer than ten annual respondents for all of the regulatory ''collection of information'' requirements for ONC–ATLs under Part 170 of Title 45. Accordingly, the ''collection of information'' requirements/burden that are associated with this final rule are not subject to the PRA under 5 CFR 1320.3(c). As noted in the Proposed Rule, the PRA (44 U.S.C. 3518(c)(1)(B)(ii)) exempts the information collections specified in 45 CFR 170.565 that apply to ONC–ATLs, which are collection activities that would occur during administrative actions or investigations involving ONC against an ONC–ATL.

C. Health IT Developers

We proposed in 45 CFR 170.580 that a health IT developer would have to submit certain information to ONC as part of a review of the health IT developer's certified health IT and if ONC took action against the certified health IT (*e.g.,* requiring a CAP to correct a non-conformity or suspending or terminating a certification for a Complete EHR or Health IT Module). However, we concluded in the Proposed Rule that the PRA exempts these information collections because 44 U.S.C. 3518(c)(1)(B)(ii) excludes collection activities during the conduct of administrative actions or investigations involving the agency against specific individuals or entities.

Comments. We received no comments specific to the ''collection of information'' requirements applicable to health IT developers and our PRA determination.

Response. We continue to maintain that the ''collection of information'' requirements for health IT developers that are associated with this final rule, including providing access to the health IT as clarified earlier in the preamble, are not subject to the PRA under 44 U.S.C. 3518(c)(1)(B)(ii), which excludes collection activities during the conduct of administrative actions or investigations involving the agency against specific individuals or entities.

VI. Regulatory Impact Statement

A. Statement of Need

While ONC-authorized certification bodies (ONC–ACBs) have been delegated authority to issue certifications for health IT on ONC's behalf under the ONC Health IT Certification Program (''Program''), they do not have responsibility to address the full range of requirements applicable to health IT certified under the Program, such as those that may pose a risk to public health or safety and are inconsistent with section 3001(b) of the PHSA. In addition, ONC–ACBs may be unable to effectively administer Program requirements in certain circumstances due to practical challenges. In contrast, ONC is well-positioned to review certified health IT against the full range of requirements under the Program. This final rule is being published to enhance Program oversight by providing a regulatory framework for ONC to directly review of health IT in certain circumstances and to take appropriate responsive actions to address potential non-conformities and non-conformities, including requiring the correction of non-conformities as determined by ONC in health IT certified under the Program and suspending and terminating certifications issued to Complete EHRs and Health IT Modules.

This final rule also sets forth processes for ONC to timely and directly address testing issues by enabling ONC to authorize and further oversee ONC-accredited testing laboratories (ONC–ATLs). These processes will serve to align the testing structure with ONC's authorization and oversight of ONC–ACBs. In addition, this final rule will increase the transparency and availability of information about certified health IT through the publication of identifiable surveillance results. The publication of identifiable surveillance results supports further accountability of health IT developers to their customers and users of certified health IT.

B. Alternatives Considered

We assessed alternatives to our proposed approaches (*i.e.,* ONC's direct review of certified health IT and the authorization and oversight of accredited testing labs (ONC–ATLs)). One alternative would have been to maintain the approach for the Program prior to this final rule in which ONC–ACBs had sole responsibility for issuing and administering certifications in accordance with ISO/IEC 17065, the PoPC for ONC–ACBs, and other requirements of the Program. This approach would also have left the testing structure as it existed before this final rule. A second alternative would have been for ONC to take further responsibility for the testing, certification, and ongoing conformity of health IT with Program requirements by making testing and certification determinations and/or reviewing all determinations made under the Program. We requested comments on our assessment of alternatives and any alternatives that we should also consider.

Comments. Some commenters stated that ONC direct review is unnecessary, while other commenters stated that review of certified health IT should be left to ONC–ACBs.

Response. As we stated in the Proposed Rule, we continue to believe that adopting either alternative approach would be misguided. The current approach, which relies on ONC–ACBs to review certified health IT and take necessary actions, does not provide a regulatory framework for addressing non-conformities in certified health IT that present a serious risk to public health or safety or that present issues described in § 170.580(a)(2)(ii). As stated in the Proposed Rule, we fully considered the Program structure when initially establishing the Program and have made appropriate modifications as the Program has evolved. These past considerations primarily focused on a market-driven approach for the Program with testing and certification conducted on behalf of ONC and with ONC retaining and establishing direct and indirect oversight over certain activities. We also noted in the Proposed Rule and in this final rule that ONC–ACBs play an integral role in the Program and have the necessary expertise and capacity to effectively administer specific Program requirements. Similarly, accredited testing labs also play an integral role in the Program's success through the testing of health IT.

ONC direct review will complement ONC–ACBs' roles under the Program and serve to address matters, for example, beyond their resources and expertise. ONC direct oversight of ONC–ATLs will ensure that, like with ONC–ACBs, testing labs are directly and immediately accountable to ONC for their performance across a variety of Program items that affect the testing of health IT. Overall, the provisions in this final rule serve to enhance the Program by providing more consistency and accountability for Program participants, which will provide greater confidence in certified health IT when it is implemented, maintained, and used. Accordingly, and for the reasons outlined in this final rule, maintaining the Program as it is currently structured is not acceptable. If we did not change the current testing structure, a lack of parity in ONC oversight for testing and certification would continue to exist. ONC direct oversight of ONC–ATLs will ensure that, like with ONC–ACBs, testing labs are directly and immediately accountable to ONC for their performance across a variety of Program items that affect the testing of health IT. For the reasons outlined throughout this final rule, and specifically detailed in section II.A.1, we do not believe that continuing the Program with a framework for only ONC–ACB surveillance of certified health IT is a viable option or alternative.

C. Overall Impact

We examined the impact of the final rule as required by Executive Order 12866 on Regulatory Planning and Review (September 30, 1993), Executive Order 13563 on Improving Regulation and Regulatory Review (February 2, 2011), the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), section 202 of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1532), and Executive Order 13132 on Federalism (August 4, 1999).

1. Executive Orders 12866 and 13563—Regulatory Planning and Review Analysis

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). A regulatory impact analysis (RIA) must be prepared for major rules with economically significant effects ($100 million or more in any one year). It has been determined that this final rule is an economically significant rule as the potential costs associated with this final rule could be greater than $100 million per year. Accordingly, we have prepared an RIA that to the best of our ability presents the costs and benefits of this final rule.

a. Costs

We have identified and estimated the potential monetary costs for health IT developers, ONC–ATLs, the federal government (*i.e.,* ONC), and health care providers as a result of this final rule. We have categorized and addressed costs as follows: (1) Costs for health IT developers to correct non-conformities as determined by ONC; (2) costs for ONC and health IT developers related to an ONC inquiry into certified health IT non-conformities and ONC direct review, including costs for the new ''proposed termination'' step; (3) costs for health IT developers and ONC associated with the appeal process following a suspension/termination of a Complete EHR's or Health IT Module's certification; (4) costs for health care providers to transition to another certified health IT product when the certification of a Complete EHR or Health IT Module that they currently use is terminated; (5) costs for ONC–ATLs and ONC associated with ONC–ATL accreditation, application, renewal, and reporting requirements; (6) costs for ONC–ATLs and ONC related to revoking ONC–ATL status; and (7) costs for ONC–ACBs to submit identifiable surveillance results to the CHPL. We also provide an overall annual monetary cost estimate for the final rule (*see* (8) Total Annual Cost Estimate). We note that we have rounded all estimates to the nearest dollar and all estimates are expressed in 2016 dollars.

Comments on the Proposed Rule

General

Comments. Commenters expressed concerns that the costs of direct review could flow downstream to health IT developers, health care providers, and ONC–ATLs.

Response. We appreciate commenters' concerns and agree that certain stakeholders may incur costs as a result of this final rule. We have, therefore, estimated the direct costs for health IT developers and ONC due to ONC actions stemming from direct review under the provisions of this final rule, such as the costs for health IT developers to respond to a notice of potential non-conformity or notice of non-conformity or to file an appeal of an ONC determination. We have also estimated the indirect costs for health care providers because these costs may arise if ONC were to terminate the certification of health IT being used by health care providers to participate in a program requiring the use of certified health IT. We note that we do not believe there are any costs for ONC–ATLs related to direct review conducted by ONC.

Costs for Health IT Developers To Correct Non-Conformities Identified by ONC

Comments. A commenter asserted that substantial costs should be attributed to the reassessment of health IT for current conformity and estimated it would take at least 400 hours to perform a gap and risk assessment per product.

Response. We stated in the Proposed Rule that some health IT developers may reassess their products for conformity. We also stated in the Proposed Rule (81 FR 11073–74) and maintain that health IT developers should always be ensuring that their products are safe and conducting conformity and safety assessments of their health IT as part of proper quality management. We are unable to project the number of assessments that would occur beyond what is observed under the existing regulatory and market structure. Therefore, we have not included these costs in our quantitative cost estimates.

Comments. Some commenters noted that, if ONC alleges non-conformities outside the scope of certification criteria or test procedures, there could be a significant burden for health IT developers to respond to investigations and to change their products.

Response. We thank commenters for their thoughtful comments on this aspect of our proposal. We refer readers to section II.A.1.a of this final rule for a detailed discussion of what constitutes a non-conformity. As discussed in more detail in section C.1.a.(1) of this regulatory impact statement, while there would likely be costs to correct a non-conformity found as a result of ONC direct review under the processes outlined in this final rule, it is difficult to project such instances and costs given unpredictability of non-conformity occurrences and the underlying need to correct non-conformities. We have, however, estimated the costs to ONC and health IT developers related to an ONC inquiry into certified health IT non-conformities and ONC direct review in section C.1.a.(2) of this RIA.

Costs for ONC and Health IT Developers Related to an ONC Inquiry Into Certified Health IT Non-Conformities and ONC Direct Review

Comments. Some commenters suggested that we underestimated the costs to health IT developers, both in terms of dollars and ''softer'' costs, such as negative pressure on innovation. Commenters suggested we estimate the costs for ONC investigations. Commenters also stated that there should be a cost associated with unsubstantiated allegations and complaints. Commenters noted that ONC staff may lack appropriate expertise to conduct investigations.

Response. We clarify that the estimates for the review of, and inquiry into, certified health IT includes investigations (*see* section C.1.a.(2) of this RIA). In consideration of comments and due to the potential complexity of such investigations, we have increased the high end of our estimated range of costs by doubling our original high-end estimate for health IT developers and ONC. The unsubstantiated allegations and complaints noted by the commenters are captured in our low-end range of cost estimates.

We appreciate commenters' concerns regarding whether ONC staff will have the expertise to conduct investigations. ONC is evaluating the expertise and capabilities of current ONC staff and, if necessary, will hire additional staff with the requisite expertise and capabilities. However, we have no basis for estimating these potential costs in this RIA. These potential staffing costs will be driven by the volume of ONC direct review situations and the volume of additional responsibilities of ONC staff.

Costs for Health IT Developers and ONC Associated With the Appeal Process Following a Suspension/Termination of a Complete EHR's or Health IT Module's Certification

Comments. A commenter stated that ONC's estimated costs for a health IT developer to provide required information to appeal a suspension or termination are conservative, and these tasks would require experienced personnel who possess a high degree of technical knowledge.

Response. We appreciate the commenter's concern, but maintain that our estimate is reasonable, particularly due to the wide range of hours calculated. We agree with the commenter that compiling information for an appeal will require experienced personnel with technical expertise and we accounted for this expertise by assuming that the expertise of the employee(s) needed to participate in the appeal would be equivalent to a GS–15, Step 1 federal employee.

Costs for Health Care Providers To Transition to Another Certified Health IT Product When the Certification of a Complete EHR or Health IT Module That They Currently Use Is Terminated

Comments. Commenters were concerned about the financial impact of this final rule on health care providers, specifically the downstream costs for providers to transition to another certified health IT product. Multiple commenters suggested that our estimated average cost per product per health care provider to implement a new certified health IT product of approximately $33,000 is too low. Commenters also noted that the health care provider will probably not get a refund from the health IT developer and will have to acquire and possibly install a new product. A commenter suggested that ONC should account for the costs of labor, retraining employees, and lost productivity, in addition to the licensing and implementation costs of a new product. Another commenter suggested that in addition to direct financial costs of transitioning to another certified health IT product, ONC should calculate the costs associated with errors and inefficiencies caused by the transition.

Response. We thank commenters for their thoughtful comments on our cost estimates, but have adopted these estimates as proposed. We agree with commenters that there may be costs associated with the labor, retraining of employees, lost productivity, and errors and inefficiencies caused by the transition, but we have been unable to identify reliable data upon which we could base or revise our cost estimates. The relationship between a provider and a health IT developer will be guided by relevant contracts and licenses. Transition costs will most likely be costs negotiated as part of the health IT transactions and will vary with respect to the complexity of the health IT system and the tear-down, data transfer, and implementation of the new system while still providing patient care. We discuss these relationships and the associated costs in more detail in section C.1.a.(4) of this RIA.

Costs for ONC–ATLs and ONC Associated With ONC–ATL Accreditation, Application, Renewal, and Reporting Requirements

Comments. A couple of commenters questioned why existing accredited testing labs would incur an $11,000 fee. One accredited testing lab stated that our ATL-specific cost estimates were reasonable.

Response. We have adopted the accreditation cost estimates as proposed. On-site assessments are required prior to initial accreditation, during the first renewal year, and every two years thereafter. As such, the current five accredited testing labs would incur the on-site assessment fee once during the initial three-year ONC–ATL authorization period. Based on our consultations with NIST, we estimate a full scope on-site assessment for all criteria required for accreditation will cost approximately $11,000. This is the estimate we have used to calculate the estimated burden. However, we note that these values are approximated and will vary depending on the agreements established between health IT developers and ONC–ATLs.

Comments. A couple of commenters suggested that ONC should reevaluate its method for estimating the applicant staff time necessary to prepare and participate in the full scope on-site assessment. Commenters opined that since ONC–ACBs have already gone through this assessment, there should be actual experience data from those ONC–ACBs that could provide a more reliable estimate.

Response. Based on information provided by ONC–ACBs, we have revised our estimate for the applicant staff time necessary to prepare and participate in the full scope on-site assessment from 200 hours to 130 hours. Accordingly, we have also revised our cost estimate for a limited scope on-site assessment to 65 hours, which is half the estimate for the full scope on-site assessment. Based on these adjusted estimates for staff time for a GS–15, Step 1 federal employee, we estimate the applicant staff cost for a full scope on-site assessment at $15,956 and the applicant staff cost for a limited scope on-site assessment at $7,978.

Comments. We received one comment from an accredited testing lab suggesting that we increase the burden hours for application submission and general updates of accreditation by a factor of four or more to more accurately reflect time spent by the ONC–ATL due to time spent internally by the organization preparing for the submission.

Response. We have accepted the commenter's suggestion and increased the burden hour estimates by a factor of four for the following requirements: (1) ONC–ATL application at 45 CFR 170.520(b); (2) reporting changes at 45 CFR 170.524(d); and (3) renewal at 45 CFR 170.540(c).

Comments. A couple of commenters noted that we estimated $55,623 as the annualized cost for the first accreditation/application and 3-year authorization and we estimated $84,372 as the annualized cost to renew accreditation, application, and authorization during the first three-year ONC–ATL authorization period. They were confused as to why a renewal cost would be higher than the cost for a new testing lab.

Response. We have revised these estimates as described below in the ''Costs to the Applicant/ONC–ATL'' section below. We also clarify that the proposed renewal cost per testing lab ($50,623) is lower than the cost for each new testing lab applicant ($55,623). The reason the annualized cost is higher for renewals than for new applicants is because we initially calculated for five renewals (there are currently five accredited testing labs) and three new applicants.

Costs for ONC–ACBs To Submit Identifiable Surveillance Results to the CHPL

Comments. A couple commenters suggested that the proposed cost estimate for ONC–ACBs posting identifiable surveillance results of $205 is too low. These commenters suggested that approximately six hours would be required.

Response. As discussed in section II.B of this final rule, ONC–ACBs will be required to report the following information for all surveillance results: The names of health IT developers; names of products and versions; certification criteria and Program requirements surveilled; identification of the type of surveillance (*i.e.,* reactive or random); the dates surveillance was initiated and completed; and the number of sites that were used in randomized surveillance. However, in order to reduce the burden on ONC–ACBs, ONC will post surveillance results on the CHPL. This is consistent with our consideration in the Proposed Rule of having the hyperlinks on the ONC Web site as a way of providing stakeholders with a more readily available means for accessing the results. ONC–ACBs will be required to submit the data into the CHPL directly, but will not be required to host and update the data on their own Web sites as proposed.

We estimate that submitting identifiable surveillance results on a quarterly basis will further limit the burden on ONC–ACBs, but acknowledge that the expanded scope and volume of surveillance information will require additional time to submit the results to the CHPL than the four hours proposed. Therefore, in response to comments, we estimate that it will take an employee 20 hours annually to report identifiable surveillance results to the CHPL.

Cost Estimates

The only changes to the cost estimates from the Proposed Rule are: (1) We doubled the high-end estimate for ONC staff time related to ONC's review and inquiry into certified health IT and health IT developer staff time associated with providing ONC with all requested records and documentation that ONC would use to make a suspension and/or termination determination, including for the new ''proposed termination'' step; (2) based on information provided by ONC–ACBs, we revised our estimate for the applicant staff time necessary to prepare and participate in a full and a limited scope on-site assessment; (3) based on public comments, we increased the burden hour estimates for ONC–ATLs by a factor of four from the estimates in the Proposed Rule for the requirements in 45 CFR 170.520(b) (ONC–ATL application), 45 CFR 170.524(d) (reporting changes to ONC), and 45 CFR 170.540(c) (ONC–ATL status renewal); and (4) we added cost estimates for ONC–ACBs to report identifiable surveillance results to the CHPL.

We made employee assumptions about the level of expertise needed to complete the requirements in this section of the final rule. We correlated that expertise with the corresponding grade and step of an employee classified under the General Schedule Federal Salary Classification, relying on the associated employee hourly rates for the Washington, DC locality pay area as published by the Office of Personnel Management. We assumed that an applicant expends one hundred percent (100%) of an employee's hourly wage on benefits and overhead for the employee. Therefore, we doubled the employee's hourly wage to account for benefits. We concluded that a 100% expenditure on benefits is an appropriate estimate based on research conducted by HHS.

We used the General Schedule Federal Salary Classification for private sector employee wage calculations because the majority of the tasks and requirements that would be performed by private sector employees do not easily fall within a particular occupational classification identified by the Bureau of Labor Statistics (BLS). For instance, while we estimated costs for specialized testing lab personnel to support accreditation, we also estimated costs for participating in administrative reviews and appeals and reporting certain information to ONC. As noted above, in all instances, we correlated the expertise needed to complete the task or requirement with the corresponding grade and step of a federal employee classified under the General Schedule Federal Salary Classification.

(1) Costs for Health IT Developers To Correct Non-Conformities Identified by ONC

We acknowledged in the Proposed Rule that this rulemaking may: (1) Lead health IT developers to reassess whether their certified health IT is conforming; and (2) require health IT developers to correct non-conformities found by ONC in their certified health IT. We also stated in the Proposed Rule that the costs to perform either of the above would be determined on a case-by-case basis, likely vary significantly based on various factors, and that we did not have reliable information on which to base costs estimates for these activities (81 FR 11074). We seek to clarify that these statements were made to provide a comprehensive view of all potential costs. However, estimating the prevalence of entities incurring these potential costs that would be attributable to this final rule presents a substantial challenge. There are no new certification requirements in this final rule and health IT developers have already been certified to applicable certification criteria and other Program requirements. Independent of this final rule, health IT developers should still be ensuring that their products are safe and conducting conformity and safety assessments of their health IT as part of proper quality management. These activities are typically a regular cost of doing business to ensure that their certified health IT is not, for example, creating public health and/or safety issues by causing medical errors (*see* 81 FR 11073–74). If ONC identifies/finds a non-conformity with a certified capability under the direct review processes outlined in this final rule, then the costs to correct the non-conformity are a result of this final rule. However, due to the difficulty of projecting such instances given the underlying need to correct non-conformities, we have not been able to include these costs in our quantitative cost estimates.

(2) Costs for ONC and Health IT Developers Related to an ONC Inquiry Into Certified Health IT Non-Conformities and ONC Direct Review

ONC has broad discretion to review certified health IT. However, we anticipate that such direct review will be relatively infrequent and will focus on situations that pose a risk to public health or safety. We estimate that a health IT developer may commit, on average and depending on complexity, between 80 and 800 hours of staff time to provide ONC with all requested records, access to the technology as needed, and documentation that ONC would use to conduct the fact-finding, make a non-conformity determination, approve a CAP, and make a suspension and/or termination determination, including the new ''proposed termination'' step. We assumed that the expertise of the employee(s) needed to comply with ONC's requests would be equivalent to a GS–15, Step 1 federal employee. The hourly wage with benefits for a GS–15, Step 1 employee located in Washington, DC is approximately $122.74. Therefore, we estimate the cost for a health IT developer to cooperate with an ONC review and inquiry into certified health IT will, on average, range from $9,819 to $98,192. We note that some health IT developers' costs are expected to be less and some health IT developers' costs are expected to be more than this estimated cost range.

In comparison, the BLS average hourly wage for a nonsupervisory employee under the North American Industry Classification System (NAICS) 541511, ''Custom Computer Programming Services,'' is $42.67.[22] We assumed that, just as with the General Schedule Federal Salary Classification, an applicant expends one hundred percent (100%) of an employee's hourly wage on benefits for the employee. Therefore, we doubled the employee's hourly wage to account for benefits, bringing the average hourly wage with benefits to $85.34. Accordingly, the BLS estimated wages for a health IT developer to cooperate with an ONC review and inquiry into certified health IT will, on average, range from $6,827 to $68,272, which is considerably lower than the General Schedule Federal Salary Classification estimates. We estimate that ONC may commit, on average and depending on complexity, between 20 and 1,200 hours of staff time to complete a review and inquiry into certified health IT. We assumed that the expertise of a GS–15, Step 1 federal employee(s) will be necessary. Therefore, we estimate the cost for ONC to review and conduct an inquiry into certified health IT will, on average, range from $2,455 to $147,288. We note that some reviews and inquiries may cost less and some may cost more than this estimated cost range.

(3) Costs for Health IT Developers and ONC Associated With the Appeal Process Following a Suspension/Termination of a Complete EHR's or Health IT Module's Certification

As discussed in section II.A.1.c.(5) of this final rule's preamble, § 170.580(g) permits a health IT developer to appeal an ONC determination to suspend or terminate a certification issued to a Complete EHR or Health IT Module. We estimate that a health IT developer may commit, on average and depending on complexity, between 80 to 240 hours of staff time to provide the required information to appeal a suspension or termination and respond to any requests from the hearing officer. We assumed that the expertise of the employee(s) needed to participate in the appeal would be equivalent to a GS–15, Step 1 federal employee. The hourly wage with benefits for a GS–15, Step 1 employee located in Washington, DC is approximately $122.74. Therefore, we estimate the cost for a health IT developer to appeal a suspension or termination will, on average, range from $9,819 to $29,458. We note that some health IT developers' costs are expected to be less and some health IT developers' costs are expected to be more than this estimated cost range. In comparison, the BLS average hourly wage with benefits is $85.34. Therefore, the cost for a health IT developer to appeal a suspension or termination using BLS wages will, on average, range from $6,827 to $20,482.

We estimate that ONC would commit, on average and depending on complexity, between 200 and 800 hours of staff time to conduct an appeal. This would include the time to represent ONC in the appeal and support the costs

[22] *See http://beta.bls.gov/dataViewer/view/timeseries/CEU6054151108.*

for the hearing officer. We assumed that the expertise of a GS–15, Step 1 federal employee(s) will be necessary. Therefore, we estimate the cost for ONC to conduct an appeal will, on average, range from $24,548 to $98,192. We note that some appeals may cost less and some may cost more than this estimated cost range.

(4) Costs for Health Care Providers To Transition to Another Certified Health IT Product When the Certification of a Complete EHR or Health IT Module That They Currently Use Is Terminated

This cost analysis with regards to health care providers focuses on the direct effects of the termination of a Complete EHR's or Health IT Module's certification under this final rule's provisions as a certification termination would have the greatest potential impact. We note and emphasize that the estimated costs for health care providers as a result of a certification termination could be incurred absent the provisions in this final rule. ONC–ACBs currently have the authority to terminate (and suspend) the certifications of Complete EHRs and Health IT Modules. In this regard, ONC–ACBs have terminated certifications for both Complete EHRs and Health IT Modules.

The most recent termination of a certification by an ONC–ACB occurred in June 2016 when a health IT developer failed to submit a CAP related to transparency requirements. No eligible professionals (EPs) attested under the Medicare EHR Incentive Program to using this certified health IT product. Another termination by an ONC–ACB occurred in September 2015 when the certifications of a health IT developer's Complete EHRs and Health IT Modules were terminated for failure to respond and participate in routine surveillance requests.[23] Only 48 eligible professionals attested under the Medicare EHR Incentive Program to using these certified health IT products. In April 2013, an ONC–ACB terminated the certifications of Complete EHRs and Health IT Modules because they did not meet the required functionality.[24] Those certified health IT products had no Medicare attestations. Considering that these are the only terminations and impacts over the five years of the Program and consistent with our stated intent to work with health IT developers to correct non-conformities found in their certified health IT under the provisions in this final rule, we maintain that it is highly unlikely that the high end of our estimated costs for health care providers will ever be realized.

We estimate the monetary costs that will be sustained by health care providers to transition to another certified health IT product when the certification of a Complete EHR or Health IT Module that they currently use is terminated. We anticipate that health care providers impacted by certification termination will transition to a new certified health IT product due to eventually needing certified health IT to participate in other HHS programs requiring the use of certified health IT (*e.g.,* the EHR Incentive Programs[25]). We calculated the estimated upfront cost for health care providers using the number of known EPs that report under the Medicare EHR Incentive Program using certified Complete EHRs and certified Health IT Modules that would have their certifications terminated multiplied by an estimated average cost per product per provider to implement a new certified health IT product. The estimated average cost per product per provider to implement a new certified health IT product is approximately $33,000. This estimate is consistent with other analyses on average costs.[26]

This analysis and cost estimates does not include sunk costs during the transition year, such as ongoing maintenance for the health IT product that had its certification(s) terminated and any upfront costs the provider paid for the health IT product. The transition by a health care provider to a new certified health IT product could also include non-sunk costs associated with unwinding contractual matters and technological connectivity, replacement/implementation efforts, training of workforce, and the potential for an operational shut down to effectuate a transition to a replacement technology. In regard to contractual matters, we acknowledge that transitioning to a new certified health IT product following a certification termination may be further complicated by the fact that health care providers may have entered multi-year transactions for a Complete EHR or Health IT Module(s). These costs would likely vary significantly based on the contract and specific situation. Conversely, unlike the cost categories just mentioned, which would tend to make our estimates understate the costs to providers due to a termination of certification, some aspects of certified health IT implementation may be similar across products, thus reducing the costs of transitioning to a new product below the costs incurred in association with the original implementation.

We used the following formula to calculate the estimated upfront costs for health care providers to transition to a new product:

1. Number of EPs reporting with a certified Complete EHR or certified Health IT Module that could potentially have its certification terminated
2. #1 multiplied by the average upfront cost per product per health care provider
3. Result of #2 equals the estimated cost for health care providers to replace the certified Complete EHR or certified Health IT Module

Applying this formula, we calculated the upper and lower threshold impacts as well as the median and mean impacts of terminating certifications issued to a Complete EHR or Health IT Module(s). We calculated the upper and lower thresholds from the certified Complete EHR and certified Health IT Modules with the greatest and least number of reported attestations to the Medicare EHR Incentive Program, respectively.[27] The median and mean impacts also were calculated using the number of reported attestations for each product (*see* table 3 (Cost Impact to Health Care Providers)). We calculated the estimated cost to those health care providers assuming all the health care providers would transition to a new certified health IT product.

[23] *http://www.hhs.gov/news/press/2015pres/09/20150902c.html.*

[24] *http://www.hhs.gov/about/news/2013/04/25/certification-for-electronic-health-record-product-revoked.html.*

[25] For health care provider guidance regarding circumstances and options when the health IT they are using to participate in the EHR Incentive Programs has its certification terminated or withdrawn, please see CMS EHR Incentive Programs FAQ 12657: *https://questions.cms.gov/faq.php?isDept=0&search=decertified&searchType=keyword&submitSearch=1&id=5005.*

[26] A Health Affairs study (*http://content.healthaffairs.org/content/30/3/481.abstract*) estimated the average cost for EHR implementation at a five-physician practice as $162,000. Dividing by five, the estimated cost per physician is $32,400, which is close to our estimated cost of $33,000 to implement an in-office health IT product.

[27] As of November 30, 2015.

TABLE 3—COST IMPACT TO HEALTH CARE PROVIDERS

	Lower	Median	Mean	Upper
Number of EP Attestations	1	24	190	19,692
Calculated Cost	$33,000	$792,000	$6,270,000	$649,836,000

We estimate the cost impact of certification termination on health care providers will range from $33,000 to $649,836,000 with a median cost of $792,000 and a mean cost of $6,270,000.

(5) Costs to ONC–ATLs and ONC Associated With ONC–ATL Accreditation, Application, Renewal, and Reporting Requirements

Costs to the Applicant/ONC–ATL

An applicant for ONC–ATL status will be required to submit an application and must be accredited in order to be a qualified ONC–ATL applicant. We estimate there will be between five and eight applicants, five of which are already accredited by NVLAP to ISO/IEC 17025 and up to three new applicants. Any new applicants for ONC–ATL status under the Program will first be required to become accredited by NVLAP to ISO/IEC 17025.

We note in section V (''Collection of Information Requirements'') of this final rule that we have increased the burden hour estimates by a factor of four from the estimates in the Proposed Rule for requirements in 45 CFR 170.520(b) (ONC–ATL application), 45 CFR 170.524(d) (reporting changes to ONC), and 45 CFR 170.540(c) (ONC–ATL status renewal). As such, the following cost estimates reflect the associated increase in burden hour estimates.

Based on our consultations with NIST, we estimate that it will take approximately 2–5 days for NVLAP to complete a full scope on-site assessment for all criteria required for accreditation at an approximate cost of $11,000. The on-site assessment fee covers the costs incurred by the assessors conducting the on-site assessment such as preparation time, time on-site, and travel costs (*e.g.* flights, hotel, meals, etc.). Section 170.511 will permit the authorization of ONC–ATLs for testing to one or even a partial certification criterion. Based on our consultations with NIST, this will take at least one day to complete and may reduce the necessary scope and cost of the on-site assessment to approximately $8,000. The current five accredited testing labs will each incur the full scope on-site assessment fee of $11,000, as discussed below. We anticipate the potential three new applicants will each incur a limited scope on-site assessment fee of $8,000, as discussed below.

Based on information provided by ONC–ACBs, we estimate the applicant staff time necessary to prepare and participate in the full scope on-site assessment at 130 hours. We estimate the applicant staff time necessary to prepare and participate in the limited scope on-site assessment at 65 hours, which is half the estimate for the full scope on-site assessment. We anticipate that an employee equivalent to a GS–15, Step 1 federal employee will be responsible for preparation and participation in the accreditation assessment. The hourly wage with benefits for a GS–15, Step 1 employee located in Washington, DC is approximately $122.74. Therefore, we estimate the applicant staff cost for the full scope on-site assessment at $15,956 and the applicant staff cost for the limited scope on-site assessment at $7,978.

In comparison, the BLS average hourly wage for a ''Computer and Information Analyst'' under NAICS 541380, Testing Laboratories, is $43.54.[28] The average hourly wage is $87.08 with the inclusion of benefits. Therefore, the BLS estimate for applicant staff cost for the full scope on-site assessment is $17,416 and the BLS estimate for applicant staff cost for the limited scope on-site assessment is $8,708. We emphasize that the problem with using the BLS information for the ATL classifications and wage estimates is that ONC–ATL duties do not easily fall within a particular occupational classification. For instance, there is not a singular occupational classification under NAICS 541380, Testing Laboratories, that would accurately capture the various tasks performed by ONC–ATLs in the processes described in this final rule. Thus, we used a broad occupation category, ''Computer and Information Analysts,'' for this estimate.

We anticipate that ONC–ATLs will incur an estimated $5,000 accreditation administrative/technical support fee each year during the three-year ONC–ATL authorization period.[29] The accreditation administrative/technical support fee covers costs associated with NVLAP staff under the Program. On-site assessments are required prior to initial accreditation, during the first renewal year, and every two years thereafter. As such, we expect the potential three new applicants will each incur the on-site assessment fee twice during their initial three-year ONC–ATL authorization period and the current five accredited testing labs will incur the on-site assessment fee once during the same period. Further, as stated above, we estimate that each full scope on-site assessment for all criteria will cost approximately $11,000 and each limited scope on-site assessment will cost approximately $8,000. We estimate that staff expertise and cost for renewal is likely to remain consistent at approximately $15,956 for a full scope on-site assessment and $7,978 for a limited scope on-site assessment. We expect that each ONC–ATL will renew its status, meaning it will request reauthorization from ONC to be an ONC–ATL, every three years.

After becoming accredited by NVLAP, an applicant for ONC–ATL status will incur minimal costs to prepare and submit an application to the National Coordinator. We estimate that it will take 40 minutes to provide the general information requested in the application, 120 minutes to assemble the information necessary to provide documentation of accreditation by NVLAP, and 80 minutes to review and agree to the PoPC for ONC–ATLs. We note that these time estimates are also accurate for an ONC–ATL to complete the proposed status renewal process. Based on our consultations with NIST, we estimate that an employee equivalent to a GS–9, Step 1 federal employee could provide the required general identifying information and documentation of accreditation status. The hourly wage with benefits for a GS–9, Step 1 federal employee located in Washington, DC is approximately $51.20. We estimate that an employee equivalent to a GS–15, Step 1 federal employee would be responsible for reviewing and agreeing to the PoPC for ONC–ATLs. Therefore, our cost estimate per ONC–ATL for these activities is $300. In comparison, the BLS cost estimate for one hour of work with

[28] *See http://www.bls.gov/oes/current/naics5_541380.htm#15-0000.*

[29] *See* NVLAP Fee Structure, *http://www.nist.gov/nvlap/nvlap-fee-policy.cfm.*

benefits by a ''Computer and Information Analyst'' is $348.

Overall, we estimate the total cost of ONC–ATL accreditation, application, and the first proposed three-year authorization period will be approximately $53,128 and the total cost for up to three new applicants will be approximately $159,384. We assume that ONC–ATLs will remain accredited during the three-year ONC–ATL authorization period.

We estimate the total cost for an ONC–ATL to renew its accreditation, application, and authorization during the first three-year ONC–ATL authorization period to be approximately $48,832 and the total renewal cost for all five current ONC–ATLs to be approximately $219,160. Based on our cost estimate timeframe of three years, we estimate the annualized renewal cost to be approximately $73,053.

We explain in § 170.524(d) that ONC–ATLs shall report various changes to their organization within 15 days. We estimate an employee equivalent to the Federal Salary Classification of GS–9, Step 1 could complete the transmissions of the requested information to ONC. As specified in section VI.B of this final rule, we estimate two responses per year at four hours per response for ONC–ATLs to provide updated information to ONC per § 170.524(d). Accordingly, we estimate it will cost each ONC–ATL $409.60 annually to meet this requirement. To estimate the highest possible cost, we assumed that the eight applicants we estimate will apply to become ONC–ATLs will become ONC–ATLs. Therefore, we estimate the total annual cost for ONC–ATLs to meet the requirements of proposed § 170.524(d) to be $3,276. In comparison, using the BLS wages, we estimate the total annual cost for ONC–ATLs to meet the requirements of proposed § 170.524(d) to be $5,573.

We explain in § 170.524(f) that ONC–ATLs shall retain all records related to the testing of Complete EHRs and Health IT Modules to an edition of certification criteria for a minimum of three years from the effective date that removed the applicable edition from the Code of Federal Regulations. Based on our consultations with NIST, we concluded that this time period is in line with common industry practices. Consequently, it does not represent an additional cost to ONC–ATLs.

Costs to ONC

We estimate the cost to develop the ONC–ATL application to be $522 based on the five hours of work we believe it would take a GS–14, Step 1 federal employee to develop an application form. The hourly wage with benefits for a GS–14, Step 1 employee located in Washington, DC is approximately $104.34. We also anticipate that there will be costs associated with reviewing applications under the Program. We expect that a GS–15, Step 1 federal employee will review the applications and ONC (or a designated representative) will issue final decisions on all applications. We anticipate that it will take approximately 20 hours to review and reach a final decision on each application. This estimate assumes a satisfactory application (*i.e.,* no formal deficiency notifications) and includes the time necessary to verify the information in each application and prepare a briefing for the National Coordinator. We estimate the cost for the application review process to be $2,455. As a result, we estimate ONC's overall cost of administering the entire application process to be approximately $2,977. Based on our cost estimate timeframe of three years, we estimate the annualized cost to ONC to be $992. These costs will be the same for a new applicant or ONC–ATL renewal.

As discussed in this final rule's preamble, we will also post the names of applicants granted ONC–ATL status on our Web site. We note that there will be minimal cost associated with this action and estimate the potential cost for posting and maintaining the information on our Web site to be approximately $446 annually. This amount is based on a maximum of six hours of work for a GS–12, Step 1 federal employee. The hourly wage with benefits for a GS–12 Step 1 federal employee located in Washington, DC is $74.

We note that there will be minimal cost associated with recording and maintaining updates and changes reported by the ONC–ATLs. We estimate an annual cost to the federal government of $743. This amount is based on ten hours of yearly work of a GS–12, Step 1 federal employee.

(6) Costs for ONC–ATLs and ONC Related To Revoking ONC–ATL Status

Costs to the ONC–ATL

We have revised § 170.565 to apply the same process for ONC–ATL status revocation as applies to ONC–ACBs. We estimate that an ONC–ATL may commit, on average and depending on complexity, between 20 and 160 hours of staff time to provide responses and information requested by ONC. We assume that the expertise of the employee(s) needed to comply with ONC's requests will be equivalent to a GS–15, Step 1 federal employee. The hourly wage with benefits for a GS–15, Step 1 employee located in Washington, DC, is approximately $122.74. Therefore, we estimate the cost for an ONC–ATL to comply with ONC requests per § 170.565 will, on average, range from $2,455 to $19,638. In comparison, the BLS cost estimate for a ''Computer and Information Analyst'' would, on average, range from $1,742 to $13,933. We note that in some instances the costs may be less and in other instances the costs may exceed this estimated cost range.

Costs to ONC

We estimate that ONC would commit, on average and depending on complexity, between 40 and 320 hours of staff time to conducting actions under § 170.565 related to ONC–ATLs. We assume that the expertise of a GS–15, Step 1 federal employee(s) would be necessary. Therefore, we estimate the cost for ONC would, on average, range from $4,910 to $39,277. We note that in some instances the costs may be less and in other instances the costs may exceed this estimated cost range.

(7) Costs for ONC–ACBs To Submit Identifiable Surveillance Results to the CHPL

In this final rule, we require ONC–ACBs to submit identifiable surveillance results to the CHPL quarterly. We estimate that it will take an employee 20 hours annually to submit these identifiable surveillance results quarterly to the CHPL. The hourly wage with benefits for a GS–9, Step 1 federal employee located in Washington, DC, is approximately $51.20. Therefore, we estimate the annual cost for each ONC–ACB to report surveillance results to be $1,024 and the total cost for all three ONC–ACBs to be $3,072. In comparison, the average hourly wage with benefits for a ''Computer Support Specialist'' under NAICS 541380, Testing Laboratories, is $55.90.[30] Therefore, the BLS estimate for the annual cost for each ONC–ACB to report identifiable surveillance results quarterly is $1,118 and the total cost for all three ONC–ACBs is $3,354.

We note that ONC may incur a cost for hosting the CHPL, but we have not estimated this cost because ONC already hosts the CHPL and any additional cost associated with this final rule is nominal. Similarly, we note that ONC may incur a cost for updating the CHPL due to the new requirements in this final rule, but we have not estimated

[30] *http://www.bls.gov/oes/current/naics5_541380.htm#15-0000.*

these costs because the CHPL has already been updated for the current posting of non-conforming findings and CAPs. As such, any additional cost associated with this final rule will be nominal.

(8) Total Annual Cost Estimate

We estimate the overall annual cost for this final rule, based on the cost estimates outlined above, will range from $171,011 to $650,352,050 with an average annual cost of $6,597,033.

b. Benefits

The final rule's provisions for ONC direct review of certified health IT will promote health IT developers' accountability for the performance, reliability, and safety of certified health IT; and facilitate the use of safer and more reliable health IT by health care providers and patients. Specifically, ONC's direct review of certified health IT will facilitate ONC's assessment of non-conformities and ability to require comprehensive corrective actions for health IT developers to address non-conformities determined by ONC, including notifying affected customers. We emphasize that our first and foremost goal is to work with health IT developers to remedy any non-conformities with certified health IT in a timely manner and across all customers. If ONC ultimately suspends and/or terminates a certification issued to a Complete EHR or Health IT Module under the provisions in this final rule, such action will serve to protect the integrity of the Program and users of health IT. While we do not have available means to quantify the benefits of ONC direct review of certified health IT, we note that ONC direct review supports and enables the National Coordinator to fulfill his or her responsibilities under the HITECH Act, instills public confidence in the Program, and protects public health and safety.

This final rule's provisions will provide other benefits as well. The provisions for ONC to authorize and oversee testing labs (ONC–ATLs) will facilitate further public confidence in testing and certification by facilitating ONC's ability to timely and directly address testing issues for health IT. The public availability of identifiable surveillance results will enhance transparency and the accountability of health IT developers to their customers. We note that this will provide customers and users of certified health IT with valuable information about the continued conformity of certified health IT. Further, the public availability of identifiable surveillance results will likely benefit health IT developers by providing a more complete context of surveillance in the health IT industry and illuminating good performance and the continued conformity of certified health IT with Program requirements. Again, while we do not have available means to quantify these benefits, we maintain that these approaches will improve Program conformity and compliance as well as further public confidence in certified health IT.

We note that we do not have data to establish how often we will need to exercise direct review, the extent of existing and future non-conformities, and the likely outcomes of ONC review, including up to preventing the loss of life. We also note that we do not have data to establish that the provisions for direct oversight of testing labs and the public availability of identifiable surveillance results would actually result in greater public confidence in certified health IT and increased adoption of certified health IT.

c. Accounting Statement and Table

When a rule is considered an economically significant rule under Executive Order 12866, we are required to develop an accounting statement indicating the classification of the expenditures associated with the provisions of this final rule. Monetary annualized benefits are presented as discounted flows using 3 percent and 7 percent factors in table 4 below. We are not able to explicitly define the universe of all costs, but have provided an average of likely costs of this final rule as well as a high and low range of likely costs. This final rule requires no federal annualized monetized transfers.

TABLE 4—ACCOUNTING STATEMENT

							Source
BENEFITS							
Qualitative, but not monetized	Expected qualitative benefits include: health IT developer accountability for the performance, reliability, and safety of certified health IT; the use of safer and more reliable health IT by health care providers and patients; and further public confidence in testing and certification.						RIA
COSTS							
Annualized monetized costs	Year dollar	Estimates (in millions)			Unit discount rate	Period covered	
		Low	Mean	High			
	2015	.17 .17	6.60 6.60	650.35 650.35	7% 3%	One year	RIA
TRANSFERS							
From Whom To Whom?	N/A						

2. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) requires agencies to analyze options for regulatory relief of small businesses if a rule has a significant impact on a substantial number of small entities. The Small Business Administration (SBA) establishes the size of small businesses for federal government programs based on average annual receipts or the average employment of a firm.[31] The entities that are likely to be

[31] The SBA references that annual receipts means "total income" (or in the case of a sole proprietorship, "gross income") plus "cost of goods sold" as these terms are defined and reported on Internal Revenue Service tax return forms.

directly affected by this final rule are applicants for ONC–ATL status and health IT developers.

We estimate up to eight applicants for ONC–ATL status. These applicants are classified under the North American Industry Classification System (NAICS) codes 541380 (Testing Laboratories) specified at 13 CFR 121.201 where the SBA publishes ''Small Business Size Standards by NAICS Industry.'' [32] The SBA size standard associated with this NAICS code is set at $15 million annual receipts or less. As specified in section VI.C.(5) of this final rule's preamble, we estimate minimal costs for applicants for ONC–ATL status to apply and participate in the Program as ONC–ATLs. We have finalized the minimum amount of requirements necessary to accomplish our goal of enhanced oversight of testing under the Program. As discussed in section VI.B of this final rule, we emphasize that there are also no appropriate regulatory or non-regulatory alternatives that could be developed to lessen the compliance burden associated with this final rule. We further note that we expect all of the estimated costs to be recouped by those applicants that become ONC–ATLs through the fees they charge for testing health IT under the Program.

While health IT developers that pursue certification of their health IT under the Program represent a small segment of the overall information technology industry, we believe that many health IT developers impacted by this final rule most likely fall under NAICS code 541511 ''Custom Computer Programming Services.'' [33] The SBA size standard associated with this NAICS code is set at $27.5 million annual receipts or less. There is enough data generally available to establish that between 75% and 90% of entities that are categorized under NAICS code 541511 are under the SBA size standard. We also note that with the exception of aggregate business information available through the U.S. Census Bureau and the SBA related to NAICS code 541511, it appears that many health IT developers that pursue certification of their health IT under the Program are privately held or owned and do not regularly, if at all, make their specific annual receipts publicly available. As a result, it has been difficult to locate empirical data related to many of these health IT developers to correlate to the SBA size standard. However, although not perfectly correlated to the size standard for NAICS code 541511, we do have information indicating that over 60% of health IT developers that have had Complete EHRs and/or Health IT Modules certified to the 2011 Edition have less than 51 employees.

We estimate that this final rule will have effects on health IT developers, some of which may be small entities, that have certified health IT or are likely to pursue certification of their health IT under the Program. This is because health IT developers may need to reassess their health IT to verify conformity with the Program requirements outlined in this final rule and they may have their certified health IT subjected to corrective action, suspension, and/or termination under the provisions of this final rule. We have, however, finalized the minimum amount of requirements necessary to accomplish our primary policy goals of enhancing Program oversight and health IT developer accountability for the performance, reliability, and safety of certified health IT. Further, as discussed in section VI.B of this final rule, there are no appropriate regulatory or non-regulatory alternatives that could be developed to lessen the compliance burden associated with this final rule.

We do not believe that this final rule will create a significant impact on a substantial number of small entities. Additionally, the Secretary certifies that this final rule will not have a significant impact on a substantial number of small entities.

3. Executive Order 13132—Federalism

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a proposed rule (and subsequent final rule) that imposes substantial direct requirement costs on state and local governments, preempts state law, or otherwise has federalism implications. Nothing in this final rule imposes substantial direct compliance costs on state and local governments, preempts state law, or otherwise has federalism implications. We are not aware of any state laws or regulations that are contradicted or impeded by any of the provisions in this final rule.

4. Unfunded Mandates Reform Act of 1995

Section 202 of the Unfunded Mandates Reform Act of 1995 requires that agencies assess anticipated costs and benefits before issuing any rule that imposes unfunded mandates on state, local, and tribal governments or the private sector requiring spending in any one year of $100 million in 1995 dollars, updated annually for inflation. The current inflation-adjusted statutory threshold is approximately $144 million. While our estimated potential cost effects of this final rule reach the statutory threshold, we do not believe this final rule imposes unfunded mandates on state, local, and tribal governments or the private sector. We estimate the *potential* monetary costs for the private sector (health IT developers and health care providers) and note that the costs will be the result of a health IT developer not maintaining its certified health IT product's conformity with voluntary Program requirements and having its product's Complete EHR or Health IT Modules' certification(s) terminated. We further state that the minimal monetary cost estimates for ONC–ATLs derive from voluntary participation in the Program and will be recouped through fees charged for the testing of health IT under the Program.

OMB reviewed this final rule.

List of Subjects in 45 CFR Part 170

Computer technology, Electronic health record, Electronic information system, Electronic transactions, Health, Health care, Health information technology, Health insurance, Health records, Hospitals, Incorporation by reference, Laboratories, Medicaid, Medicare, Privacy, Reporting and recordkeeping requirements, Public health, Security.

For the reasons set forth in the preamble, 45 CFR subtitle A, subchapter D, part 170, is amended as follows:

PART 170—HEALTH INFORMATION TECHNOLOGY STANDARDS, IMPLEMENTATION SPECIFICATIONS, AND CERTIFICATION CRITERIA AND CERTIFICATION PROGRAMS FOR HEALTH INFORMATION TECHNOLOGY

■ 1. The authority citation for part 170 continues to read as follows:

Authority: 42 U.S.C. 300jj–11; 42 U.S.C. 300jj–14; 5 U.S.C. 552.

■ 2. Amend § 170.299 by revising paragraph (a) to read as follows:

§ 170.299 Incorporation by reference.

(a) Certain material is incorporated by reference into this subpart with the approval of the Director of the Federal Register under 5 U.S.C. 552(a) and 1 CFR part 51. To enforce any edition other than that specified in this section, the Department of Health and Human Services must publish a document in the **Federal Register** and the material must be available to the public. All approved material is available for inspection at U.S. Department of Health and Human Services, Office of the

[32] *https://www.sba.gov/sites/default/files/files/Size_Standards_Table.pdf.*

[33] *https://www.sba.gov/sites/default/files/files/Size_Standards_Table.pdf.*

National Coordinator for Health Information Technology, 330 C Street SW., Washington, DC 20201, call ahead to arrange for inspection at 202–690–7151, and is available from the sources listed below. It is also available for inspection 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/code_of_federal_regulations/ibr_locations.html*.

* * * * *

■ 3. Revise § 170.501 to read as follows:

§ 170.501 Applicability.

(a) This subpart establishes the processes that applicants for ONC–ACB status must follow to be granted ONC–ACB status by the National Coordinator; the processes the National Coordinator will follow when assessing applicants and granting ONC–ACB status; the requirements that ONC–ACBs must follow to maintain ONC–ACB status; and the requirements of ONC–ACBs for certifying Complete EHRs, Health IT Module(s), and other types of health IT in accordance with the applicable certification criteria adopted by the Secretary in subpart C of this part.

(b) This subpart establishes the processes that applicants for ONC–ATL status must follow to be granted ONC–ATL status by the National Coordinator; the processes the National Coordinator will follow when assessing applicants and granting ONC–ATL status; the requirements that ONC–ATLs must follow to maintain ONC–ATL status; and the requirements of ONC–ATLs for testing Complete EHRs and Health IT Modules in accordance with the applicable certification criteria adopted by the Secretary in subpart C of this part.

(c) This subpart establishes the processes accreditation organizations must follow to request approval from the National Coordinator to be an ONC–AA and that the National Coordinator will follow to approve an accreditation organization under the ONC Health IT Certification Program as well as certain ongoing responsibilities for an ONC–AA.

(d) This subpart establishes the processes the National Coordinator will follow when exercising direct review of certified health IT and related requirements for ONC–ACBs, ONC–ATLs, and developers of health IT certified under the ONC Health IT Certification Program.

■ 4. Amend § 170.502 by revising the definitions of ''Applicant'' and ''Gap certification'' and by adding the definition of ''ONC-Authorized Testing Lab or ONC–ATL'' in alphabetical order to read as follows:

§ 170.502 Definitions.

* * * * *

Applicant means a single organization or a consortium of organizations that seeks to become an ONC–ACB or ONC–ATL by submitting an application to the National Coordinator for such status.

* * * * *

Gap certification means the certification of a previously certified Complete EHR or Health IT Module(s) to:

(1) All applicable new and/or revised certification criteria adopted by the Secretary at subpart C of this part based on test results issued by a NVLAP-accredited testing laboratory under the ONC Health IT Certification Program or an ONC–ATL; and

(2) All other applicable certification criteria adopted by the Secretary at subpart C of this part based on the test results used to previously certify the Complete EHR or Health IT Module(s) under the ONC Health IT Certification Program.

* * * * *

ONC-Authorized Testing Lab or ONC–ATL means an organization or a consortium of organizations that has applied to and been authorized by the National Coordinator pursuant to this subpart to perform the testing of Complete EHRs and Health IT Modules to certification criteria adopted by the Secretary at subpart C of this part.

* * * * *

■ 5. Revise § 170.505 to read as follows:

§ 170.505 Correspondence.

(a) Correspondence and communication with ONC or the National Coordinator shall be conducted by email, unless otherwise necessary or specified. The official date of receipt of any email between ONC or the National Coordinator and an accreditation organization requesting ONC–AA status, the ONC–AA, an applicant for ONC–ACB status, an applicant for ONC–ATL status, an ONC–ACB, an ONC–ATL, health IT developer, or a party to any proceeding under this subpart is the date on which the email was sent.

(b) In circumstances where it is necessary for an accreditation organization requesting ONC–AA status, the ONC–AA, an applicant for ONC–ACB status, an applicant for ONC–ATL status, an ONC–ACB, an ONC–ATL, health IT developer, or a party to any proceeding under this subpart to correspond or communicate with ONC or the National Coordinator by regular, express, or certified mail, the official date of receipt for all parties will be the date of the delivery confirmation to the address on record.

■ 6. Amend § 170.510 by revising the section heading and introductory text to read as follows:

§ 170.510 Authorization scope for ONC–ACB status.

Applicants for ONC–ACB status may seek authorization from the National Coordinator to perform the following types of certification:

* * * * *

■ 7. Add § 170.511 to read as follows:

§ 170.511 Authorization scope for ONC–ATL status.

Applicants may seek authorization from the National Coordinator to perform the testing of Complete EHRs or Health IT Modules to a portion of a certification criterion, one certification criterion, or many or all certification criteria adopted by the Secretary under subpart C of this part.

■ 8. Revise § 170.520 to read as follows:

§ 170.520 Application.

(a) *ONC–ACB application.* Applicants must include the following information in an application for ONC–ACB status and submit it to the National Coordinator for the application to be considered complete.

(1) The type of authorization sought pursuant to § 170.510. For authorization to perform Health IT Module certification, applicants must indicate the specific type(s) of Health IT Module(s) they seek authorization to certify. If qualified, applicants will only be granted authorization to certify the type(s) of Health IT Module(s) for which they seek authorization.

(2) General identifying, information including:

(i) Name, address, city, state, zip code, and Web site of applicant; and

(ii) Designation of an authorized representative, including name, title, phone number, and email address of the person who will serve as the applicant's point of contact.

(3) Documentation that confirms that the applicant has been accredited by the ONC–AA.

(4) An agreement, properly executed by the applicant's authorized representative, that it will adhere to the Principles of Proper Conduct for ONC–ACBs.

(b) *ONC–ATL application.* Applicants must include the following information in an application for ONC–ATL status and submit it to the National Coordinator for the application to be considered complete.

(1) The authorization scope sought pursuant to § 170.511.

(2) General identifying, information including:

(i) Name, address, city, state, zip code, and Web site of applicant; and

(ii) Designation of an authorized representative, including name, title, phone number, and email address of the person who will serve as the applicant's point of contact.

(3) Documentation that confirms that the applicant has been accredited by NVLAP to the ONC Health IT Certification Program, including to ISO/IEC 17025 (incorporated by reference, *see* § 170.599).

(4) An agreement, properly executed by the applicant's authorized representative, that it will adhere to the Principles of Proper Conduct for ONC–ATLs.

■ 9. Amend § 170.523 by revising paragraphs (h) and (i) and adding paragraph (o) to read as follows:

§ 170.523 Principles of proper conduct for ONC–ACBs.

* * * * *

(h) Only certify health IT (Complete EHRs and/or Health IT Modules) that has been tested, using test tools and test procedures approved by the National Coordinator, by a/an:

(1) ONC–ATL;

(2) NVLAP-accredited testing laboratory under the ONC Health IT Certification Program for no longer than six months from December 19, 2016; or

(3) ONC–ATL, NVLAP-accredited testing laboratory under the ONC Health IT Certification Program, and/or an ONC–ATCB for the purposes of:

(i) Certifying previously certified Complete EHRs and/or Health IT Module(s) if the certification criterion or criteria to which the Complete EHRs and/or Health IT Module(s) was previously certified have not been revised and no new certification criteria are applicable to the Complete EHRs and/or Health IT Module(s); or

(ii) Performing gap certification.

(i) Conduct surveillance of certified health IT in accordance with its accreditation, § 170.556, and the following requirements:

(1) Submit an annual surveillance plan to the National Coordinator.

(2) Report, at a minimum, on a quarterly basis to the National Coordinator the results of its surveillance, including surveillance results that identify:

(i) The names of health IT developers;

(ii) Names of products and versions;

(iii) Certification criteria and ONC Health IT Certification Program requirements surveilled;

(iv) The type of surveillance (*i.e.,* reactive or randomized);

(v) The dates surveillance was initiated and completed; and

(vi) As applicable, the number of sites that were used in randomized surveillance.

(3) Annually submit a summative report of surveillance results to the National Coordinator.

* * * * *

(o) Be prohibited from reducing the scope of a Complete EHR or Health IT Module's certification when it is under surveillance or under a corrective action plan.

■ 10. Add § 170.524 to read as follows:

§ 170.524 Principles of proper conduct for ONC–ATLs.

An ONC–ATL shall:

(a) Maintain its NVLAP accreditation for the ONC Health IT Certification Program, including accreditation to ISO/IEC 17025 (incorporated by reference, *see* § 170.599);

(b) Attend all mandatory ONC training and program update sessions;

(c) Maintain a training program that includes documented procedures and training requirements to ensure its personnel are competent to test health IT;

(d) Report to ONC within 15 days any changes that materially affect its:

(1) Legal, commercial, organizational, or ownership status;

(2) Organization and management including key testing personnel;

(3) Policies or procedures;

(4) Location;

(5) Personnel, facilities, working environment or other resources;

(6) ONC authorized representative (point of contact); or

(7) Other such matters that may otherwise materially affect its ability to test health IT.

(e) Allow ONC, or its authorized agent(s), to periodically observe on site (unannounced or scheduled), during normal business hours, any testing performed pursuant to the ONC Health IT Certification Program;

(f) Records retention:

(1) Retain all records related to the testing of Complete EHRs and/or Health IT Modules to an edition of certification criteria for a minimum of 3 years from the effective date that removes the applicable edition from the Code of Federal Regulations; and

(2) Make the records available to HHS upon request during the retention period described in paragraph (f)(1) of this section;

(g) Only test health IT using test tools and test procedures approved by the National Coordinator; and

(h) Promptly refund any and all fees received for:

(1) Requests for testing that are withdrawn while its operations are suspended by the National Coordinator;

(2) Testing that will not be completed as a result of its conduct; and

(3) Previous testing that it performed if its conduct necessitates the retesting of Complete EHRs and/or Health IT Modules.

■ 11. Revise § 170.525 to read as follows:

§ 170.525 Application submission.

(a) An applicant for ONC–ACB or ONC–ATL status must submit its application either electronically via email (or Web site submission if available), or by regular or express mail.

(b) An application for ONC–ACB or ONC–ATL status may be submitted to the National Coordinator at any time.

■ 12. Amend § 170.530 by revising paragraphs (c)(2) and (4) and (d)(2) and (3) to read as follows:

§ 170.530 Review of application.

* * * * *

(c) * * *

(2) In order for an applicant to continue to be considered for ONC–ACB or ONC–ATL status, the applicant's revised application must address the specified deficiencies and be received by the National Coordinator within 15 days of the applicant's receipt of the deficiency notice, unless the National Coordinator grants an applicant's request for an extension of the 15-day period based on a finding of good cause. If a good cause extension is granted, then the revised application must be received by the end of the extension period.

* * * * *

(4) If the National Coordinator determines that a revised application still contains deficiencies, the applicant will be issued a denial notice indicating that the applicant cannot reapply for ONC–ACB or ONC–ATL status for a period of six months from the date of the denial notice. An applicant may request reconsideration of this decision in accordance with § 170.535.

(d) * * *

(2) The National Coordinator will notify the applicant's authorized representative of its satisfactory application and its successful achievement of ONC–ACB or ONC–ATL status.

(3) Once notified by the National Coordinator of its successful achievement of ONC–ACB or ONC–ATL status, the applicant may represent itself as an ONC–ACB or ONC–ATL (as

applicable) and begin certifying or testing (as applicable) health information technology consistent with its authorization.

■ 13. Amend § 170.535 by revising the section heading and paragraphs (a) and (d)(1) to read as follows:

§ 170.535 ONC–ACB and ONC–ATL application reconsideration.

(a) *Basis for reconsideration request.* An applicant may request that the National Coordinator reconsider a denial notice only if the applicant can demonstrate that clear, factual errors were made in the review of its application and that the errors' correction could lead to the applicant obtaining ONC–ACB or ONC–ATL status.

* * * * *

(d) * * *

(1) If the National Coordinator determines that clear, factual errors were made during the review of the application and that correction of the errors would remove all identified deficiencies, the applicant's authorized representative will be notified of the National Coordinator's determination and the applicant's successful achievement of ONC–ACB or ONC–ATL status.

* * * * *

■ 14. Revise § 170.540 to read as follows:

§ 170.540 ONC–ACB and ONC–ATL status.

(a) *Acknowledgement and publication.* The National Coordinator will acknowledge and make publicly available the names of ONC–ACBs and ONC–ATLs, including the date each was authorized and the type(s) of certification or scope of testing, respectively, each has been authorized to perform.

(b) *Representation.* Each ONC–ACB or ONC–ATL must prominently and unambiguously identify the scope of its authorization on its Web site and in all marketing and communications statements (written and oral) pertaining to its activities under the ONC Health IT Certification Program.

(c) *Renewal.* An ONC–ACB or ONC–ATL is required to renew its status every three years. An ONC–ACB or ONC–ATL is required to submit a renewal request, containing any updates to the information requested in § 170.520, to the National Coordinator 60 days prior to the expiration of its status.

(d) *Expiration.* An ONC–ACB's or ONC–ATL's status will expire three years from the date it was granted by the National Coordinator unless it is renewed in accordance with paragraph (c) of this section.

■ 15. Amend § 170.556 by revising paragraph (d)(6) and (e)(1) to read as follows:

§ 170.556 In-the-field surveillance and maintenance of certification for health IT.

* * * * *

(d) * * *

(6) *Withdrawal.* If a certified Complete EHR or certified Health IT Module's certification has been suspended, an ONC–ACB is permitted to initiate certification withdrawal procedures for the Complete EHR or Health IT Module (consistent with its accreditation to ISO/IEC 17065 and procedures for withdrawing a certification) when the health IT developer has not completed the actions necessary to reinstate the suspended certification.

(e) * * *

(1) *Rolling submission of in-the-field surveillance results.* The results of in-the-field surveillance under this section must be submitted to the National Coordinator, at a minimum, on a quarterly basis in accordance with § 170.523(i)(2).

* * * * *

■ 16. Revise § 170.557 to read as follows:

§ 170.557 Authorized testing and certification methods.

(a) *ONC–ATL applicability.* An ONC–ATL must provide remote testing for both development and deployment sites.

(b) *ONC–ACB applicability.* An ONC–ACB must provide remote certification for both development and deployment sites.

■ 17. Revise § 170.560 to read as follows:

§ 170.560 Good standing as an ONC–ACB or ONC–ATL.

(a) *ONC–ACB good standing.* An ONC–ACB must maintain good standing by:

(1) Adhering to the Principles of Proper Conduct for ONC–ACBs;

(2) Refraining from engaging in other types of inappropriate behavior, including an ONC–ACB misrepresenting the scope of its authorization, as well as an ONC–ACB certifying Complete EHRs and/or Health IT Module(s) for which it does not have authorization; and

(3) Following all other applicable federal and state laws.

(b) *ONC–ATL good standing.* An ONC–ATL must maintain good standing by:

(1) Adhering to the Principles of Proper Conduct for ONC–ATLs;

(2) Refraining from engaging in other types of inappropriate behavior, including an ONC–ATL misrepresenting the scope of its authorization, as well as an ONC–ATL testing health IT for which it does not have authorization; and

(3) Following all other applicable federal and state laws.

■ 18. Revise § 170.565 to read as follows:

§ 170.565 Revocation of ONC–ACB or ONC–ATL status.

(a) *Type-1 violations.* The National Coordinator may revoke an ONC–ATL or ONC–ACB's status for committing a Type-1 violation. Type-1 violations include violations of law or ONC Health IT Certification Program policies that threaten or significantly undermine the integrity of the ONC Health IT Certification Program. These violations include, but are not limited to: False, fraudulent, or abusive activities that affect the ONC Health IT Certification Program, a program administered by HHS or any program administered by the federal government.

(b) *Type-2 violations.* The National Coordinator may revoke an ONC–ATL or ONC–ACB's status for failing to timely or adequately correct a Type-2 violation. Type-2 violations constitute noncompliance with § 170.560.

(1) *Noncompliance notification.* If the National Coordinator obtains reliable evidence that an ONC–ATL or ONC–ACB may no longer be in compliance with § 170.560, the National Coordinator will issue a noncompliance notification with reasons for the notification to the ONC–ATL or ONC–ACB requesting that the ONC–ATL or ONC–ACB respond to the alleged violation and correct the violation, if applicable.

(2) *Opportunity to become compliant.* After receipt of a noncompliance notification, an ONC–ATL or ONC–ACB is permitted up to 30 days to submit a written response and accompanying documentation that demonstrates that no violation occurred or that the alleged violation has been corrected.

(i) If the ONC–ATL or ONC–ACB submits a response, the National Coordinator is permitted up to 30 days from the time the response is received to evaluate the response and reach a decision. The National Coordinator may, if necessary, request additional information from the ONC–ATL or ONC–ACB during this time period.

(ii) If the National Coordinator determines that no violation occurred or that the violation has been sufficiently corrected, the National Coordinator will issue a memo to the ONC–ATL or ONC–ACB confirming this determination.

(iii) If the National Coordinator determines that the ONC–ATL or ONC–

ACB failed to demonstrate that no violation occurred or to correct the area(s) of non-compliance identified under paragraph (b)(1) of this section within 30 days of receipt of the noncompliance notification, then the National Coordinator may propose to revoke the ONC–ATL or ONC–ACB's status.

(c) *Proposed revocation.* (1) The National Coordinator may propose to revoke an ONC–ATL or ONC–ACB's status if the National Coordinator has reliable evidence that the ONC–ATL or ONC–ACB has committed a Type-1 violation; or

(2) The National Coordinator may propose to revoke an ONC–ATL or ONC–ACB's status if, after the ONC–ATL or ONC–ACB has been notified of a Type-2 violation, the ONC–ATL or ONC–ACB fails to:

(i) Rebut the finding of a violation with sufficient evidence showing that the violation did not occur or that the violation has been corrected; or

(ii) Submit to the National Coordinator a written response to the noncompliance notification within the specified timeframe under paragraph (b)(2) of this section.

(d) *Suspension of an ONC–ATL or ONC–ACB's operations.* (1) The National Coordinator may suspend the operations of an ONC–ATL or ONC–ACB under the ONC Health IT Certification Program based on reliable evidence indicating that:

(i) *Applicable to both ONC–ACBs and ONC–ATLs.* The ONC–ATL or ONC–ACB committed a Type-1 or Type-2 violation;

(ii) *Applicable to ONC–ACBs.* The continued certification of Complete EHRs or Health IT Modules by the ONC–ACB could have an adverse impact on the health or safety of patients.

(iii) *Applicable to ONC–ATLs.* The continued testing of Complete EHRs or Health IT Modules by the ONC–ATL could have an adverse impact on the health or safety of patients.

(2) If the National Coordinator determines that the conditions of paragraph (d)(1) of this section have been met, an ONC–ATL or ONC–ACB will be issued a notice of proposed suspension.

(3) Upon receipt of a notice of proposed suspension, an ONC–ATL or ONC–ACB will be permitted up to 3 days to submit a written response to the National Coordinator explaining why its operations should not be suspended.

(4) The National Coordinator is permitted up to 5 days from receipt of an ONC–ATL or ONC–ACB's written response to a notice of proposed suspension to review the response and make a determination.

(5) The National Coordinator may make one of the following determinations in response to the ONC–ATL or ONC–ACB's written response or if the ONC–ATL or ONC–ACB fails to submit a written response within the timeframe specified in paragraph (d)(3) of this section:

(i) Rescind the proposed suspension; or

(ii) Suspend the ONC–ATL or ONC–ACB's operations until it has adequately corrected a Type-2 violation; or

(iii) Propose revocation in accordance with paragraph (c) of this section and suspend the ONC–ATL or ONC–ACB's operations for the duration of the revocation process.

(6) A suspension will become effective upon an ONC–ATL or ONC–ACB's receipt of a notice of suspension.

(e) *Opportunity to respond to a proposed revocation notice.* (1) An ONC–ATL or ONC–ACB may respond to a proposed revocation notice, but must do so within 10 days of receiving the proposed revocation notice and include appropriate documentation explaining in writing why its status should not be revoked.

(2) Upon receipt of an ONC–ATL or ONC–ACB's response to a proposed revocation notice, the National Coordinator is permitted up to 30 days to review the information submitted by the ONC–ACB or ONC–ATL and reach a decision.

(f) *Good standing determination.* If the National Coordinator determines that an ONC–ATL or ONC–ACB's status should not be revoked, the National Coordinator will notify the ONC–ATL or ONC–ACB's authorized representative in writing of this determination.

(g) *Revocation.* (1) The National Coordinator may revoke an ONC–ATL or ONC–ACB's status if:

(i) A determination is made that revocation is appropriate after considering the information provided by the ONC–ATL or ONC–ACB in response to the proposed revocation notice; or

(ii) The ONC–ATL or ONC–ACB does not respond to a proposed revocation notice within the specified timeframe in paragraph (e)(1) of this section.

(2) A decision to revoke an ONC–ATL or ONC–ACB's status is final and not subject to further review unless the National Coordinator chooses to reconsider the revocation.

(h) *Extent and duration of revocation*—(1) *Effectuation.* The revocation of an ONC–ATL or ONC–ACB is effective as soon as the ONC–ATL or ONC–ACB receives the revocation notice.

(2) *ONC–ACB provisions.* (i) A certification body that has had its ONC–ACB status revoked is prohibited from accepting new requests for certification and must cease its current certification operations under the ONC Health IT Certification Program.

(ii) A certification body that has had its ONC–ACB status revoked for a Type-1 violation is not permitted to reapply for ONC–ACB status under the ONC Health IT Certification Program for a period of 1 year.

(iii) The failure of a certification body that has had its ONC–ACB status revoked to promptly refund any and all fees for certifications of Complete EHRs and Health IT Module(s) not completed will be considered a violation of the Principles of Proper Conduct for ONC–ACBs and will be taken into account by the National Coordinator if the certification body reapplies for ONC–ACB status under the ONC Health IT Certification Program.

(3) *ONC–ATL provisions.* (i) A testing lab that has had its ONC–ATL status revoked is prohibited from accepting new requests for testing and must cease its current testing operations under the ONC Health IT Certification Program.

(ii) A testing lab that has had its ONC–ATL status revoked for a Type-1 violation is not permitted to reapply for ONC–ATL status under the ONC Health IT Certification Program for a period of 1 year.

(iii) The failure of a testing lab that has had its ONC–ATL status revoked to promptly refund any and all fees for testing of health IT not completed will be considered a violation of the Principles of Proper Conduct for ONC–ATLs and will be taken into account by the National Coordinator if the testing lab reapplies for ONC–ATL status under the ONC Health IT Certification Program.

■ 19. Revise § 170.570 to read as follows:

§ 170.570 Effect of revocation on the certifications issued to Complete EHRs and EHR Module(s).

(a) The certified status of Complete EHRs and/or Health IT Module(s) certified by an ONC–ACB or tested by an ONC–ATL that had its status revoked will remain intact unless a Type-1 violation was committed by the ONC–ACB and/or ONC–ATL that calls into question the legitimacy of the certifications issued.

(b) If the National Coordinator determines that a Type-1 violation was committed by an ONC–ACB and/or ONC–ATL that called into question the legitimacy of certifications issued to health IT, then the National Coordinator would:

(1) Review the facts surrounding the revocation of the ONC–ACB's or ONC–ATL's status; and

(2) Publish a notice on ONC's Web site if the National Coordinator believes that the Complete EHRs and/or Health IT Module(s) certifications were based on unreliable testing and/or certification.

(c) If the National Coordinator determines that Complete EHRs and/or Health IT Module(s) certifications were based on unreliable testing and/or certification, the certification status of affected Complete EHRs and/or Health IT Module(s) would only remain intact for 120 days after the National Coordinator publishes the notice.

(1) The certification status of affected Complete EHRs and/or Health IT Module(s) can only be maintained after the 120-day timeframe by being re-tested by an ONC–ATL in good standing, as necessary, and re-certified by an ONC–ACB in good standing.

(2) The National Coordinator may extend the time that the certification status of affected Complete EHRs and/or Health IT Module(s) remains intact as necessary for the proper retesting and recertification of the affected health IT.

■ 20. Add § 170.580 to read as follows:

§ 170.580 ONC review of certified health IT.

(a) *Direct review*—(1) *Purpose.* ONC may directly review certified health IT to determine whether it conforms to the requirements of the ONC Health IT Certification Program.

(2) *Circumstances that may trigger review*—(i) *Unsafe conditions.* ONC may initiate direct review under this section if it has a reasonable belief that certified health IT may not conform to the requirements of the Program because the certified health IT may be causing or contributing to conditions that present a serious risk to public health or safety, taking into consideration—

(A) The potential nature, severity, and extent of the suspected conditions;

(B) The need for an immediate or coordinated governmental response; and

(C) If applicable, information that calls into question the validity of the health IT's certification or maintenance thereof under the Program.

(ii) *Impediments to ONC–ACB oversight.* ONC may initiate direct review under this section if it has a reasonable belief that certified health IT may not conform to requirements of the Program and the suspected non-conformity presents issues that—

(A) May require access to confidential or other information that is not available to an ONC–ACB;

(B) May require concurrent or overlapping review by two or more ONC–ACBs; or

(C) May exceed an ONC–ACB's resources or expertise.

(3) *Relationship to ONC–ACBs and ONC–ATLs.* (i) ONC's review of certified health IT is independent of, and may be in addition to, any surveillance conducted by an ONC–ACB.

(ii) ONC may assert exclusive review of certified health IT as to any matters under review by ONC and any similar matters under surveillance by an ONC–ACB.

(iii) ONC's determination on matters under its review is controlling and supersedes any determination by an ONC–ACB on the same matters.

(iv) An ONC–ACB and ONC–ATL shall provide ONC with any available information that ONC deems relevant to its review of certified health IT.

(v) ONC may end all or any part of its review of certified health IT under this section at any time and refer the applicable part of the review to the relevant ONC–ACB(s) if ONC determines that doing so would serve the effective administration or oversight of the ONC Health IT Certification Program.

(b) *Notice*—(1) *Notice of potential non-conformity*—(i) *Circumstances that may trigger notice of potential non-conformity.* At any time during its review of certified health IT under paragraph (a) of this section, ONC may send a notice of potential non-conformity if it has a reasonable belief that certified health IT may not conform to the requirements of the ONC Health IT Certification Program.

(ii) *Health IT developer response.* (A) The health IT developer must respond to the notice of potential non-conformity by:

(*1*) Cooperating with ONC and/or a third party acting on behalf of ONC;

(*2*) Providing ONC and/or a third party acting on behalf of ONC access, including in accordance with paragraph (b)(3) of this section, to the certified health IT under review;

(*3*) Providing ONC with a written explanation and all supporting documentation addressing the potential non-conformity within 30 days, or within the adjusted timeframe set in accordance with paragraph (b)(1)(ii)(B) of this section.

(B) ONC may adjust the 30-day timeframe specified in paragraph (b)(1)(ii)(A)(*3*) of this section to be shorter or longer based on factors including, but not limited to:

(*1*) The type of certified health IT and certification in question;

(*2*) The type of potential non-conformity to be corrected;

(*3*) The time required to correct the potential non-conformity; and

(*4*) Issues of public health or safety.

(iii) *ONC determination.* After receiving the health IT developer's written explanation and supporting documentation as required by paragraph (b)(1)(ii)(A)(*3*) of this section, ONC shall do one of the following:

(A) Issue a written determination ending its review.

(B) Request additional information and continue its review in accordance with a new timeframe ONC establishes under (b)(1)(ii)(A)(*3*) and (b)(1)(ii)(B) of this section.

(C) Substantiate a non-conformity and issue a notice of non-conformity.

(D) Issue a notice of proposed termination.

(2) *Notice of non-conformity*—(i) *Circumstances that may trigger notice of non-conformity.* At any time during its review of certified health IT under paragraph (a) of this section, ONC may send a notice of non-conformity to the health IT developer if it determines that certified health IT does not conform to the requirements of the ONC Health IT Certification Program.

(ii) *Health IT developer response.* (A) The health IT developer must respond to the notice of non-conformity by:

(*1*) Cooperating with ONC and/or a third party acting on behalf of ONC;

(*2*) Providing ONC and/or a third party acting on behalf of ONC access, including in accordance with paragraph (b)(3) of this section, to the certified health IT under review;

(*3*) Providing ONC with a written explanation and all supporting documentation addressing the non-conformity within 30 days, or within the adjusted timeframe set in accordance with paragraph (b)(1)(ii)(B) of this section; and

(*4*) Providing a proposed corrective action plan consistent with paragraph (c) of this section.

(B) ONC may adjust the 30-day timeframe specified in paragraph (b)(2)(ii)(A)(*3*) of this section to be shorter or longer based on factors including, but not limited to:

(*1*) The type of certified health IT and certification in question;

(*2*) The type of non-conformity to be corrected;

(*3*) The time required to correct the non-conformity; and

(*4*) Issues of public health or safety.

(iii) *ONC determination.* After receiving the health IT developer's response provided in accordance with paragraph (b)(2)(ii) of this section, ONC shall either issue a written determination ending its review or continue with its review under the provisions of this section.

(3) *Records access.* In response to a notice of potential non-conformity or notice of non-conformity, a health IT developer shall make available to ONC and for sharing within HHS, with other federal departments, agencies, and offices, and with appropriate entities including, but not limited to, third-parties acting on behalf of ONC:

(i) All records related to the development, testing, certification, implementation, maintenance and use of its certified health IT; and

(ii) Any complaint records related to the certified health IT.

(c) *Corrective action plan and procedures.* (1) If ONC determines that certified health IT does not conform to requirements of the ONC Health IT Certification Program, ONC shall notify the health IT developer of its determination and require the health IT developer to submit a proposed corrective action plan.

(2) ONC shall provide direction to the health IT developer as to the required elements of the corrective action plan, which shall include such required elements as ONC determines necessary to comprehensively and expeditiously resolve the identified non-conformity(ies). The corrective action plan shall, in all cases, at a minimum include the following required elements:

(i) An assessment and description of the nature, severity, and extent of the non-conformity;

(ii) Identification of all potentially affected customers;

(iii) A detailed description of how the health IT developer will promptly ensure that all potentially affected customers are notified of the non-conformity and plan for resolution;

(iv) A detailed description of how and when the health IT developer will resolve the identified non-conformity and all issues, both at the locations where the non-conformity was identified and for all affected customers;

(v) A detailed description of how the health IT developer will ensure that the identified non-conformity and all issues are resolved;

(vi) A detailed description of the supporting documentation that will be provided to demonstrate that the identified non-conformity and all issues are resolved; and

(vii) The timeframe under which all elements of the corrective action plan will be completed.

(viii) An explanation of, and agreement to execute, the steps that will be prevent the non-conformity from re-occurring.

(3) When ONC receives a proposed corrective action plan (or a revised proposed corrective action plan), it shall either approve the proposed corrective action plan or, if the plan does not adequately address all required elements, instruct the health IT developer to submit a revised proposed corrective action plan within a specified period of time.

(4) The health IT developer is responsible for ensuring that a proposed corrective action plan submitted in accordance with paragraph (b)(2)(ii)(A)(*4*) of this section or a revised corrective action plan submitted in accordance with paragraph (c)(3) of this section adequately addresses all required elements as determined by ONC no later than 90 days after the health IT developer's receipt of a notice of non-conformity.

(5) Health IT developers may request extensions for the submittal and/or completion of corrective action plans. In order to make these requests, health IT developers must submit a written statement to ONC that explains and justifies the extension request. ONC will evaluate each request individually and will make decisions on a case-by-case basis.

(6) Upon fulfilling all of its obligations under the corrective action plan, the health IT developer must submit an attestation to ONC, which serve as a binding official statement by the health IT developer that it has fulfilled all of its obligations under the corrective action plan.

(7) ONC may reinstitute a corrective action plan if it later determines that a health IT developer has not fulfilled all of its obligations under the corrective action plan as attested in accordance with paragraph (c)(6) of this section.

(d) *Suspension.* (1) ONC may suspend the certification of a Complete EHR or Health IT Module at any time if ONC has a reasonable belief that the certified health IT may present a serious risk to public health or safety.

(2) When ONC decides to suspend a certification, ONC will notify the health IT developer of its determination through a notice of suspension.

(i) The notice of suspension will include, but may not be limited to:

(A) An explanation for the suspension;

(B) Information supporting the determination;

(C) The consequences of suspension for the health IT developer and the Complete EHR or Health IT Module under the ONC Health IT Certification Program; and

(D) Instructions for appealing the suspension.

(ii) A suspension of a certification will become effective upon the date specified in the notice of suspension.

(3) The health IT developer must notify all potentially affected customers of the identified non-conformity(ies) and suspension of certification in a timely manner.

(4) When a certification is suspended, the health IT developer must cease and desist from any marketing, licensing, and sale of the suspended Complete EHR or Health IT Module as ''certified'' under the ONC Health IT Certification Program from that point forward until such time ONC cancels the suspension in accordance with paragraph (d)(6) of this section.

(5) The certification of any health IT produced by a health IT developer that has the certification of one of its Complete EHRs or Health IT Modules suspended under the Program is prohibited, unless ONC cancels a suspension in accordance with paragraph (d)(6) of this section.

(6) ONC may cancel a suspension at any time if ONC no longer has a reasonable belief that the certified health IT presents a serious risk to public health or safety.

(e) *Proposed termination.* (1) ONC may propose to terminate a certification issued to a Complete EHR and/or Health IT Module if:

(i) The health IT developer fails to timely respond to any communication from ONC, including, but not limited to:

(A) Fact-finding;

(B) A notice of potential non-conformity within the timeframe established in accordance with paragraph (b)(1)(ii)(A)(*3*) of this section;

(C) A notice of non-conformity within the timeframe established in accordance with paragraph (b)(2)(ii)(A)(*3*) of this section; or

(D) A notice of suspension.

(ii) The information or access provided by the health IT developer in response to any ONC communication, including, but not limited to: Fact-finding, a notice of potential non-conformity, or a notice of non-conformity is insufficient or incomplete;

(iii) The health IT developer fails to cooperate with ONC and/or a third party acting on behalf of ONC;

(iv) The health IT developer fails to timely submit in writing a proposed corrective action plan;

(v) The health IT developer fails to timely submit a corrective action plan that adequately addresses the elements required by ONC as described in paragraph (c) of this section;

(vi) The health IT developer does not fulfill its obligations under the corrective action plan developed in accordance with paragraph (c) of this section; or

(vii) ONC concludes that a certified health IT's non-conformity(ies) cannot be cured.

(2) When ONC decides to propose to terminate a certification, ONC will notify the health IT developer of the proposed termination through a notice of proposed termination.

(i) The notice of proposed termination will include, but may not be limited to:

(A) An explanation for the proposed termination;

(B) Information supporting the proposed termination; and

(C) Instructions for responding to the proposed termination.

(3) The health IT developer may respond to a notice of proposed termination, but must do so within 10 days of receiving the notice of proposed termination and must include appropriate documentation explaining in writing why its certification should not be terminated.

(4) Upon receipt of the health IT developer's written response to a notice of proposed termination, ONC has up to 30 days to review the information submitted by the health IT developer and make a determination. ONC may extend this timeframe if the complexity of the case requires additional time for ONC review. ONC will, as applicable:

(i) Notify the health IT developer in writing that it has ceased all or part of its review of the health IT developer's certified health IT.

(ii) Notify the health IT developer in writing of its intent to continue all or part of its review of the certified health IT under the provisions of this section.

(iii) Proceed to terminate the certification of the health IT under review consistent with paragraph (f) of this section.

(f) *Termination.* (1) The National Coordinator may terminate a certification if:

(i) A determination is made that termination is appropriate after considering the information provided by the health IT developer in response to the proposed termination notice; or

(ii) The health IT developer does not respond in writing to a proposed termination notice within the timeframe specified in paragraph (e)(3) of this section.

(2) When ONC decides to terminate a certification, ONC will notify the health IT developer of its determination through a notice of termination.

(i) The notice of termination will include, but may not be limited to:

(A) An explanation for the termination;

(B) Information supporting the determination;

(C) The consequences of termination for the health IT developer and the Complete EHR or Health IT Module under the ONC Health IT Certification Program; and

(D) Instructions for appealing the termination.

(ii) A termination of a certification will become effective after the following applicable occurrence:

(A) The expiration of the 10-day period for filing a statement of intent to appeal in paragraph (g)(3)(i) of this section if the health IT developer does not file a statement of intent to appeal.

(B) The expiration of the 30-day period for filing an appeal in paragraph (g)(3)(ii) of this section if the health IT developer files a statement of intent to appeal, but does not file a timely appeal.

(C) A final determination to terminate the certification per paragraph (g)(7) of this section if a health IT developer files an appeal.

(3) The health IT developer must notify all potentially affected customers of the identified non-conformity(ies) and termination of certification in a timely manner.

(4) ONC may rescind a termination determination before the termination becomes effective if ONC determines that termination is no longer appropriate.

(g) *Appeal*—(1) *Basis for appeal.* A health IT developer may appeal an ONC determination to suspend or terminate a certification issued to a Complete EHR or Health IT Module if the health IT developer asserts:

(i) ONC incorrectly applied ONC Health IT Certification Program requirements for suspension or termination; or

(ii) ONC's determination was not sufficiently supported by the information provided by ONC with its determination.

(2) *Method and place for filing an appeal.* A statement of intent to appeal followed by a request for appeal must be submitted to ONC in writing by an authorized representative of the health IT developer whose Complete EHR or Health IT Module was subject to the determination being appealed. The statement of intent to appeal and request for appeal must be filed in accordance with the requirements specified in the notice of termination or notice of suspension.

(3) *Time for filing a request for appeal.* (i) A statement of intent to appeal must be filed within 10 days of a health IT developer's receipt of the notice of suspension or notice of termination.

(ii) An appeal, including all supporting documentation, must be filed within 30 days of the filing of the intent to appeal.

(4) *Effect of appeal on suspension and termination.* (i) A request for appeal stays the termination of a certification issued to a Complete EHR or Health IT Module, but the Complete EHR or Health IT Module is prohibited from being marketed, licensed, or sold as ''certified'' during the stay.

(ii) A request for appeal does not stay the suspension of a Complete EHR or Health IT Module.

(5) *Appointment of a hearing officer.* The National Coordinator will assign the case to a hearing officer to adjudicate the appeal on his or her behalf.

(i) The hearing officer may not review an appeal in which he or she participated in the initial suspension or termination determination or has a conflict of interest in the pending matter.

(ii) The hearing officer must be trained in a nationally recognized ethics code that articulates nationally recognized standards of conduct for hearing officers/officials.

(6) *Adjudication.* (i) The hearing officer may make a determination based on:

(A) The written record, which includes the:

(*1*) ONC determination and supporting information;

(*2*) Information provided by the health IT developer with the appeal filed in accordance with paragraphs (g)(1) through (3) of this section; and

(*3*) Information ONC provides in accordance with paragraph (g)(6)(v) of this section; or

(B) All the information provided in accordance with paragraph (g)(6)(i)(A) and any additional information from a hearing conducted in-person, via telephone, or otherwise.

(ii) The hearing officer will have the discretion to conduct a hearing if he/she:

(A) Requires clarification by either party regarding the written record under paragraph (g)(6)(i)(A) of this section;

(B) Requires either party to answer questions regarding the written record under paragraph (g)(6)(i)(A) of this section; or

(C) Otherwise determines a hearing is necessary.

(iii) The hearing officer will neither receive witness testimony nor accept any new information beyond what was provided in accordance with paragraph (g)(6)(i) of this section.

(iv) The default process will be a determination in accordance with paragraph (g)(6)(i)(A) of this section.

(v) ONC will have an opportunity to provide the hearing officer with a written statement and supporting documentation on its behalf that clarifies, as necessary, its determination to suspend or terminate the certification.

(A) The written statement and supporting documentation must be included as part of the written record and provided to the health IT developer within 15 days of the health IT developer's filing of an intent to appeal.

(B) Failure of ONC to submit a written statement does not result in any adverse findings against ONC and may not in any way be taken into account by the hearing officer in reaching a determination.

(7) *Determination by the hearing officer.* (i) The hearing officer will issue a written determination to the health IT developer within 30 days of receipt of the appeal or within a timeframe agreed to by the health IT developer and ONC and approved by the hearing officer, unless ONC cancels the suspension or rescinds the termination determination.

(ii) The National Coordinator's determination on appeal, as issued by the hearing officer, is final and not subject to further review.

■ 21. Add § 170.581 to read as follows:

§ 170.581 Certification ban.

(a) *Ban.* The certification of any of a health IT developer's health IT is prohibited when the certification of one or more of the health IT developer's Complete EHRs or Health IT Modules is:

(1) Terminated by ONC under the ONC Health IT Certification Program;

(2) Withdrawn from the ONC Health IT Certification Program by an ONC–ACB because the health IT developer requested it to be withdrawn when the health IT developer's health IT was the subject of a potential non-conformity or non-conformity as determined by ONC;

(3) Withdrawn by an ONC–ACB because of a non-conformity with any of the certification criteria adopted by the Secretary under subpart C of this part; or

(4) Withdrawn by an ONC–ACB because the health IT developer requested it to be withdrawn when the health IT developer's health IT was the subject of surveillance for a certification criterion or criteria adopted by the Secretary under subpart C of this part, including notice of pending surveillance.

(b) *Reinstatement.* The certification of a health IT developer's health IT subject to the prohibition in paragraph (a) of this section may commence once the following conditions are met.

(1) A health IT developer must request ONC's permission in writing to participate in the ONC Health IT Certification Program.

(2) The request must demonstrate that the customers affected by the certificate termination or withdrawal have been provided appropriate remediation.

(3) ONC is satisfied with the health IT developer's demonstration under paragraph (b)(2) of this section that all affected customers have been provided with appropriate remediation and grants reinstatement into the ONC Health IT Certification Program.

■ 22. Revise § 170.599 to read as follows:

§ 170.599 Incorporation by reference.

(a) Certain material is incorporated by reference into this subpart with the approval of the Director of the Federal Register under 5 U.S.C. 552(a) and 1 CFR part 51. To enforce any edition other than that specified in this section, the Department of Health and Human Services must publish a document in the **Federal Register** and the material must be available to the public. All approved material is available for inspection at U.S. Department of Health and Human Services, Office of the National Coordinator for Health Information Technology, 330 C Street SW., Washington, DC 20201, call ahead to arrange for inspection at 202–690–7151, and is available from the source listed below. It is also available for inspection 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/code_of_federal_regulations/ibr_locations.html.*

(b) International Organization for Standardization, Case postale 56, CH·1211, Geneve 20, Switzerland, telephone +41–22–749–01–11, *http://www.iso.org.*

(1) ISO/IEC GUIDE 65:1996—General Requirements for Bodies Operating Product Certification Systems (First Edition), 1996, ''ISO/IEC Guide 65,'' IBR approved for § 170.503.

(2) ISO/IEC 17011:2004 Conformity Assessment—General Requirements for Accreditation Bodies Accrediting Conformity Assessment Bodies (Corrected Version), February 15, 2005, ''ISO/IEC 17011,'' IBR approved for § 170.503.

(3) ISO/IEC 17025:2005(E)—General requirements for the competence of testing and calibration laboratories (Second Edition), 2005–05–15, ''ISO/IEC 17025,'' IBR approved for §§ 170.520(b) and 170.524(a).

(4) ISO/IEC 17065:2012(E)—Conformity assessment—Requirements for bodies certifying products, processes and services (First Edition), 2012, ''ISO/IEC 17065,'' IBR approved for § 170.503.

Sylvia M. Burwell,

Secretary, Department of Health and Human Services.

[FR Doc. 2016–24908 Filed 10–14–16; 8:45 am]

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FEDERAL REGISTER

Vol. 81 Wednesday,

No. 202 October 19, 2016

Part IV

The President

Federal Register

Vol. 81, No. 202

Wednesday, October 19, 2016

Presidential Documents

Title 3—

The President

Proclamation 9523 of October 14, 2016

National Character Counts Week, 2016

By the President of the United States of America

A Proclamation

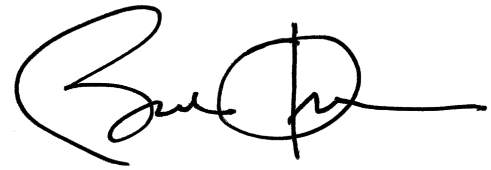
Our country has survived centuries of trial and triumph, and we have endured times that have tested us and marked moments of progress that were once deemed impossible. Today, we live in a time of extraordinary possibility—and we must decide how our next chapters will be written. The task of shaping America's course falls to each one of us as individuals who make up our American family, and as we celebrate National Character Counts Week, let us seek to live out the ideals that have inspired our country's journey and that define our national character.

No matter who you are, what you look like, where you come from, or what your circumstances are, America should be a place where the things that make you unique and different are celebrated. That promise of equality and acceptance has been our country's North Star since its founding, and in thinking of how that centuries-old ideal translates into our lives today, it comes down to all of us showing others the compassion and acceptance that we would only wish for ourselves. If we seek to understand one another and take advantage of opportunities to bring people together across lines of difference, we will increasingly realize as a people that we are more alike than we are different.

Let us listen to each other, see each other, and recognize the common humanity that makes America what it is. Let us embrace the multitudes of races, faiths, cultures, and origins that make up our diverse, vibrant Nation. It will make us better as a people and stronger as a country, and it starts with reflecting on the way we live our lives, the way we treat others, and the example we set for those around us. We have a collective obligation to reflect in our own lives the values we strive to reflect in our national life, and no gesture of goodwill is too small—together, ripples of kindness can drown out voices of hate, wash away cynicism and doubt, and help us see the world in truer colors.

NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim October 16 through October 22, 2016, as National Character Counts Week. I call upon public officials, educators, parents, students, and all Americans to observe this week with appropriate ceremonies, activities, and programs.

IN WITNESS WHEREOF, I have hereunto set my hand this fourteenth day of October, in the year of our Lord two thousand sixteen, and of the Independence of the United States of America the two hundred and forty-first.



[FR Doc. 2016–25480
Filed 10–18–16; 11:15 am]
Billing code 3295–F7–P

Presidential Documents

Proclamation 9524 of October 14, 2016

National Forest Products Week, 2016

By the President of the United States of America

A Proclamation

Filtering the air we breathe and the water we drink, and providing the habitats that are home to diverse species of fish and wildlife, forests are an essential part of our planet. Across America, they offer a wide range of cultural and recreational activities that have sustained and entertained people since long before our Nation's founding. Today, forests provide products we use each day, including paper, wood, and building and packaging materials. During National Forest Products Week, we express our appreciation for the incredible bounty forests provide and we renew our commitment to ensuring the next generation can enjoy their irreplaceable resources.

Our forests are at increasing risk from catastrophic wildfires, erosion, drought, and climate change. That is why my Administration is working alongside State and local leaders, landowners, and businesses to develop solutions to preserve our forests—because we must respond to challenges that threaten these important spaces. America's forests play an important role in addressing climate change by absorbing carbon pollution. It is critical that we protect and restore our forests, and through the Climate Action Plan, Federal agencies are coming together to strengthen the resilience of our forests and enhance their ability to absorb even more carbon pollution.

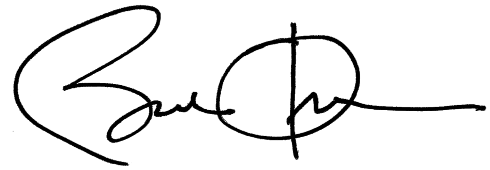
The health and well-being of our forests and our communities go hand in hand. With the Department of Agriculture, we are working to strengthen markets for forest products. By allocating millions of dollars to help expand technologies that encourage the use of wood in innovative ways, we are also striving to improve forest health and generate rural jobs. And we are exploring ways to help forestland owners respond to climate change—earlier this year, we released a roadmap for implementing key building blocks to achieve this goal, such as private forest growth and retention, stewardship of Federal forests, and promotion of wood products.

Forests generate billions of dollars in economic growth, sustaining local economies and enhancing communities across our country. We rely on them in so many aspects of our national life, and throughout this week, we must continue working to protect the precious resources our forests hold so they can continue enriching our world and supporting our way of life.

To recognize the importance of products from our forests, the Congress, by Public Law 86–753 (36 U.S.C. 123), as amended, has designated the week beginning on the third Sunday in October of each year as ''National Forest Products Week'' and has authorized and requested the President to issue a proclamation in observance of this week.

NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, do hereby proclaim October 16 through October 22, 2016, as National Forest Products Week. I call on the people of the United States to join me in recognizing the dedicated individuals who are responsible for the stewardship of our forests and for the preservation, management, and use of these precious natural resources for the benefit of the American people.

IN WITNESS WHEREOF, I have hereunto set my hand this fourteenth day of October, in the year of our Lord two thousand sixteen, and of the Independence of the United States of America the two hundred and forty-first.



[FR Doc. 2016–25484
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Billing code 3295–F7–P

Presidential Documents

Proclamation 9525 of October 14, 2016

Blind Americans Equality Day, 2016

By the President of the United States of America

A Proclamation

Each day, blind and visually impaired Americans contribute to our society, refusing to allow anything to hold them back. In order to ensure more Americans with disabilities can continue participating fully in our country, we must each do our part to promote equal opportunity for all. On Blind Americans Equality Day, we reaffirm the inherent dignity of every human being and recommit to forging a future in which all Americans, including those with visual impairments, can pursue their full measure of happiness.

More than two decades ago, one of the most comprehensive civil rights bills in our history, the Americans with Disabilities Act (ADA), was signed into law. Ever since, the ADA has helped reduce discrimination and promote equal access to classrooms, workplaces, and transportation—and it is imperative that we build on the significant progress we have made for individuals living with disabilities. Because the unemployment rate is more than twice as high for Americans with disabilities, my Administration has worked to improve employment opportunities, including within the Federal Government where we are leading as a model employer. Last year, we hosted the White House Summit on Disability and Employment, which provided resources to help employers hire more individuals with disabilities. And through the Workforce Innovation and Opportunity Act, we expanded access to critical services for many individuals with disabilities, including those who are blind or visually impaired, so that they can pursue high-quality employment opportunities. People with disabilities deserve to live their lives in their communities and raise their families, and earlier this year we hosted a Forum on the Civil Rights of Parents with Disabilities because every family, including those headed by people with disabilities, deserves the chance to reach for a future of ever greater possibility.

Our Nation must continue to promote equal opportunity and the right of all Americans to live full and independent lives. This begins early on—we must ensure that any child with a print disability can access the tools they need to pursue an education. That is why we have worked to provide appropriate materials and services, including Braille and Braille literacy instruction, in schools. We are investing in technologies that provide visually impaired students equal access to the general education curriculum. We are also working to make the websites of Government agencies and private companies more accessible to anyone with a disability—an effort which remains an important priority. And I have encouraged the Senate to ratify the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, which will broaden access to a new world of knowledge for these individuals.

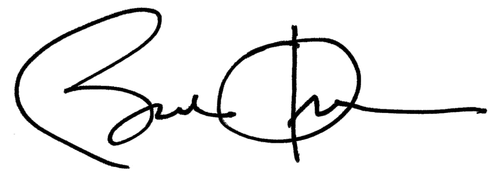
Disability touches us all, and together we can strive to ensure that all blind and visually impaired individuals face no unnecessary barriers to success. By providing equal access to resources and technologies and giving everyone the chance to make of their lives what they will, we can continue to advance opportunity and prosperity for all our people.

By joint resolution approved on October 6, 1964 (Public Law 88–628, as amended), the Congress designated October 15 of each year as ''White Cane

Safety Day'' to recognize the contributions of Americans who are blind or have low vision. Today, let us reaffirm our commitment to being a Nation where all our people, including those with disabilities, have every opportunity to achieve their dreams.

NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim October 15, 2016, as Blind Americans Equality Day. I call upon public officials, business and community leaders, educators, librarians, and Americans across the country to observe this day with appropriate ceremonies, activities, and programs.

IN WITNESS WHEREOF, I have hereunto set my hand this fourteenth day of October, in the year of our Lord two thousand sixteen, and of the Independence of the United States of America the two hundred and forty-first.



[FR Doc. 2016–25485
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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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This is a continuing list of public bills from the current session of Congress which have become Federal laws. This list is also available online at *http://www.archives.gov/federal-register/laws*.

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S. 246/P.L. 114–244
Alyce Spotted Bear and Walter Soboleff Commission on Native Children Act (Oct. 14, 2016; 130 Stat. 981)

Last List October 13, 2016

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