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DEPARTMENT OF HOMELAND SECURITY

8 CFR Part 214

[CIS No. 2605–17; DHS Docket No. USCIS–2017–0004]

RIN 1615–AC12

DEPARTMENT OF LABOR

Employment and Training Administration Wage and Hour Division

20 CFR Part 655

[DOL Docket No. 2017–0003]

RIN 1205–AB84

Exercise of Time-Limited Authority To Increase the Fiscal Year 2017 Numerical Limitation for the H–2B Temporary Nonagricultural Worker Program

AGENCY: U.S. Citizenship and Immigration Services, Department of Homeland Security and Employment and Training Administration and Wage and Hour Division, Department of Labor.

ACTION: Temporary rule.

SUMMARY: The Secretary of Homeland Security (''Secretary''), in consultation with the Secretary of Labor, has decided to increase the numerical limitation on H–2B nonimmigrant visas to authorize the issuance of up to an additional 15,000 through the end of Fiscal Year (FY) 2017. This is a one-time increase based on a time-limited statutory authority and does not affect the H–2B program in future fiscal years. The Departments are promulgating regulations to implement this determination.

DATES: This final rule is effective from July 19, 2017 through September 30, 2017, except for the addition of 20 CFR 655.65, which is effective from July 19, 2017 through September 30, 2020.

FOR FURTHER INFORMATION CONTACT: Regarding 8 CFR part 214: Kevin J. Cummings, Chief, Business and Foreign Workers Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security, 20 Massachusetts Ave NW., Suite 1100, Washington, DC 20529–2120, telephone (202) 272–8377 (not a toll-free call). Regarding 20 CFR part 655: William W. Thompson, II, Administrator, Office of Foreign Labor Certification, Employment and Training Administration, Department of Labor, Box #12–200, 200 Constitution Ave. NW., Washington, DC 20210, telephone (202) 513–7350 (this is not a toll-free number).

Individuals with hearing or speech impairments may access the telephone numbers above via TTY by calling the toll-free Federal Information Relay Service at 1–877–889–5627 (TTY/TDD).

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I. Background

A. Legal Framework

The Immigration and Nationality Act (INA) establishes the H–2B nonimmigrant classification for a nonagricultural temporary worker ''having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform . . . temporary [non-agricultural] service or labor if unemployed persons capable of performing such service or labor cannot be found in this country.'' INA section 101(a)(15)(H)(ii)(b), 8 U.S.C. 1101(a)(15)(H)(ii)(b). Employers must petition DHS for classification of prospective temporary workers as H–2B nonimmigrants. INA section 214(c)(1), 8 U.S.C. 1184(c)(1). DHS must approve this petition before the beneficiary can be considered eligible for an H–2B visa. Finally, the INA requires that ''[t]he question of importing any alien as [an H–2B] nonimmigrant . . . in any specific case or specific cases shall be determined by [DHS],[1] after consultation with appropriate agencies of the Government.'' INA section 214(c)(1), 8 U.S.C. 1184(c)(1).

DHS regulations provide that an H–2B petition for temporary employment in the United States must be accompanied by an approved temporary labor certification (TLC) from DOL. 8 CFR 214.2(h)(6)(iii)(A) & (C), (iv)(A). The TLC serves as DHS's consultation with DOL with respect to whether a qualified U.S. worker is available to fill the petitioning H–2B employer's job opportunity and whether a foreign worker's employment in the job opportunity will adversely affect the wages or working conditions of similarly employed U.S. workers. *See* INA section 214(c)(1), 8 U.S.C. 1184(c)(1); 8 CFR 214.2(h)(6)(iii)(A) and (D).

The Departments have established regulatory procedures under which DOL certifies whether a qualified U.S. worker is available to fill the job opportunity described in the employer's petition for a temporary nonagricultural worker, and whether a foreign worker's employment in the job opportunity will adversely affect the wages or working conditions of similarly employed U.S. workers. *See*

[1] As of March 1, 2003, in accordance with section 1517 of Title XV of the Homeland Security Act of 2002 (HSA), Public Law 107–296, 116 Stat. 2135, any reference to the Attorney General in a provision of the Immigration and Nationality Act describing functions which were transferred from the Attorney General or other Department of Justice official to the Department of Homeland Security by the HSA ''shall be deemed to refer to the Secretary'' of Homeland Security. *See* 6 U.S.C. 557 (2003) (codifying HSA, Title XV, § 1517); 6 U.S.C. 542 note; 8 U.S.C. 1551 note.

20 CFR part 655, subpart A. The regulations establish the process by which employers obtain a TLC, and the rights and obligations of workers and employers.

The INA also authorizes DHS to impose appropriate remedies against an employer for a substantial failure to meet the terms and conditions of employing an H–2B nonimmigrant worker, or for a willful misrepresentation of a material fact in a petition for an H–2B nonimmigrant worker. INA section 214(c)(14)(A), 8 U.S.C. 1184(c)(14)(A). The INA expressly authorizes DHS to delegate certain enforcement authority to DOL. INA section 214(c)(14)(B), 8 U.S.C. 1184(c)(14)(B). DHS has delegated this authority to DOL. *See* DHS, Delegation of Authority to DOL under Section 214(c)(14)(A) of the Immigration and Nationality Act (Jan. 16, 2009); *see also* 8 CFR 214.2(h)(6)(ix) (stating that DOL may investigate employers to enforce compliance with the conditions of, among other things, an H–2B petition and a DOL-approved TLC). This enforcement authority has been delegated within DOL to the Wage and Hour Division, and is governed by regulations at 29 CFR part 503.

B. H–2B Numerical Limitations Under the INA

The INA sets the annual number of aliens who may be issued H–2B visas or otherwise provided H–2B nonimmigrant status to perform temporary nonagricultural work at 66,000, to be distributed semi-annually beginning in October and in April. *See* INA sections 214(g)(1)(B) and 214(g)(10), 8 U.S.C. 1184(g)(1)(B) and 8 U.S.C. 1184(g)(10). Up to 33,000 aliens may be issued H–2B visas or provided H–2B nonimmigrant status in the first half of a fiscal year, and the remaining annual allocation will be available for employers seeking to hire H–2B workers during the second half of the fiscal year.[2] If insufficient petitions are approved to use all H–2B numbers in a given fiscal year, the unused numbers cannot be carried over for petition approvals in the next fiscal year.

Because of the intense competition for H–2B visas in recent years, the semi-annual visa allocation, and the regulatory requirement that employers apply for labor certification 75 to 90 days before the start date of work,[3] employers who wish to obtain visas for their workers under the semi-annual allotment must act early to receive a TLC and file a petition with USCIS. As a result, DOL typically sees a significant spike in TLC applications for H–2B visas for temporary or seasonal jobs during the U.S.'s warm weather months. For example, in FY 2017, from *Applications for Temporary Labor Certification* filed in January, DOL's Office of Foreign Labor Certification (OFLC) certified 54,827 worker positions for start dates of work *on* April 1, in excess of the entire semi-annual visa allocation. USCIS received sufficient H–2B petitions to meet the second half of the fiscal year regular cap on March 13, 2017. This was the earliest date that the cap was reached in a respective fiscal year since FY 2009 and reflects an ongoing trend of high program demand, as further represented by the FY 2016 reauthorization of the returning worker cap exemption and by section 543 of the Consolidated Appropriations Act, 2017, Public Law 115–31 (FY 2017 Omnibus), which is discussed below.

C. FY 2017 Omnibus

On May 5, 2017, the President signed the FY 2017 Omnibus, which contains a provision (section 543 of division F, hereinafter ''section 543'') permitting the Secretary of Homeland Security, under certain circumstances and after consultation with the Secretary of Labor, to increase the number of H–2B visas available to U.S. employers, notwithstanding the otherwise established statutory numerical limitation. Specifically, section 543 provides that ''the Secretary of Homeland Security, after consultation with the Secretary of Labor, and upon the determination that the needs of American businesses cannot be satisfied in [FY] 2017 with U.S. workers who are willing, qualified, and able to perform temporary nonagricultural labor,'' may increase the total number of aliens who may receive an H–2B visa in FY 2017 by not more than the highest number of H–2B nonimmigrants who participated in the H–2B returning worker program in any fiscal year in which returning workers were exempt from the H–2B numerical limitation.[4] This rule implements the authority contained in section 543.

D. Joint Issuance of the Final Rule

The Departments have determined that it is appropriate to issue this final rule jointly. This determination is related to ongoing litigation following conflicting court decisions concerning DOL's authority to independently issue legislative rules to carry out its consultative function pertaining to the H–2B program under the INA.[5] Although DHS and DOL each have authority to independently issue rules implementing their respective duties under the H–2B program, the Departments are implementing section 543 in this manner to ensure there can be no question about the authority underlying the administration and enforcement of the temporary cap increase. This approach is consistent with recent rules implementing DOL's general consultative role under section 214(c)(1) of the INA, 8 U.S.C. 1184(c)(1). *See also* 8 CFR 214.2(h)(6)(iv).[6]

II. Discussion

A. Statutory Determination

Following consultation with the Secretary of Labor, the Secretary of Homeland Security has determined that the needs of some American businesses cannot be satisfied in FY 2017 with U.S. workers who are willing, qualified, and able to perform temporary nonagricultural labor. In accordance with the FY 2017 Omnibus, the Secretary of Homeland Security has determined that it is appropriate, for the reasons stated below, to raise the numerical limitation on H–2B nonimmigrant visas by up to an additional 15,000 for the remainder of the fiscal year. Consistent with such authority, the Secretary of Homeland Security has decided to increase the H–2B cap for FY 2017 by up to 15,000 additional visas for those American businesses that attest to a level of need such that, if they do not receive all of the workers under the cap increase, they are likely to suffer irreparable harm, *i.e.,* suffer a permanent and severe financial loss. These businesses must attest that they will likely suffer irreparable harm and must retain documentation, as

[2] The Federal Government's fiscal year runs from October 1 of the budget's prior year through September 30 of the year being described. For example, fiscal year 2017 is from October 1, 2016 through September 30, 2017.

[3] 20 CFR 655.15(b).

[4] The highest number of returning workers in any such fiscal year was 64,716, which represents the number of beneficiaries covered by H–2B returning worker petitions that were approved for FY 2007. DHS also considered using an alternative approach, under which DHS measured the number of H–2B returning workers admitted at the ports of entry (66,792 for FY 2007).

[5] *See* Temporary Non-Agricultural Employment of H–2B Aliens in the United States, 80 FR 24042 (Apr. 29, 2015) (codified at 8 CFR part 214, 20 CFR part 655, and 29 CFR part 503).

[6] On April 29, 2015, following a court's vacatur of nearly all of DOL's H–2B regulations, *Perez* v. *Perez,* No. 14–cv–682 (N.D. Fla. Mar. 4, 2015), the Departments jointly promulgated an interim final rule governing DOL's role in enforcing the statutory and regulatory rights and obligations applicable to employment under the H–2B program. *See* Temporary Non-Agricultural Employment of H–2B Aliens in the United States, 80 FR 24042 (Apr. 29, 2015) (codified at 8 CFR part 214, 20 CFR part 655, and 29 CFR part 503).

described below, supporting this attestation.

The Secretary of Homeland Security's determination to increase the numerical limitation is based on the conclusion that some businesses face closing their doors in the absence of a cap increase. Some stakeholders have reported that access to additional H–2B visas is essential to the continued viability of some small businesses that play an important role in sustaining the economy in their states, while others have stated that an increase is unnecessary and raises the possibility of abuse.[7] The Secretary of Homeland Security has deemed it appropriate, notwithstanding such risk of abuse, to take immediate action to avoid irreparable harm to businesses; such harm would in turn result in wage and job losses by their U.S. workers, and other adverse downstream economic effects.[8]

The decision to direct the benefits of this one-time cap increase to businesses that need workers to avoid irreparable harm, rather than directing the cap increase to any and all businesses seeking temporary workers, is consistent with the Secretary's broad discretion under section 543. Section 543 provides that the Secretary, upon satisfaction of the statutory business need standard, *may* increase the numerical limitation to meet such need.[9] The scope of the assessment called for by the statute is quite broad, and accordingly delegates the Secretary broad discretion to identify the business needs he finds most relevant. Within that context, DHS has determined to focus on the businesses with the most permanent, severe potential losses, for the below reasons.

First, DHS interprets section 543's reference to ''the needs of American businesses'' as describing a need different than the need required of employers in petitioning for an H–2B worker.[10] If the term ''needs'' in section 543 referred to the same business need entailed under the existing H–2B program, it would not have been necessary for Congress to reference such need, because Congress could have relied on existing statute and regulations. Alternatively, Congress could have made explicit reference to such statute and regulations. Accordingly, DHS interprets this authority as authorizing DHS to address relatively heightened business need, beyond the existing requirements of the H–2B program. DOL concurs in this interpretation.

Second, this approach limits the one-time increase in a way that is responsive to stakeholders who, citing potential adverse impacts on U.S. workers from a general cap increase applicable to all potential employers, sought opportunities for more formal input and analysis prior to such an increase. Although the calendar does not lend itself to such additional efforts, the Secretary has determined that in the unique circumstances presented here, it is appropriate to tailor the availability of this temporary cap increase to those businesses likely to suffer irreparable harm, *i.e.,* those facing permanent and severe financial loss.

Under this rule, employers must also meet, among other requirements, the generally applicable requirements that insufficient qualified U.S. workers are available to fill the petitioning H–2B employer's job opportunity and that the foreign worker's employment in the job opportunity will not adversely affect the wages or working conditions of similarly employed U.S. workers. INA section 214(c)(1), 8 U.S.C. 1184(c)(1); 8 CFR 214.2(h)(6)(iii)(A) and (D); 20 CFR 655.1. To meet this standard, in order to be eligible for additional visas under this rule, employers must have a valid TLC in accordance with 8 CFR 214.2(h)(6)(iv)(A) and (D), and 20 CFR 655 subpart A. Under DOL's H–2B regulations, TLCs expire on the last day of authorized employment. 20 CFR 655.55(a). Therefore, in order to have an unexpired TLC, the date on the employer's visa petition must not be later than the last day of authorized employment on the TLC. This rule also requires an additional recruitment for certain petitioners, as discussed below.

Accordingly, this rule increases the FY 2017 numerical limitation by up to 15,000 to ensure a sufficient number of visas to meet the level of demand in past years, but also restricts the availability of such visas by prioritizing only the most significant business needs. These provisions are each described in turn below.

B. Numerical Increase of Up to 15,000

DHS expects the increase of up to 15,000 visas[11] to be sufficient to meet at least the same amount of need as the H–2B program met in FY 2016. Section 543 of the FY 2017 Omnibus sets as the maximum limit for any increase in the H–2B numerical limitation for FY 2017, the highest number of H–2B returning workers[12] who were exempt from the cap in previous years. Consistent with the statute's reference to H–2B returning workers, in determining the appropriate number by which to increase the H–2B numerical limitation, the Secretary focused on the number of visas allocated to returning workers in years in which Congress enacted ''returning

[7] Other stakeholders have reported abuses of the H–2B program. For example, the Government Accountability Office, has recommended increased worker protections in the H–2B program based on certain abuses of the program by unscrupulous employers and recruiters. *See* U.S. Government Accountability Office, *H–2A and H–2B Visa Programs: Increased Protections Needed for Foreign Workers,* GAO–15–154 (Washington DC, revised 2017), *http://www.gao.gov/assets/690/684985.pdf;* U.S. Government Accountability Office, *H–2B Visa Program: Closed Civil Criminal Cases Illustrate Instances of H–2B Workers Being Targets of Fraud and Abuse,* GAO–10–1053 (Washington DC, 2010), *http://www.gao.gov/assets/320/310640.pdf; see also* Testimony of Stephen G. Bronars, The Impact of the H–2B Program on the U.S. Labor Market, before the Senate Subcommittee on Immigration and the National Interest (June 8, 2016), *https://www.judiciary.senate.gov/imo/media/doc/06-08-16BronarsTestimony.pdf. Preliminary Analysis of the Economic Impact of the H–2B Worker Program on Virginia's Economy,* Thomas J. Murray (Sept. 2011), *http://web.vims.edu/GreyLit/VIMS/mrr11-12.pdf.*

[8] *See* Randel K. Johnson & Tamar Jacoby, U.S. Chamber of Commerce & ImmigrationWorks USA, The Economics of the H–2B Program (Oct. 28, 2010), *available at https://www.uschamber.com/sites/default/files/documents/files/16102_LABR%2520H2BReport_LR.pdf. (last visited June 22, 2017).*

[9] DHS believes it is reasonable to infer that Congress intended, in enacting the FY 2017 Omnibus, to authorize the Secretary to allocate any new H–2B visas authorized under section 543 to the entities with the ''business need'' that serves as the basis for the increase.

[10] A petitioning employer must demonstrate that it has a temporary need for the services or labor for which it seeks to hire H–2B workers. *See* 8 CFR 214.2(h)(6)(ii); 20 CFR 655.6.

[11] In contrast with section 214(g)(1) of the INA, 8 U.S.C. 1184(g)(1), which establishes a cap on the number of individuals who may be issued visas *or otherwise provided H–2B status,* and section 214(g)(10) of the INA, 8 U.S.C. 1184(g)(10), which imposes a first half of the fiscal year cap on H–2B issuance with respect to the number of individuals who may be issued visas *or are accorded [H–2B] status*'' (emphasis added), section 543 only authorizes DHS to increase the number of available H–2B *visas.* Accordingly, DHS will not permit individuals authorized for H–2B status pursuant to an H–2B petition approved under section 543 to change to H–2B status from another nonimmigrant status. *See* INA section 248, 8 U.S.C. 1258; *see also* 8 CFR pt. 248. If a petitioner files a petition seeking H–2B workers in accordance with this rule and requests a change of status on behalf of someone in the United States, the change of status request will be denied, but the petition will be adjudicated in accordance with applicable DHS regulations. Any alien authorized for H–2B status under the approved petition would need to obtain the necessary H–2B visa at a consular post abroad and then seek admission to the United States in H–2B status at a port of entry.

[12] During fiscal years 2005 to 2007, and 2016, Congress enacted ''returning worker'' exemptions to the H–2B visa cap, allowing workers who were counted against the H–2B cap in one of the three preceding fiscal years not to be counted against the upcoming fiscal year cap. Save Our Small and Seasonal Businesses Act of 2005, Public Law 109–13, Sec. 402 (May 11, 2005); John Warner National Defense Authorization Act, Public Law 109–364, Sec. 1074, (Oct. 17, 2006); Consolidated Appropriations Act of 2016, Public Law 114–113, Sec. 565 (Dec. 18, 2015).

worker'' exemptions from the H–2B numerical limitation. During each of the years the returning worker provision was in force, U.S. employers' standard business needs for H–2B workers exceeded the normal 66,000 cap.

Most recently, in FY 2016, 18,090 returning workers were approved for H–2B petitions, despite Congress having reauthorized the returning worker program with more than three-quarters of the fiscal year remaining. Of those 18,090 workers authorized for admission, 13,382 were admitted into the United States or otherwise acquired H–2B status. While section 543 does not limit the issuance of additional H–2B visas to returning workers, the Secretary, in consideration of the statute's reference to returning workers, determined that it would be appropriate to use these recent figures as a basis for the maximum numerical limitation under section 543. This rule therefore authorizes up to 15,000 additional H–2B visas (rounded up from 13,382) for FY 2017.

C. Business Need Standard—Irreparable Harm

To file an H–2B petition during the remainder of FY 2017, petitioners must meet all existing H–2B eligibility requirements, including having an approved, valid and unexpired TLC per 8 CFR 214.2(h)(6) and 20 CFR 655 subpart A. In addition, the petitioner must submit an attestation in which the petitioner affirms, under penalty of perjury, that it meets the business need standard set forth above. Under that standard, the petitioner must be able to establish that if they do not receive all of the workers under the cap increase, they are likely to suffer irreparable harm, that is, permanent and severe financial loss. Although the TLC process focuses on establishing whether a petitioner has a need for workers, the TLC does not directly address the harm a petitioner may face in the absence of such workers; the attestation addresses this question. The attestation must be submitted directly to USCIS, together with the Petition for a Nonimmigrant Worker (Form I–129), the valid TLC, and any other necessary documentation. The new attestation form is included in this rulemaking as Appendix A.

The attestation serves as prima facie initial evidence to DHS that the petitioner's business is likely to suffer irreparable harm.[13] Any petition received lacking the requisite attestation may be denied in accordance with 8 CFR 103.2(b)(8)(ii). Although this regulation does not require submission of evidence at the time of filing of the petition, other than an attestation, the employer must have such evidence on hand and ready to present to DHS or DOL at any time starting with the date of filing, through the prescribed document retention period discussed below.

In addition to the statement regarding the irreparable harm standard, the attestation will also state that the employer: Meets all other eligibility criteria for the available visas; will comply with all assurances, obligations, and conditions of employment set forth in the *Application for Temporary Employment Certification* (Form ETA 9142B and Appendix B) certified by the DOL for the job opportunity; will conduct additional recruitment of U.S. workers, in accordance with this rulemaking; and will document and retain evidence of such compliance. The process under this regulation is similar to the process the Departments have employed with respect to the statutory provisions authorizing seafood employers to stagger crossing of H–2B workers. For seafood employers, a similar attestation, which provides that the employer has conducted additional recruitment, is provided to the consular officer at the time they apply for a visa and/or to the U.S. Customs and Border Protection officer at the time the H–2B worker seeks admission at a port of entry. *See* 20 CFR 655.15(f). Because the new attestation will be submitted to USCIS as initial evidence with the Form I–129 petition, a denial of the petition based on or related to statements made in the attestation is appealable under existing USCIS procedures. Specifically, DHS considers the attestation to be evidence that is incorporated into and a part of the petition consistent with 8 CFR 103.2(b).

The requirement to provide a post-TLC attestation to USCIS is sufficiently protective of U.S. workers given that the employer, in completing the TLC process, has already made one unsuccessful attempt to recruit U.S. workers. In addition, the employer is required to retain documentation, which must be provided upon request, supporting the new attestations, including a recruitment report for any additional recruitment required under this rule. Accordingly, USCIS may issue a denial or a request for additional evidence in accordance with 8 CFR 103.2(b) or 8 CFR 214.2(h)(11) based on such documentation, and DOL's WHD will be able to review this documentation and enforce the attestations. Although the employer must have such documentation on hand at the time it files the petition, the Departments have determined that if employers were required to submit the attestations to DOL before seeking a petition from DHS or to complete all recruitment before submitting a petition, the attendant delays would render any visas unlikely to satisfy the needs of American businesses given processing timeframes and that there are only a few months remaining in this fiscal year.

In accordance with the attestation requirement, whereby petitioners attest that they meet the irreparable harm standard, and the documentation retention requirements at 20 CFR 655.65, the petitioner must retain documents and records meeting their burden to demonstrate compliance with this rule, and must provide the documents and records upon the request of DHS or DOL, such as in the event of an audit or investigation. Supporting evidence may include, but is not limited to, the following types of documentation:

(1) Evidence that the business is or would be unable to meet financial or contractual obligations without H–2B workers, including evidence of contracts, reservations, orders, or other business arrangements that have been or would be cancelled absent the requested H–2B workers; and evidence demonstrating an inability to pay debts/bills;

(2) Evidence that the business has suffered or will suffer permanent and severe financial loss during the period of need, as compared to the period of need in prior years, such as: Financial statements (including profit/loss statements) comparing present period of need as compared to prior years; bank statements, tax returns or other documents showing evidence of current and past financial condition; relevant tax records, employment records, or other similar documents showing hours worked and payroll comparisons from prior years to current year;

(3) Evidence showing the number of workers needed in previous seasons to meet the employer's temporary need as compared to those currently employed, including the number of H–2B workers requested, the number of H–2B workers actually employed, the dates of their employment, and their hours worked (*e.g.,* payroll records), particularly in comparison to the weekly hours stated on the TLC. In addition, for employers that obtain authorization to employ H–2B workers under this rule, evidence showing the number of H–2B workers requested under this rule, the number of workers actually employed, including H–2B workers, the dates of their

[13] An employer may request fewer workers on the H–2B petition than the number of workers listed on the TLC.

employment, and their hours worked (*e.g.,* payroll records), particularly in comparison to the weekly hours stated on the TLC; and/or

(4) Evidence that the business is dependent on H–2B workers, such as: Number of H–2B workers compared to U.S. workers needed prospectively or in the past; business plan or reliable forecast showing that, due to the nature and size of the business, there is a need for a specific number of H–2B workers.

These examples of potential evidence, however, will not exclusively or necessarily establish that the business meets the irreparable harm standard, and petitioners may retain other types of evidence they believe will satisfy this standard. If an audit or investigation occurs, DHS or DOL will review all evidence available to it to confirm that the petitioner properly attested to DHS that their business would likely suffer irreparable harm. If DHS subsequently finds that the evidence does not support the employer's attestation, DHS may deny or revoke the petition consistent with existing regulatory authorities and/or notify DOL. In addition, DOL may independently take enforcement action, including, among other things, to debar the petitioner from using the H–2B program generally for not less than one year or more than 5 years from the date of the final agency decision and may disqualify the debarred party from filing any labor certification applications or labor condition applications with DOL for the same period set forth in the final debarment decision. *See, e.g.,* 20 CFR 655.73; 29 CFR 503.20, 503.24.[14]

To the extent that evidence reflects a preference for hiring H–2B workers over U.S. workers, an investigation by other agencies enforcing employment and labor laws, such as the Immigrant and Employee Rights Section of the Department of Justice's Civil Rights Division, may be warranted. *See* INA section 274B, 8 U.S.C. 1324b (prohibiting certain types of employment discrimination based on citizenship status or national origin). In addition, if members of the public have information that a participating employer may be abusing this program, DHS invites them to notify USCIS's Fraud Detection and National Security Directorate by contacting the general H–2B complaint address at *ReportH2BAbuse@uscis.dhs.gov.*[15]

DHS, in exercising its statutory authority under INA section 101(a)(15)(H)(ii)(b), 8 U.S.C. 1101(a)(15)(H)(ii)(b), and section 543, is responsible for adjudicating eligibility for H–2B classification. As in all cases, the burden rests with the petitioner to establish eligibility by a preponderance of the evidence. Accordingly, as noted above, where the petition lacks initial evidence, such as a properly completed attestation, DHS may deny the petition in accordance with 8 CFR 103.2(b)(8)(ii). Further, where the initial evidence submitted with the petition contains inconsistencies or is inconsistent with other evidence in the petition and underlying TLC, DHS may issue a Request for Evidence, Notice of Intent to Deny, or Denial in accordance with 8 CFR 103.2(b)(8). In addition, where it is determined that an H–2B petition filed pursuant to the FY 2017 Omnibus was granted erroneously, the H–2B petition approval may be revoked, *see* 8 CFR 214.2(h)(11).

Because of the unique circumstances of this regulation, and because the attestation plays a vital role in achieving the purposes of this regulation, DHS and DOL intend that the attestation requirement be non-severable from the remainder of the regulation. Thus, in the event the attestation requirement is enjoined or held invalid, the remainder of the regulation, with the exception of the retention requirements, is also intended to cease operation in the relevant jurisdiction, without prejudice to workers already present in the United States under this regulation, as consistent with law.

D. DHS Petition Procedures

To petition for H–2B workers under this rule, the petitioner must file a Petition for a Nonimmigrant Worker, Form-129 in accordance with applicable regulations and form instructions, and must submit the attestation described above. The attestation must be filed on Form ETA–9142–B–CAA, *Attestation for Employers Seeking to Employ H–2B Nonimmigrants Workers Under Section 543 of the Consolidated Appropriations Act,* which is attached to this rulemaking as Appendix A. *See* 20 CFR 655.64. Once a petitioner has completed the Form ETA–9142–B–CAA attestation, it must submit the attestation to USCIS along with an unexpired TLC. *See* new 8 CFR 214.2(h)(6)(x). A petitioner is required to retain a copy of such attestation and all supporting evidence for 3 years from the date the associated TLC was approved, consistent with 20 CFR 655.56 and 29 CFR 503.17. *See* new 20 CFR 655.65. Petitions submitted pursuant to the FY 2017 Omnibus will be processed in the order in which they were received. Petitioners may also choose to request premium processing of their petition under 8 CFR 103.8(e), which allows for expedited processing for an additional fee.

To encourage timely filing of any petition seeking a visa under the FY 2017 Omnibus, DHS is notifying the public that the petition may not be approved by USCIS on or after October 1, 2017. *See* new 8 CFR 214.2(h)(6)(x). Petitions not approved before October 1, 2017 will be denied and any fees will not be refunded. *See* new 8 CFR 214.2(h)(6)(x).

USCIS's current processing goals for H–2B petitions that can be adjudicated without the need for further evidence (*i.e.,* without a Request for Evidence or Notice of Intent to Deny) are 15 days for petitions requesting premium processing and 30 days for standard processing.[16] Given USCIS's processing goals for premium processing, DHS believes that 15 days from the end of the fiscal year is the minimum time needed for petitions to be adjudicated, although USCIS cannot guarantee that it will be sufficient time in all cases. Therefore, if the increase in the H–2B numerical limitation to 15,000 visas has not yet been reached, USCIS will begin rejecting petitions received after September 15, 2017. *See* new 8 CFR 214.2(h)(6)(x)(C).

As with other Form I–129 filings, DHS encourages petitioners to provide a duplicate copy of Form I–129 and all supporting documentation at the time of filing if the beneficiary is seeking a nonimmigrant visa abroad. Failure to submit duplicate copies may cause a delay in the issuance of a visa to otherwise eligible applicants.[17]

F. DOL Procedures

Because all employers are required to have an approved and valid TLC from DOL in order to file a Form I–129 petition with DHS in accordance with 8 CFR 214.2(h)(6)(iv)(A) and (D), employers with an approved TLC will have already conducted recruitment, as

[14] Pursuant to the statutory provisions governing enforcement of the H–2B program, INA section 214(c)(14), 8 U.S.C. 1184(c)(14), a violation exists under the H–2B program where there has been a willful misrepresentation of a material fact or a substantial failure to meet any of the terms and conditions. A substantial failure is a willful failure to comply that constitutes a significant deviation from the terms and conditions. *See, e.g.,* 29 CFR 503.19.

[15] DHS may publicly disclose information regarding the H–2B program consistent with applicable law and regulations.

[16] These processing goals are not binding on USCIS; depending on the evidence presented, actual processing times may vary from these 15- and 30-day periods.

[17] Petitioners should note that under section 543, the H–2B numerical increase relates to the total number of aliens who may receive a visa under section 101(a)(15)(H)(ii)(b) of the INA in this fiscal year.

set forth in 20 CFR 655.40–48, to determine whether U.S. workers are qualified and available to perform the work for which H–2B workers are sought. In addition to the recruitment already conducted, employers with current labor certification containing a start date of work before June 1, 2017, must conduct a fresh round of recruitment for U.S. workers. As noted in the 2015 H–2B comprehensive rule, U.S. workers seeking employment in these jobs typically do not search for work months in advance, and cannot make commitments about their availability for employment far in advance of the work. *See* 80 FR 24041, 24061, 24071. Given the 75–90 day labor certification process applicable in the H–2B program generally, employer recruitment typically occurs between 40 and 60 days before the start date of employment. Therefore, employers with TLCs containing a start date of work before June 1, 2017, likely began their recruitment around April 1, 2017, and likely ended it about April 20, 2017. In order to provide U.S. workers a realistic opportunity to pursue jobs for which employers will be seeking foreign workers under this rule, the Departments have determined that employers with start dates of work before June 1, 2017 have not conducted recent recruitment so that the Departments can reasonably conclude that there are *currently* an insufficient number of U.S. workers qualified and available to perform the work absent an additional, though abbreviated, recruitment attempt.

Therefore, employers with still valid TLCs with a start date of work before June 1, 2017, will be required to conduct additional recruitment, and attest that the recruitment will be conducted, as follows. The employer must place a new job order for the job opportunity with the State Workforce Agency (SWA), serving the area of intended employment. The job order must contain the job assurances and contents set forth in 20 CFR 655.18 for recruitment of U.S. workers at the place of employment, and remain posted for at least 5 days beginning not later than the next business day after submitting a petition for H–2B worker to USCIS. In addition, eligible employers will also be required to place one newspaper advertisement, which may be published on any day of the week, meeting the advertising requirements of 20 CFR 655.41, during the period of time the SWA is actively circulating the job order for intrastate clearance. Employers must retain the additional recruitment documentation, including a recruitment report that meets the requirements for recruitment reports set forth in 20 CFR 655.48(a)(1)(2) & (7), together with a copy of the attestation and supporting documentation, as described above, for a period of 3 years from the date that the TLC was approved, consistent with the document retention requirements under 20 CFR 655.56. These requirements are similar to those that apply to seafood employers who bring in additional workers between 90 and 120 days after their certified start date of need under 20 CFR 655.15(f).

The employer must hire any qualified U.S. worker who applies or is referred for the job opportunity until 2 business days after the last date on which the job order is posted. The two business day requirement permits an additional brief period of time to enable U.S. workers to contact the employer following the job order or newspaper advertisement. Consistent with 20 CFR 655.40(a), applicants can be rejected only for lawful job-related reasons.

DOL's Wage and Hour Division has the authority to investigate the employer's attestations, as the attestations are a required part of the H–2B petition process under this rule and the attestations rely on the employer's existing, approved TLC. Where a WHD investigation determines that there has been a willful misrepresentation of a material fact or a substantial failure to meet the required terms and conditions of the attestations, WHD may institute administrative proceedings to impose sanctions and remedies, including (but not limited to) assessment of a civil money penalty, recovery of wages due, make whole relief for any U.S. worker who has been improperly rejected for employment, laid off or displaced, or debarment for 1 to 5 years. *See* 29 CFR 503.19, 503.20. This regulatory authority is consistent with WHD's existing enforcement authority and is not limited by the expiration date of this rule. Therefore, in accordance with the documentation retention requirements at new 20 CFR 655.65, the petitioner must retain documents and records proving compliance with this rule, and must provide the documents and records upon request by DHS or DOL.

Petitioners must also comply with any other applicable laws in their recruitment, such as avoiding unlawful discrimination against U.S. workers based on their citizenship status or national origin. Specifically, the failure to recruit and hire qualified and available U.S. workers on account of such individuals' national origin or citizenship status may violate INA section 274B, 8 U.S.C. 1324b.

III. Statutory and Regulatory Requirements

A. Administrative Procedure Act

This rule is issued without prior notice and opportunity to comment and with an immediate effective date pursuant to the Administrative Procedure Act (APA). 5 U.S.C. 553(b) and (d).

1. Good Cause To Forgo Notice and Comment Rulemaking

The APA, 5 U.S.C. 553(b)(B), authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' The good cause exception for forgoing notice and comment rulemaking ''excuses notice and comment in emergency situations, or where delay could result in serious harm.'' *Jifry* v. *FAA,* 370 F.3d 1174, 1179 (D.C. Cir. 2004). Although the good cause exception is ''narrowly construed and only reluctantly countenanced,'' *Tenn. Gas Pipeline Co.* v. *FERC,* 969 F.2d 1141, 1144 (D.C. Cir. 1992), the Departments have appropriately invoked the exception in this case, for the reasons set forth below.

In this case, the Departments are bypassing advance notice and comment because of the exigency created by section 543 of the Consolidated Appropriations Act, 2017 (FY 2017 Omnibus), which went into effect on May 5, 2017 and expires on September 30, 2017. Because the statutory cap was reached in mid-March, USCIS stopped accepting H–2B petitions on March 13, 2017, and given high demand by American businesses for H–2B workers, and the short period of time remaining in the fiscal year for U.S. employers to avoid the economic harms described above, a decision to undertake notice and comment rulemaking would likely delay final action on this matter by weeks or months, and would therefore complicate and likely preclude the Departments from successfully exercising the authority in section 543.

Courts have found ''good cause'' under the APA when an agency is moving expeditiously to avoid significant economic harm to a program, program users, or an industry. Courts have held that an agency may use the good cause exception to address ''a serious threat to the financial stability of [a government] benefit program,'' *Nat'l Fed'n of Fed. Emps.* v. *Devine,* 671 F.2d 607, 611 (D.C. Cir. 1982), or to avoid ''economic harm and disruption'' to a given industry, which would likely result in higher consumer prices, *Am.*

Fed'n of Gov't Emps. v. *Block,* 655 F.2d 1153, 1156 (D.C. Cir. 1981).

Consistent with the above authorities, the Departments have bypassed notice and comment to prevent the ''serious economic harm to the H–2B community,'' including associated U.S. workers, that could result from ongoing uncertainty over the status of the numerical limitation, *i.e.,* the effective termination of the program through the remainder of FY 2017. *See Bayou Lawn & Landscape Servs.* v. *Johnson,* 173 F. Supp. 3d 1271, 1285 & n.12 (N.D. Fla. 2016). The Departments note that this action is temporary in nature, *see id.,*[18] and includes appropriate conditions to ensure that it affects only those businesses most in need.

2. Good Cause To Proceed With an Immediate Effective Date

The APA also authorizes agencies to make a rule effective immediately, upon a showing of good cause instead of imposing a 30-day delay. 5 U.S.C. 553(d)(3). The good cause exception to the 30-day effective date requirement is easier to meet than the good cause exception for foregoing notice and comment rulemaking. *Riverbend Farms, Inc.* v. *Madigan,* 958 F.2d 1479, 1485 (9th Cir. 1992); *Am. Fed'n of Gov't Emps., AFL–CIO* v. *Block,* 655 F.2d 1153, 1156 (D.C. Cir. 1981); *U.S. Steel Corp.* v. *EPA,* 605 F.2d 283, 289–90 (7th Cir. 1979). An agency can show good cause for eliminating the 30-day delayed effective date when it demonstrates urgent conditions the rule seeks to correct or unavoidable time limitations. *U.S. Steel Corp.,* 605 F.2d at 290; *United States* v. *Gavrilovic,* 511 F.2d 1099, 1104 (8th Cir. 1977). For the same reasons set forth above, we also conclude that the Departments have good cause to dispense with the 30-day effective date requirement given that this rule is necessary to prevent U.S. businesses from suffering irreparable harm and therefore causing significant economic disruption.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* (RFA), imposes certain requirements on Federal agency rules that are subject to the notice and comment requirements of the APA. *See* 5 U.S.C. 603(a), 604(a). This final rule is exempt from notice and comment requirements for the reasons stated above. Therefore, the requirements of the RFA applicable to final rules, 5 U.S.C. 604, do not apply to this final rule. Accordingly, the Departments are not required to either certify that the final rule would not have a significant economic impact on a substantial number of small entities or conduct a regulatory flexibility analysis.

C. Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 (UMRA) is intended, among other things, to curb the practice of imposing unfunded Federal mandates on State, local, and tribal governments. Title II of the Act requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may result in $100 million or more expenditure (adjusted annually for inflation) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector. The value equivalent of $100 million in 1995 adjusted for inflation to 2016 levels by the Consumer Price Index for All Urban Consumer (CPI–U) is $157 million.

This rule does not exceed the $100 million expenditure in any 1 year when adjusted for inflation ($157 million in 2016 dollars), and this rulemaking does not contain such a mandate. The requirements of Title II of the Act, therefore, do not apply, and the Departments have not prepared a statement under the Act.

D. Small Business Regulatory Enforcement Fairness Act of 1996

This temporary rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Act of 1996, Public Law 104–121, 804, 110 Stat. 847, 872 (1996), 5 U.S.C. 804(2). This rule has not been found to result in an annual effect on the economy of $100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic or export markets.

E. Executive Orders 12866 (Regulatory Planning and Review), 13563 (Improving Regulation and Regulatory Review), and 13771 (Reducing Regulation and Controlling Regulatory Costs)

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. Executive Order 13771 (''Reducing Regulation and Controlling Regulatory Costs'') directs agencies to reduce regulation and control regulatory costs.

The Office of Management and Budget (OMB) has determined that this rule is a ''significant regulatory action'' although not an economically significant regulatory action. Accordingly, OMB has reviewed this regulation. This regulation is exempt from Executive Order 13771. OMB considers this final rule to be an Executive Order 13771 deregulatory action.

1. Summary

With this final rule, DHS is authorizing up to an additional 15,000 visas for the remainder of FY 2017, pursuant to the FY 2017 Omnibus, to be available to certain U.S. businesses under the H–2B visa classification. By the authority given under the FY 2017 Omnibus, DHS is increasing the H–2B cap for the remainder of FY 2017 for those businesses that: (1) Show that there are an insufficient number of qualified U.S. workers to meet their needs in FY 2017; and (2) attest that their businesses are likely to suffer irreparable harm without the ability to employ the H–2B workers that are the subject of their petition. This final rule aims to help prevent such harm by allowing them to hire additional H–2B workers within FY 2017. Table 1 (below) provides a brief summary of the provision and its impact.

[18] Because the Departments have issued this rule as a temporary final rule, this rule—with the sole exception of the document retention requirements—will be of no effect after September 30, 2017, even if Congress includes an authority similar to section 543 in a subsequent act of Congress.

TABLE 1—SUMMARY OF PROVISION AND IMPACT

Current provision	Changes resulting from the proposed provisions	Expected cost of the proposed provision	Expected benefit of the proposed provision
The current statutory cap limits H–2B visa allocations by 66,000 workers a year.	The amended provisions would allow for up to 15,000 additional H–2B visas for the remainder of the fiscal year.	• The total estimated cost to file Form I–129 would be $1,502,984 (rounded) if human resource specialists file, $2,216,881 (rounded) if in-house lawyers file, and $3,042,989 (rounded) if outsourced lawyers file. • If a Form I–907 is submitted as well, the total estimated cost to file for Form I–907 would be a maximum of $2,867,398 if human resource specialists file, $2,927,882 if in-house lawyers file, and $3,008,243 if outsourced lawyers file. • DHS may incur some additional adjudication costs as more applicants may file Form I–129. However, these additional costs are expected to be covered by the fees paid for filing the form	• Eligible petitioners would be able to hire the temporary workers needed to prevent their businesses from suffering irreparable harm. • U.S. employees of these businesses would avoid harm.
	Petitioners would also be required to fill out newly created Form ETA–9142–B–CAA, Attestation for Employers Seeking to Employ H–2B Nonimmigrants Workers Under Section 543 of the Consolidated Appropriations Act.	• The total estimated cost to petitioners to complete and file ETA–9142–B–CAA is $1,597,426.	• Serves as initial evidence to DHS that the petitioner meets the irreparable harm standard.

Source: USCIS and DOL analysis.

2. Background and Purpose of the Rule

The H–2B visa classification program was designed to serve U.S. businesses that are unable to find a sufficient number of qualified U.S. workers to perform nonagricultural work of a temporary or seasonal nature. For an H–2B nonimmigrant worker to be admitted into the United States under this visa classification, the hiring employer is required to: (1) Receive a TLC from DOL and (2) file a Form I–129 with DHS. The temporary nature of the services or labor described on the approved TLC is subject to DHS review during adjudication of Form I–129.[19] Up to 33,000 aliens may be issued H–2B visas or provided H–2B nonimmigrant status in the first half of a fiscal year, and the remaining annual allocation will be available for employers seeking to hire H–2B workers during the second half of the fiscal year.[20] Any unused numbers from the first half of the fiscal year will be available for employers seeking to hire H–2B workers during the second half of the fiscal year. However, any unused H–2B numbers from one fiscal year do not carry over into the next and will therefore not be made available.[21]

The H–2B cap for the second half of FY 2017 was reached on March 13, 2017. Normally, once the H–2B cap has been reached, petitioners must wait until the next half of the fiscal year, or the beginning of the next fiscal year, for additional visas to become available. However, on May 5, 2017, the President signed the FY 2017 Omnibus that contains a provision (Sec. 543 of Div. F) authorizing the Secretary of Homeland Security, under certain circumstances, to increase the number of H–2B visas available to U.S. employers, notwithstanding the established statutory numerical limitation. After consulting with the Secretary of Labor, the Secretary of the Homeland Security has determined it is appropriate to exercise his discretion and raise the H–2B cap by up to an additional 15,000 visas for the remainder of FY 2017 for those businesses who would qualify under certain circumstances.

3. Population

This temporary rule would impact those employers who file Form I–129 on behalf of the nonimmigrant worker they seek to hire under the H–2B visa program. More specifically, this rule would impact those employers who could establish that their business is likely to suffer irreparable harm because they cannot employ the H–2B workers requested on their petition in this fiscal year. Due to the temporary nature of this rule and the limited time left for these additional visas to be available, DHS believes it is more reasonable to assume that eligible petitioners for these additional 15,000 visas will be those employers that have already completed the steps to receive an approved TLC prior to the issuance of this rule.[22] According to DOL OFLC's certification data for FY 2017, there were about 4,174 H–2B certifications with expected work start dates between April 1 and September 30, 2017. However, many of these certifications have already been filled under the existing cap. Of the 4,174 certifications, we estimated that

[19] Revised effective 1/18/2009; 73 FR 78104.

[20] *See* INA section 214(g)(1)(B), 8 U.S.C. 1184(g)(1)(B), INA section 214(g)(10) and 8 U.S.C. 1184(g)(10).

[21] A TLC approved by the Department of Labor must accompany an H–2B petition. The employment start date stated on the petition generally must match the start date listed on the TLC. *See* 8 CFR 214.2(h)(6)(iv)(A) and (D).

[22] Note that as in the standard H–2B visa issuance process, petitioning employers must still apply for a temporary labor certification and receive approval from DOL before submitting the Form I–129 petition with USCIS.

1,876 certifications would have been filled with the second semi-annual statutory cap of 33,000 visas.[23] We believe that the remaining certifications of 2,298 (= 4,174 − 1,876) represents the pool of employers with approved certifications that may apply for additional H–2B workers under this rule, and therefore serves as a reasonable proxy for the number of petitions we may receive under this rule.[24]

4. Cost-Benefit Analysis

The costs for this form include filing costs and the opportunity costs of time to complete and file the form. The current filing fee for Form I–129 is $460 and the estimated time needed to complete and file Form I–129 for H–2B classification is 4.26 hours.[25] The time burden of 4.26 hours for Form I–129 also includes the time to file and retain documents. The application must be filed by a U.S. employer, a U.S. agent, or a foreign employer filing through the U.S. agent. 8 CFR 214.2(h)(2). Due to the expedited nature of this rule, DHS was unable to obtain data on the number of Form I–129 H–2B applications filed directly by a petitioner and those that are filed by a lawyer on behalf of the petitioner. Therefore, DHS presents a range of estimated costs including if only human resource (HR) specialists file Form I–129 or if only lawyers file Form I–129.[26] Further, DHS presents cost estimates for lawyers filing on behalf of applicants based on whether all Form I–129 applications are filed by in-house lawyers or by outsourced lawyers.[27] DHS presents an estimated range of costs assuming that only HR specialists, in-house lawyers, or outsourced lawyers file these forms, though DHS recognizes that it is likely that filing will be conducted by a combination of these different types of filers.

To estimate the total opportunity cost of time to petitioners who complete and file Form I–129, DHS uses the mean hourly wage rate of HR specialists of $31.20 as the base wage rate.[28] If applicants hire an in-house or outsourced lawyer to file Form I–129 on their behalf, DHS uses the mean hourly wage rate of $67.25 as the base wage rate.[29] Using the most recent Bureau of Labor Statistics (BLS) data, DHS calculated a benefits-to-wage multiplier of 1.46 to estimate the full wages to include benefits such as paid leave, insurance, and retirement.[30] DHS multiplied the average hourly U.S. wage rate for HR specialists and for in-house lawyers by the benefits-to-wage multiplier of 1.46 to estimate the full cost of employee wages. The total per hour wage is $45.55 for an HR specialist and $98.19 for an in-house lawyer.[31] In addition, DHS recognizes that an entity may not have in-house lawyers and therefore, seek outside counsel to complete and file Form I–129 on behalf of the petitioner. Therefore, DHS presents a second wage rate for lawyers labeled as outsourced lawyers. DHS estimates the total per hour wage is $168.13 for an outsourced lawyer.[32] [33] If a lawyer submits Form I–129 on behalf of the petitioner, Form G–28 (Notice of Entry of Appearance as Attorney or Accredited Representative), must accompany the Form I–129 submission.[34] DHS estimates the time burden to complete and submit Form G–28 for a lawyer is 53 minutes (0.88 hour, rounded). For this analysis, DHS adds the time to complete Form G–28 to the opportunity cost of time to lawyers for filing Form I–129 on behalf of a petitioner. Therefore, the total opportunity cost of time for an HR specialist to complete and file Form I–129 is $194.04, for an in-house lawyer to complete and file is $504.70, and for an outsourced lawyer to complete and file is $864.19.[35] The total cost, including filing fee and opportunity costs of time, per petitioner to file Form I–129 is $654.04 if HR specialists file, $964.70 if an in-house lawyer files, and $1,324.19 if an outsourced lawyer files the form.[36]

(a) Cost to Petitioners

As mentioned in *Section 3,* the population impacted by this rule is the 2,298 petitioners who may apply for up to 15,000 additional H–2B visas for the remainder of FY 2017. Based on the previously presented total filing costs per petitioner, DHS estimates the total cost to file Form I–129 is $1,502,984 (rounded) if HR specialists file, $2,216,881 (rounded) if in-house lawyers file, and $3,042,989 (rounded) if outsourced lawyers file.[37] DHS

[23] DOL approved a total of 4,174 certifications for 73,424 H–2B positions with work start date between April and September in 2017. Therefore, we estimated that the average number of H–2B positions per certification is 17.59 (= 73,424/4,174) and the number of certifications that would have been filled with the second semi-annual statutory cap of 33,000 is 1,876 (= 33,000/17.59).

[24] The preamble of this rule explains how DHS established 15,000 as the number of H–2B visas to be made available for the remainder of the fiscal year. Based on the FY 2016 returning workers program, the USCIS Service Center Operations Directorate estimates that approximately 1,538 petitions were associated with the 18,090 returning workers discussed in the preamble of this rule. For consistency and to provide a reasonable estimate for the number of possible petitioners, USCIS uses the 2,298 petitioners based on the DOL OFLC's certification data in FY 2017.

[25] The public reporting burden for this form is 2.26 hours for Form I–129 and an additional 2 hours for H Classification Supplement. *See* Form I–129 instructions at *https://www.uscis.gov/i-129.*

[26] For the purposes of this analysis, DHS assumes a human resource specialist or some similar occupation completes and files these forms as the employer or petitioner who is requesting the H–2B worker. However, DHS understands that not all entities have human resources departments or occupations and, therefore, recognizes equivalent occupations may prepare these petitions.

[27] For the purposes of this analysis, DHS adopts the terms ''in-house'' and ''outsourced'' lawyers as they were used in the DHS, U.S. Immigration and Customs Enforcement (ICE) analysis, ''Final Small Entity Impact Analysis: Safe-Harbor Procedures for Employers Who Receive a No-Match Letter'' at G–4 (posted Nov. 5, 2008), *available at http://www.regulations.gov/#!documentDetail;D=ICEB-2006-0004-0922.* The DHS ICE analysis highlighted the variability of attorney wages and was based on information received in public comment to that rule. We believe the distinction between the varied wages among lawyers is appropriate for our analysis.

[28] U.S. Department of Labor, Bureau of Labor Statistics, *Occupational Employment Statistics, May 2016, Human Resources Specialist: http://www.bls.gov/oes/current/oes131071.htm.*

[29] U.S. Department of Labor, Bureau of Labor Statistics. May 2016 National Occupational Employment and Wage Estimates, Mean Hourly Wage (23–1011 Lawyers), *available at https://www.bls.gov/oes/current/oes231011.htm.*

[30] The benefits-to-wage multiplier is calculated as follows: (Total Employee Compensation per hour)/(Wages and Salaries per hour). *See* Economic News Release, U.S. Department of Labor, Bureau of Labor Statistics, Table 1. Employer costs per hour worked for employee compensation and costs as a percent of total compensation: Civilian workers, by major occupational and industry group (June 2016), *available at http://www.bls.gov/news.release/pdf/ecec.pdf.*

[31] Calculation for the total wage of an HR specialist: $31.20 × 1.46 = $45.55 (rounded). Calculation for the total wage of an in-house lawyer: $67.25 × 1.46 = $98.19 (rounded).

[32] *Calculation:* Average hourly wage rate of lawyers × Benefits-to-wage multiplier for outsourced lawyer = $67.25 × 2.5 = $168.125 = $168.13.

[33] The DHS ICE ''Safe-Harbor Procedures for Employers Who Receive a No-Match Letter'' used a multiplier of 2.5 to convert in-house attorney wages to the cost of outsourced attorney based on information received in public comment to that rule. We believe the explanation and methodology used in the Final Small Entity Impact Analysis remains sound for using 2.5 as a multiplier for outsourced labor wages in this rule, *see* page G–4 [Sept. 1, 2015] [*http://www.regulations.gov/#!documentDetail;D=ICEB-2006-0004-0922*].

[34] USCIS, *Filing Your Form G–28, https://www.uscis.gov/forms/filing-your-form-g-28.*

[35] Calculation if an HR specialist files: $45.55 × (4.26 hours) = $194.04 (rounded); Calculation if an in-house lawyer files: $98.19 × (4.26 hours to file Form I–129 H2B + 0.88 hour to file Form G–28) = $504.70 (rounded); Calculation if an outsourced lawyer files: $168.13 × (4.26 hours to file Form I–129 H2B + 0.88 hour to file Form G–28) = $864.19 (rounded).

[36] Calculation if an HR specialist files: $194.04 + $460 (filing fee) = $654.04; Calculation if an in-house lawyer files: $504.70 + $460 (filing fee) = $964.70; Calculation if outsourced lawyer files: $864.19 + $460 (filing fee) = $1,324.19.

[37] Calculation if HR specialist files: $654.04 × 2,298 (population applying for H–2B visas) = $1,502,983.92 = $1,502,984 (rounded); Calculation

Continued

recognizes that not all Form I–129 applications are likely to be filed by only one type of filer and cannot predict how many applications would be filed by each type of filer. Therefore, DHS estimates that the total cost to file Form I–129 could range from $1,502,984 (rounded) to $3,042,989 (rounded) depending on the combination of applications filed by each type of filer.

(1) Form I–907

Employers may use Form I–907, Request for Premium Processing Service, to request faster processing of their Form I–129 petitions for H–2B visas. The filing fee for Form I–907 is $1,225 and the time burden for completing the form is 0.5 hours. Using the wage rates established previously, the opportunity cost of time is $22.78 for an HR specialist to file Form I–907, $49.10 for an in-house lawyer to file, and $84.07 for an outsourced lawyer to file.[38] Therefore, the total filing cost to complete and file Form I–907 per petitioner is $1,247.78 if HR specialists file, $1,274.10 if in-house lawyers file, and $1,309.07 if outsourced lawyers file.[39] Due to the expedited nature of this rule, DHS was unable to obtain data on the average percentage of Form I–907 applications that were submitted with Form I–129 H–2B petitions. Table 2 (below) shows the range of percentages of the 2,298 petitioners who may also request their Form I–129 adjudications be premium processed as well as the estimated total cost of filing Form I–907. DHS anticipates that most, if not all, of the additional 2,298 Form I–129 petitions will be requesting premium processing due to the limited time between the publication of this rule and the end of the fiscal year. Further, as shown in table 2, the total estimated cost to complete and file a request for premium processing (Form I–907) when submitted with Form I–129 on behalf of an H–2B worker is a maximum of $2,867,398 if human resources specialists file, $2,927,882 if in-house lawyers file, and $3,008,243 if outsourced lawyers file.

TABLE 2—TOTAL COST OF FILING FORM I–907 UNDER THE H–2B VISA PROGRAM

Percent of filers requesting premium processing [a]	Number of filers requesting premium processing [b]	Total cost to filers [c]		Outsourced lawyer ($)
		Human resources specialist ($)	In-house lawyer ($)	
25	575	716,850	731,970	752,061
50	1,149	1,433,699	1,463,941	1,504,121
75	1,724	2,150,549	2,195,911	2,256,182
90	2,068	2,580,659	2,635,094	2,707,419
95	2,183	2,724,029	2,781,488	2,857,831
100	2,298	2,867,398	2,927,882	3,008,243

Notes:
[a] Assumes that all 15,000 additional H–2B visas will be filled by 2,298 petitioners.
[b] Numbers and dollar amounts are rounded to the nearest whole number.
[c] Calculation: (Total cost per filer of Form I–907) × Number of filers who request premium processing = Total cost to filer (rounded to the nearest dollar).
Source: USCIS analysis.

(2) Attestation Requirements

The remaining provisions of this rule include a new form for applicants, Form ETA–9142–B–CAA–Attestation for Admission of H–2B Workers, attached to this rulemaking as Appendix A.

The new attestation form includes new recruiting requirements, the irreparable harm standard, and document retention obligations. DOL estimates the time burden for completing and signing the form is 0.25 hour and 1 hour for retaining documents and records relating to recruitment. The petitioner must retain documents and records of a new job order for the job opportunity placed with the State Workforce Agency (SWA) and one newspaper advertisement. DOL estimates that it would take up to one hour to file and retain documents and records relating to recruitment. Using the total per hour wage for an HR specialist ($45.55), the opportunity cost of time for an HR specialist to complete the new attestation form and to retain documents relating to recruitment is $56.94.[40]

Additionally, the new form requires that the petitioner assess and document supporting evidence for meeting the irreparable harm standard, and retain those documents and records, which we assume will require the resources of a financial analyst (or another equivalent occupation). Using the same methodology previously described for wages, the total per hour wage for a financial analyst is $68.53.[41] DOL estimates the time burden for these tasks is at least 4 hours and 1 hour for gathering and retaining documents and records. Therefore, the total opportunity costs of time for a financial analyst to assess, document, and retain supporting evidence is $342.65.[42]

As discussed previously, we believe that the estimated 2,298 remaining unfilled certifications for the latter half of FY 2017 would include all potential employers who might request to employ H–2B workers under this rule. This number of certifications is a reasonable proxy for the number of employers who may need to review and sign the attestation. Using this estimate for the total number of certifications, DOL

if an in-house lawyer files: $964.70 × 2,298 (population applying for H–2B visas) = $2,216,880.60 = $2,216,881 (rounded); Calculation if an outsourced lawyer files: $1,324.19 × 2,298 (population applying for H–2B visas) = $3,042,988.62 = $3,042,989 (rounded).

[38] Calculation if an HR specialist files: $45.55 × (0.5 hours) = $22.78 (rounded); Calculation if an in-house lawyer files: $98.19 × (0.5 hours) = $49.10 (rounded); Calculation if an outsourced lawyer files: $168.13 × (0.5 hours) = $84.07 (rounded).

[39] Calculation if an HR specialist files: $22.78 + $1,225 = $1,247.78; Calculation if an in-house lawyer files: $49.10 + $1,225 = 1,274.10; Calculation if outsourced lawyer files: $84.07 + $1,225 = $1,309.07.

[40] Calculation: $45.55 (total per hour wage for an HR specialist) × 1.25 (time burden for the new attestation form and retaining recruitment documentation) = $56.94.

[41] Calculation: $46.94 (total per hour wage for a financial analyst, based on BLS wages) × 1.46 (benefits-to-wage multiplier) = $68.53. U.S. Department of Labor, Bureau of Labor Statistics, *Occupational Employment Statistics, May 2016, Financial Analysts: http://www.bls.gov/oes/current/oes132051.htm.*

[42] Calculation: $68.53 (total per hour wage for a financial analyst) × 5 hours (time burden for assessing, documenting and retention of supporting evidence demonstrating the employer is likely to suffer irreparable harm) = $342.65.

estimates that the cost for HR specialists is $130,842 and for financial analysts is $787,410 (rounded).[43] The total cost is estimated to be $918,252.[44]

Employers will place a new job order for the job opportunity with the SWA serving the area of intended employment for at least 5 days beginning no later than the next business day after submitting a petition for an H–2B worker and the attestation to USCIS. DOL estimates that an HR specialist (or another equivalent occupation) would spend 1 hour to prepare a new job order and submit it to the SWA.[45] DOL estimates the total cost of placing a new job order is $104,674.[46]

Employers will also place one newspaper advertisement during the period of time the SWA is actively circulating the job order for intrastate clearance. DOL estimates that a standard job listing in an online edition of a newspaper is $250.[47] The total cost associated with one online newspaper job listing is $574,500.[48]

Therefore, the total cost for the new attestation form is estimated to be $1,597,426.[49]

(b) Cost to the Federal Government

DHS anticipates some additional costs in adjudicating the additional petitions submitted as a result of the increase in cap limitation for H–2B visas. However, DHS expects these costs to be covered by the fees associated with the forms.

(c) Benefits to Petitioners

The inability to access H–2B workers for these entities may cause their businesses to suffer irreparable harm. Temporarily increasing the number of available H–2B visas for this fiscal year may allow some businesses to hire the additional labor resources necessary to avoid such harm. Preventing such harm may ultimately rescue the jobs of any other employees (including U.S. employees) at that establishment.

F. Executive Order 13132 (Federalism)

This rule does not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order No. 13132, 64 FR 43,255 (Aug. 4, 1999), this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

G. Executive Order 12988 (Civil Justice Reform)

This rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order No. 12988, 61 FR 4729 (Feb. 5, 1996).

H. National Environmental Policy Act

DHS analyzes actions to determine whether NEPA applies to them and if so what degree of analysis is required. DHS Directive (Dir) 023–01 Rev. 01 establishes the procedures that DHS and its components use to comply with NEPA and the Council on Environmental Quality (CEQ) regulations for implementing NEPA, 40 CFR parts 1500 through 1508. The CEQ regulations allow federal agencies to establish, with CEQ review and concurrence, categories of actions (''categorical exclusions'') which experience has shown do not individually or cumulatively have a significant effect on the human environment and, therefore, do not require an Environmental Assessment (EA) or Environmental Impact Statement (EIS). 40 CFR 1507.3(b)(1)(iii), 1508.4. DHS Instruction 023–01 Rev. 01 establishes such Categorical Exclusions that DHS has found to have no such effect. Dir. 023–01 Rev. 01 Appendix A Table 1. For an action to be categorically excluded, DHS Instruction 023–01 Rev. 01 requires the action to satisfy each of the following three conditions: (1) The entire action clearly fits within one or more of the Categorical Exclusions; (2) the action is not a piece of a larger action; and (3) no extraordinary circumstances exist that create the potential for a significant environmental effect. Inst. 023–01 Rev. 01 section V.B (1)–(3).

This rule temporarily amends the regulations implementing the H–2B nonimmigrant visa program to increase the numerical limitation on H–2B nonimmigrant visas for the remainder of FY 2017 based on the Secretary of Homeland Security's determination, in consultation with the Secretary of Labor, consistent with the FY 2017 Omnibus. Generally, a rule which changes the number of visas which can be issued has no impact on the environment and any attempt to analyze that impact would be largely, if not completely, speculative. The Departments cannot estimate with reasonable certainty which employers will successfully petition for employees in what locations and numbers. At most, however, it is reasonably foreseeable that an increase of up to15,000 visas may be issued for temporary entry into the United States in diverse industries and locations. For purposes of the cost estimates contained in the economic analysis above, DHS bases its calculations on the assumption that all 15,000 will be issued. Even making that assumption, with a current U.S. population in excess of 323 million and a U.S. land mass of 3.794 million square miles, this is insignificant by any measure.

DHS has determined that this rule does not individually or cumulatively have a significant effect on the human environment and it thus would fit within one categorical exclusion under Environmental Planning Program, DHS Instruction 023–01 Rev. 01, Appendix A, Table 1. Specifically, the rule fits within Categorical Exclusion number A3(d) for rules that interpret or amend an existing regulation without changing its environmental effect.

This rule maintains the current human environment by helping to prevent irreparable harm to certain U.S. businesses and to prevent a significant adverse effect on the human environment that would likely result from loss of jobs and income. With the exception of recordkeeping requirements, this rulemaking terminates after September 30, 2017; it is not part of a larger action and presents no extraordinary circumstances creating the potential for significant environmental effects. No further NEPA analysis is required.

I. Paperwork Reduction Act

The Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.,* provides that a Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally

[43] Calculations: Cost for HR Specialists: $45.55 (total per hour wage for an HR specialist) × 2,298 certifications × 1.25 hours = $130,842. Cost for Financial Analysts: $68.53 (total per hour wage for a financial analyst) × 2,298 certifications × 5 hours = $787,410.

[44] Calculation: $130,842 (total cost for HR specialists) + $787,410 (total cost for financial analysts) = $918,252.

[45] The job order must address the content requirements at 20 CFR 655.18, consistent with new requirements contained in the 2016 Department of Labor Appropriations Act (Division H, Title I of Pub. L. 114–113) (2016 DOL Appropriations Act), which was enacted on December 18, 2015.

[46] Calculation: $45.55 (total per hour wage for an HR specialist) × 2,298 certifications × 1 hour (time burden for placing a job order with the SWA) = $104,674.

[47] Source: The Washington Post, Online Only Job Listings (35 days), page 4 available at: *https://www.washingtonpost.com/wp-stat/ad/public/static/media_kit/16-3729-01-jobs.pdf.*

[48] Calculation: $250 (cost of one online newspaper job listing) × 2,298 certifications = $574,500.

[49] Calculation: $918,252 (total cost for HR specialists and financial analysts) + $104,674 (total cost to place job order with State Workforce Agency) + $574,500 (total cost to place online newspaper job listings) = $1,597,426.

not required to respond to an information collection, unless it is approved by OMB under the PRA and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid Control Number. *See* 5 CFR 1320.5(a) and 1320.6. DOL has submitted the Information Collection Request (ICR) contained in this rule to OMB and obtained approval using emergency clearance procedures outlined at 5 CFR 1320.13. The Departments note that while DOL submitted the ICR, both DHS and DOL will use the information.

More specifically, this rule includes a new form (*Attestation for Employers Seeking to Employ H–2B Nonimmigrants Workers Under Section 543 of the Consolidated Appropriations Act,* Form ETA–9142–B–CAA) for petitioners to submit to DHS, and that petitioners will use to make the irreparable harm attestation described above. The petitioner would file the attestation with DHS. In addition, the petitioner may need to advertise the positions. Finally, the petitioner will need to retain documents and records proving compliance with this implementing rule, and must provide the documents and records to DHS and DOL staff in the event of an audit or investigation. The information collection requirements associated with this rule are summarized as follows:

Agency: DOL–ETA.

Type of Information Collection: New collection.

Title of the Collection: H–2B Nonimmigrants Workers Under Section 543 of the Consolidated Appropriations Act.

Agency Form Number: ETA–9142–B–CAA.

Affected Public: Private Sector—businesses or other for-profits.

Total Estimated Number of Respondents: 2,298.

Average Responses per Year per Respondent: 1.

Total Estimated Number of Responses: 2,298.

Average Time per Response: 6.25 hours per application.

Total Estimated Annual Time Burden: 14,363 hours.

Total Estimated Other Costs Burden: $679,174.

List of Subjects

8 CFR Part 214

Administrative practice and procedure, Aliens, Cultural exchange programs, Employment, Foreign officials, Health professions, Reporting and recordkeeping requirements, Students.

20 CFR Part 655

Administrative practice and procedure, Employment, Employment and training, Enforcement, Foreign workers, Forest and forest products, Fraud, Health professions, Immigration, Labor, Longshore and harbor work, Migrant workers, Nonimmigrant workers, Passports and visas, Penalties, Reporting and recordkeeping requirements, Unemployment, Wages, Working conditions.

Department of Homeland Security

8 CFR Chapter I

For the reasons discussed in the joint preamble, part 214 of chapter I of title 8 of the Code of Federal Regulations is amended as follows:

PART 214—NONIMMIGRANT CLASSES

■ 1. The authority citation for part 214 continues to read as follows:

Authority: 8 U.S.C. 1101, 1102, 1103, 1182, 1184, 1186a, 1187, 1221, 1281, 1282, 1301–1305 and 1372; sec. 643, Pub. L. 104–208, 110 Stat. 3009–708; Public Law 106–386, 114 Stat. 1477–1480; section 141 of the Compacts of Free Association with the Federated States of Micronesia and the Republic of the Marshall Islands, and with the Government of Palau, 48 U.S.C. 1901 note and 1931 note, respectively; 48 U.S.C. 1806; 8 CFR part 2.

■ 2. Effective July 19, 2017 through September 30, 2017, amend § 214.2 by adding paragraph (h)(6)(x) to read as follows:

§ 214.2 Special requirements for admission, extension, and maintenance of status

* * * * *

(h) * * *

(6) * * *

(x) *Special requirements for additional cap allocations under the Consolidated Appropriations Act, 2017, Public Law 115–31*—(A) *Public Law 115–31.* Notwithstanding the numerical limitations set forth in paragraph (h)(8)(i)(C) of this section, for fiscal year 2017 only, the Secretary has authorized up to an additional 15,000 aliens who may receive H–2B nonimmigrant visas pursuant to section 543 of the Consolidated Appropriations Act, 2017, Public Law 115–31. Notwithstanding § 248.2 of this part, an alien may not change status to H–2B nonimmigrant under this provision.

(B) *Eligibility.* In order to file a petition with USCIS under this paragraph (h)(6)(x), the petitioner must:

(1) Comply with all other statutory and regulatory requirements for H–2B classification, including requirements in this section, under part 103 of this chapter, and under parts 655 of Title 20 and 503 of Title 29; and

(2) Submit to USCIS, at the time the employer files its petition, a U.S. Department of Labor attestation, in compliance with 20 CFR 655.64, evidencing that without the ability to employ all of the H–2B workers requested on the petition filed pursuant to this paragraph (h)(6)(x), its business is likely to suffer irreparable harm (that is, permanent and severe financial loss), and that the employer will provide documentary evidence of this fact to DHS or DOL upon request.

(C) *Processing.* USCIS will reject petitions filed pursuant to this paragraph (h)(6)(x) that are received after the numerical limitation has been reached or after September 15, 2017, whichever is sooner. USCIS will not approve a petition filed pursuant to this paragraph (h)(6)(x) on or after October 1, 2017.

(D) *Sunset.* This paragraph (h)(6)(x) expires on October 1, 2017.

(E) *Non-severability.* The requirement to file an attestation under paragraph (h)(6)(x)(B)(*2*) of this section is intended to be non-severable from the remainder of this paragraph (h)(6)(x); in the event that paragraph (h)(6)(x)(B)(*2*) is enjoined or held to be invalid by any court of competent jurisdiction, this paragraph (h)(6)(x) is also intended to be enjoined or held to be invalid in such jurisdiction, without prejudice to workers already present in the United States under this regulation, as consistent with law.

* * * * *

Department of Labor

Accordingly, for the reasons stated in the joint preamble, 20 CFR part 655 is amended as follows:

Title 20—Employees' Benefits

PART 655—TEMPORARY EMPLOYMENT OF FOREIGN WORKERS IN THE UNITED STATES

■ 3. The authority citation for part 655 continues to read as follows:

Authority: Section 655.0 issued under 8 U.S.C. 1101(a)(15)(E)(iii), 1101(a)(15)(H)(i) and (ii), 8 U.S.C. 1103(a)(6), 1182(m), (n) and (t), 1184(c), (g), and (j), 1188, and 1288(c) and (d); sec. 3(c)(1), Pub. L. 101–238, 103 Stat. 2099, 2102 (8 U.S.C. 1182 note); sec. 221(a), Pub. L. 101–649, 104 Stat. 4978, 5027 (8 U.S.C. 1184 note); sec. 303(a)(8), Pub. L. 102–232, 105 Stat. 1733, 1748 (8 U.S.C. 1101 note); sec. 323(c), Pub. L. 103–206, 107 Stat. 2428; sec. 412(e), Pub. L. 105–277, 112 Stat.

2681 (8 U.S.C. 1182 note); sec. 2(d), Pub. L. 106–95, 113 Stat. 1312, 1316 (8 U.S.C. 1182 note); 29 U.S.C. 49k; Pub. L. 107–296, 116 Stat. 2135, as amended; Pub. L. 109–423, 120 Stat. 2900; 8 CFR 214.2(h)(4)(i); and 8 CFR 214.2(h)(6)(iii).

Subpart A issued under 8 CFR 214.2(h).

Subpart B issued under 8 U.S.C. 1101(a)(15)(H)(ii)(a), 1184(c), and 1188; and 8 CFR 214.2(h).

Subparts F and G issued under 8 U.S.C. 1288(c) and (d); sec. 323(c), Pub. L. 103–206, 107 Stat. 2428; and 28 U.S.C. 2461 note, Pub. L. 114–74 at section 701.

Subparts H and I issued under 8 U.S.C. 1101(a)(15)(H)(i)(b) and (b)(1), 1182(n) and (t), and 1184(g) and (j); sec. 303(a)(8), Pub. L. 102–232, 105 Stat. 1733, 1748 (8 U.S.C. 1101 note); sec. 412(e), Pub. L. 105–277, 112 Stat. 2681; 8 CFR 214.2(h); and 28 U.S.C. 2461 note, Pub. L. 114–74 at section 701.

Subparts L and M issued under 8 U.S.C. 1101(a)(15)(H)(i)(c) and 1182(m); sec. 2(d), Pub. L. 106–95, 113 Stat. 1312, 1316 (8 U.S.C. 1182 note); Pub. L. 109–423, 120 Stat. 2900; and 8 CFR 214.2(h).

■ 4. Effective July 19, 2017 through September 30, 2017, add § 655.64 to read as follows:

§ 655.64 Special Eligibility Provisions for Fiscal Year 2017 under the Consolidated Appropriations Act.

An employer filing a petition with USCIS under 8 CFR 214.2(h)(6)(x) to employ H–2B workers from July 19, 2017 through September 15, 2017 must meet the following requirements:

(a) The employer must attest on Form ETA–9142–B–CAA that without the ability to employ all of the H–2B workers requested on the petition filed pursuant to 8 CFR 214.2(h)(6)(x), its business is likely to suffer irreparable harm (that is, permanent and severe financial loss), and that the employer will provide documentary evidence of this fact to DHS or DOL upon request.

(b) An employer with a start date of work before June 1, 2017 on its approved Temporary Labor Certification, must conduct additional recruitment of U.S. workers as follows:

(1) The employer must place a new job order for the job opportunity with the State Workforce Agency, serving the area of intended employment. The job order must contain the job assurances and contents set forth in 20 CFR 655.18 for recruitment of U.S. workers at the place of employment, and remain posted for at least 5 days beginning not later than the next business day after submitting a petition for H–2B worker(s); and

(2) The employer must place one newspaper advertisement on any day of the week meeting the advertising requirements of 20 CFR 655.41, during the period of time the State Workforce Agency is actively circulating the job order for intrastate clearance; and

(3) The employer must hire any qualified U.S. worker who applies or is referred for the job opportunity until 2 business days after the last date on which the job order is posted under paragraph (c)(1) of this section. Consistent with 20 CFR 655.40(a), applicants can be rejected only for lawful job-related reasons.

(c) This section expires on October 1, 2017.

(d) *Non-severability.* The requirement to file an attestation under paragraph (a) of this section is intended to be non-severable from the remainder of this section; in the event that paragraph (a) is enjoined or held to be invalid by any court of competent jurisdiction, the remainder of this section is also intended to be enjoined or held to be invalid in such jurisdiction, without prejudice to workers already present in the United States under this regulation, as consistent with law.

■ 3. Effective July 19, 2017 through September 30, 2020, add § 655.65 to read as follows:

§ 655.65 Special Document Retention Provisions for Fiscal Years 2017 through 2020 under the Consolidated Appropriations Act.

(a) An employer that files a petition with USCIS to employ H–2B workers in fiscal year 2017 under authority of the temporary increase in the numerical limitation under Public Law 115–31 must maintain for a period of 3 years from the date of certification, consistent with 20 CFR 655.56 and 29 CFR 503.17, the following:

(1) A copy of the attestation filed pursuant to regulations governing that temporary increase;

(2) Evidence establishing that employer's business is likely to suffer irreparable harm (that is, permanent and severe financial loss), if it cannot employ H–2B nonimmigrant workers in fiscal year 2017;

(3) If applicable, evidence of additional recruitment and a recruitment report that meets the requirements set forth in 20 CFR 655.48(a)(1), (2), and (7).

DOL or DHS may inspect these documents upon request.

(b) This section expires on October 1, 2020.

John F. Kelly,

Secretary of Homeland Security.

Alexander Acosta,

Secretary of Labor.

Appendix A

Attestation for Employers Seeking To Employ H–2B Nonimmigrant Workers Under Section 543 of the Consolidated Appropriations Act, 2017 Public Law 115–31 (May 5, 2017)

By virtue of my signature below, I *hereby certify* that the following is true and correct:

(A) I am an employer with an approved labor certification from the Department of Labor seeking permission to employ H–2B nonimmigrant workers for temporary employment in the United States.

(B) I was granted temporary labor certification from the Department of Labor (DOL) for my business's job opportunity, which required that the worker(s) *begin employment before October 1, 2017* and is currently valid.

(C) I attest that if my business cannot employ all the H–2B nonimmigrant workers requested on my Form I–129 petition before the end of this fiscal year (September 30, 2017) in the job opportunity certified by DOL, my business is likely to suffer irreparable harm (that is, permanent and severe financial loss).

(D) I attest that my business has a bona fide temporary need for all the H–2B nonimmigrant workers requested on the Form I–129 petition, consistent with 8 CFR 214.2(h)(6)(ii).

(E) If my current labor certification contains a start date of work before June 1, 2017, I will complete a new assessment of the United States labor market in advance of H–2B nonimmigrant workers coming to the United States to begin employment before October 1, 2017, as follows:

1. I will place a new job order for the job opportunity with the State Workforce Agency (SWA) serving the area of intended employment that contains the job assurances and contents set forth in 20 CFR 655.18 for recruitment of U.S. workers at the place of employment for at least 5 days beginning not later than the next business day after submitting a petition for an H–2B nonimmigrant worker(s) and this accompanying attestation to U.S. Citizenship and Immigration Services;

2. I will place one newspaper advertisement, which may be published on any day of the week, meeting the advertising requirements of 20 CFR 655.41, during the period of time the SWA is actively circulating the job order for intrastate clearance; and

3. I will offer the job to any qualified and available U.S. worker who applies or is referred for the job opportunity until 2 business days after the last date on which the job order is posted. I understand that consistent with 20 CFR 655.40(a), applicants can be rejected only for lawful job-related reasons.

(F) I agree to retain a copy of this signed attestation form, the additional recruitment

documentation, including a recruitment report that meets the requirements for recruitment reports set forth in 20 CFR 655.48(a)(1),(2) & (7), together with evidence establishing that my business meets the standard described in paragraph (C) of this attestation, for a period of 3 years from the date of certification, consistent with the document retention requirements under 20 CFR 655.65, 20 CFR 655.56, and 29 CFR 503.17. Further, I agree to provide this documentation to a DHS or DOL official upon request.

(G) I agree to comply with all assurances, obligations, and conditions of employment set forth in the *Application for Temporary Employment Certification* (Form ETA 9142B and Appendix B) certified by the DOL for my business's job opportunity.

I hereby sign this under penalty of perjury:

1. Name of hiring or designated official of the employer (*Last Name, First Name*) *	2. DOL Case Number *
3. Signature *	4. Date signed *

[FR Doc. 2017–15208 Filed 7–17–17; 11:15 am]

BILLING CODE 4510–FP–P; 4510–27–P; 9111–97–P

NUCLEAR REGULATORY COMMISSION

10 CFR Parts 170 and 171

[NRC–2016–0081]

RIN 3150–AJ73

Revision of Fee Schedules; Fee Recovery for Fiscal Year 2017; Corrections

AGENCY: Nuclear Regulatory Commission.

ACTION: Final rule; correction.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) published a final rule amending regulations that will become effective August 29, 2017. The fiscal year (FY) 2017 final fee rule, published June 30, 2017, amends the licensing, inspection, special project, and annual fees charged to NRC applicants and licensees. This document corrects the annual fees for fuel facility licensees.

DATES: *Effective Date:* These corrections are effective on August 29, 2017.

ADDRESSES: Please refer to Docket ID NRC–2016–0081 when contacting the NRC about the availability of information for this action. You may obtain publicly-available information related to this action by any of the following methods:

- *Federal Rulemaking Web site:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2016–0081. Address questions about NRC dockets to Carol Gallagher; telephone: 301–415–3463; email: *Carol.Gallagher@nrc.gov.* For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly-available documents online in the ADAMS Public Documents collection at *http://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''ADAMS Public Documents'' and then select ''Begin Web-based ADAMS Search.'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.*
- *NRC's PDR:* You may examine and purchase copies of public documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

FOR FURTHER INFORMATION CONTACT: Michele Kaplan, Office of the Chief Financial Officer, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, telephone: 301–415–5256, email: *Michele.Kaplan@nrc.gov.*

SUPPLEMENTARY INFORMATION: The NRC published a final rule amending its regulations in parts 170 and 171 of title 10 of the *Code of Federal Regulations* that will become effective August 29, 2017. The FY 2017 final fee rule, published June 30, 2017 (82 FR 30682), amends the licensing, inspection, special project, and annual fees charged to NRC applicants and licensees.

The FY 2017 final fee rule contained inadvertent errors in the calculation of the fuel facilities fee class annual fees. Although the fuel facilities total annual fee recovery amount was correctly calculated at $28.4 million, the NRC staff incorrectly calculated the prorated unpaid portion of Lead Cascade's annual fee to be spread among the six fee categories within the fee class for the remaining licensees. When prorating Lead Cascade's expected annual fee, the NRC staff mistakenly used the 1.E. fee category, which caused the calculated unpaid prorated amount to be higher than the actual prorated amount by $1.5 million. To correct this situation, the NRC staff lowered the amount to be recovered from the remaining licensees by $1.5 million. This rule, therefore, corrects fee categories 1.A.(1)(a), 1.A.(1)(b), 1.A.(2)(b), 1.A.(2)(c), 1.E., and 2.A.(1) in the table in § 171.16(d) and Table VIII in the portion of the final rule preamble that includes these fees.

Rulemaking Procedure

Under the Administrative Procedure Act (5 U.S.C. 553(b)), an agency may waive the normal notice and comment requirements if it finds, for good cause, that they are impracticable, unnecessary, or contrary to the public interest. As authorized by 5 U.S.C. 553(b)(3)(B) and (d)(3), the NRC finds good cause to waive notice and opportunity for comment on these amendments and to make this final rule effective on August 29, 2017, the effective date of the FY 2017 final rule. These amendments are necessary to correct an error in the NRC's fee calculations and do not involve changes to NRC policy or the exercise of agency discretion. Second, these amendments will have no adverse effect on any person or entity regulated by the NRC because these amendments will lower annual fees (if anything, these amendments will have a beneficial effect on the affected fee classes). For these reasons, an opportunity for comment would not be meaningful. These amendments need to be effective on August 29, 2017, the effective date of the FY 2017 final rule, in order to avoid incorrect payments by stakeholders in the affected fee classes and the consequent administrative burden on the NRC if refunds must be processed.

Correction of Errors

In FR Doc. 2017–13520, appearing on page 30682 in the **Federal Register** of Friday, June 30, 2017, the following corrections are made:

Correction to the Preamble

1. Beginning on page 30686, in section a., Fuel Facilities, Table VIII is corrected to read as follows:

TABLE VIII—ANNUAL FEES FOR FUEL FACILITIES

Facility type (fee category)	FY 2016 final annual fee	FY 2017 final annual fee	Percentage change
High-Enriched Uranium Fuel (1.A.(1)(a))	$7,867,000	$7,255,000	−7.8
Low-Enriched Uranium Fuel (1.A.(1)(b))	2,736,000	2,629,000	−3.9
Limited Operations (1.A(2)(a))	0.0	0.0	0.0
Gas Centrifuge Enrichment Demonstration (1.A.(2)(b))	1,539,000	1,366,000	−11.2
Hot Cell (and others) (1.A.(2)(c))	770,000	710,000	−7.8
Uranium Enrichment (1.E.)	3,762,000	3,470,000	−7.8
UF_6 Conversion and Deconversion (2.A.(1))	1,625,000	1,498,000	−7.8

Correction to the Regulatory Text

§ 171.16 [Corrected]

■ 2. On page 30705, in § 171.16, paragraph (d), in the table, correct fee categories 1.A.(1), 1.A.(2)(b) and (c), 1.E., and 2.A.(1) to read as follows:

§ 171.16 Annual fees: Materials licensees, holders of certificates of compliance, holders of sealed source and device registrations, holders of quality assurance program approvals, and government agencies licensed by the NRC.

* * * * *

(d) * * *

SCHEDULE OF MATERIALS ANNUAL FEES AND FEES FOR GOVERNMENT AGENCIES LICENSED BY NRC

[See footnotes at end of table]

Category of materials licenses	Annual fees [1 2 3]
1. Special nuclear material:	
A. (1) Licenses for possession and use of U–235 or plutonium for fuel fabrication activities.	
(a) Strategic Special Nuclear Material (High Enriched Uranium) [Program Code(s): 21213]	$7,255,000
(b) Low Enriched Uranium in Dispersible Form Used for Fabrication of Power Reactor Fuel [Program Code(s): 21210]	2,629,000
(2) * * *	
(b) Gas centrifuge enrichment demonstration facilities [Program Code(s): 21205]	1,366,000
(c) Others, including hot cell facilities [Program Code(s): 21130, 21133]	710,000
* * * * * *	*
	[11] N/A
E. Licenses or certificates for the operation of a uranium enrichment facility [Program Code(s): 21200]	3,470,000
* * * * * *	*
	6,400
2. Source material:	
A. (1) Licenses for possession and use of source material for refining uranium mill concentrates to uranium hexafluoride or for deconverting uranium hexafluoride in the production of uranium oxides for disposal. [Program Code: 11400]	1,498,000
* * * * * *	*

[1] Annual fees will be assessed based on whether a licensee held a valid license with the NRC authorizing possession and use of radioactive material during the current FY. The annual fee is waived for those materials licenses and holders of certificates, registrations, and approvals who either filed for termination of their licenses or approvals or filed for possession only/storage licenses before October 1, 2015, and permanently ceased licensed activities entirely before this date. Annual fees for licensees who filed for termination of a license, downgrade of a license, or for a possession-only license during the FY and for new licenses issued during the FY will be prorated in accordance with the provisions of § 171.17. If a person holds more than one license, certificate, registration, or approval, the annual fee(s) will be assessed for each license, certificate, registration, or approval held by that person. For licenses that authorize more than one activity on a single license (*e.g.,* human use and irradiator activities), annual fees will be assessed for each category applicable to the license.

[2] Payment of the prescribed annual fee does not automatically renew the license, certificate, registration, or approval for which the fee is paid. Renewal applications must be filed in accordance with the requirements of parts 30, 40, 70, 71, 72, or 76 of this chapter.

[3] Each FY, fees for these materials licenses will be calculated and assessed in accordance with § 171.13 and will be published in the **Federal Register** for notice and comment.

* * * * *

Dated at Rockville, Maryland, this 10th day of July 2017.

For the Nuclear Regulatory Commission.

Cindy Bladey,

Chief, Rules, Announcements and Directives Branch, Division of Administrative Services, Office of Administration.

[FR Doc. 2017–14717 Filed 7–18–17; 8:45 am]

BILLING CODE 7590–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2016–9498; Directorate Identifier 2016–NM–105–AD; Amendment 39–18958; AD 2017–14–14]

RIN 2120–AA64

Airworthiness Directives; Airbus Airplanes

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

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for all Airbus Model A321 series airplanes. This AD was prompted by a determination from fatigue testing that cracks could develop in the cabin floor beam junction at certain fuselage frame locations. This AD requires repetitive inspections for cracking in the cabin floor beam junction at certain fuselage frame locations, and repair if necessary. We are issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective August 23, 2017.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD as of August 23, 2017.

ADDRESSES: For service information identified in this final rule, contact Airbus, Airworthiness Office—EIAS, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France; telephone: +33 5 61 93 36 96; fax: +33 5 61 93 44 51; email: *account.airworth-eas@airbus.com;* Internet: *http://www.airbus.com.* You may view this referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221. It is also available on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–9498.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–9498; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Office (telephone: 800–647–5527) is Docket Management Facility, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.

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

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to all Airbus Model A321 series airplanes. The NPRM published in the **Federal Register** on December 16, 2016 (81 FR 91060). The NPRM was prompted by a determination from fatigue testing on the Model A321 airframe that cracks could develop in the cabin floor beam junction at certain fuselage frame locations. The NPRM proposed to require repetitive inspections for cracking in the cabin floor beam junction at certain fuselage frame locations, and repair if necessary. We are issuing this AD to detect and correct cracking in the cabin floor beam junction at certain fuselage frame locations, which could result in reduced structural integrity of the airplane.

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Union, has issued EASA AD 2016–0105, dated June 6, 2016 (referred to after this as the Mandatory Continuing Airworthiness Information, or ''the MCAI''), to correct an unsafe condition on all Airbus Model A321 series airplanes. The MCAI states:

> Following the results of a new full scale fatigue test campaign on the A321 airframe in the context of the A321 extended service goal, it was identified that cracks could develop in the cabin floor beam junctions at fuselage frame (FR) 35.1 and FR 35.2, on both left hand (LH) and right hand (RH) sides, also on aeroplanes operated in the context of design service goal.
>
> This condition, if not detected and corrected, could reduce the structural integrity of the fuselage.
>
> Prompted by these findings, Airbus developed an inspection programme, published in Service Bulletin (SB) A320–53–1317, SB A320–53–1318, SB A320–53–1319, and SB A320–53–1320, each containing instructions for a different location.
>
> For the reasons described above, this [EASA] AD requires repetitive detailed inspections (DET) of the affected cabin floor beam junctions [for cracking] and, depending on findings, accomplishment of a repair.
>
> This [EASA] AD is considered an interim action, pending development of a permanent solution.

* * * * *

You may examine the MCAI in the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–9498.

Comments

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

Request To Use Later Approved Service Information Revisions

Delta Airlines (DAL) requested that we revise the proposed AD to permit use of later approved revisions of service information as we have done in previous alternative methods of compliance (AMOCs). DAL stated that Airbus service bulletins are EASA approved, and through the bi-lateral agreement with the European Union, these subsequent service bulletin revisions should be allowed to be used by U.S. operators without seeking an AMOC. DAL also explained that having the ability to utilize future service bulletin revisions without seeking an AMOC is more efficient and preserves the required level of safety. DAL added that they operate airplanes that are not listed in the service bulletin applicability, but are included in the proposed AD. DAL claimed that without a provision allowing later approved revisions, they might have to apply for multiple AMOCs as the service information is updated.

We do not agree with DAL's request. We may not refer to any document that does not yet exist in an AD. In general terms, we are required by Office of the Federal Register (OFR) regulations to either publish the service document contents as part of the actual AD language; or submit the service document to the OFR for approval as ''referenced'' material, in which case we may only refer to such material in the text of an AD. The AD may refer to the

service document only if the OFR approved it for ''incorporation by reference.'' See 1 CFR part 51.

To allow operators to use later revisions of the referenced document (issued after publication of the AD), either we must revise the AD to reference specific later revisions, or operators must request approval to use later revisions as an AMOC under the provisions of paragraph (i)(1) of this AD.

In addition, in accordance with 14 CFR part 39.27, if there is a conflict between an AD and service information, operators must follow the requirements of the AD. We have not changed this AD in this regard.

Conclusion

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

- Are consistent with the intent that was proposed in the NPRM for correcting the unsafe condition; and
- Do not add any additional burden upon the public than was already proposed in the NPRM.

Related Service Information Under 1 CFR Part 51

We reviewed the following service information, which describes procedures for inspections for cracking on the frame to cabin floor beam junction at certain fuselage frame locations, and repairs. This service information is distinct because it applies to different locations on the airplanes.

- Airbus Service Bulletin A320–53–1317, dated December 15, 2015 (FR 35.1 on the right-hand side).
- Airbus Service Bulletin A320–53–1318, dated October 9, 2015 (FR 35.1 on the left-hand side).
- Airbus Service Bulletin A320–53–1319, dated October 9, 2015 (FR 35.2 on the right-hand side).
- Airbus Service Bulletin A320–53–1320, dated October 9, 2015 (FR 35.2 on the left-hand side).

This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

Costs of Compliance

We estimate that this AD affects 175 airplanes of U.S. registry.

We estimate the following costs to comply with this AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Inspection	6 work-hours × $85 per hour = $510 per inspection cycle.	$0	$510 per inspection cycle	$89,250 per inspection cycle.

We have received no definitive data that would enable us to provide cost estimates for the on-condition actions specified in this AD.

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed above, I certify that this AD:

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by adding the following new airworthiness directive (AD):

2017–14–14 Airbus: Amendment 39–18958; Docket No. FAA–2016–9498; Directorate Identifier 2016–NM–105–AD.

(a) Effective Date

This AD is effective August 23, 2017.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Airbus Model A321–111, –112, –131, –211, –212, –213, –231, and –232 airplanes, certificated in any category, all manufacturer serial numbers.

(d) Subject

Air Transport Association (ATA) of America Code 53, Fuselage.

(e) Reason

This AD was prompted by a determination from fatigue testing on the Model A321 airframe that cracks could develop in the cabin floor beam junction at certain fuselage frame locations. We are issuing this AD to detect and correct cracking in the cabin floor beam junction at certain fuselage frame locations, which could result in reduced structural integrity of the airplane.

(f) Compliance

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

(g) Repetitive Inspections

Before exceeding 36,900 total flight cycles since first flight of the airplane, or within 2,100 flight cycles after the effective date of this AD, whichever occurs later: Do a detailed inspection for cracking of the frame to cabin floor beam junction on the aft and forward sides at frame (FR) 35.1 and FR 35.2 on the left-hand and right-hand sides, in accordance with the Accomplishment Instructions of the Airbus service information specified in paragraphs (g)(1), (g)(2), (g)(3), and (g)(4) of this AD. Repeat the inspection of the frame to cabin floor beam junction on the aft and forward sides at FR 35.1 and FR 35.2 on the left-hand and right-hand sides thereafter at intervals not to exceed 15,300 flight cycles.

(1) Airbus Service Bulletin A320–53–1317, dated December 15, 2015 (FR 35.1 right-hand side).

(2) Airbus Service Bulletin A320–53–1318, dated October 9, 2015 (FR 35.1 left-hand side).

(3) Airbus Service Bulletin A320–53–1319, dated October 9, 2015 (FR 35.2 right-hand side).

(4) Airbus Service Bulletin A320–53–1320, dated October 9, 2015 (FR 35.2 left-hand side).

(h) Repair

If any crack is found during any inspection required by paragraph (g) of this AD: Before further flight, repair using a method approved by the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA; or the European Aviation Safety Agency (EASA); or Airbus's EASA Design Organization Approval (DOA). Although the service information specified in paragraph (g) of this AD specifies to contact Airbus for repair instructions, and specifies that action as ''RC'' (Required for Compliance), this AD requires repair as specified in this paragraph. Repair of an airplane as required by this paragraph does not constitute terminating action for the repetitive actions required by paragraph (g) of this AD, unless otherwise specified in the instructions provided by the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA; or EASA; or Airbus's EASA DOA.

(i) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the International Branch, send it to the attention of the person identified in paragraph (j)(2) of this AD. Information may be emailed to: *9-ANM-116-AMOC-REQUESTS@faa.gov.* Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office.

(2) *Contacting the Manufacturer:* For any requirement in this AD to obtain corrective actions from a manufacturer, the action must be accomplished using a method approved by the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA; or EASA; or Airbus's EASA DOA. If approved by the DOA, the approval must include the DOA-authorized signature.

(3) *Required for Compliance (RC):* Except as required by paragraph (h) of this AD: If any service information contains procedures or tests that are identified as RC, those procedures and tests must be done to comply with this AD; any procedures or tests that are not identified as RC are recommended. Those procedures and tests that are not identified as RC may be deviated from using accepted methods in accordance with the operator's maintenance or inspection program without obtaining approval of an AMOC, provided the procedures and tests identified as RC can be done and the airplane can be put back in an airworthy condition. Any substitutions or changes to procedures or tests identified as RC require approval of an AMOC.

(j) Related Information

(1) Refer to Mandatory Continuing Airworthiness Information (MCAI) EASA AD 2016–0105, dated June 6, 2016, for related information. This MCAI may be found in the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–9498.

(2) For more information about this AD, contact Sanjay Ralhan, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, WA 98057–3356; telephone: 425–227–1405; fax: 425–227–1149. Information may be emailed to: *9-ANM-116-AMOC-REQUESTS@faa.gov.*

(3) Service information identified in this AD that is not incorporated by reference is available at the addresses specified in paragraphs (k)(3) and (k)(4) of this AD.

(k) Material Incorporated by Reference

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

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

(i) Airbus Service Bulletin A320–53–1317, dated December 15, 2015.

(ii) Airbus Service Bulletin A320–53–1318, dated October 9, 2015.

(iii) Airbus Service Bulletin A320–53–1319, dated October 9, 2015.

(iv) Airbus Service Bulletin A320–53–1320, dated October 9, 2015.

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

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

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

Issued in Renton, Washington, on June 29, 2017.

Michael Kaszycki,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2017–14588 Filed 7–18–17; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2016–9389; Directorate Identifier 2014–NM–153–AD; Amendment 39–18953; AD 2017–14–09]

RIN 2120–AA64

Airworthiness Directives; Fokker Services B.V. Airplanes

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

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for all Fokker Services B.V. Model F28 Mark 0100 airplanes. This AD was prompted by an evaluation by the design approval holder (DAH) indicating that certain wing fuel tank access panels are subject to widespread fatigue damage (WFD). This AD requires replacement of affected access panels and modification of the coamings of the associated access holes. We are issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective August 23, 2017.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD as of August 23, 2017.

ADDRESSES: For service information identified in this final rule, contact Fokker Services B.V., Technical Services Dept., P.O. Box 1357, 2130 EL Hoofddorp, the Netherlands; telephone: +31 (0)88–6280–350; fax: +31 (0)88–6280–111; email: *technicalservices@fokker.com;* Internet: *http://www.myfokkerfleet.com.* You may view this referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW.,

Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221. It is also available on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–9389.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–9389; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Office (telephone 800–647–5527) is Docket Management Facility, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Tom Rodriguez, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, WA 98057–3356; telephone 425–227–1137; fax 425–227–1149.

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to all Fokker Services B.V. Model F28 Mark 0100 airplanes. The NPRM published in the **Federal Register** on November 17, 2016 (81 FR 81018) (''the NPRM''). The NPRM was prompted by an evaluation by the DAH indicating that certain wing fuel tank access panels are subject to WFD. The NPRM proposed to require replacement of affected access panels and modification of the coamings of the associated access holes. We are issuing this AD to prevent fatigue cracking in the wing structure, which could result in reduced structural integrity of the airplane.

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Union, has issued EASA AD 2014–0158, dated July 7, 2014 (referred to after this as the Mandatory Continuing Airworthiness Information, or ''the MCAI''), to correct an unsafe condition for all Fokker Services B.V. Model F28 Mark 0100 series airplanes. The MCAI states:

Based on findings on test articles, fatigue-induced cracks may develop in the coamings of certain wing fuel tank access panels Part Number (P/N) D12395–403 and P/N D12450–403, installed on Fokker F28 Mark 0100 aeroplanes.

To ensure the continued structural integrity with respect to fatigue, repetitive inspections were included in the Airworthiness Limitations Section (ALS) of the Instructions for Continued Airworthiness. Fokker Services also developed precautionary measures to reduce stress loads in the affected areas by replacement of the affected access panels with new panels, P/N D19701–401 and P/N D19701–403, having thinner skin, and a modification by introducing internal patches to the coamings of the affected access holes.

These precautionary measures were introduced with Service Bulletins (SB) SBF100–57–027 and SBF100–57–028. As part of the Widespread Fatigue Damage re-evaluation, it was concluded that repetitive inspections through the ALS do not provide a sufficient level of protection against the fatigue-induced cracks.

This condition, if not corrected, would affect the structural integrity of the lower wing skins of both outer wings in the areas surrounding the affected fuel tank access panels.

For the reasons described above, this [EASA] AD requires replacement of the affected access panels and modification of the coamings of these access holes.

Post-modification inspection requirements depend on the actual number of flight cycles accumulated at the moment of modification. Related detailed information is provided in SBF100–57–027 and SBF100–57–028, as well as in Fokker Services ALS Report SE–623 Issue 12.

Fokker Services All Operators Message AOF100.178#05 provides additional information concerning the subject addressed by this [EASA] AD.

You may examine the MCAI in the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–9389. In the NPRM, we incorrectly cited EASA AD 2016–0125, dated June 21, 2016. We do not address EASA AD 2016–0125 or its contents in this AD.

Comments

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

Conclusion

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

- Are consistent with the intent that was proposed in the NPRM for correcting the unsafe condition; and
- Do not add any additional burden upon the public than was already proposed in the NPRM.

Related Service Information Under 1 CFR Part 51

Fokker Services B.V. has issued the following service information:

- Fokker Service Bulletin SBF100–57–027, Revision 2, dated December 11, 2013, which provides instructions to replace certain fuel tank access panels.
- Fokker Service Bulletin SBF100–57–028, Revision 2, dated December 11, 2013, which provides instructions to modify the coamings of certain fuel tank access holes.

This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the ADDRESSES section.

Costs of Compliance

We estimate that this AD affects 15 airplanes of U.S. registry.

We estimate the following costs to comply with this AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Replacement and modification	510 work-hours × $85 per hour = $43,350	$45,500	$88,850	$1,332,750

Authority for This Rulemaking

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

We are issuing this rulemaking under the authority described in ''Subtitle VII, Part A, Subpart III, Section 44701: General requirements.'' Under that section, Congress charges the FAA with

promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

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

For the reasons discussed above, I certify that this AD:

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

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

3. Will not affect intrastate aviation in Alaska; and

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by adding the following new airworthiness directive (AD):

2017–14–09 Fokker Services B.V.: Amendment 39–18953; Docket No. FAA–2016–9389; Directorate Identifier 2014–NM–153–AD.

(a) Effective Date

This AD is effective August 23, 2017.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Fokker Services B.V. Model F28 Mark 0100 airplanes, certificated in any category, all serial numbers.

(d) Subject

Air Transport Association (ATA) of America Code 57, Wings.

(e) Reason

This AD was prompted by an evaluation by the design approval holder indicating that certain wing fuel tank access panels are subject to widespread fatigue damage. We are issuing this AD to prevent fatigue cracking in the wing structure, which could result in reduced structural integrity of the airplane.

(f) Compliance

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

(g) Modification and Replacement

Within 63,000 flight cycles since first flight of the airplane, or within 90 days after the effective date of this AD, whichever occurs later, accomplish the actions specified in paragraphs (g)(1) and (g)(2) of this AD, as applicable.

(1) For airplanes identified in Fokker Service Bulletin SBF100–57–028, Revision 2, dated December 11, 2013: Modify the coamings of the fuel tank access holes at the access panel locations identified in, and in accordance with the Accomplishment Instructions of Fokker Service Bulletin SBF100–57–028, Revision 2, dated December 11, 2013.

(2) For airplanes identified in Fokker Service Bulletin SBF100–57–027, Revision 2, dated December 11, 2013: Replace access panels having part number D12395–403 and D12450–403 with new panels having part number D19701–401 and D19701–403, at the access panel locations identified in, and in accordance with the Accomplishment Instructions of Fokker Service Bulletin SBF100–57–027, Revision 2, dated December 11, 2013.

(h) Parts Installation Prohibition

(1) For airplanes that, on the effective date of this AD, have an access panel with part number D12395–403 or D12450–403 installed at any of the affected locations: After accomplishing the actions required by paragraphs (g)(1) and (g)(2) of this AD, as applicable, no person may install, on any airplane, access panels having part number D12395–403 or D12450–403 at any access panel location as identified in Fokker Service Bulletin SBF100–57–027, Revision 2, dated December 11, 2013.

(2) For airplanes that, on the effective date of this AD, do not have an access panel with part number D12395–403 or D12450–403 installed at any of the affected locations: As of the effective date of this AD, no person may install, on any airplane, access panels having part number D12395–403 or D12450–403 at any access panel location as identified in Fokker Service Bulletin SBF100–57–027, Revision 2, dated December 11, 2013.

(i) Credit for Previous Actions

(1) This paragraph provides credit for actions required by paragraph (g)(1) of this AD, if those actions were performed before the effective date of this AD using the service information specified in paragraph (i)(1)(i) or (i)(1)(ii) of this AD.

(i) Fokker Service Bulletin SBF100–57–028, dated May 2, 1994.

(ii) Fokker Service Bulletin SBF100–57–028, Revision 1, dated November 1, 1994.

(2) This paragraph provides credit for actions required by paragraph (g)(2) of this AD, if those actions were performed before the effective date of this AD using the service information specified in paragraph (i)(2)(i) or (i)(2)(ii) of this AD.

(i) Fokker Service Bulletin SBF100–57–027, dated September 13, 1993.

(ii) Fokker Service Bulletin SBF100–57–027, Revision 1, dated May 2, 1994.

(j) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the International Branch, send it to the attention of the person identified in paragraph (k)(2) of this AD. Information may be emailed to: *9-ANM-116-AMOC-REQUESTS@faa.gov.* Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office.

(2) *Contacting the Manufacturer:* For any requirement in this AD to obtain corrective actions from a manufacturer, the action must be accomplished using a method approved by the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA; or the European Aviation Safety Agency (EASA); or Fokker Services B.V.'s EASA Design Organization Approval (DOA). If approved by the DOA, the approval must include the DOA-authorized signature.

(k) Related Information

(1) Refer to Mandatory Continuing Airworthiness Information (MCAI) EASA AD 2014–0158, dated July 7, 2014, for related information. This MCAI may be found in the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–9389.

(2) For more information about this AD, contact Tom Rodriguez, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, WA 98057–3356; telephone 425–227–1137; fax 425–227–1149.

(3) Service information identified in this AD that is not incorporated by reference is available at the addresses specified in paragraphs (l)(3) and (l)(4) of this AD.

(l) Material Incorporated by Reference

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

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

(i) Fokker Service Bulletin SBF100–57–027, Revision 2, dated December 11, 2013.

(ii) Fokker Service Bulletin SBF100–57–028, Revision 2, dated December 11, 2013.

(3) For service information identified in this AD, contact Fokker Services B.V., Technical Services Dept., P.O. Box 1357, 2130 EL Hoofddorp, the Netherlands; telephone: +31 (0)88–6280–350; fax: +31 (0)88–6280–111; email: *technicalservices@fokker.com;* Internet: *http://www.myfokkerfleet.com.*

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

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

Issued in Renton, Washington, on July 3, 2017.

Dionne Palermo,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2017–14583 Filed 7–18–17; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2016–9506; Directorate Identifier 2016–NM–090–AD; Amendment 39–18957; AD 2017–14–13]

RIN 2120–AA64

Airworthiness Directives; The Boeing Company Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for certain The Boeing Company Model 737–600, –700, –700C, –800, –900, and –900ER series airplanes. This AD was prompted by a report of an aborted takeoff because the rudder pedals were not operating correctly. Investigation revealed a protruding screw in the rudder pedal heel rest adjacent to the pedals. This AD requires a torque check of the screws in the cover assembly of the heel rest for both the Captain and the First Officer's rudder pedals, and corrective action if necessary. We are issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective August 23, 2017.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of August 23, 2017.

ADDRESSES: For service information identified in this final rule, contact Boeing Commercial Airplanes, Attention: Data & Services Management, P.O. Box 3707, MC 2H–65, Seattle, WA 98124–2207; telephone 206–544–5000, extension 1; fax 206–766–5680; Internet *https://www.myboeingfleet.com*. You may view this referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA. For information on the availability of this material at the FAA, call 425–227–1221. It is also available on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–9506.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2016–9506; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the regulatory evaluation, any comments received, and other information. The address for the Docket Office (phone: 800–647–5527) is Docket Management Facility, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Kelly McGuckin, Aerospace Engineer, Systems and Equipment Branch, ANM–130S, FAA, Seattle Aircraft Certification Office (ACO), 1601 Lind Avenue SW., Renton, WA 98057–3356; phone: 425–917–6490; fax: 425–917–6590; email: *Kelly.McGuckin@faa.gov*.

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to certain The Boeing Company Model 737–600, –700, –700C, –800, –900, and –900ER series airplanes. The NPRM published in the **Federal Register** on December 20, 2016 (81 FR 92753). The NPRM was prompted by a report of an aborted takeoff because the rudder pedals were not operating correctly. Investigation revealed a protruding screw in the rudder pedal heel rest adjacent to the pedals. It was determined that the screws in the cover assembly of the heel rest for both the Captain and the First Officer's rudder pedals might not have been properly torqued. The NPRM proposed to require a torque check of the screws in the cover assembly of the heel rest for both the Captain and the First Officer's rudder pedals, and corrective action if necessary. We are issuing this AD to detect and correct a protruding screw in the cover assembly of the heel rest of a rudder pedal. A protruding screw could restrict rudder pedal motion and reduce differential braking control during takeoff or landing, which could cause a high speed runway excursion.

Comments

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

Support for the NPRM

Boeing, Air Line Pilots Association, International, and Tyler Myers supported the intent of the NPRM.

Request To Allow Credit for Previously Accomplished Actions

United Airlines noted that the NPRM did not address whether or not the final rule would allow operators to take credit for accomplishment of the actions in Boeing Alert Service Bulletin 737–25A1732, Revision 1, dated August 15, 2016 (''BASB 737–25A1732, Revision 1''), if completed prior to the effective date of the final rule. We infer that the commenter is requesting that the final rule include a statement that accomplishment of the actions specified in BASB 737–25A1732, Revision 1, prior to the effective date of the final rule is acceptable for compliance with the requirements of the final rule.

We agree with the commenter that operators should be able to take credit for accomplishment of the actions in BASB 737–25A1732, Revision 1, prior to the effective date of this AD. This allowance was provided in paragraph (f) of the proposed AD in the statement ''Comply with this AD within the compliance times specified unless already done.'' However, since the NPRM was issued, Boeing has published, and we have reviewed, Boeing Alert Service Bulletin 737–25A1732, Revision 2, dated April 13,

2017 (''BASB 737–25A1732, Revision 2''). BASB 737–25A1732, Revision 2, provides clarification of the actions described in the work instructions by providing supplementary details and including additional descriptive figures. No additional work is necessary and the scope of this AD is not expanded.

We have revised paragraphs (c), (g), and (h) of this AD to refer to BASB 737–25A1732, Revision 2. We have also added paragraph (i) to this AD to give credit for actions accomplished using the work instructions in BASB 737–25A1732, Revision 1; and redesignated the subsequent paragraphs accordingly.

Effect of Winglets on Accomplishment of the Proposed Actions

Aviation Partners Boeing stated that the installation of winglets per Supplemental Type Certificate (STC) ST00830SE does not affect the accomplishment of the manufacturer's service instructions.

We agree with the commenter that STC ST00830SE does not affect the accomplishment of the manufacturer's service instructions. Therefore, the installation of STC ST00830SE does not affect the ability to accomplish the actions required by this AD. We have not changed this AD in this regard.

Conclusion

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

- Are consistent with the intent that was proposed in the NPRM for correcting the unsafe condition; and
- Do not add any additional burden upon the public than was already proposed in the NPRM.

Related Service Information Under 1 CFR Part 51

We reviewed Boeing Alert Service Bulletin 737–25A1732, Revision 2, dated April 13, 2017. The service information describes procedures for a torque check of the screws in the cover assembly of the heel rest for both the Captain and the First Officer's rudder pedals, and corrective action. This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

Costs of Compliance

We estimate that this AD affects 1,187 airplanes of U.S. registry. We estimate the following costs to comply with this AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Torque check	2 work-hours × $85 per hour = $170	$0	$170	$201,790

We have received no definitive data that will enable us to provide cost estimates for the on-condition actions specified in this AD.

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed above, I certify that this AD:

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

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

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

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by adding the following new airworthiness directive (AD):

2017–14–13 The Boeing Company: Amendment 39–18957; Docket No. FAA–2016–9506; Directorate Identifier 2016–NM–090–AD.

(a) Effective Date

This AD is effective August 23, 2017.

(b) Affected ADs

None.

(c) Applicability

This AD applies to The Boeing Company Model 737–600, –700, –700C, –800, –900, and –900ER series airplanes, certificated in any category, as identified in Boeing Alert Service Bulletin 737–25A1732, Revision 2, dated April 13, 2017.

(d) Subject

Air Transport Association (ATA) of America Code 25, Equipment and Furnishings.

(e) Unsafe Condition

This AD was prompted by a report of an aborted takeoff because the rudder pedals were not operating correctly. Investigation revealed a protruding screw in the rudder pedal heel rest adjacent to the pedals. It was determined that the screws in the cover assembly of the heel rest for both the Captain and the First Officer's rudder pedals might

not have been properly torqued. We are issuing this AD to detect and correct a protruding screw in the cover assembly of the heel rest of a rudder pedal. A protruding screw could restrict rudder pedal motion and reduce differential braking control during takeoff or landing, which could cause a high speed runway excursion.

(f) Compliance

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

(g) Torque Check

Within 21 months after the effective date of this AD: Do a one-time torque check of the screws in the cover assembly of the heel rest for both the Captain and the First Officer's rudder pedals, in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin 737–25A1732, Revision 2, dated April 13, 2017.

(h) Corrective Action

If the results of the torque check required by paragraph (g) of this AD indicate that any screw does not hold torque to the required value, before further flight, replace the affected screw and associated nutplate, in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin 737–25A1732, Revision 2, dated April 13, 2017.

(i) Credit for Actions Accomplished Previously

This paragraph provides credit for the actions specified in paragraphs (g) and (h) of this AD, if those actions were performed before the effective date of this AD using Boeing Alert Service Bulletin 737–25A1732, Revision 1, dated August 15, 2016.

(j) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Seattle Aircraft Certification Office (ACO), FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the ACO, send it to the attention of the person identified in paragraph (k)(1) of this AD. Information may be emailed to: *9-ANM-Seattle-ACO-AMOC-Requests@faa.gov.*

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

(3) An AMOC that provides an acceptable level of safety may be used for any repair, modification, or alteration required by this AD if it is approved by the Boeing Commercial Airplanes Organization Designation Authorization (ODA) that has been authorized by the Manager, Seattle ACO, to make those findings. To be approved, the repair method, modification deviation, or alteration deviation must meet the certification basis of the airplane, and the approval must specifically refer to this AD.

(4) For service information that contains steps that are labeled as Required for Compliance (RC), the provisions of paragraphs (j)(4)(i) and (j)(4)(ii) of this AD apply.

(i) The steps labeled as RC, including substeps under an RC step and any figures identified in an RC step, must be done to comply with the AD. If a step or sub-step is labeled ''RC Exempt,'' then the RC requirement is removed from that step or sub-step. An AMOC is required for any deviations to RC steps, including substeps and identified figures.

(ii) Steps not labeled as RC may be deviated from using accepted methods in accordance with the operator's maintenance or inspection program without obtaining approval of an AMOC, provided the RC steps, including substeps and identified figures, can still be done as specified, and the airplane can be put back in an airworthy condition.

(k) Related Information

(1) For more information about this AD, contact Kelly McGuckin, Aerospace Engineer, Systems and Equipment Branch, ANM–130S, FAA, Seattle ACO, 1601 Lind Avenue SW., Renton, WA 98057–3356; phone: 425–917–6490; fax: 425–917–6590; email: *Kelly.McGuckin@faa.gov.*

(2) Service information identified in this AD that is not incorporated by reference is available at the addresses specified in paragraphs (l)(3) and (l)(4) of this AD.

(l) Material Incorporated by Reference

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

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

(i) Boeing Alert Service Bulletin 737–25A1732, Revision 2, dated April 13, 2017.

(ii) Reserved.

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

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

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

Issued in Renton, Washington, on June 29, 2017.

Michael Kaszycki,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2017–14584 Filed 7–18–17; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 300

[TD 9820]

RIN 1545–BN09

Special Enrollment Examination User Fee for Enrolled Agents

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulation.

SUMMARY: This document contains a final regulation changing the amount of the user fee for the special enrollment examination to become an enrolled agent. The charging of user fees is authorized by the Independent Offices Appropriations Act of 1952. The final regulation affects individuals taking the enrolled agent special enrollment examination.

DATES:

Effective date: This regulation is effective August 18, 2017.

Applicability date: For the date of applicability, see § 300.4(d).

FOR FURTHER INFORMATION CONTACT:

Jonathan R. Black, (202) 317–6845 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background and Explanation of Provisions

This document contains amendments to 26 CFR part 300 regarding user fees. On January 26, 2016, a notice of proposed rulemaking (REG–134122–15) proposing to change the amount of the Enrolled Agent Special Enrollment Examination (EA–SEE) user fee was published in the **Federal Register** (81 FR 4221) (January 26, 2016 proposed rule). On October 25, 2016, a second notice of proposed rulemaking (REG–134122–15) withdrawing the January 26, 2016 proposed rule and proposing a smaller change to the EA–SEE user fee was published in the **Federal Register** (81 FR 73363) (October 25, 2016 proposed rule). Comments responding to each proposed rule were received, and a public hearing on the second proposed rule was held on December 29, 2016. After consideration of the comments, this Treasury decision adopts the regulations proposed by the October 25, 2016 proposed rule without change.

A. Enrolled Agents and the Special Enrollment Examination

Section 330 of title 31 of the United States Code authorizes the Secretary of the Treasury to regulate the practice of

representatives before the Treasury Department. Pursuant to 31 U.S.C. 330, the Secretary has published regulations governing practice before the IRS in 31 CFR part 10 and reprinted the regulations as Treasury Department Circular No. 230 (Circular 230).

Section 10.4(a) of Circular 230 authorizes the IRS to grant status as enrolled agents to individuals who demonstrate special competence in tax matters by passing a written examination (the EA–SEE) administered by, or under the oversight of, the IRS and who have not engaged in any conduct that would justify suspension or disbarment under Circular 230. There were a total of 51,755 active enrolled agents as of September 1, 2016.

Beginning in 2006, the IRS engaged the services of a third-party contractor to develop and administer the EA–SEE. The EA–SEE is composed of three parts, which are offered in a testing period that begins each May 1 and ends the last day of the following February. The EA–SEE is not available in March and April, during which period it is updated to reflect recent changes in the relevant law. More information on the EA–SEE, including content, scoring, and how to register, can be found on the IRS Web site at *www.irs.gov/tax-professionals/enrolled-agents.* The IRS Return Preparer Office (RPO) oversees the administration of the EA–SEE.

B. User Fee Authority

The Independent Offices Appropriations Act of 1952 (IOAA) (31 U.S.C. 9701) authorizes each agency to promulgate regulations establishing the charge for services provided by the agency (user fees). The IOAA provides that these user fee regulations are subject to policies prescribed by the President and shall be as uniform as practicable. Those policies are currently set forth in the Office of Management and Budget (OMB) Circular A–25 (OMB Circular), 58 FR 38142 (July 15, 1993).

The IOAA states that the services provided by an agency should be self-sustaining to the extent possible. 31 U.S.C. 9701(a). The OMB Circular states that agencies that provide services that confer special benefits on identifiable recipients beyond those accruing to the general public are to establish user fees that recover the full cost of providing those services. The OMB Circular requires that agencies identify all services that confer special benefits and determine whether user fees should be assessed for those services.

Agencies are to review user fees biennially and update them as necessary to reflect changes in the cost of providing the underlying services. During this biennial review, an agency must calculate the full cost of providing each service, taking into account all direct and indirect costs to any part of the U.S. government. The full cost of providing a service includes, but is not limited to, salaries, retirement benefits, rents, utilities, travel, and management costs, as well as an appropriate allocation of overhead and other support costs associated with providing the service.

An agency should set the user fee at an amount that recovers the full cost of providing the service unless the agency requests, and OMB grants, an exception to the full-cost requirement. OMB may grant exceptions only where the cost of collecting the fees would represent an unduly large part of the fee for the activity, or where any other condition exists that, in the opinion of the agency head, justifies an exception. When OMB grants an exception, the agency does not collect the full cost of providing the service that confers a special benefit on identifiable recipients rather than the public at large, and the agency therefore must fund the remaining cost of providing the service from other available funding sources. When OMB grants an exception, the agency, and by extension all taxpayers, subsidizes the cost of the service to the recipients who should otherwise be required to pay the full cost of providing the service as the IOAA and the OMB Circular direct.

C. The EA–SEE User Fee

As discussed earlier, Circular 230 section 10.4(a) provides that the IRS will grant enrolled agent status to an applicant if the applicant, among other things, demonstrates special competence in tax matters by written examination. The EA–SEE is the written examination that tests special competence in tax matters for purposes of that provision, and an applicant must pass all three parts of the EA–SEE to be granted enrolled agent status through written examination. The IRS confers a benefit on individuals who take the EA–SEE beyond those that accrue to the general public by providing them with an opportunity to demonstrate special competence in tax matters by passing a written examination and therefore satisfying one of the requirements for becoming an enrolled agent under Circular 230 section 10.4(a). Because the opportunity to take the EA–SEE is a special benefit, the IRS charges a user fee to take the examination.

Pursuant to the guidelines in the OMB Circular, the IRS has calculated its cost of providing examination services under the enrolled agent program. The user fee is implemented under the authority of the IOAA and the OMB Circular and recovers the full cost of overseeing the program. The user fee was $11 to take each part of the EA–SEE and was set in 2006. The IRS does not intend to subsidize any of the cost of making the EA–SEE available to examinees and is not applying for an exception to the full-cost requirement from OMB. As a result, this regulation increases the user fee to the full cost to the IRS for overseeing the EA–SEE program, $81 per part, effective for examinees who register on or after March 1, 2018, to take the EA–SEE. The contractor who administers the EA–SEE also charges individuals taking the EA–SEE an additional fee for its services. For the May 2016 to February 2017 testing period, the contractor's fee was $98 for each part of the EA–SEE. For the May 2017 to February 2019 testing periods, the contractor's fee is $100.94. For the May 2019 to February 2020 testing period, the contractor's fee will be $103.97. The contract was subject to public procurement procedures, and there were no tenders that were more competitive.

Summary of Comments

The comments submitted on the January 26, 2016 proposed rule and the October 25, 2016 proposed rule are available at *www.regulations.gov* or upon request. Comments that were submitted on the January 26, 2016 proposed rule, which was withdrawn by the October 25, 2016 proposed rule, are addressed to the extent relevant to the October 25, 2016 proposed rule. Certain comments on the January 26, 2016 proposed rule, such as those comments requesting additional details on the cost of background investigations and costing methodology, were addressed in the preamble to the October 25, 2016 proposed rule.

All of the comments received opposed increasing the user fee for the EA–SEE. Specifically, comments expressed concern that the increased user fee would discourage individuals from becoming enrolled agents. The comments stated that discouraging individuals would be counter-productive considering that the IRS and taxpayers benefit from having more tax professionals who meet the standards required of an enrolled agent. Comments suggested that the IRS should work to increase the number of people taking the EA–SEE each year and focus its attention on encouraging unenrolled preparers, particularly those who participate in the Annual Filing Season Program in Rev. Proc. 2014–42, to become enrolled agents, which would result in a reduced user fee on a per-part basis when the IRS redetermines the

cost of the EA–SEE at the next biennial review of the user fee.

The Treasury Department and the IRS do not intend the user fee to discourage individuals from becoming enrolled agents and have considered the possible impact of increasing the user fee on the number of individuals taking the EA–SEE. Enrolled agents play a valuable role in the tax administration process, and the IRS uses the EA–SEE to ensure their qualifications. The IRS welcomes a continuing dialogue on how it can attract more individuals to take the EA–SEE and thereby lower the cost per part by spreading the fixed costs of administration over a larger population of examinees. The Treasury Department and the IRS have considered the potential impact on the number of individuals if the full cost of the EA–SEE program is collected and concluded not to seek an exemption to the full-cost requirement. Additionally, efforts to improve unenrolled preparers' knowledge of federal tax law, such as implementation of the Annual Filing Season Program, have not substantially affected the number of individuals taking the EA–SEE and have no direct relationship with the user fee.

Some comments alternatively recommended that the fee remain the same for taking the EA–SEE the first time, but that subsequent attempts to take and pass the EA–SEE should be subject to a higher fee. Comments suggested that the fee for subsequent attempts could be rebated if the individual passed the EA–SEE. The comments explained that this would discourage all but the most serious candidates from taking the EA–SEE. Comments also suggested that the IRS could increase the fee gradually over a period of years, in order to encourage preparers to become enrolled agents sooner rather than later, and that the IRS should retain the $11 per part user fee for a two-year window so that everyone who passed at least one part of the EA–SEE (presumably prior to the announcement of the fee increase) would have an opportunity to complete all parts of the EA–SEE without an unexpected fee increase.

The Treasury Department and the IRS considered these comments but have declined to implement them. The Treasury Department and the IRS do not have information to forecast how many examinees are likely to pass each part of the EA–SEE the first time versus on later attempts, and it therefore would not be able to adequately determine the cost allocation between first-time and repeat examinees. Additionally, the Treasury Department and the IRS think examinees should be charged the full cost to the IRS of overseeing the administration of the EA–SEE, regardless of whether they have already taken one or two parts, given the absolute amount of the user fee ($81 per part). This final regulation increases the user fee to the full cost to the IRS, and the IRS has determined that it will not seek an exception to the full-cost requirement from OMB.

Comments recommended the IRS consider alternative means to reduce costs after the existing agreement with the contractor who administers the EA–SEE expires in 2020. Contractor costs are unrelated to this user fee regulation, and any concerns related to such costs should be directed to the RPO.

Comments also asked how it was possible that the IRS did not notice the increased costs over the course of the decade following the last user fee increase. Although the OMB Circular directs the IRS to set its fees every two years, the IRS was unable to obtain accurate estimates of its total costs until recently, because it had insufficient data to estimate the change in size of the testing population.

Comments suggested that the IRS should not charge a user fee to register for the EA–SEE, because the IRS and the general public benefit from the existence of enrolled agents. Whether a benefit accrues to the IRS and the general public, however, is not relevant to whether a user fee is appropriate under the OMB Circular. As discussed in the October 25, 2016 proposed rule, it is appropriate under the OMB Circular to charge a user fee for taking the EA–SEE because taking the EA–SEE provides a benefit to examinees. *See Seafarers Int'l Union of N. Am.* v. *U.S. Coast Guard,* 81 F.3d 179, 183 (D.C. Cir. 1996). The IOAA permits the IRS to charge a user fee for providing a ''service or thing of value.'' *See* 31 U.S.C. 9701(b). A government activity constitutes a ''service or thing of value'' when it provides ''special benefits to an identifiable recipient beyond those that accrue to the general public.'' *See* OMB Circular section 6(a)(1). Among other things, a ''special benefit'' exists when a government service is performed at the request of the recipient and is beyond the services regularly received by other members of the same group or the general public. *See* OMB Circular section 6(a)(1)(c). It is permissible for a service for which an agency charges a user fee to generate an ''incidental public benefit,'' and there is no requirement that the agency weigh this public benefit against the specific benefit to the identifiable recipient. *See Seafarers,* 81 F.3d at 183–84 (D.C. Cir. 1996). The IRS confers a benefit on individuals who take the EA–SEE beyond those that accrue to the general public by providing them with an opportunity to satisfy one of the requirements for becoming an enrolled agent under Circular 230 section 10.4(a).

Comments observed that the IRS charges user fees inconsistently because, for example, the IRS does not charge user fees for toll-free telephone service, continuing-education webinars, walk-in service, notice letters, the annual filing season program record of completion, etc. This regulation deals only with the user fee for the EA–SEE, which, as discussed earlier, is compliant with the requirements of the OMB Circular, and the appropriateness of the EA–SEE user fee is not contingent on whether the IRS charges, or should charge, user fees for other activities.

Comments further questioned the determination of the amount of the EA–SEE user fee. One comment assumed that the increase in revenue was allocable to ten full-time equivalent employees and questioned how so much time was involved in oversight of the EA–SEE—the comment noted that, after accounting for the cost of background investigations, the salary of a GS–12 step 1 employee in Washington, DC, when multiplied by the overhead rate and again multiplied by ten, equals approximately the expected increase in annual revenue to the IRS from the increased user fee. Comments also questioned how much time staff spent reviewing surveys and setting the annual cut score, among other things. The preamble to the October 25, 2016 proposed rule addresses most questions about costing methodology. As stated in that preamble, eight individuals spend approximately seventy-five percent of their time on the EA–SEE, and two individuals spend approximately ten-percent of their time on the EA–SEE. That amounts to just over six people working full time. The calculation in the comment on employee hours did not appear to account for the cost of benefits, which are calculated as 28.5 percent of salary, and the variance between the ten employee salaries, which range from GS–7 to GS–15, in calculating the number of employees involved. RPO employees do not track the time spent on each individual task associated with the EA–SEE, but—as stated in the preamble to the October 25, 2016 proposed rule—managers who are familiar with the employees' work provided estimates of the total time involved, based on their knowledge and experience.

Finally, comments asked the IRS to request an exception to the full-cost requirement from the OMB and

questioned whether it is good public policy to charge a user fee when the public benefits from minimum competency standards for return preparers. The IRS has determined that an exception to the full-cost requirement is not justified, because subsidizing the cost of the EA–SEE program requires diverting resources from other activities that are in the public interest and that inure to the public generally, rather than to identifiable recipients requesting the specific benefit of taking the EA–SEE.

Special Analyses

Certain IRS regulations, including this one, are exempt from the requirements of Executive Order 12866, as supplemented and reaffirmed by Executive Order 13563. Therefore, a regulatory assessment is not required. Pursuant to the Regulatory Flexibility Act (5 U.S.C. chapter 6), it is hereby certified that this regulation will not have a significant economic impact on a substantial number of small entities. The user fee primarily affects individuals who take the enrolled agent examination, many of whom may not be classified as small entities under the Regulatory Flexibility Act. Therefore, a substantial number of small entities is not likely to be affected. Further, the economic impact on any small entities affected would be limited to paying the $70 difference in cost per part between the $81 user fee and the previous $11 user fee, which is unlikely to present a significant economic impact. Moreover, the total economic impact of this regulation is approximately $1.57 million, which is the product of the approximately 22,425 parts of the EA–SEE administered annually and the $70 increase in the fee. Accordingly, the rule is not expected to have a significant economic impact on a substantial number of small entities, and a regulatory flexibility analysis is not required.

Drafting Information

The principal author of this regulation is Jonathan R. Black of the Office of the Associate Chief Counsel (Procedure and Administration).

Statement of Availability of IRS Documents

Rev. Proc. 2014–42, Annual Filing Season Program, is published in the Internal Revenue Bulletin and is available from the Superintendent of Documents, U.S. Government Publishing Office, Washington, DC 20402, or by visiting the IRS Web site at *www.irs.gov.*

List of Subjects in 26 CFR Part 300

Reporting and recordkeeping requirements, User fees.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 300 is amended as follows:

PART 300—USER FEES

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

Authority: 31 U.S.C. 9701.

■ **Par. 2.** Section 300.4 is amended by revising paragraphs (b) and (d) to read as follows:

§ 300.4 Enrolled agent special enrollment examination fee.

* * * * *

(b) *Fee.* The fee for taking the enrolled agent special enrollment examination is $81 per part, which is the cost to the government for overseeing the development and administration of the examination and does not include any fees charged by the administrator of the examination.

* * * * *

(d) *Applicability date.* This section applies to registrations that occur on or after March 1, 2018, for the enrolled agent special enrollment examination. Section 300.4 (as contained in 26 CFR part 300, revised April 2017) applies to registrations that occur before March 1, 2018.

Kirsten Wielobob,

Deputy Commissioner for Services and Enforcement.

Approved: June 27, 2017.

Tom West,

Tax Legislative Counsel.

[FR Doc. 2017–15210 Filed 7–18–17; 8:45 am]

BILLING CODE 4830–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R01–OAR–2015–0648; A–1–FRL–9964–80–Region 1]

Air Plan Approval; Maine; Motor Vehicle Fuel Requirements

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is approving a State Implementation Plan (SIP) revision submitted by the State of Maine Department of Environmental Protection (Maine DEP) on August 28, 2015. This SIP revision includes a revised motor vehicle fuel volatility regulation that has been updated to be consistent with existing Federal regulations which require retailers to sell reformulated gasoline (RFG) in the counties of York, Cumberland, Sagadahoc, Androscoggin, Kennebec, Knox, and Lincoln, as of June 1, 2015. The intended effect of this action is to approve of this amendment into the Maine SIP. This action is being taken under the Clean Air Act.

DATES: This rule is effective on August 18, 2017.

ADDRESSES: EPA has established a docket for this action under Docket Identification No. EPA–R01–OAR–2015–0648. 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, *i.e.,* 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 at *http://www.regulations.gov* or at the U.S. Environmental Protection Agency, EPA New England Regional Office, Office of Ecosystem Protection, Air Quality Planning Unit, 5 Post Office Square—Suite 100, Boston, MA. EPA requests that if at all possible, you contact the contact listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday, 8:30 a.m. to 4:30 p.m., excluding legal holidays.

FOR FURTHER INFORMATION CONTACT: John Rogan, Air Quality Planning Unit, U.S. Environmental Protection Agency, New England Regional Office, 5 Post Office Square—Suite 100, (Mail Code OEP05–2), Boston, MA 02109–3912, telephone (617) 918–1645, facsimile (617) 918–0645, email *rogan.john@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document whenever "we," "us," or "our" is used, we mean EPA.

Table of Contents

I. Background and Purpose
II. Final Action
III. Incorporation by Reference
IV. Statutory and Executive Order Reviews

I. Background and Purpose

On May 8, 2017 (82 FR 21346), EPA published a Notice of Proposed Rulemaking (NPR) for the State of Maine. The NPR proposed approval of Maine's revised Chapter 119, Motor

Vehicle Fuel Volatility Limits, that had been amended to require retailers to sell reformulated gasoline (RFG) in the counties of York, Cumberland, Sagadahoc, Androscoggin, Kennebec, Knox, and Lincoln effective June 1, 2015. The formal SIP revision was submitted by the Maine DEP on August 28, 2015. A detailed discussion of Maine's August 28, 2015 SIP revision and EPA's rationale for proposing approval of the SIP revision were provided in the NPR and will not be restated in this notice. No public comments were received on the NPR.

II. Final Action

EPA is approving Maine's August 28, 2015 SIP revision. Specifically, EPA is approving Maine's revised Chapter 119, Motor Vehicle Fuel Volatility Limits, and incorporating it into the Maine SIP. EPA is approving this SIP revision because it meets all applicable requirements of the Clean Air Act and relevant EPA guidance, and it will not interfere with attainment or maintenance of the ozone NAAQS.

III. 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 the State of Maine's revised Chapter 119 described in the amendments to 40 CFR part 52 set forth below. The EPA has made, and will continue to make, these documents generally available through *http://www.regulations.gov.*

IV. Statutory and Executive Order Reviews

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

- Is not a significant regulatory action subject to review by the Office of Management and Budget under Executive 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 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 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 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 September 18, 2017. 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, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: June 28, 2017.

Deborah A. Szaro,

Acting Regional Administrator, EPA New England.

Part 52 of chapter I, title 40 of the Code of Federal Regulations is amended as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

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

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

Subpart U—Maine

■ 2. In § 52.1020, the table in paragraph (c) is amended by revising the entry for "Chapter 119" to read as follows:

§ 52.1020 Identification of plan.

* * * * *

(c) * * *

EPA-APPROVED MAINE REGULATIONS

State citation	Title/subject	State effective date	EPA approval date EPA approval date and citation [1]	Explanations
*	*	*	*	*
Chapter 119	Motor Vehicle Fuel Volatility Limit.	7/15/2015	7/19/2017 [Insert **Federal Register** citation].	Requires the sale of federal RFG year round and removes the 7.8 RVP requirement during the period of May 1 through September 15 in 7 southern counties.
*	*	*	*	*

[1] In order to determine the EPA effective date for a specific provision listed in this table, consult the **Federal Register** notice cited in this column for the particular provision.

* * * * *

[FR Doc. 2017–15049 Filed 7–18–17; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R01–OAR–2017–0023; A–1–FRL–9965–10–Region 1]

Air Plan Approval; ME; Consumer Products Alternative Control Plan

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: The Environmental Protection Agency (EPA) is approving a State Implementation Plan (SIP) revision submitted by the Maine Department of Environmental Protection (Maine DEP). The SIP revision consists of an Alternative Control Plan (ACP) for the control of volatile organic compound (VOC) emissions from Reckitt Benckiser's Air Wick Air Freshener Single Phase Aerosol Spray, issued pursuant to Maine's consumer products rule. This action is being taken in accordance with the Clean Air Act.

DATES: This direct final rule will be effective September 18, 2017, unless EPA receives adverse comments by August 18, 2017. If adverse comments are received, EPA will publish a timely withdrawal of the direct final rule in the **Federal Register** informing the public that the rule will not take effect.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R01–OAR–2017–0023 at *http://www.regulations.gov,* or via email to *Mackintosh.David@epa.gov.* For comments submitted at *Regulations.gov,* follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed 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: David L. Mackintosh, Air Quality Planning Unit, U.S. Environmental Protection Agency, EPA New England Regional Office, 5 Post Office Square—Suite 100, (Mail Code OEP05–2), Boston, MA 02109–3912, tel. 617–918–1584, email *Mackintosh.David@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document whenever ''we,'' ''us,'' or ''our'' is used, we mean EPA.

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I. Background and Purpose
II. Description and Evaluation of the State's Submittal
III. Final Action
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I. Background and Purpose

Maine's Chapter 152, ''Control of Emissions of Volatile Organic Compounds from Consumer Products'' (Chapter 152) became effective in the State of Maine on September 1, 2004 and was approved by EPA into the Maine SIP on October 24, 2005 (70 FR 61382). Maine subsequently amended this rule. The current amended version of the rule became effective in the State of Maine on December 15, 2007 and was approved by EPA into the Maine SIP on May 22, 2012 (77 FR 30216). Chapter 152 contains VOC content limits for the manufacture and sale of various consumer products in the state of Maine. Chapter 152 also provides for state and EPA approval of ACPs by allowing the responsible party the option of voluntarily applying for such agreements.

On March 30, 2012, the Maine DEP received an ACP application from Reckitt Benckiser LLC (Reckitt) for Reckitt's Air Wick Air Freshener Single-Phase Aerosol Spray pursuant to Chapter 152. The Maine DEP approved the Reckitt ACP effective April 23, 2013 and on the same day sent EPA the ACP for approval into the Maine SIP.

II. Description and Evaluation of the State's Submittal

Reckitt manufactures Air Wick Air Freshener Single-Phase Aerosol Spray (Product), which is offered for retail sale and wholesale distribution in the State of Maine. The Product contains 4.6% VOCs by weight. The Chapter 152 regulatory content limit for single-phase aerosol air freshener is 30% VOCs by weight. Reckitt's ACP generates VOC credits, expressed in pounds of VOCs, based on the difference between the Product VOC content and regulatory VOC limit for each unit sold in the State of Maine. Credits generated are subject to the conditions in the ACP Approval. Reckitt shall monitor Maine sales of the Product and each calendar quarter shall provide to the Maine DEP accurate records and documentation as a basis for compliance reporting. Only sales in the State of Maine that are substantiated by accurate documentation shall be used in the calculation of VOC emissions and emission reductions (surplus reductions). The resulting surplus reduction credits shall be discounted by 5% prior to the issuance

of the surplus emission reduction certificates by the Maine DEP. Reckitt must maintain a minimum of three years of detailed transactional data, traceable to invoice levels. Maine DEP shall issue surplus reduction certificates which establish and quantify to the nearest pound of VOC reduced, surplus reductions achieved by Reckitt operating under the ACP.

Surplus reduction certificates shall not constitute instruments, securities, or any other form of property. The issuance, use and trading of all surplus reductions shall be subject to the conditions within the ACP. Any surplus reductions issued by Maine DEP may be used by Reckitt until the reductions expire, are traded to another responsible party operating under a SIP-approved ACP, or until the ACP is canceled. A valid surplus reduction shall be in effect starting five days after the date of issuance by the Maine DEP, for a continuous period of one year at the end of which period the surplus reduction shall then expire. Surplus reductions cannot be applied retroactively to any compliance period prior to the compliance period in which the reductions were generated. While valid, surplus reductions certificates can only be used in the State of Maine to:

(1) Adjust either the Consumer Product ACP emissions of either Reckitt or another ACP responsible party to which the reductions were traded, provided the surplus reductions are not to be used by any ACP responsible party to lower its ACP emissions when its ACP emissions are equal to or less than the ACP limit during the applicable compliance period; or

(2) be traded for the purpose of reconciling another approved Consumer Product ACP responsible party's shortfalls.

EPA has reviewed the ACP and has determined that it is approvable. Reckitt must still, at a minimum, comply with the VOC content limits in Maine's SIP-approved Chapter 152. However, to the extent that the company documents, as outlined in the ACP, the sales of Product in Maine with a VOC content below these limits, the Maine DEP will issue VOC emission reduction credits that may be used in the future. Since to date, this is the first and only Consumer Product ACP submitted by the State of Maine for SIP approval, reduction certificates generated may only be held for future use until they expire (*i.e.,* for one year). Certificates generated may only be used after a second Consumer Product ACP is submitted by Maine, and approved by EPA, into the Maine SIP. Thus, this SIP revision meets the anti-back sliding requirements of Section 110(l) of the Clean Air Act.

III. Final Action

EPA is approving, and incorporating into the Maine SIP, an ACP for Reckitt Benckiser's Air Wick Air Freshener Single Phase Aerosol Spray.

The EPA is publishing this action without prior proposal because the Agency views this as a noncontroversial amendment and anticipates no adverse comments. However, in the proposed rules section of this **Federal Register** publication, EPA is publishing a separate document that will serve as the proposal to approve the SIP revision should relevant adverse comments be filed.

This rule will be effective September 18, 2017 without further notice unless the Agency receives relevant adverse comments by August 18, 2017.

If the EPA receives such comments, then EPA will publish a notice withdrawing the final rule and informing the public that the rule will not take effect. All public comments received will then be addressed in a subsequent final rule based on the proposed rule. The EPA will not institute a second comment period on the proposed rule. All parties interested in commenting on the proposed rule should do so at this time. If no such comments are received, the public is advised that this rule will be effective on September 18, 2017 and no further action will be taken on the proposed rule. Please note that if EPA receives adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, EPA may adopt as final those provisions of the rule that are not the subject of an adverse comment.

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 the alternative control plan issued by the Maine DEP to Reckitt described in the amendments to 40 CFR part 52 set forth below. The EPA has made, and will continue to make, these materials generally available through *www.regulations.gov,* and/or at the EPA Region 1 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, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a significant regulatory action subject to review by the Office of Management and Budget under Executive 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 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 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. Section 804, however, exempts from section 801 the following types of rules: Rules of particular applicability; rules relating to agency management or personnel; and rules of agency organization, procedure, or practice that do not substantially affect the rights or obligations of non-agency parties. 5 U.S.C. 804(3). Because this is a rule of particular applicability, EPA is not required to submit a rule report regarding this action under section 801.

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 September 18, 2017. 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 this **Federal Register**, rather than file an immediate petition for judicial review of this direct final rule, so that 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.

Dated: July 5, 2017.

Deborah A. Szaro,

Acting Regional Administrator, EPA New England.

Part 52 of chapter I, title 40 of the Code of Federal Regulations is amended as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

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

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

Subpart U—Maine

■ 2. In § 52.1020(d), the table is amended by adding an entry for ''Reckitt Benckiser's Air Wick Air Freshener Single Phase Aerosol Spray'' at the end of the table to read as follows:

§ 52.1020 Identification of plan.

* * * * *

(d) * * *

EPA-APPROVED MAINE SOURCE SPECIFIC REQUIREMENTS

Name of source	Permit number	State effective date	EPA approval date [2]	Explanations
* *	*	*	*	* *
Reckitt Benckiser's Air Wick Air Freshener Single Phase Aerosol Spray.	Alternative Control Plan.	4/23/2013	7/19/2017 [Insert **Federal Register** citation].	Issued pursuant to Chapter 152 Control of Volatile Organic Compounds from Consumer Products.

[2] In order to determine the EPA effective date for a specific provision listed in this table, consult the **Federal Register** notice cited in this column for the particular provision.

[FR Doc. 2017–15048 Filed 7–18–17; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

48 CFR Parts 1501, 1504, 1509, 1515, 1516, 1517, 1519, 1535, 1552 and 1553

[EPA–HQ–OARM–2017–0126; FRL 9960–62–OARM]

Administrative Amendments to Environmental Protection Agency Acquisition Regulation

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: The Environmental Protection Agency (EPA) is issuing a final rule to amend the Environmental Protection Agency Acquisition Regulation (EPAAR) to make administrative updates, corrections and minor edits. EPA does not anticipate any adverse comments.

DATES: This rule is effective on September 18, 2017 without further notice, unless EPA receives adverse comment by August 18, 2017. If EPA receives adverse comment, we will publish a timely withdrawal in the **Federal Register** informing the public that the rule will not take effect.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OARM–2017–0126, at *https://www.regulations.gov.* Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov.* 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, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *https://www.epa.gov/dockets/commenting-epa-dockets.*

FOR FURTHER INFORMATION CONTACT: Julianne Odend'hal, Office of Acquisition Management (Mail Code 3802R), U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue NW., Washington, DC 20460; telephone

number: 202–564–5218; email address: *Odend'hal.Julianne@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Why is EPA using a direct final rule?

EPA is publishing this rule without a prior proposed rule because we view this as a noncontroversial action and anticipate no adverse comment. The EPAAR is being amended to make administrative changes including updates, corrections and minor edits. None of these changes are substantive or of a nature to cause any significant expense for EPA or its contractors. If EPA receives adverse comment, we will publish a timely withdrawal in the **Federal Register** informing the public that the rule will not take effect. Any parties interested in commenting must do so at this time.

II. Does this action apply to me?

This action applies to contractors who have or wish to have contracts with the EPA.

III. What should I consider as I prepare my comments for EPA?

A. *Submitting CBI.* Do not submit this information to EPA through *https://www.regulations.gov* or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD ROM that you mail to EPA, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is claimed as CBI). In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

B. *Tips for Preparing Your Comments.* When submitting comments, remember to:

• Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).

• *Follow directions*—The agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

• Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

• Describe any assumptions and provide any technical information and/or data that you used.

• If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

• Provide specific examples to illustrate your concerns, and suggest alternatives.

• Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

• Make sure to submit your comments by the comment period deadline identified.

IV. Background

EPAAR Parts 1501, 1504, 1509, 1515, 1516, 1517, 1519, 1535, 1552 and 1553 are being amended to make administrative changes including updates, corrections and minor edits.

V. Final Rule

This direct final rule amends the EPAAR to make the following changes: (1) EPAAR 1501.603–1 is amended to remove outdated policy reference ''chapter 8 of the EPA ''Contracts Management Manual'' '' and to add in its place ''the EPA Acquisition Guide (EPAAG) subsection 1.6.4''; (2) EPAAR 1504.804–5 is amended to remove outdated policy reference ''Unit 42 of the EPA Acquisition Handbook'' and to add in its place ''the EPA Acquisition Guide (EPAAG) subsection 4.8.1''; (3) EPAAR 1509.507–1(a)(1) is amended to clarify the FAR reference by removing ''(FAR) 48 CFR'' and adding in its place ''FAR''; (4) EPAAR 1515.404–473(a) is amended to remove ''except those identified in EPAAR (48 CFR) 1516.404–273(b)'' and to add in its place ''except those otherwise identified in the EPAAR'' because the EPAAR reference no longer exists; (5) EPAAR 1516.301–70 is amended to clarify the FAR reference by removing ''48 CFR'' and adding in its place ''in FAR''; (6) EPAAR 1516.406(b) is amended to correct the EPAAR reference by removing ''clause'' and adding in its place ''provision''; (7) EPAAR 1517.208 is amended to include a prescription for 48 CFR 1552.217–70 by adding a new paragraph (a) stating that the Contracting Officer shall insert the provision at 1552.217–70, Evaluation of Contract Options, in solicitations containing options, and re-designating existing paragraphs (a) through (g) as paragraphs (b) through (h); (8) EPAAR part 1519 is amended to correct an office title by removing ''Office of Small Business Programs (OSBP)'' and ''OSBP'', and adding in their place ''Office of Small and Disadvantaged Business Utilization (OSDBU)'' and ''OSDBU'' respectively wherever they appear in part 1519; (9) EPAAR 1535.007(a), (b) and (c) are amended to clarify the EPAAR references by adding ''the provision at''; (10) EPAAR 1552.209–71 Alternate I introductory text is amended to add ''(SEP 1998)''; (11) EPAAR 1552.209–73 Alternate I introductory text is amended to add ''(JAN 2015)''; (12) EPAAR 1552.211–74 Alternate I and II introductory texts are amended to add ''(APR 1984)'' and Alternate III and IV introductory texts are amended to add ''(DEC 2014)''; (13) EPAAR 1552.216–72 Alternate I introductory text is amended to add ''(JUL 2014)''; (14) EPAAR 1552.216–75 introductory text and the ending text are amended to correct the EPAAR references by removing ''clause'' and adding in their place ''provision''; (15) EPAAR 1552.217–76 clause title is amended to add ''(MAR 1984)''; (16) EPAAR 1552.217–77 introductory text is amended by removing ''1517.208(g)'' and adding in its place ''1517.208(h)''; (17) EPAAR 1552.219–70(b) and (d) are amended to correct an office title by removing ''Office of Small Business Programs (OSBP)'' and ''OSBP'', and adding in their place ''Office of Small and Disadvantaged Business Utilization (OSDBU)'' and ''OSDBU'' respectively; (18) EPAAR 1552.219–71(f)(2)(v) and (k) are amended to correct an office title by removing ''Office of Small Business Programs (OSBP)'' and adding in its place ''Office of Small and Disadvantaged Business Utilization (OSDBU)'', and 1552.219–71(k) is amended to update the address to Office of Small and Disadvantaged Business Utilization, U.S. Environmental Protection Agency, William Jefferson Clinton North Building, Mail Code 1230A, 1200 Pennsylvania Avenue NW., Washington, DC 20450, Telephone: (202) 566–2075, Fax: (202) 566–0266; (19) EPAAR 1552.223–71 is amended by removing the following Web site addresses: ''*http://www.epa.gov/oppt/greenmeetings/*'', ''(*http://www.epa.gov/greenpower/join/purchase.htm*)'', ''*http://www.epa.gov/epawaste/conserve/smm/wastewise/*'', ''*http://www.epa.gov/foodrecoverychallenge/*'', and ''*http://www.epa.gov/dfe/*'' and adding the following addresses to replace them respectively: ''*https://www.epa.gov/p2/green-meetings*'', ''*https://www.epa.gov/greenpower/green-power-partnership-basic-program-information*'', ''*https://www.epa.gov/smm/wastewise*'', ''*https://www.epa.gov/sustainable-management-food/food-recovery-challenge-frc*'', and ''*https://www.epa.gov/saferchoice/history-safer-choice-and-design-environment*''*;* (20) EPAAR 1552.227–76 Alternate I introductory text is amended to add ''(JAN 2015)''; (21) EPAAR 1552.242–70(a) is amended to update

the address to U.S. Environmental Protection Agency, Manager, Financial Analysis and Oversight Service Center, Mail Code 3802R, Policy, Training, and Oversight Division, 1200 Pennsylvania Avenue NW., Washington, DC 20460; and (22) EPAAR 1553.213 is amended to remove ''1553.213 Small purchases and other simplified purchase procedures.'' and to add in its place ''1553.213 Simplified acquisition procedures.'' to conform to the FAR.

VI. Statutory and Executive Order Reviews

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

This action is exempt from review by the Office of Management and Budget (OMB) because it is limited to matters of agency organization.

B. Paperwork Reduction Act

This action does not impose an information collection burden under the PRA because it does not contain any information collection activities.

C. Regulatory Flexibility Act (RFA), as Amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), 5 U.S.C. 601 et seq.

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. In making this determination, the impact of concern is any significant adverse economic impact on small entities. An agency may certify that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves regulatory burden, has no net burden or otherwise has a positive economic effect on the small entities subject to the rule. This action amends the EPAAR to make administrative changes including updates, corrections, and minor edits. We have therefore concluded that this action will have no net regulatory burden for all directly regulated small entities.

D. Unfunded Mandates Reform Act

This action does not contain an unfunded mandate of $100 million or more as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. The action imposes no enforceable duty on any state, local or tribal governments or the private sector.

E. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.

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

This action does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). Thus, Executive Order 13175 does not apply to this action. In the spirit of Executive Order 13175, and consistent with EPA policy to promote communication between EPA and Tribal governments, EPA specifically solicits additional comment on this rule from Tribal officials.

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

EPA interprets Executive Order 13045 (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the Executive Order has the potential to influence the regulation. This action is not subject to Executive Order 13045 because it does not establish an environmental standard intended to mitigate health or safety risks.

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

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

I. National Technology Transfer and Advancement Act of 1995

This rulemaking does not involve technical standards.

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

Executive Order 12898 (59 FR 7629, (February 16, 1994)) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States. EPA has determined that this final rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it does not affect the level of protection provided to human health or the environment.

K. Congressional Review

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

List of Subjects in 48 CFR Parts 1501, 1504, 1509, 1515, 1516, 1517, 1519, 1535, 1552 and 1553

Government procurement.

Dated: May 22, 2017.

Kimberly Y. Patrick,

Director, Office of Acquisition Management.

For the reasons stated in the preamble, 48 CFR parts 1501, 1504, 1509, 1515, 1516, 1517, 1519, 1535, 1552 and 1553 are amended as set forth below:

PART 1501—GENERAL

■ 1. The authority citation for part 1501 continues to read as follows:

Authority: 5 U.S.C. 301; Sec. 205(c), 63 Stat. 390, as amended, 40 U.S.C. 486(c); and 41 U.S.C. 418b.

■ 2. Revise section 1501.603–1 to read as follows:

1501.603–1 General.

EPA Contracting Officers shall be selected and appointed and their appointments terminated in accordance with the Contracting Officer warrant program specified in EPA Acquisition Guide (EPAAG) subsection 1.6.4.

PART 1504—ADMINISTRATIVE MATTERS

■ 3. The authority citation for part 1504 continues to read as follows:

Authority: 5 U.S.C. 301; Sec. 205(c), 63 Stat. 390, as amended, 40 U.S.C. 486(c); 41 U.S.C. 418b.

■ 4. Revise section 1504.804–5 to read as follows:

1504.804–5 Detailed procedures for closing out contract files.

In addition to those procedures set forth in FAR 4.804–5, the contracting office shall, before final payment is made under a cost reimbursement type contract, verify the allowability, allocability, and reasonableness of costs claimed. Verification of total costs incurred should be obtained from the Office of Audit through the Financial Analysis and Oversight Service Center in the form of a final audit report. Similar verification of actual costs shall be made for other contracts when cost incentives, price redeterminations, or cost-reimbursement elements are involved. Termination settlement proposals shall be submitted to the Financial Analysis and Oversight Service Center for review by the Office of Audit as prescribed by FAR 49.107. All such audits will be coordinated through the cost advisory group in the contracting office. Exceptions to these procedures are the quick close-out procedures as described in FAR 42.708 and EPA Acquisition Guide (EPAAG) subsection 4.8.1.

PART 1509—CONTRACTOR QUALIFICATIONS

■ 5. The authority citation for part 1509 continues to read as follows:

Authority: Sec. 205(c), 63 Stat. 390, as amended, 40 U.S.C. 486(c).

■ 6. Amend section 1509.507–1 by revising paragraph (a)(1) to read as follows:

1509.507–1 Solicitation provisions.

(a) * * *

(1) Include the information prescribed in FAR 9.507–1;

* * * * *

PART 1515—CONTRACTING BY NEGOTIATION

■ 7. The authority citation for part 1515 continues to read as follows:

Authority: 5 U.S.C. 301; Sec. 205(c), 63 Stat. 390, as amended, 40 U.S.C. 486(c); and 41 U.S.C. 418b.

■ 8. Amend section 1515.404–473 by revising paragraph (a) to read as follows:

1515.404–473 Limitations.

(a) In addition to the limitations established by statute (see FAR 15.404–4(b)(4)(i)), no administrative ceilings on profits or fees shall be established, except those otherwise identified in the EPAAR.

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PART 1516—TYPES OF CONTRACTS

■ 9. The authority citation for part 1516 continues to read as follows:

Authority: 5 U.S.C. 301 and 41 U.S.C. 418b.

■ 10. Revise section 1516.301–70 to read as follows:

1516.301–70 Payment of fee.

The policy of EPA for cost-reimbursement, term form contracts is to make provisional payment of fee (*i.e.* the fixed fee on cost-plus-fixed-fee type contracts or the base fee on cost-plus-award-fee type contracts) on a percentage of work completed basis, when such a method will not prove detrimental to proper contract performance. Percentage of work completed is the ratio of the direct labor hours performed in relation to the direct labor hours set forth in the contract in clause 48 CFR 1552.211–73, Level of Effort—Cost Reimbursement Contract. Provisional payment of fee will remain subject to withholding provisions, such as in FAR 52.216–8, Fixed Fee.

■ 11. Amend section 1516.406 by revising paragraph (b) to read as follows:

1516.406 Contract clauses.

* * * * *

(b) The Contracting Officer shall insert the provision at 48 CFR 1552.216–75, Base Fee and Award Fee Proposal, in all solicitations which contemplate the award of cost-plus-award-fee contracts. The Contracting Officer shall insert the appropriate percentages.

* * * * *

PART 1517—SPECIAL CONTRACTING METHODS

■ 12. The authority citation for part 1517 continues to read as follows:

Authority: 5 U.S.C. 301; Sec. 205(c), 63 Stat. 390, as amended, 40 U.S.C. 486(c); and 41 U.S.C. 418b.

■ 13. Revise section 1517.208 to read as follows:

1517.208 Solicitation provisions and contract clauses.

(a) The Contracting Officer shall insert the provision at 48 CFR 1552.217–70, Evaluation of Contract Options, in solicitations containing options.

(b) The Contracting Officer shall insert the clause at 48 CFR 1552.217–71, Option to Extend the Term of the Contract—Cost-Type Contract, when applicable.

(c) The Contracting Officer shall insert the clause at 48 CFR 1552.217–72, Option to Extend the Term of the Contract—Cost-Plus-Award-Fee Contract, when applicable.

(d) The Contracting Officer shall insert the clause at 48 CFR 1552.217–73, Option for Increased Quantity—Cost-Type Contract, when applicable.

(e) The Contracting Officer shall insert the clause at 48 CFR 1552.217–74, Option for Increased Quantity—Cost-Plus-Award-Fee Contract, when applicable.

(f) The Contracting Officer shall insert the clause at 48 CFR 1552.217–75, Option to Extend the Effective Period of the Contract—Time and Materials or Labor Hour Contract, when applicable.

(g) The Contracting Officer shall insert the clause at 48 CFR 1552.217–76, Option to Extend the Effective Period of the Contract—Indefinite Delivery/Indefinite Quantity Contract, when applicable.

(h) The Contracting officer shall insert the clause at 48 CFR 1552.217–77, Option to Extend the Term of the Contract—Fixed Price, when applicable.

■ 14. Revise part 1519 to read as follows:

PART 1519—SMALL BUSINESS PROGRAMS

Subpart 1519.2—Policies

Sec.
1519.201 Policy.
1519.201–71 Director of the Office of Small and Disadvantaged Business Utilization.
1519.201–72 Small business specialists.
1519.202–5 [Reserved]
1519.203 Mentor-protégé.
1519.204 [Reserved]

Subpart 1519.5—Set-Asides for Small Business

1519.501 Review of acquisitions.
1519.503 Class set-aside for construction.

Subpart 1519.6—[Reserved]

Subpart 1519.7—The Small Business Subcontracting Program

1519.705–2 Determining the need for a subcontract plan.
1519.705–4 Reviewing the subcontracting plan.
1519.705–70 Synopsis of contracts containing Pub. L. 95–507 subcontracting plans and goals.

Authority: Sec. 205(c), 63 Stat. 390, as amended, 40 U.S.C. 486(c).

Subpart 1519.2—Policies

1519.201 Policy.

Each program's Assistant or Associate Administrator shall be responsible for developing its socioeconomic goals on a fiscal year basis. The goals shall be developed in collaboration with the supporting Chiefs of Contracting Offices (CCOs) or Regional Acquisition Managers (RAMs), the assigned Small Business Specialist (SBS), and the Office of Small and Disadvantaged Business Utilization (OSDBU). The goals will be based on advance procurement plans and past performance. The goals shall be submitted to the Director of OSDBU, at least thirty (30) days prior to the start of the fiscal year.

1519.201–71 Director of the Office of Small and Disadvantaged Business Utilization.

The Director of the Office of Small and Disadvantaged Business Utilization (OSDBU) provides guidance and advice, as appropriate, to Agency program and contracts officials on small business programs. The OSDBU Director is the central point of contact for inquiries concerning the small business programs from industry, the Small Business Administration (SBA), and the Congress; and shall advise the Administrator and staff of such inquiries as required. The OSDBU Director shall represent the Agency in the negotiations with the other Government agencies on small business programs matters.

1519.201–72 Small business specialists.

(a) Small Business Specialists (SBSs) shall be appointed in writing. Regional SBSs will normally be appointed from members of staffs of the appointing authority. The appointing authorities for regional SBSs are the RAMs. The SBSs for EPA headquarters, Research Triangle Park (RTP), and Cincinnati shall be appointed by the OSDBU Director. The SBS is administratively responsible directly to the appointing authority and, on matters relating to small business programs activities, receives technical guidance from the OSDBU Director.

(b) A copy of each appointment and termination of all SBSs shall be forwarded to the OSDBU Director. In addition to performing the duties outlined in paragraph (c) of this section that are normally performed in the activity to which assigned, the SBS shall perform such additional functions as may be prescribed from time to time in furtherance of overall small business programs goals. The SBS may be appointed on either a full- or part-time basis; however, when appointed on a part-time basis, small business duties shall take precedence over collateral responsibilities.

(c) The SBS appointed pursuant to paragraph (a) of this section shall perform the following duties as appropriate:

(1) Maintain a program designed to locate capable small business sources for current and future acquisitions;

(2) Coordinate inquiries and requests for advice from small business concerns on acquisition matters;

(3) Review all proposed solicitations in excess of the simplified acquisition threshold, assure that small business concerns will be afforded an equitable opportunity to compete, and, as appropriate, initiate recommendations for small business set-asides, or offers of requirements to the Small Business Administration (SBA) for the 8(a) program, and complete EPA Form 1900–37, ''Record of Procurement Request Review,'' as appropriate;

(4) Take action to assure the availability of adequate specifications and drawings, when necessary, to obtain small business participation in an acquisition. When small business concerns cannot be given an opportunity on a current acquisition, initiate action, in writing, with appropriate technical and contracting personnel to ensure that necessary specifications and/or drawings for future acquisitions are available;

(5) Review proposed contracts for possible breakout of items or services suitable for acquisition from small business concerns;

(6) Participate in the evaluation of a prime contractor's small business subcontracting programs;

(7) Assure that adequate records are maintained, and accurate reports prepared, concerning small business participation in acquisition programs;

(8) Make available to SBA copies of solicitations when so requested; and

(9) Act as liaison with the appropriate SBA office or representative in connection with matters concerning the small business programs including set-asides.

1519.202–5 [Reserved]

1519.203 Mentor-protégé.

(a) The contracting officer shall insert the clause at 48 CFR 1552.219–70, Mentor-Protégé Program, in all contracts under which the contractor has been approved to participate in the EPA Mentor-Protégé Program.

(b) The contracting officer shall insert the provision at 48 CFR 1552.219–71, Procedures for Participation in the EPA Mentor-Protégé Program, in all solicitations valued at $500,000 or more which will be cost-plus-award-fee or cost-plus fixed-fee contracts.

1519.204 [Reserved]

Subpart 1519.5—Set-Asides for Small Business

1519.501 Review of acquisitions.

(a) If no Small Business Administration (SBA) representative is available, the Small Business Specialist (SBS) shall initiate recommendations to the contracting officer for small business set-asides with respect to individual acquisitions or classes of acquisitions or portions thereof.

(b) When the SBS has recommended that all, or a portion, of an individual acquisition or class of acquisitions be set aside for small business, the contracting officer shall:

(1) Promptly concur in the recommendation; or

(2) Promptly disapprove the recommendation, stating in writing the reasons for disapproval. If the contracting officer disapproves the recommendation of the SBS, the SBS may appeal to the appropriate appointing authority, whose decision shall be final.

1519.503 Class set-aside for construction.

(a) Each proposed acquisition for construction estimated to cost between $10,000 and $1,000,000 shall be set-aside for exclusive small business participation. Such set-asides shall be considered to be unilateral small business set-asides, and shall be withdrawn in accordance with the procedure of FAR 19.506 only if found not to serve the best interest of the Government.

(b) Small business set-aside preferences for construction acquisitions in excess of $1,000,000 shall be considered on a case-by-case basis.

Subpart 1519.6—[Reserved]

Subpart 1519.7—The Small Business Subcontracting Program

1519.705–2 Determining the need for a subcontract plan.

One copy of the determination required by FAR 19.705–2(c) shall be placed in the contract file and one copy provided to the Director of the Office of Small and Disadvantaged Business Utilization.

1519.705–4 Reviewing the subcontracting plan.

In determining the acceptability of a proposed subcontracting plan, the

contracting officer shall obtain advice and recommendations from the Office of Small and Disadvantaged Business Utilization, which shall in turn coordinate review by the Small Business Administration Procurement Center Representative (if any).

1519.705–70 Synopsis of contracts containing Pub. L. 95–507 subcontracting plans and goals.

The synopsis of contract award, where applicable, shall include a statement identifying the contract as one containing Public Law 95–507 subcontracting plans and goals.

PART 1535—RESEARCH AND DEVELOPMENT CONTRACTING

■ 15. The authority citation for part 1535 continues to read as follows:

Authority: Sec. 205(c), 63 Stat. 390, as amended, 40 U.S.C. 486(c).

■ 16. Revise section 1535.007 to read as follows:

1535.007 Solicitations.

(a) Contracting officers shall insert the provision at 48 CFR 1552.235–73, Access to Federal Insecticide, Fungicide, and Rodenticide Act Confidential Business Information, in all solicitations when the contracting officer has determined that EPA may furnish the contractor with confidential business information which EPA had obtained from third parties under the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. 136 *et seq.*).

(b) Contracting officers shall insert the provision at 48 CFR 1552.235–75, Access to Toxic Substances Control Act Confidential Business Information, in all solicitations when the contracting officer has determined that EPA may furnish the contractor with confidential business information which EPA had obtained from third parties under the Toxic Substances Control Act (15 U.S.C. 2601 *et seq.*).

(c) Contracting officers shall insert the provision at 48 CFR 1552.235–81, Institutional Oversight of Life Sciences Dual Use Research of Concern-Representation, when notified in the Advance Procurement Plan (APP) or by an EPA funding/requesting office, in accordance with the Institutional Oversight of Life Sciences Dual Use Research of Concern (iDURC) EPA Order 1000.19, Policy and Procedures for Managing Dual Use Research of Concern, in solicitations that will result in a contract under which EPA funding will be used by the recipient to conduct or sponsor ''life sciences research''.

PART 1552—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 17. The authority citation for part 1552 continues to read as follows:

Authority: 5 U.S.C. 301 and 41 U.S.C. 418b.

■ 18. Amend section 1552.209–71 by revising the introductory text in Alternate I to read as follows:

1552.209–71 Organizational conflicts of interest.

* * * * *

Alternate I (SEP 1998). Contracts for other than Superfund work shall include Alternate I in this clause in lieu of paragraph (e).

* * * * *

■ 19. Amend section 1552.209–73 by revising the introductory text in Alternate I to read as follows:

1552.209–73 Notification of conflicts of interest regarding personnel.

* * * * *

Alternate I (JAN 2015). Contracts for other than Superfund work shall include Alternate I in this clause in lieu of paragraph (d).

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■ 20. Amend section 1552.211–74 by revising the introductory text in Alternates I through IV to read as follows:

1552.211–74 Work assignments.

* * * * *

Alternate I (APR 1984). As prescribed in 1511.011–74(b)(1), modify the existing clause by adding the following paragraph (f) to the basic clause:

* * * * *

Alternate II (APR 1984). As prescribed in 1511.011–74(b)(1), modify the existing clause by adding the following paragraph (f) to the basic clause:

* * * * *

Alternate III (DEC 2014). As prescribed in 1511.011–74(b)(2), modify the existing clause by adding the following paragraph (f) to the basic clause:

* * * * *

Alternate IV (DEC 2014). As prescribed in 1511.011–74(b)(2), modify the existing clause by adding the following paragraph (f) to the basic clause:

* * * * *

■ 21. Amend section 1552.216–72 by revising the introductory text in Alternate I to read as follows:

1552.216–72 Ordering—by designated ordering officers.

* * * * *

Alternate I (JUL 2014). As prescribed in 1516.505(a), insert the subject clause, or a clause substantially similar to the subject clause, in indefinite delivery/indefinite quantity contracts when formal input from the Contractor will not be obtained prior to order issuance.

* * * * *

1552.216–75 [Amended]

■ 22. Amend section 1552.216–75 by:

■ a. Removing, in the introductory text, the text ''clause'' and adding the text ''provision'' in its place; and

■ b. Removing the words ''(End of clause)'' and adding the words ''(End of provision)'' in its place.

1552.217–76 [Amended]

■ 23. Amend section 1552.217–76 by adding the clause date ''(MAR 1984)'' after the clause title.

1552.217–77 [Amended]

■ 24. Amend the introductory text of section 1552.217–77 by removing the text ''1517.208(g)'' and adding the text ''1517.208(h)'' in its place.

■ 25. Revise section 1552.219–70 to read as follows:

1552.219–70 Mentor-Protégé Program.

As prescribed in 1519.203(a), insert the following clause:

Mentor-Protégé Program (SEP 2017)

(a) The Contractor has been approved to participate in the EPA Mentor-Protégé Program. The purpose of the Program is to increase the participation of small disadvantaged businesses (SDBs) as subcontractors, suppliers, and ultimately as prime contractors; establish a mutually beneficial relationship with SDBs and EPA's large business prime contractors (although small businesses may participate as Mentors); develop the technical and corporate administrative expertise of SDBs which will ultimately lead to greater success in competition for contract opportunities; promote the economic stability of SDBs; and aid in the achievement of goals for the use of SDBs in subcontracting activities under EPA contracts.

(b) The Contractor shall submit an executed Mentor-Protégé agreement to the Contracting Officer, with a copy to the Office of Small and Disadvantaged Business Utilization (OSDBU) or the Small Business Specialist, within thirty (30) calendar days after the effective date of the contract. The Contracting Officer will notify the Contractor within thirty (30) calendar days from its submission if the agreement is not accepted.

(c) The Contractor as a Mentor under the Program agrees to fulfill the terms of its agreement(s) with the Protégé firm(s).

(d) If the Contractor or Protégé firm is suspended or debarred while performing under an approved Mentor-Protégé agreement, the Contractor shall promptly give notice of the suspension or debarment to the OSDBU and the Contracting Officer.

(e) Costs incurred by the Contractor in fulfilling their agreement(s) with the Protégé firm(s) are not reimbursable on a direct basis under this contract.

(f) In an attachment to Individual Subcontract Reports (ISR), the Contractor shall report on the progress made under their Mentor-Protégé agreement(s), providing:

(1) The number of agreements in effect; and

(2) The progress in achieving the developmental assistance objectives under each agreement, including whether the objectives of the agreement have been met, problem areas encountered, and any other appropriate information.

(End of clause)

■ 26. Revise section 1552.219–71 to read as follows:

1552.219–71 Procedures for Participation in the EPA Mentor-Protégé Program.

As prescribed in 1519.203(b), insert the following provision:

Procedures for Participation in the EPA Mentor-Protégé Program (SEP 2017)

(a) This provision sets forth the procedures for participation in the EPA Mentor-Protégé Program (hereafter referred to as the Program). The purpose of the Program is to increase the participation of concerns owned and/or controlled by socially and economically disadvantaged individuals as subcontractors, suppliers, and ultimately as prime contractors; to establish a mutually beneficial relationship between these concerns and EPA's large business prime contractors (although small businesses may participate as Mentors); to develop the technical and corporate administrative expertise of these concerns, which will ultimately lead to greater success in competition for contract opportunities; to promote the economic stability of these concerns; and to aid in the achievement of goals for the use of these concerns in subcontracting activities under EPA contracts. If the successful offeror is accepted into the Program they shall serve as a Mentor to a Protégé firm(s), providing developmental assistance in accordance with an agreement with the Protégé firm(s).

(b) To participate as a Mentor, the offeror must receive approval in accordance with paragraph (h) of this section.

(c) A Protégé must be a concern owned and/or controlled by socially and economically disadvantaged individuals within the meaning of section 8(a)(5) and (6) of the Small Business Act (15 U.S.C. 637(a)(5) and (6)), including historically black colleges and universities. Further, in accordance with Public Law 102–389 (the 1993 Appropriation Act), for EPA's contracting purposes, economically and socially disadvantaged individuals shall be deemed to include women.

(d) Where there may be a concern regarding the Protégé firm's eligibility to participate in the program, the protégé's eligibility will be determined by the contracting officer after the SBA has completed any formal determinations.

(e) The offeror shall submit an application in accordance with paragraph (k) of this section as part of its proposal which shall include as a minimum the following information.

(1) A statement and supporting documentation that the offeror is currently performing under at least one active Federal contract with an approved subcontracting plan and is eligible for the award of Federal contracts;

(2) A summary of the offeror's historical and recent activities and accomplishments under any disadvantaged subcontracting programs. The offeror is encouraged to include any initiatives or outreach information believed pertinent to approval as a Mentor firm;

(3) The total dollar amount (including the value of all option periods or quantities) of EPA contracts and subcontracts received by the offeror during its two preceding fiscal years. (Show prime contracts and subcontracts separately per year);

(4) The total dollar amount and percentage of subcontract awards made to all concerns owned and/or controlled by disadvantaged individuals under EPA contracts during its two preceding fiscal years.

(5) The number and total dollar amount of subcontract awards made to the identified Protégé firm(s) during the two preceding fiscal years (if any).

(f) In addition to the information required by paragraph (e) of this section, the offeror shall submit as a part of the application the following information for each proposed Mentor-Protégé relationship:

(1) Information on the offeror's ability to provide developmental assistance to the identified Protégé firm and how the assistance will potentially increase contracting and subcontracting opportunities for the Protégé firm.

(2) A letter of intent indicating that both the Mentor firm and the Protégé firm intend to enter into a contractual relationship under which the Protégé will perform as a subcontractor under the contract resulting from this solicitation and that the firms will negotiate a Mentor-Protégé agreement. The letter of intent must be signed by both parties and contain the following information:

(i) The name, address and phone number of both parties;

(ii) The Protégé firm's business classification, based upon the NAICS code(s) which represents the contemplated supplies or services to be provided by the Protégé firm to the Mentor firm;

(iii) A statement that the Protégé firm meets the eligibility criteria;

(iv) A preliminary assessment of the developmental needs of the Protégé firm and the proposed developmental assistance the Mentor firm envisions providing the Protégé. The offeror shall address those needs and how their assistance will enhance the Protégé. The offeror shall develop a schedule to assess the needs of the Protégé and establish criteria to evaluate the success in the Program;

(v) A statement that if the offeror or Protégé firm is suspended or debarred while performing under an approved Mentor-Protégé agreement the offeror shall promptly give notice of the suspension or debarment to the EPA Office of Small and Disadvantaged Business Utilization (OSDBU) and the Contracting Officer. The statement shall require the Protégé firm to notify the Contractor if it is suspended or debarred.

(g) The application will be evaluated on the extent to which the offeror's proposal addresses the items listed in paragraphs (e) and (f) of this section. To the maximum extent possible, the application should be limited to not more than 10 single pages, double spaced. The offeror may identify more than one Protégé in its application.

(h) If the offeror is determined to be in the competitive range, or is awarded a contract without discussions, the offeror will be advised by the Contracting Officer whether their application is approved or rejected. The Contracting Officer, if necessary, may request additional information in connection with the offeror's submission of its revised or best and final offer. If the successful offeror has submitted an approved application, they shall comply with the clause titled ''Mentor-Protégé Program.''

(i) Subcontracts of $1,000,000 or less awarded to firms approved as Protégés under the Program are exempt from the requirements for competition set forth in FAR 44.202–2(a)(5) and 52.244–5(b). However, price reasonableness must still be determined and the requirements in FAR 44.202–2(a)(8) for cost and price analysis continue to apply.

(j) Costs incurred by the offeror in fulfilling their agreement(s) with a Protégé firm(s) are not reimbursable as a direct cost under the contract. Unless EPA is the responsible audit agency under FAR 42.703–1, offerors are encouraged to enter into an advance agreement with their responsible audit agency on the treatment of such costs when determining indirect cost rates. Where EPA is the responsible audit agency, these costs will be considered in determining indirect cost rates.

(k) *Submission of Application and Questions Concerning the Program.* The application for the Program shall be submitted to the Contracting Officer, and to the EPA Office of Small and Disadvantaged Business Utilization at the following address: Office of Small and Disadvantaged Business Utilization, U.S. Environmental Protection Agency, William Jefferson Clinton North Building, Mail Code 1230A, 1200 Pennsylvania Avenue NW., Washington, DC 20460, Telephone: (202) 566–2075, *Fax:* (202) 566–0266.

(End of provision)

■ 27. Revise section 1552.223–71 to read as follows:

1552.223–71 EPA Green Meetings and Conferences.

As prescribed in 1523.703–1, insert the following provision, or language substantially the same as the provision, in solicitations for meetings and conference facilities.

EPA Green Meetings and Conferences (SEP 2017)

(a) The mission of the EPA is to protect human health and the environment. As such, all EPA meetings and conferences will be

staged using as many environmentally preferable measures as possible. Environmentally preferable means products or services that have a lesser or reduced effect on the environment when compared with competing products or services that serve the same purpose.

(b) Potential meeting or conference facility providers for EPA shall provide information about the environmentally preferable features and practices identified by the checklist contained in paragraph (c) of this section, addressing sustainability for meeting and conference facilities including lodging and non-lodging oriented facilities.

(c) The following list of questions is provided to assist contracting officers in evaluating the environmental preferability of prospective meeting and conference facility providers. More information about EPA's Green Meetings initiative may be found on the Internet at *https://www.epa.gov/p2/green-meetings.*

(1) Does your facility track energy usage and/or GHG emissions through ENERGY STAR Portfolio Manager (*http://www.energystar.gov/benchmark*) or some other calculator based on a recognized greenhouse gas tracking protocol? Y/N__

(2) If available for your building type, does your facility currently qualify for the Energy Star certification for superior energy performance? Y/N __, NA__

(3) Does your facility track water use through ENERGY STAR Portfolio Manager or another equivalent tracking tool and/or undertake best management practices to reduce water use in the facility (*http://www.epa.gov/watersense/commercial*)? Y/N__

(4) Do you use landscaping professionals who are either certified by a WaterSense recognized program or actively undertake the WaterSense ''Water-Smart'' landscaping design practices (*http://www.epa.gov/watersense/outdoor*)? Y/N__, NA__

(5) Based on the amount of renewable energy your buildings uses, does (or would) your facility qualify as a partner under EPA's Green Power Partnership program (*https://www.epa.gov/greenpower/green-power-partnership-basic-program-information*)? Y/N__

(6) Do you restrict idling of motor vehicles in front of your facility, at the loading dock and elsewhere at your facility? Y/N__

(7) Does your facility have a default practice of not changing bedding and towels unless requested by guests? Y/N__, NA__

(8) Does your facility participate in EPA's WasteWise (*https://www.epa.gov/smm/wastewise*) and/or Food Recovery Challenge (*https://www.epa.gov/sustainable-management-food/food-recovery-challenge-frc*) programs? Y/N__

(9) Do you divert from landfill at least 50% of the total solid waste generated at your facility? Y/N__

(10) Will your facility be able to divert from the landfill at least 75% of the total solid waste expected to be generated during this conference/event? Y/N__

(11) Do you divert from landfill at least 50% of the food waste generated at your facility (through donation, use as animal feed, recycling, anaerobic digestion, or composting)? Y/N__

(12) Will your facility be able to divert from landfill at least 75% of the food waste expected to be generated during this conference/event (through donation, use as animal feed, recycling, anaerobic digestion, or composting)? Y/N__

(13) Does your facility provide recycling containers for visitors, guests and staff (paper and beverage at minimum)? Y/N__

(14) With respect to any food and beverage prepared and/or served at your facility, does at least 50% of it on average meet sustainability attributes such as: Local, organic, fair trade, fair labor, antibiotic-free, etc.? Y/N__

(15) Will your facility be able to ensure that at least 75% of the food and beverage expected to be served during this conference/event meets sustainability attributes such as: Local, organic, fair trade, fair labor, antibiotic-free, etc.? Y/N__

(16) Does your facility use Design for the Environment (DfE) cleaning products (*https://www.epa.gov/saferchoice/history-safer-choice-and-design-environment*), or similar products meeting other recognized standards for being 'environmentally preferable' (*http://www.epa.gov/epp/*) or more sustainable? Y/N__

(17) Is your facility prepared to document or demonstrate all of the claims you have made above? Y/N__

(d) The contractor shall include any additional ''Green Meeting'' information in their proposal which is believed is pertinent to better assist us in considering environmental preferability in selecting our meeting venue.

(End of provision)

■ 28. Amend section 1552.227–76 by revising the introductory text in Alternate I to read as follows:

1552.227–76 Project employee confidentiality agreement.

* * * * *

Alternate I (JAN 2015). Contracts for other than Superfund work shall include Alternate I in this clause in lieu of paragraph (d).

* * * * *

■ 29. Revise section 1552.242–70 to read as follows:

1552.242–70 Indirect costs.

As prescribed in 1542.705–70, insert the following clause in all cost-reimbursement and non-commercial time and materials type contracts. If ceilings are not being established, enter ''not applicable'' in paragraph (c) of the clause.

Indirect Costs (SEP 2017)

(a) In accordance with paragraph (d) of the ''Allowable Cost and Payment'' clause, the final indirect cost rates applicable to this contract shall be established between the Contractor and the appropriate Government representative (EPA, other Government agency, or auditor), as provided by FAR 42.703–1(a). EPA's procedures require a Contracting Officer determination of indirect cost rates for its contracts. In those cases where EPA is the cognizant agency (see FAR 42.705–1), the final rate proposal shall be submitted to the cognizant audit activity and to the following designated Contracting Officer: U.S. Environmental Protection Agency, Manager, Financial Analysis and Oversight Service Center, Mail Code 3802R, Policy, Training Oversight Division, 1200 Pennsylvania Avenue NW., Washington, DC 20460.

Where EPA is not the cognizant agency, the final rate proposal shall be submitted to the above-cited address, to the cognizant audit agency, and to the designated Contracting Officer of the cognizant agency. Upon establishment of the final indirect cost rates, the Contractor shall submit an executed Certificate of Current Cost or Pricing Data (see FAR 15.406–2) applicable to the data furnished in connection with the final rates to the cognizant audit agency. The final rates shall be contained in a written understanding between the Contractor and the appropriate Government representative. Pursuant to the ''Allowable Cost and Payment'' clause, the allowable indirect costs under this contract shall be obtained by applying the final agreed upon rate(s) to the appropriate bases.

(b) Until final annual indirect cost rates are established for any period, the Government shall reimburse the contractor at billing rates established by the appropriate Government representative in accordance with FAR 42.704, subject to adjustment when the final rates are established. The established billing rates are currently as follows:

Cost center	Period	Rate	Base

These billing rates may be prospectively or retroactively revised by mutual agreement, at the request of either the Government or the Contractor, to prevent substantial overpayment or underpayment.

(c) Notwithstanding the provisions of paragraphs (a) and (b) of this clause, ceilings are hereby established on indirect costs reimbursable under this contract. The Government shall not be obligated to pay the Contractor any additional amount on account of indirect costs in excess of the ceiling rates listed below:

Cost center	Period	Rate	Base

(End of clause)

PART 1553—FORMS

■ 30. The authority citation for part 1553 continues to read as follows:

Authority: Sec. 205(c), 63 Stat. 390, as amended, 40 U.S.C. 486(c).

■ 31. Revise the heading for section 1553.213 to read as follows:

1553.213 Simplified acquisition procedures.

* * * * *

[FR Doc. 2017–14828 Filed 7–18–17; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 160920866–7167–02]

RIN 0648–XF558

Fisheries of the Exclusive Economic Zone Off Alaska; Reapportionment of the 2017 Gulf of Alaska Pacific Halibut Prohibited Species Catch Limits for the Trawl Deep-Water and Shallow-Water Fishery Categories

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

ACTION: Temporary rule; reapportionment.

SUMMARY: NMFS is reapportioning the seasonal apportionments of the 2017 Pacific halibut prohibited species catch (PSC) limits for the trawl deep-water and shallow-water species fishery categories in the Gulf of Alaska. This action is necessary to account for the actual halibut PSC use by the trawl deep-water and shallow-water species fishery categories from May 15, 2017 through June 30, 2017. This action is consistent with the goals and objectives of the Fishery Management Plan for Groundfish of the Gulf of Alaska.

DATES: Effective 1200 hours, Alaska local time (A.l.t.), July 17, 2017, through 2400 hours, A.l.t., December 31, 2017.

FOR FURTHER INFORMATION CONTACT: Obren Davis, 907–586–7228.

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fishery in the Gulf of Alaska (GOA) exclusive economic zone according to the Fishery Management Plan for Groundfish of the Gulf of Alaska (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 final 2017 and 2018 harvest specifications for groundfish in the GOA (82 FR 12032, February 27, 2017) apportions the 2017 Pacific halibut PSC limit for trawl gear in the GOA to two trawl fishery categories: A deep-water species fishery and a shallow-water species fishery. The halibut PSC limit for these two trawl fishery categories is further apportioned by season, including four seasonal apportionments to the shallow-water species fishery and three seasonal apportionments to the deep-water species fishery. The two fishery categories also are apportioned a combined, fifth seasonal halibut PSC limit. Unused seasonal apportionments are added to the next season apportionment during a fishing year.

Regulations at § 679.21(d)(4)(iii)(D) require NMFS to combine management of the available trawl halibut PSC limits in the second season (April 1 through July 1) deep-water and shallow-water species fishery categories for use in either fishery from May 15 through June 30 of each year. Furthermore, NMFS is required to reapportion the halibut PSC limit between the deep-water and shallow-water species fisheries after June 30 to account for actual halibut PSC use by each fishery category during May 15 through June 30. As of July 13, 2017, NMFS has determined that the trawl deep-water and shallow-water fisheries used 196 metric tons (mt) and 33 mt of halibut PSC, respectively, from May 15 through June 30. Accordingly, pursuant to § 679.21(d)(4)(iii)(D), the Regional Administrator is reapportioning the combined first and second seasonal apportionments (810 mt) of halibut PSC limit between the trawl deep-water and shallow-water fishery categories to account for the actual PSC use (722 mt) in each fishery. Therefore, Table 15 of the final 2017 and 2018 harvest specifications for groundfish in the GOA (82 FR 12032, February 27, 2017) is revised consistent with this adjustment.

TABLE 15—FINAL 2017 AND 2018 APPORTIONMENT OF PACIFIC HALIBUT PSC TRAWL LIMITS BETWEEN THE TRAWL GEAR DEEP-WATER SPECIES FISHERY AND THE SHALLOW-WATER SPECIES FISHERY CATEGORIES.

[Values are in metric tons]

Season	Shallow-water	Deep-water [1]	Total
January 20—April 1	28	221	249
April 1—July 1	119	354	473
Subtotal of combined first and second season limit (January 20—July 1)	147	575	722
July 1—September 1	184	416	600

TABLE 15—FINAL 2017 AND 2018 APPORTIONMENT OF PACIFIC HALIBUT PSC TRAWL LIMITS BETWEEN THE TRAWL GEAR DEEP-WATER SPECIES FISHERY AND THE SHALLOW-WATER SPECIES FISHERY CATEGORIES.—Continued

[Values are in metric tons]

Season	Shallow-water	Deep-water [1]	Total
September 1—October 1	128	(*)	128
Subtotal January 20—October 1	459	991	1,450
October 1—December 31 [2]			256
Total			1,706

[1] Vessels participating in cooperatives in the Central GOA Rockfish Program will receive 191 mt of the third season (July 1 through September 1) deep-water species fishery halibut PSC apportionment.

[2] There is no apportionment between trawl shallow-water and deep-water species fishery categories during the fifth season (October 1 through December 31).

* Any remainder.

Classification

This action responds to the best available information recently obtained from the fishery. The 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 allow for harvests that exceed the originally specified apportionment of the halibut PSC limits to the deep-water and shallow-water fishery categories. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of July 13, 2017.

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: July 14, 2017.

Margo B. Schulze-Haugen,

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

[FR Doc. 2017–15122 Filed 7–14–17; 4:15 pm]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register

Vol. 82, No. 137

Wednesday, July 19, 2017

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–R01–OAR–2017–0023; A–1–FRL–9965–09–Region 1]

Air Plan Approval; ME; Consumer Products Alternative Control Plan

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to approve a State Implementation Plan (SIP) revision submitted by the Maine Department of Environmental Protection (Maine DEP). The SIP revision consists of an Alternative Control Plan (ACP) for the control of volatile organic compound emissions from Reckitt Benckiser's Air Wick Air Freshener Single Phase Aerosol Spray, issued pursuant to Maine's consumer products rule. This action is being taken in accordance with the Clean Air Act.

DATES: Written comments must be received on or before August 18, 2017.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R01–OAR–2017–0023 at *http://www.regulations.gov,* or via email to *Mackintosh.David@epa.gov.* For comments submitted at *Regulations.gov,* follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed 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: David L. Mackintosh, Air Quality Planning Unit, U.S. Environmental Protection Agency, EPA New England Regional Office, 5 Post Office Square—Suite 100, (Mail Code OEP05–2), Boston, MA 02109–3912, tel. 617–918–1584, email *Mackintosh.David@epa.gov.*

SUPPLEMENTARY INFORMATION: In the Final Rules Section of this **Federal Register**, EPA is approving the State's SIP submittal as a direct final rule without prior proposal because the Agency views this as a noncontroversial submittal and anticipates no adverse comments. A detailed rationale for the approval is set forth in the direct final rule. If no adverse comments are received in response to this action rule, no further activity is contemplated. If EPA receives adverse comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on this proposed rule. EPA will not institute a second comment period. Any parties interested in commenting on this action should do so at this time. Please note that if EPA receives adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, EPA may adopt as final those provisions of the rule that are not the subject of an adverse comment.

For additional information, see the direct final rule which is located in the Rules Section of this **Federal Register**.

Dated: July 5, 2017.

Deborah A. Szaro,

Acting Regional Administrator, EPA New England.

[FR Doc. 2017–15051 Filed 7–18–17; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R06–OAR–2015–0496; FRL–9964–11–Region 6]

Approval and Promulgation of Implementation Plans; Texas; Reasonably Available Control Technology for the 2008 8-Hour Ozone National Ambient Air Quality Standard

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: Pursuant to the Federal Clean Air Act (CAA or Act), the Environmental Protection Agency (EPA) is proposing to conditionally approve revisions to the Texas State Implementation Plan (SIP) addressing Oxides of Nitrogen (NO_X) Reasonably Available Control Technology (RACT) for the Martin Marietta (formerly, Texas Industries, Inc., or TXI) cement manufacturing plant in Ellis County. We are proposing to fully approve revisions to the Texas SIP addressing NO_X RACT for all other affected sources in the ten county Dallas Fort Worth (DFW) 2008 8-Hour ozone nonattainment area. We are also proposing to approve NO_X RACT negative declarations (a finding that there are no emission sources in certain categories) for the DFW 2008 8-Hour ozone nonattainment area. The DFW 2008 8-Hour ozone nonattainment area consists of Collin, Dallas, Denton, Ellis, Johnson, Kaufman, Parker, Rockwall, Tarrant, and Wise counties. The RACT requirements apply to major sources of NO_X in these ten counties.

DATES: Comments must be received on or before August 18, 2017.

ADDRESSES: Submit your comments, identified by Docket No. EPA–R06–OAR–2015–0496 or via email to *shar.alan@epa.gov.* Follow the on-line instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov.* 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 Alan Shar, (214) 665–6691, *shar.alan@epa.gov.* 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.*

Docket: The index to the docket for this action is available electronically at *www.regulations.gov* and in hard copy at the EPA Region 6, 1445 Ross Avenue, Suite 700, Dallas, Texas. While all documents in the docket are listed in the index, some information may be publicly available only at the hard copy location (*e.g.,* copyrighted material), and some may not be publicly available at either location (*e.g.,* CBI).

FOR FURTHER INFORMATION CONTACT: Mr. Alan Shar (6MM–AA), (214) 665–6691, *shar.alan@epa.gov.* To inspect the hard copy materials, please contact Alan Shar.

SUPPLEMENTARY INFORMATION:

Throughout this document ''we,'' ''us,'' and ''our'' refer to EPA.

Outline

I. Background
- A. What is RACT, and what are the RACT requirements relevant for this action?

II. Evaluation
- A. What is the Texas Commission on Environmental Quality's (TCEQ) approach and analysis to RACT?
- B. Is Texas' RACT determination for NO_X sources approvable?
- C. Are there negative declarations for categories of NO_X sources within this nonattainment area?
- D. RACT and Cement Manufacturing Plants
- E. Ellis County Cement Manufacturing Plants
- F. What is a conditional approval?

III. Proposed Action

IV. Statutory and Executive Order Reviews

I. Background

A. What is RACT and what are the RACT requirements relevant for this action?

Section 172(c)(1) of the Clean Air Act (CAA, Act) requires that SIPs for nonattainment areas ''provide for the implementation of all reasonably available control measures as expeditiously as practicable (including such reductions in emissions from existing sources in the area as may be obtained through the adoption, at a minimum, of reasonably available control technology) and shall provide for attainment of the primary National Ambient Air Quality Standards (NAAQS).'' The EPA has defined RACT as the lowest emissions limitation that a particular source is capable of meeting by the application of control technology that is reasonably available, considering technological and economic feasibility. See September 17, 1979 (44 FR 53761).

Section 182(b)(2) of the Act requires states to submit a SIP revision and implement RACT for major stationary sources in moderate and above ozone nonattainment areas. For a Moderate, Serious, or Severe area a major stationary source is one that emits, or has the potential to emit, 100, 50, or 25 tons per year (tpy) or more of VOCs or NO_X, respectively. See CAA sections 182(b), 182(c), and 182(d). The EPA provides states with guidance concerning what types of controls could constitute RACT for a given source category through the issuance of Control Technique Guidelines (CTG) and Alternative Control Techniques (ACT) documents. See *http://www.epa.gov/airquality/ozonepollution/SIPToolkit/ctgs.html* (URL dating August 17, 2014) for a listing of EPA-issued CTGs and ACTs.

The DFW nonattainment area was designated nonattainment for the 1997 8-Hour ozone standard and classified as Moderate with an attainment deadline of June 15, 2010. See January 14, 2009 (74 FR 1903).

The DFW area was later reclassified to Serious on December 20, 2010 (75 FR 79302) because it failed to attain the 1997 8-Hour standard by its attainment deadline of June 15, 2010. Thus, per section 182(c) of the CAA, a major stationary source in the DFW area, is one which emits, or has the potential to emit, 50 tpy or more of VOCs or NO_X. The EPA approved NO_X RACT for the DFW area classified as Serious under the 1997 8-Hour Ozone standard on March 27, 2015 (80 FR 16291).

The EPA designated the DFW area as nonattainment for the 2008 8-Hour ozone NAAQS with a moderate classification. The designated area for the 2008 standard includes Wise County, which was not included as part of the nonattainment area for the 1997 8-Hour Ozone standard. See May 21, 2012 (77 FR 30088), 40 CFR 81.344; and Mississippi Commission on Environmental Quality vs. EPA, No. 12–1309 (D.C. Cir., June 2, 2015) (upholding EPA's inclusion of Wise County in the DFW 2008 8-Hour ozone nonattainment area).

Thus, based on the moderate classification of the DFW area for the 2008 ozone standard, under section 182(b) of the CAA, a major stationary source in Wise County is one that emits, or has the potential to emit, 100 tpy or more of VOCs or NO_X.

II. Evaluation

A. What is the TCEQ's approach and analysis to RACT?

Sections 182(b)(2)(A) and (B) of the CAA require that states must ensure RACT is in place for each source category for which EPA has issued a CTG, and for any major source not covered by a CTG. The EPA has not issued CTGs for sources of NO_X, so the NO_X RACT requirement applies to all major sources of NO_X. As a part of its July 10, 2015 DFW SIP submittal, TCEQ conducted RACT analyses to demonstrate that the RACT requirements for affected NO_X sources in the DFW 2008 8-Hour ozone nonattainment area have been satisfied, relying on the NO_X RACT rules EPA had previously approved for the DFW area for its classification as Serious for the 1997 8-Hour ozone standard. See March 27, 2015 (80 FR 16292), and 40 CFR 51.1112. The RACT analysis is contained in Appendix F of the TCEQ July 10, 2015 SIP submittal as a component of the DFW 2008 8-Hour ozone attainment demonstration plan.

B. Is Texas' RACT determination for NO_X sources approvable?

The requirements for RACT are included in 182(b)(2) of the Act and further explained in our ''SIP Requirements Rule'' of March 6, 2015 (80 FR 12279), which explains States should refer to existing CTGs and ACTs as well as all relevant technical information including recent technical information received during the public comment period to determine if RACT is being applied. States may conclude, in some cases, that sources already addressed by RACT determinations to meet the 1-Hour and/or the 1997 8-Hour ozone NAAQS do not need to implement additional controls to meet the 2008 ozone NAAQS RACT requirement. The EPA has previously found that Texas NO_X rules meet RACT for the 1-Hour and the 1997 8-Hour standards. See March 27, 2015 (80 FR 16291).

Texas adopted new rules for wood-fired boilers in the DFW area, and new rules for major sources in the added county, Wise County, and determined they were RACT. We have reviewed the wood-fired boilers rules and the rules for major sources in Wise County and

are proposing that those rules are RACT for the covered sources. In addition, we are proposing to determine that the State's certification that the applicable control requirements Texas has in place for all other affected NO_X sources as identified in Table F–4 of the submittal (including the proposed conditional approval for the Martin Marietta cement manufacturing plant in Ellis County) meet the RACT requirement for the 2008 8-Hour ozone standard. See part 3, section 5 of the TSD.

Table 1 below contains a list of affected source categories, EPA reference documents, and the corresponding sections of 30 TAC Chapter 117 that TCEQ determined were RACT for sources of NO_X in the DFW area for the 2008 NAAQS. See Table F1, Appendix F of the July 10, 2015 DFW SIP submittal.

TABLE 1—SOURCE CATEGORIES, EPA REFERENCE DOCUMENTS, AND CORRESPONDING SECTION OF 30 TAC CHAPTER 117 FULFILLING RACT

Source category	EPA reference documents	30 TAC chapter 117 fulfilling RACT
Glass Manufacturing	NO_X Emissions from Glass Manufacturing (EPA–453/R–94–037, June 1994)	§ 117.400–§ 117.456
Industrial, Commercial, and Institutional Boilers.	NO_X Emissions from Industrial, Commercial and Institutional Boilers (EPA–453/R–94–022, March 1994).	§ 117.400–§ 117.456
Iron and Steel Mills	NO_X Emissions from Iron and Steel Mills (EPA–453/R–94–065, September 1994)	§ 117.400–§ 117.456
Process Heaters	NO_XEmissions from Process Heaters (EPA–453/R–93–034, September 1993)	§ 117.400–§ 117.456
Stationary Internal Combustion Engines.	NO_X Emissions from Stationary Internal Combustion Engines (EPA–453/R–93–032, July 1993, Updated September 2000).	§ 117.400–§ 117.456
Stationary Turbines	NO_X Emissions from Stationary Combustion Turbines (EPA–453/R–93–007, January 1993).	§ 117.400–§ 117.456
Utility Boilers	NO_X Emissions from Utility Boilers (EPA–453/R–94–023, March 1994)	§ 117.1300–§ 117.1356

On April 13, 2016 (81 FR 21747), we approved revisions to 30 TAC Chapter 117 (NO_X rules) for control of NO_X emissions for affected sources in the DFW area as part of the SIP, but did not make the determination whether these rule revisions met RACT at 81 FR 21747. See docket No. EPA–R06–OAR–2015–0497 at *www.regulations.gov*.

We have reviewed the emission limitations and control requirements for the above source categories, Table 1, in 30 TAC Chapter 117, and compared them against EPA's ACT documents, available technical information, and guidelines. Based on our review and evaluation we found the emission limitations and control requirements in 30 TAC Chapter 117 for the above source categories to be consistent with our guidance and ACT documents, and based upon available technical information that the corresponding sections in 30 TAC Chapter 117 provide for the lowest emission limitation through application of control techniques that are reasonably available considering technological and economic feasibility. For more information, see part 3, section 6 of the TSD prepared in conjunction with this action. Also, see part 4 of the TSD for the March 27, 2015 (80 FR 16291) at *www.regulations.gov,* docket ID No. EPA–R06–OAR–2013–0804.

We are proposing to find that the control requirements for the source categories identified in Table 1 are RACT for all affected sources in the ten County DFW area under the 2008 8-Hour ozone NAAQS. See part 3, sections 5–7 of the TSD.

C. Are there negative declarations for categories of NO_X sources within this nonattainment area?

States are not required to adopt RACT limits for source categories for which no sources exist in a nonattainment area and can submit a negative declaration to that effect. Texas has reviewed its emissions inventory and determined that there are no nitric and adipic acid manufacturing operations in the DFW area. See Table F–1, page 8 of the Appendix F, titled ''State Rules Addressing NO_X RACT Requirements in ACT Reference.'' We are also unaware of any such facilities operating in the DFW nonattainment area, and thus we are proposing to approve the negative declarations made for the nitric and adipic acid manufacturing operations in the ten County DFW area under the 2008 8-Hour ozone NAAQS.

D. RACT and Cement Manufacturing Plants

As detailed in Table 2 below, EPA has issued guidance on NO_X emissions from Cement Manufacturing Plants and Texas has adopted rules for the control of NO_X emissions from Cement Manufacturing Plants codified at 30 TAC Chapter 117. The rules establish NO_X emissions by adopting a NO_X cap on each of the cement manufacturing plants in the area.

TABLE 2—CEMENT MANUFACTURING, EPA REFERENCE DOCUMENTS, AND CORRESPONDING SECTION OF 30 TAC CHAPTER 117 FULFILLING RACT

Source category	EPA reference documents	30 TAC chapter 117 fulfilling RACT
Cement Manufacturing	NO_X Emissions from Cement Manufacturing (EPA–453/R–94–004, 1994/03); and NO_X Control Technologies for the Cement Industry: Final Report (EPA–457/R–00–002, 2000/09).	§ 117.3100—§ 117.3145

The source cap provision is a NO_X emission limitation expressed in tons per day (tpd) for cement kilns in Ellis County (thereafter, Cap_{8hour}, cap). The Cap_{8hour} was established based on a formula that included average annual tons of clinker produced for the three-year period of 2003, 2004, and 2005 plus one standard deviation. See 30 TAC § 117.3123. The addition of one standard deviation to the average annual clinker production rates was intended to provide further operational flexibility for the sources as they calculated their production rates for the wet and dry

kiln systems, ''N_W'' and ''N_D'', in order for TCEQ to determine a tpd numerical value for the Cap_{8hour} emission limitation. See Equation 117.3123(b). The formula for establishing the Cap_{8hour} includes an emission factor of 3.4 lbs of NO_X/ton of clinker produced for wet kilns, and an emission factor of 1.7 lbs of NO_X/ton of clinker produced for dry kilns. Compliance with the 30-day rolling average cap must be shown starting March 31st of each calendar year, and the NO_X cap limitation in section 117.3123 applies from March 1st through October 31st of each calendar year. See part 4, sections 8 and 9 of the TSD for more information. Each cement manufacturing plant in Ellis County has been allocated a specific value in tons per day as its cap. Once established based on 2003, 2004, and 2005 production rates the calculated emission rate is not changed. We approved this rule on January 14, 2009 (74 FR 1927) as part of the DFW SIP, and as meeting the NO_X RACT requirement for cement kilns operating in the DFW 1997 8-Hour ozone nonattainment area. Since that time, there are no longer any wet kilns in the area.

E. Ellis County Cement Manufacturing Plants

Currently, three companies operate four cement kilns in Ellis County. Below we evaluate whether RACT is in place for these plants.

Ash Grove Cement Company (Ash Grove) operated three kilns in Ellis County. A federally enforceable 2013 consent decree, not a part of this SIP submittal, required by September 10, 2014 shutdown of two kilns and reconstruction of kiln #3 with Selective Noncatalytic Reduction (SNCR) with an emission limitation of 1.5 pounds of NO_X per ton of clinker produced (lb NO_X/ton of clinker), and a 12-month rolling tonnage limit for NO_X of 975 tpy. A May 11, 2016 letter from Ash Grove to TCEQ confirms decommissioning of the kilns # 1 and 2. We have made this letter available in docket for this action. The reconstructed kiln #3 is a dry kiln subject to the 1.5 lb NO_X/ton of clinker emission standard per 40 CFR 60 subpart F (New Source Performance Standard—NSPS) for Portland Cement Plants. A review of NO_X emission limits in place across the country is included with the TSD for this action, and it can be seen that this limit is well within the range of the most stringent controls currently in place. This NO_X emission limit is the lowest emission limitation through application of control techniques (SNCR) that is reasonably available considering technological and economic feasibility, and therefore the NSPS satisfies RACT for Ash Grove in Ellis County. The TCEQ has the delegated authority to enforce this federal standard through the agency's general NSPS delegation. The TCEQ air permit for this plant is available in the docket for this action. Further, we are proposing to remove our approval of the cap rules as being RACT for Ash Grove and finding that the NSPS applicable to Ash Grove meets RACT for the 2008 ozone NAAQS.

Holcim U.S., Inc. (Holcim) currently has two dry preheater/precalciner kilns equipped with SNCR. There has not been a long wet cement kiln associated with the Holcim operations in Ellis County. The current section 117.3123 source cap is established at 5.3 tpd NO_X for Holcim. As discussed above this cap was established based on an emission factor of 1.7 lbs/ton of clinker. Again such an emission rate is among the most stringent emission rates in place across the country. We believe the NO_X emission limitation established by the section 117.3123 cap is the lowest emission limitation through application of control techniques (SNCR) that is reasonably available considering technological and economic feasibility for this source, and therefore it satisfies RACT for Holcim. Consequently, we are retaining the cap rules as meeting RACT for Holcim for the 2008 ozone NAAQS.

Martin Marietta (MM) currently operates one dry preheater/precalciner kiln #5. The existing section 117.3123 source cap allocated to this kiln is set at 7.9 tpd NO_X. The permitted capacity of this kiln is 2,800,000 tons of clinker per year, and it has a permitted emissions limitation of 1.95 lb NO_X/ton of clinker. According to TCEQ, the kiln #5 typically operates well below the source cap, at an average emission factor below 1.5 lbs/ton of clinker. While the NO_X limit of 1.95 lbs/ton of clinker is somewhat higher than the limits in place at other cement plants in Ellis County, it is still among the most stringent limits in the country. We believe that it is reasonable for the limit to be less stringent than Ash Grove's limit because Ash Grove (kiln #3) is a new source and new sources generally can achieve a lower emission rate than existing sources that must be retrofitted. We also believe it is reasonable that MM's limit be somewhat higher than the emission factor (1.7 lbs/ton of clinker) used to establish the emission cap at Holcim because the emission cap allows for operational flexibility to balance emissions between the two Holcim kilns.

We are proposing to conditionally approve 1.95 lbs/ton of clinker as RACT for MM following the State's written commitment to EPA. The commitment letter states that through an agreed order between TCEQ and MM, certain conditions of MM's air permit, concerning the NO_X emission limitation of 1.95 lb/ton of clinker produced from kiln #5, will be incorporated into a future revision to the Texas SIP. That particular future SIP revision will be submitted to EPA per timeline described in section F below.

We have reviewed the emission limitations and control requirements for the source category listed in Table 2 above, the corresponding sections in 30 TAC Chapter 117, and the Appendix F of the July 10, 2015 DFW SIP submittal, and compared them against EPA's ACT documents and guidelines. Based on our review and evaluation we found the emission limitations and control requirements in 30 TAC Chapter 117 and the Appendix F of the July 10, 2015 DFW SIP submittal for the above source category to be consistent with our guidance and ACT documents. We have also found these limits are among the most stringent in place in the country, at this time. As such, we are proposing that they provide for the lowest emission limitation through application of control techniques that are reasonably available considering technological and economic feasibility. For more information, see parts 2 and 4 of the TSD prepared in conjunction with this action.

F. What is a conditional approval?

Under section 110(k)(4) of the Act the Administrator may approve a plan revision based on a commitment of the State to adopt specific enforceable measures by a date certain, but not later than 1 year after the date of approval of the plan revision. Any such conditional approval shall be treated as a disapproval, if the State fails to comply with such commitment. If the State does not meet its commitment within the specified time period by 1) not adopting and submitting measures by the date it committed to, 2) not submitting anything, or 3) EPA finding the submittal incomplete, the approval will be converted to a disapproval. The Regional Administrator would send a letter to the State finding that it did not meet its commitment or that the submittal is incomplete and that the SIP submittal was therefore disapproved. The 18-month clock for sanctions and the two-year clock for a Federal Implementation Plan would start as of the date of the letter. Subsequently, a notice to that effect would be published in the **Federal Register**, and appropriate language inserted in the CFR.

III. Proposed Action

We are proposing to conditionally approve revisions to the Texas SIP addressing NO_X RACT for the Martin Marietta (formerly, Texas Industries, Inc., or TXI) cement manufacturing plant in Ellis County. We are proposing to approve revisions to the Texas SIP addressing NO_X RACT for all other affected sources in the ten County DFW 2008 8-Hour ozone nonattainment area. We are also proposing to approve NO_X RACT negative declarations for the DFW area under the 2008 8-Hour ozone NAAQS.

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 choices, provided that they meet the criteria of the CAA. Additional information about these statutes and Executive Orders can be found at *http://www2.epa.gov/laws-regulations/laws-and-executive-orders*.

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

This action is not a significant regulatory action and was therefore not submitted to the Office of Management and Budget (OMB) for review.

B. Paperwork Reduction Act (PRA)

This action does not impose an information collection burden under the PRA because this action does not impose additional requirements beyond those imposed by state law.

C. Regulatory Flexibility Act (RFA)

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. This action will not impose any requirements on small entities beyond those imposed by state law.

D. Unfunded Mandates Reform Act (UMRA)

This action does not contain any unfunded mandate as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. This action does not impose additional requirements beyond those imposed by state law. Accordingly, no additional costs to State, local, or tribal governments, or to the private sector, will result from this action.

E. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.

F. Executive Order 13175: Coordination With Indian Tribal Governments

This action does not have tribal implications, as specified in Executive Order 13175, because 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, and will not impose substantial direct costs on tribal governments or preempt tribal law. Thus, Executive Order 13175 does not apply to this action.

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

The EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that the EPA has reason to believe may disproportionately affect children, per the definition of ''covered regulatory action'' in section 2–202 of the Executive Order. This action is not subject to Executive Order 13045 because it does not impose additional requirements beyond those imposed by state law.

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

This action is not subject to Executive Order 13211, because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act (NTTAA)

Section 12(d) of the NTTAA directs the EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. The EPA believes that this action is not subject to the requirements of section 12(d) of the NTTAA because application of those requirements would be inconsistent with the CAA.

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

The EPA lacks the discretionary authority to address environmental justice in this rulemaking.

List of Subjects in 40 CFR Part 52

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

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

Dated: July 11, 2017.

Samuel Coleman,
Acting Regional Administrator, Region 6.

[FR Doc. 2017–15165 Filed 7–18–17; 8:45 am]
BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2016–0740; FRL–9965–07–Region 9]

Approval of California Air Plan Revisions; Sacramento Metropolitan Air Quality Management District

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to approve revisions to the Sacramento Metropolitan Air Quality Management District (SMAQMD) portion of the California State Implementation Plan (SIP). These revisions concern emissions of volatile organic compounds (VOC) from organic chemical manufacturing operations. We are proposing to approve a local rule and a rule rescission to regulate these emission sources under the Clean Air Act (CAA or the Act). We are taking comments on this proposal and plan to follow with a final action.

DATES: Any comments must arrive by August 18, 2017.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R09–OAR–2016–0740 at *https://www.regulations.gov,* or via email to Andrew Steckel, Rulemaking Office Chief at *Steckel.Andrew@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 *https://www2.epa.gov/dockets/commenting-epa-dockets.*

FOR FURTHER INFORMATION CONTACT:
Arnold Lazarus, EPA Region IX, (415) 972–3024, *lazarus.arnold@epa.gov.*

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

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I. The State's Submittal

A. What rules did the State submit?

Table 1 lists the rules addressed by this action with the dates that they were amended or repealed by the local air agency and submitted by the California Air Resources Board (CARB).

TABLE 1—SUBMITTED RULES

Local agency	Rule No.	Rule title	Amended	Repealed	Submitted
SMAQMD	455	Pharmaceutical Manufacturing		4/28/16	8/22/16
SMAQMD	464	Organic Chemical Manufacturing Operations	4/28/16		8/22/16

On September 27, 2016, the EPA determined that the submittal for SMAQMD Rule 455 and Rule 464 met the completeness criteria in 40 CFR part 51 Appendix V, which must be met before formal review by the EPA.

B. Are there other versions of these rules?

We approved an earlier version of SMAQMD Rule 464 into the SIP on October 3, 2011 (76 FR 61057), and we approved SMAQMD Rule 455 into the SIP on January 24, 1985 (50 FR 3338).[1]

C. What is the purpose of the submitted rule and rule rescission?

VOCs help produce ground-level ozone, also known as ''smog,'' and particulate matter (PM), which harm human health and the environment. Section 110(a) of the CAA requires states to submit regulations that control VOC emissions. SMAQMD Rule 455, ''Pharmaceutical Manufacturing,'' was approved into the SIP on January 24, 1985 (50 FR 3338). EPA re-evaluated Rule 455 as part of our review of the SMAQMD's 2006 Reasonably Available Control Technology (RACT) SIP, and concluded that Rule 455 did not meet the requirements of Federal CAA section 110(a)(2) because it lacked test methods, recordkeeping, and monitoring requirements that are necessary to ensure that the rule is enforceable. 81 FR 53280, 53281 (August 12, 2016). The SMAQMD subsequently repealed Rule 455 and simultaneously amended Rule 464 to include pharmaceutical and cosmetic manufacture. Rule 464 limits VOC emissions from organic chemical plants and pharmaceutical and cosmetic manufacturing; its controls for pharmaceutical manufacturing replace Rule 455. The EPA's technical support documents (TSDs) have more information about these rules.

[1] EPA's approval of Rule 455 refers to the Sacramento County Air Pollution Control District, which was then the name of the regulatory authority for air pollution in the Sacramento area.

II. The EPA's Evaluation and Action

A. How is the EPA evaluating the rule and rule rescission?

SIP rules must be enforceable (see CAA section 110(a)(2)), must not interfere with applicable requirements concerning attainment and reasonable further progress or other CAA requirements (see CAA section 110(l)), and must not modify certain SIP control requirements in nonattainment areas without ensuring equivalent or greater emissions reductions (see CAA section 193).

Generally, SIP rules in ozone nonattainment areas classified as moderate or above must require RACT for each category of sources covered by a control techniques guidelines (CTG) document as well as each major source of VOCs (see CAA sections 182(b)(2)). The SMAQMD regulates an ozone nonattainment area classified as severe nonattainment for the 1997 and the 2008 8-hour ozone National Ambient Air Quality Standards (NAAQS) (40 CFR 81.305). Therefore, Rule 464 must implement RACT.

Guidance and policy documents that we use to evaluate enforceability, revision/relaxation and rule stringency requirements for the applicable criteria pollutants include the following:

1. ''State Implementation Plans; General Preamble for the Implementation of Title I of the Clean Air Act Amendments of 1990,'' 57 FR 13498 (April 16, 1992); 57 FR 18070 (April 28, 1992).
2. ''Issues Relating to VOC Regulation Cutpoints, Deficiencies, and Deviations,'' U.S. EPA, May 25, 1988; revised January 11, 1990 (''The Bluebook'').
3. ''Guidance Document for Correcting Common VOC & Other Rule Deficiencies,'' EPA Region 9, August 21, 2001 (''The Little Bluebook'').
4. ''Control of Volatile Organic Emissions from Manufacture of Synthesized Pharmaceutical Products,'' EPA–450/2–78–029, December 1978.
5. ''Control of Volatile Organic Compound Emissions from Reactor Processes and Distillation Operations Processes in the Synthetic Organic Chemical Manufacturing Industry,'' EPA–450/4–91–031, August 1993.

B. Do the rule and rule rescission meet the evaluation criteria?

We believe this rule and rule rescission are consistent with CAA requirements and relevant guidance regarding enforceability, RACT, and SIP revisions. The TSDs have more information on our evaluation.

The EPA partially approved and partially disapproved the RACT SIP revisions submitted by California on July 11, 2007 and January 21, 2009 for the SMAQMD severe ozone

nonattainment area,[2] based in part on our conclusion that the state had not fully satisfied CAA section 182 RACT requirements for the pharmaceuticals manufacturing CTG category and for the municipal waste landfill category. We are separately but contemporaneously proposing approval of submitted portions of SMAQMD Permits 24360 and 24361 for the Kiefer Landfill, which are intended to address the deficiencies identified in our 2016 partial disapproval of the SMAQMD's RACT SIP regarding the municipal waste landfill category.[3] Final approval of Rule 464 and the submitted portions of the Kiefer Landfill permits would satisfy California's obligation to implement RACT under CAA section 182 for the 1997 8-hour ozone NAAQS and thereby terminate both the sanctions clocks and the Federal Implementation Plan clock associated with our August 12, 2016 final action.

C. Public Comment and Proposed Action

As authorized in section 110(k)(3) of the Act, the EPA proposes to fully approve the submitted rule and rule rescission because we believe they fulfill all relevant requirements. We will accept comments from the public on this proposal until August 18, 2017. If we take final action to approve the submitted rule and rule rescission, our final action will incorporate these rules into the federally enforceable SIP.

III. Incorporation by Reference

In this rule, the EPA is proposing to include in a final EPA rule regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, the EPA is proposing to incorporate by reference the SMAQMD rules described in Table 1 of this preamble. The EPA has made, and will continue to make, these materials available through *https://www.regulations.gov* and at the EPA Region IX Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information).

IV. 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 proposed action merely proposes to approve state law as meeting federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this proposed action:

- Is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive 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 disproportionate human health or environmental effects with practical, appropriate, and legally permissible methods under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, 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).

List of Subjects in 40 CFR Part 52

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

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

Dated: June 29, 2017.

Alexis Strauss,

Acting Regional Administrator, Region IX.

[FR Doc. 2017–15050 Filed 7–18–17; 8:45 am]

BILLING CODE 6560–50–P

[2] See, 81 FR 53280 (August 12, 2016).

[3] We are submitting these two proposed actions together for publication, and expect the **Federal Register** notices to publish around the same time.

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2017–0196; FRL–9965–06–Region 9]

Approval of California Air Plan Revisions, Sacramento Metropolitan Air Quality Management District

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to approve a revision to the Sacramento Metropolitan Air Quality Management District (SMAQMD) portion of the California State Implementation Plan (SIP). This revision concerns emissions of volatile organic compounds (VOC) from landfill gas flaring at the Kiefer Landfill in Sacramento, California. We are proposing to approve portions of two SMAQMD operating permits that limit VOC emissions from this facility under the Clean Air Act (CAA or the Act). We are taking comments on this proposal and plan to follow with a final action.

DATES: Any comments must arrive by August 18, 2017.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R09–OAR–2017–0196 at *https://www.regulations.gov,* or via email to Andrew Steckel, Rulemaking Office Chief at *Steckel.Andrew@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 *https://www.epa.gov/dockets/commenting-epa-dockets.*

FOR FURTHER INFORMATION CONTACT: Stanley Tong, EPA Region IX, (415) 947–4122, *tong.stanley@epa.gov.*

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

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I. The State's Submittal

A. What documents did the State submit?

On January 24, 2017, the California Air Resources Board (CARB) submitted portions of SMAQMD Permits to Operate for the Kiefer Landfill. Specifically, CARB submitted permit conditions 2, 8, 13, 14, 16, 17, 22, 23, 24, 25, 26, 27, 37, 39 and 40 (or portions thereof) and Attachment A from SMAQMD Permits 24360 and 24361. SMAQMD adopted these portions of Permits 24360 and 24361 for inclusion in the California SIP on July 28, 2016. Please see the docket for a copy of the complete submitted documents.

On April 17, 2017, the EPA determined that the submittals for SMAQMD met the completeness criteria in 40 CFR part 51 Appendix V, which must be met before formal EPA review.

B. Are there other versions of these documents?

There are no previous versions of SMAQMD Permits 24360 or 24361 regulating VOC emissions from the Kiefer Landfill in the SIP. However, the SMAQMD adopted and submitted Permit No. 17359 for oxides of nitrogen (NOx) emissions from the Kiefer Landfill gas flare on October 26, 2006, and we approved it into the SIP on April 12, 2011 (76 FR 20242).

C. What is the purpose of the submitted documents?

VOCs help produce ground-level ozone, smog and particulate matter, which harm human health and the environment. Section 110(a) of the CAA requires states to submit regulations that control VOC emissions. Additionally, section 182(b)(2)(C) of the Act requires states to submit SIP provisions requiring the implementation of Reasonably Available Control Technology (RACT) for any major stationary source [1] of VOC located in an area classified as moderate nonattainment or above. The Sacramento Metro Area is classified as a severe-15 nonattainment area for the 1997 and 2008 8-hour ozone national ambient air quality standards (NAAQS),[2] and the Kiefer Landfill, which is operated by the County of Sacramento's Department of Waste Management and Recycling, is a major stationary source of VOC. The SMAQMD is therefore required to implement RACT at the facility under section 182(b)(2).

On August 12, 2016, the EPA partially approved and partially disapproved the SMAQMD's SIP revision to address RACT requirements for the 1997 8-hour ozone NAAQS, based in part on our conclusion that the submittal did not satisfy the CAA section 182 requirements for the Kiefer Landfill. See 81 FR 53280. Our final action stated that sanctions would be imposed under CAA section 179 and 40 CFR 52.31 unless the EPA approved SIP revisions correcting these deficiencies within 18 months of the effective date of our final rulemaking action.

The SMAQMD adopted the submitted portions of Permits 24360 and 24361 to address the VOC RACT deficiencies identified by the EPA for the Kiefer Landfill. The submitted portions relate to the control of VOC emissions from gas flares at the Kiefer Landfill (Permit 24360 applies to flare No. 1; and Permit 24361 applies to flare No. 2). They contain emission limits, equipment operational requirements, reporting and recordkeeping requirements, monitoring and testing requirements, and a stipulation that for federal enforcement purposes, the RACT provisions in the permits remain in effect as part of the SIP until replaced pursuant to 40 CFR part 51 and approved by the EPA.

[1] In severe ozone nonattainment areas, ''major stationary source'' includes any stationary source that emits or has a potential to emit at least 25 tons per year of VOCs. *See* CAA section 182(d).

[2] 40 CFR 81.305; 75 FR 24409 (May 5, 2010), 77 FR 30088 (May 21, 2012).

II. The EPA's Evaluation and Action

A. How is the EPA evaluating the submitted documents?

SIP provisions must be enforceable (see CAA section 110(a)(2)), must not interfere with applicable requirements concerning attainment and reasonable further progress or other CAA requirements (see CAA section 110(l)), and must not modify certain SIP control requirements in nonattainment areas without ensuring equivalent or greater emissions reductions (see CAA section 193).

Generally, the SIP must require RACT for each category of sources covered by a control techniques guidelines (CTG) document as well as each major source of VOCs or NO_X in ozone nonattainment areas classified as moderate or above (see CAA section 182(b)(2)). The Kiefer Landfill is a major source of VOCs in an ozone nonattainment area, so the SIP must implement RACT for this facility.

Guidance and policy documents that we use to evaluate enforceability, revision/relaxation and rule stringency requirements for the applicable criteria pollutants include the following:

1. ''State Implementation Plans; General Preamble for the Implementation of Title I of the Clean Air Act Amendments of 1990,'' 57 FR 13498 (April 16, 1992); 57 FR 18070 (April 28, 1992).
2. ''Issues Relating to VOC Regulation Cutpoints, Deficiencies, and Deviations,'' EPA, May 25, 1988; revised January 11, 1990 (''The Bluebook'').
3. ''Guidance Document for Correcting Common VOC & Other Rule Deficiencies,'' EPA Region 9, August 21, 2001 (''The Little Bluebook'').
4. ''Final Rule to Implement the 8-Hour Ozone National Ambient Air Quality Standard—Phase 2,'' 70 FR 71612 (November 29, 2005).
5. Memorandum from William T. Harnett to Regional Air Division Directors, ''RACT Qs & As—Reasonably Available Control Technology (RACT); Questions and Answers'' (May 18, 2006).

B. Do the submitted documents meet the evaluation criteria?

We are proposing to approve the submitted portions of SMAQMD Permits 24360 and 24361 into the SMAQMD portion of the California SIP because they satisfy the applicable CAA requirements for approval. Specifically, for SMAQMD Permit 24360, we propose to approve permit conditions 2, 8, 13, 14, 16, 17, 22, 23, 24, 25, 26, 27, 37, 39 and 40 (or portions thereof), and Attachment A, which together establish an enforceable VOC limitation satisfying

RACT for landfill gas flare No. 1 at the Kiefer Landfill. Similarly, for SMAQMD Permit 24361, we are proposing to approve into the SMAQMD portion of the California SIP, permit conditions 2, 8, 13, 14, 16, 17, 22, 23, 24, 25, 26, 27, 37, 39 and 40 (or portions thereof) and Attachment A, which together establish an enforceable VOC limitation satisfying RACT for landfill gas flare No. 2 at the Kiefer Landfill.

The VOC limitations contained in these permits are consistent with the limitations contained in other California air district rules for similar facilities. For example, permit condition 8 for landfill flares No. 1 and No. 2 specifies a VOC destruction efficiency of 98% or 20 parts per million by volume, dry, at 3% Oxygen, measured as hexane. South Coast Air Quality Management District Rule 1150.1, ''Control of Gaseous Emissions from Municipal Solid Waste Landfills'' (April 1, 2011), and Bay Area Air Quality Management District Rule 8–34, ''Solid Waste Disposal Sites'' (June 15, 2005), apply this same limit. Other California air district rules such as Yolo Solano Air Quality Management District Rule 2–38, ''Standards for Municipal Solid Waste Landfills'' (March 12, 1997) and San Diego Air Pollution Control District Rule 59.1, ''Municipal Solid Waste Landfills'' (June 17, 1998) reference 40 CFR part 60, subpart WWW, ''Standards of Performance for Municipal Solid Waste Landfills,'' for applicable requirements, which includes these same limits. The operational standards for the landfill flares are thus also consistent with the landfill flare standards in 40 CFR part 60, subpart WWW, and are also consistent with 40 CFR part 63, subpart AAAA, ''National Emission Standards for Hazardous Air Pollutants, Municipal Solid Waste Landfills.'' Because the applicable SIP currently does not contain VOC limitations for the Kiefer Landfill gas flares, the approval of these permit conditions strengthens the SIP. In sum, the submitted permit conditions satisfy the applicable requirements and guidance regarding enforceability, RACT, and SIP relaxations and may, therefore, be approved into the California SIP.

As stated earlier, on August 12, 2016 (81 FR 53280), the EPA partially approved and partially disapproved the SMAQMD's RACT SIP revisions submitted by California on July 11, 2007 and January 21, 2009, based in part on our conclusion that the state had not fully satisfied CAA section 182 RACT requirements for the pharmaceuticals manufacturing CTG category and for the Kiefer Landfill. We are separately but contemporaneously proposing approval of a SIP revision intended to address the deficiencies identified in our 2016 partial disapproval of the SMAQMD's RACT SIP regarding the pharmaceuticals manufacturing CTG category.[3] Final approval of the submitted portions of SMAQMD Permits 24360 and 24361, and SMAQMD Rule 464, *Organic Chemical Manufacturing Operations,* would satisfy California's obligation to implement RACT under CAA section 182 for the 1997 8-hour ozone NAAQS and thereby terminate both the offset sanctions clock and the Federal Implementation Plan clock associated with our August 12, 2016 final action.

Please see the docket for a copy of the complete submitted documents.

C. Public Comment and Proposed Action

As authorized in section 110(k)(3) of the Act, the EPA proposes to fully approve the specific permit conditions of SMAQMD Permits 24360 and 24361 as submitted by CARB on January 24, 2017, because we believe they fulfill all relevant requirements. We will accept comments from the public on this proposal until August 18, 2017. If we take final action to approve the submitted documents, our final action will incorporate these documents into the federally enforceable SIP.

III. Incorporation by Reference

In this rulemaking, the EPA is proposing to include in a final EPA rule regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, the EPA is proposing to incorporate by reference the SMAQMD permits described in Section I.A of this preamble. The EPA has made, and will continue to make, these materials available through *https://www.regulations.gov* and at the EPA Region IX Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information).

IV. 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 proposed action merely proposes to approve state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this proposed action:

- Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993) 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 disproportionate human health or environmental effects with practical, appropriate, and legally permissible methods under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, 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).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Ozone, Particulate matter, Reporting

[3] We are submitting these two proposed actions together for publication, and expect the **Federal Register** notices to publish around the same time.

and recordkeeping requirements, Volatile organic compounds.

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

Dated: June 29, 2017.

Alexis Strauss,

Acting Regional Administrator, Region IX.

[FR Doc. 2017–15052 Filed 7–18–17; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R8–ES–2016–0078; 4500030113]

RIN 1018–BB64

Endangered and Threatened Wildlife and Plants; 6-Month Extension of Final Determination on the Proposed Threatened Status for *Chorizanthe parryi* var. *fernandina* (San Fernando Valley Spineflower)

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule; reopening of the comment period.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce a 6-month extension of the final determination of whether to list the *Chorizanthe parryi* var. *fernandina* (San Fernando Valley spineflower), a plant species from southern California, as a threatened species. Along with this announcement to extend the final determination, we are also reopening the comment period on the proposed rule to list the species, for an additional 30 days. We are taking this action to extend the final determination based on substantial disagreement regarding the potential impact of Argentine ant invasion on the pollination ecology of *C. parryi* var. *fernandina* and scientific uncertainty related to establishment of *C. parryi* var. *fernandina* using introduction of seed into suitable, unoccupied areas. Comments previously submitted need not be resubmitted as they are already incorporated into the public record and will be fully considered in the final rule. We will submit a final listing determination to the **Federal Register** on or before March 15, 2018.

DATES: The comment period for the proposed rule that published September 15, 2016, at 81 FR 63454 is reopened. We will accept comments received or postmarked on or before August 18, 2017. If you comment using the Federal eRulemaking Portal (see **ADDRESSES**), you must submit your comments by 11:59 p.m. Eastern Time on the closing date.

ADDRESSES: You may submit comments by one of the following methods:

(1) *Federal eRulemaking Portal: http://www.regulations.gov.* In the Search box, enter the docket number for this proposed rule, which is FWS–R8–ES–2016–0078. Then click on the Search button. You may submit a comment by clicking on ''Comment Now!'' Please ensure that you have found the correct rulemaking before submitting your comment.

(2) *U.S. mail or hand delivery:* Public Comments Processing, Attn: Docket No. FWS–R8–ES–2016–0078; U.S. Fish and Wildlife Service, MS: BPHC; 5275 Leesburg Pike; Falls Church, VA 22041–3803.

FOR FURTHER INFORMATION CONTACT: Stephen P. Henry, Field Supervisor, U.S. Fish and Wildlife Service, Ventura Fish and Wildlife Office, 2493 Portola Road, Ventura, CA 93003; telephone 805–644–5763; facsimile 805–644–3958. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Relay Service at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Background

On September 15, 2016, we published a proposed rule (81 FR 63454) to list *Chorizanthe parryi* var. *fernandina* as a threatened species under the Endangered Species Act of 1973, as amended (Act; 16 U.S.C. 1531 *et seq.*). That proposal had a 60-day comment period, ending November 14, 2016. For a description of previous Federal actions concerning *C. parryi* var. *fernandina,* please refer to the September 15, 2016, proposed listing rule (81 FR 63454). We also solicited and received independent scientific review of the information contained in the proposed rule from peer reviewers with expertise in *C. parryi* var. *fernandina* or similar species ecology and identified threats to the species, in accordance with our July 1, 1994, peer review policy (59 FR 34270).

Section 4(b)(6) of the Act and its implementing regulations at 50 CFR 424.17(a) require that we take one of three actions within 1 year of a proposed listing: (1) Finalize the proposed rule; (2) withdraw the proposed rule; or (3) extend the final determination by not more than 6 months, if there is substantial disagreement regarding the sufficiency or accuracy of the available data relevant to the determination.

Since the publication of the September 15, 2016, proposed listing rule (81 FR 63454), there has been substantial disagreement among peer reviewers regarding the potential impact of the invasion of Argentine ants (*Linepithema humile*) on the pollination ecology of *C. parryi* var. *fernandina,* and there is scientific uncertainty related to establishment of *C. parryi* var. *fernandina* using introduction of seed into suitable, unoccupied areas.

We find that there is substantial scientific uncertainty and disagreement about certain data relevant to our listing determination. Therefore, in consideration of these disagreements, we have determined that a 6-month extension of the final determination for this rulemaking is necessary, and we are hereby extending the final determination for 6 months in order to solicit and consider additional information that will help to clarify these issues and to fully analyze data that are relevant to our final listing determination. With this 6-month extension, we will make a final determination on the proposed rule no later than March 15, 2018.

Information Requested

We will accept written comments and information during this reopened comment period on our proposed listing for *Chorizanthe parryi* var. *fernandina* that was published in the **Federal Register** on September 15, 2016 (81 FR 63454). We will consider information and recommendations from all interested parties. We intend that any final action resulting from the proposal be as accurate as possible and based on the best available scientific and commercial data.

In consideration of the scientific disagreements about certain data, we are particularly interested in new information and comments regarding:

(1) How Argentine ant invasion may affect the pollination ecology of *C. parryi* var. *fernandina;* and

(2) The efficacy of seed introduction for long-term establishment into suitable, unoccupied habitat of *Chorizanthe* or related taxa.

If you previously submitted comments or information on the September 15, 2016, proposed rule (81 FR 63454), please do not resubmit them. We have incorporated previously submitted comments into the public record, and we will fully consider them in the preparation of our final determination. Our final determination concerning the proposed listing will take into consideration all written comments and any additional information we receive.

You may submit your comments and materials concerning the proposed rule

by one of the methods listed in **ADDRESSES**. We request that you send comments only by the methods described in **ADDRESSES**.

If you submit information via *http://www.regulations.gov,* your entire submission—including any personal identifying information—will be posted on the Web site. If your submission is made via a hardcopy that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy submissions on *http://www.regulations.gov.*

Comments and materials we receive, as well as supporting documentation we used in preparing the proposed rule, will be available for public inspection on *http://www.regulations.gov,* or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Ventura Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**). You may obtain copies of the proposed rule at *http://www.regulations.gov* at Docket No. FWS–R8–ES–2016–0078. Copies of the proposed rule are also available at *http://www.fws.gov/cno/es//.*

Authority

The authority for this action is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: June 23, 2017.

Gregory Sheehan,

Acting Director, U.S. Fish and Wildlife Service.

[FR Doc. 2017–15126 Filed 7–18–17; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 150309236–7563–01]

RIN 0648–BE65

Fisheries of the Northeastern United States; Mid-Atlantic Fishery Management Council; Omnibus Acceptable Biological Catch Framework Adjustment

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

ACTION: Proposed rule; request for comments.

SUMMARY: This action proposes regulations to implement an Omnibus Framework Adjustment to the Mid-Atlantic Fishery Management Council acceptable biological catch setting process. This proposed rule is necessary to provide the public with an opportunity to review and comment on the measures recommended by the Mid-Atlantic Council to the National Marine Fisheries Service for implementation. The intended effect of these measures would help bring stability to quotas while accounting for year-to-year changes in stock size projections, and allow the Mid-Atlantic Council's Fishery Management Plans to automatically incorporate the best available scientific information when calculating acceptable biological catches. This action also proposes to revise regulatory language to clarify the Mid-Atlantic Council's acceptable biological catch control rule assessment level designations.

DATES: Comments must be received on or before August 18, 2017.

ADDRESSES: You may submit comments, identified by NOAA–NMFS–2017–0056, by either of the following methods:

- *Electronic Submissions:* Submit all electronic public comments via the Federal eRulemaking portal. Go to *www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2017-0056,* click the ''Comment Now!'' icon, complete the required fields, and enter or attach your comments.
- *Mail:* Submit written comments to John Bullard, Regional Administrator, NMFS, Greater Atlantic Regional Fisheries Office, 55 Great Republic Drive, Gloucester, MA 01930.

Instructions: Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered by NMFS. All comments received are a part of the public record and will generally be posted for public viewing on *www.regulations.gov* without change. All personal identifying information (*e.g.,* name, address, etc.), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publically accessible. NMFS will accept anonymous comments (enter ''N/A'' in the required fields if you wish to remain anonymous).

Copies of the Environmental Assessment and other supporting documents are available from Dr. Christopher M. Moore, Executive Director, Mid-Atlantic Fishery Management Council, Suite 201, 800 N. State Street, Dover, DE 19901. The draft Omnibus Framework Adjustment, as submitted by the Council, is also available via the internet at *http://www.greateratlantic.fisheries.noaa.gov/.*

FOR FURTHER INFORMATION CONTACT: Reid Lichwell, Fishery Management Specialist, (978) 281–9112.

SUPPLEMENTARY INFORMATION:

Background

The Mid-Atlantic Fishery Management Council (Council) is required to set annual catch limits (ACLs) that do not exceed the acceptable biological catch (ABC) recommendation of its Scientific and Statistical Committee (SSC) to prevent overfishing. ABCs represent an upper limit for the Council to use when setting catch and landing limits. The 2011 ACL Omnibus Amendment implementing rule (76 FR 60606; September 29, 2011), enacted the Council's risk policy that provides guidance to the SSC on how much overfishing risk the Council will accept when the SSC develops ABC recommendations. The policy also outlines risk tolerance for ensuring stocks under rebuilding plans achieve fishing mortality objectives.

The Council's risk policy for setting ABCs states that for a typical species whose stock size is equal to or greater than a biomass target associated with maximum sustainable yield (B_{MSY}), the acceptable probability of overfishing is 40 percent, *i.e.,* if the fishery catches the ABC then there is a 60-percent probability of not overfishing. If a species is deemed to have an atypical life history, the Council requires at least a 35-percent probability of overfishing (*i.e.,* a 65-percent chance of not overfishing), to create a larger buffer when biomass is at or above B_{MSY}. The SSC determines whether a stock is typical or atypical each time an ABC is recommended. When an overfishing probability is available and considered reliable by the SSC, the applicable tolerance for overfishing risk, as informed by the Council's risk policy, would be selected to derive the ABC recommendation.

For both typical and atypical species, the Council has specified that as stock size biomass or (B) falls below the target (B_{MSY}), then the probability of overfishing decreases, until the probability of overfishing hits zero when the stock is at 10 percent of the target (B_{MSY}). For a stock under a rebuilding plan, the probability of not exceeding the fishing mortality rate (F) within the specified timeframe must be at least 50 percent, unless this probability threshold is modified through a stock rebuilding plan.

The fishery management plans (FMPs) managed by the Council all have

provisions for setting specifications for multiple years (five years for dogfish and three years for all other species). Moving to multi-year specifications has not provided the anticipated stability to quotas over a multi-year period. This is because target fishing mortality rates are applied to stock size projections that tend to change from year-to-year, creating varying ABCs within multi-year quotas. The change to constant multi-year ABCs would help bring stability to quotas while accounting for year-to-year changes in stock size projections and prevent overfishing.

Proposed Measures

Overfishing Probability Averaging

The proposed action would, when assessment fishing mortality reference points are accepted by the SSC, average the probability of overfishing (or achieving the target fishing mortality for rebuilding stocks) consistent with the existing risk policy requirements. The constant, multi-year ABCs that would result must continue to meet the Council's risk policy goals, with the probability of overfishing not to exceed 50 percent in any given year. For stocks in a rebuilding plan, the probability of achieving the rebuilding fishery mortality must meet the risk policy objectives when constant, multi-year ABCs are recommended by the SSC.

Under the proposed measures, averaged ABCs could be set at a constant level for up to five years for spiny dogfish and up to three years for all other species managed by the Council. As an example, if the application of the risk policy would result in a 40-percent probability of overfishing in any given year of setting annual quotas, the average probability of overfishing resulting from constant multi-year ABCs cannot exceed 40 percent. For any 3-year period, an average ABC would result in slightly less chance of overfishing in some years and slightly more of a chance of overfishing in other years compared to non-averaged ABCs based on year-to-year projections, but could not, as outlined in the example, exceed 40 percent in any given year. This would result in a minimal difference of overfishing likelihood between the yearly ABCs versus a constant ABC over a 3-year period. As previously noted, the probability of overfishing could not exceed 50 percent in any given individual year of constant multi-year ABCs.

The SSC may provide both a standard 3-year recommendation as well as a constant 3-year recommendation based on the average overfishing probability approach for the Council to consider. The SSC would continue to review fishery performance each year during multi-year specifications, regardless of which multi-year approach is used to determine ABCs. The multi-year averaging of ABCs would not apply to stocks that do not have a quantitative assessment to derive ABCs and could not be used for stocks with an assessment that cannot provide information on the risk of overfishing.

ABC Control Rule Assessment Level Designations

The proposed action would revise some of the regulatory language describing the Council's ABC control rule assessment level designations. These revisions were recommended by the Council to clarify the operation of the Council's ABC control rules, these revisions are merely clarifications and do not create any regulatory changes in practice.

Notice of Approved Biological Status Criteria

We are also providing notice of the administrative process the Council will use for incorporating the best scientific information available in the development of ABCs for the Atlantic Bluefish, Golden Tilefish, and Atlantic Mackerel, Squid, and Butterfish FMPs. The best available science requirements have dictated that accepted assessment information be utilized by the SSC in setting quotas under National Standard 2. The Council's SSC will utilize peer-reviewed biological reference points (overfishing level, biomass thresholds, etc.) and periodic updates to stock status determination criteria (*i.e.,* biomass and fishing mortality reference points) to define ABCs, consistent with the Council's other FMPs and National Standards 1 and 2 of the Magnuson-Stevens Act. This change in Council operations would improve management efficiency by automatically incorporating new peer-reviewed status determination criteria instead of requiring a separate management action to adopt them within these three FMPs. Because best available science requirements have dictated that accepted assessment information be utilized by the SSC in recommending ABCs, this proposed measure would serve to clarify and simplify the administrative procedures for doing so. This same process has already been identified by the Council for their other FMPs.

Classification

Pursuant to section 304(b)(1)(A) of the Magnuson-Stevens Act, the NMFS Assistant Administrator has made a preliminary determination that this proposed rule is consistent with all the Mid-Atlantic Fishery Management Council's FMPs, provisions of the Magnuson-Stevens Act, and other applicable law, subject to further consideration after public comment.

This proposed rule has been determined to be not significant for purposes of Executive Order 12866.

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration that this proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities. The Small Business Administration defines a small business in the shellfish, finfish or other marine fishing sectors as a firm that is independently owned and operated with receipts of less than $11 million annually (see NMFS final rule revising the small business standard for commercial fishing, 80 FR 81194, December 29, 2015). The measures proposed in this action apply to the vessels that hold permits for Council-managed fisheries because all species have ABCs set by the SSC. According to permit data at the end of 2014, there were 4,712 vessels with at least one active Northeast Federal fishing permit, either commercial or party/charter (some vessels have both commercial and party/charter permits and most vessels have more than one permit).

This proposed action would make it consistent with the Council's risk policy for the SSC to specify constant multi-year ABCs for all the Council's FMPs, provided the average of each year's probability of overfishing adhere to the appropriate overfishing probability goal. This change would help bring stability to fishing quotas while accounting for year-to-year changes in stock size projections and prevent overfishing. Given the inherent uncertainty involved in assessments, the differences are not expected to be meaningful from a biological perspective.

In addition, the proposed action would add regulatory language clarifying the assessment level designations for the Council's ABC control rule. These changes to the regulations were recommended by the Council to merely clarify the ABC control rule and do not change its function or operation.

This action also provides notice that the Atlantic Bluefish, Golden Tilefish, and Atlantic Mackerel, Squid, and Butterfish FMPs will automatically incorporate the best available scientific information in calculating ABCs. This means the SSC would utilize peer-

reviewed biological reference points (overfishing level, biomass thresholds, etc.) and periodic updates to stock status determination criteria (*i.e.,* biomass and fishing mortality reference points) to define ABCs, consistent with the Council's other FMPs and National Standards 1 and 2 of the Magnuson-Stevens Act. Since best available science requirements have dictated that accepted assessment information be utilized by the SSC in setting quotas, this measure would serve to clarify and simplify the administrative procedures for doing so.

These measures are administrative and pertain to how the Council establishes catch limits. There is no reason to believe small entities will be negatively affected by the proposed action given the administrative nature of the changes. The resulting actions to set catch using these new procedures may have an indirect effect on small entities; however, catch setting will occur in separate subsequent actions that will include, as needed, analyses under the Regulatory Flexibility Act. As a result, an initial regulatory flexibility analysis is not required and none has been prepared.

List of Subjects in 50 CFR Part 648

Fisheries, Fishing, Recordkeeping and Reporting requirements.

Dated: July 12, 2017.

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

For the reasons set out in the preamble, NMFS proposes to amend 50 CFR 648 as follows:

PART 648—FISHERIES OF THE NORTHEASTERN UNITED STATES

■ 1. The authority citation for part 648 continues to read as follows:

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

■ 2. Section 648.20 is revised to read as follows:

§ 648.20 Mid-Atlantic Fishery Management Council Acceptable Biological Catch (ABC) control rules.

The SSC shall review the following criteria, and any additional relevant information, to assign managed stocks to one of four types of control rules based on the species' assessments and its treatment of uncertainty when developing ABC recommendations. The SSC shall review the ABC control rule assignment for stocks each time an ABC is recommended. ABCs may be recommended for up to 3 years for all stocks, with the exception of 5 years for spiny dogfish. The SCC may specify constant, multi-year ABCs, derived from the average of ABCs (or average risk of overfishing) if the average probability of overfishing remains between zero and 40 percent, and does not exceed a 50-percent probability in any given year. The average ABCs may remain constant for up to 3 years for all stocks, with the exception of 5 years for spiny dogfish. The SSC may deviate from the control rule methods and recommend an ABC that differs from the result of the ABC control rule application; however, any such deviation must include the following: A description of why the deviation is warranted; description of the methods used to derive the alternative ABC; and an explanation of how the deviation is consistent with National Standard 2. The four types of ABC control rules are described below.

(a) ABC control rule for a stock with an OFL probability distribution that is analytically-derived and accepted by the SSC.

(1) The SSC determines that the assessment OFL and the assessment's treatment of uncertainty are acceptable, based on the following:

(i) All important sources of scientific uncertainty are captured in the stock assessment model;

(ii) The probability distribution of the OFL is calculated within the stock assessment and adequately describes the OFL uncertainty;

(iii) The stock assessment model structure and treatment of the data prior to use in the model includes relevant details of the biology of the stock, fisheries that exploit the stock, and data collection methods;

(iv) The stock assessment provides the following estimates: Fishing mortality rate (F) at MSY or an acceptable proxy maximum fishing mortality threshold (MFMT) to define OFL, biomass, biological reference points, stock status, OFL, and the respective uncertainties associated with each value; and

(v) No substantial retrospective patterns exist in the stock assessment estimates of fishing mortality, biomass, and recruitment.

(2) An *ABC* for stocks with an accepted OFL probability distribution that is analytically-derived will be determined by applying the acceptable probability of overfishing from the MAFMC's risk policy found in § 648.21(a) through (d) to the probability distribution of the OFL.

(b) ABC control rule for a stock with an OFL probability distribution that is modified by the assessment team and accepted by the SSC.

(1) The SSC determines the assessment OFL is acceptable and the SSC accepts the assessment team's modifications to the analytically-derived OFL probability distribution, based on the following:

(i) Key features of the stock biology, the fisheries that exploit it, and/or the data collection methods for stock information are missing from, or poorly estimated in, the stock assessment;

(ii) The stock assessment provides reference points (which may be proxies), stock status, and uncertainties associated with each; however, the uncertainty is not fully promulgated through the stock assessment model and/or some important sources of uncertainty may be lacking;

(iii) The stock assessment provides estimates of the precision of biomass, fishing mortality, and reference points;

(iv) The accuracy of the minimum fishing mortality threshold and projected future biomass is estimated in the stock assessment using ad hoc methods; and

(v) The modified OFL probability distribution provided by the assessment team acceptably addresses the uncertainty of the assessment.

(2) An *ABC* for stocks with an OFL probability distribution that is modified by the assessment team and accepted by the SSC will be determined by applying the acceptable probability of overfishing from the MAFMC's risk policy found in § 648.21(a) through (d) to the probability distribution of the OFL as modified by the assessment team.

(c) ABC control rule for a stock with an OFL probability distribution that is modified by the SSC.

(1) The SSC determines the assessment OFL is acceptable but the SSC derives the appropriate uncertainty for OFL based on meta-analysis and other considerations. This requires the SSC to determine that the stock assessment does not contain an estimated probability distribution of OFL or the OFL probability distribution in the stock assessment is judged by the SSC to not adequately reflect uncertainty in the OFL estimate.

(2) An *ABC* for stocks with an OFL probability distribution that is modified by the SSC will be determined by either (i) applying the acceptable probability of overfishing from the MAFMC's risk policy found in § 648.21(a) through (d) to the SSC-adjusted OFL probability distribution. The SSC will use default assignments of uncertainty in the adjusted OFL probability distribution based on literature review and evaluation of control rule performance; or,

(ii) If the SSC cannot develop an OFL probability distribution, a default

control rule of 75 percent of the F_{MSY} value will be applied to derive ABC.

(d) ABC control rule for when an OFL cannot be specified.

(1) The SSC determines that the OFL cannot be specified given the available information.

(2) An *ABC* for stocks with an OFL that cannot be specified will be determined by using control rules based on biomass and catch history and application of the MAFMC's risk policy found in § 648.21(a) through (d).

[FR Doc. 2017–15073 Filed 7–18–17; 8:45 am]

BILLING CODE 3510–22–P

Notices

Federal Register

Vol. 82, No. 137

Wednesday, July 19, 2017

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

[Doc. No. AMS–LPS–17–0030]

Request for Extension of a Currently Approved Information Collection

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Notice; request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the U. S. Department of Agriculture (USDA) Agricultural Marketing Service's (AMS) intent to request approval from the Office of Management and Budget (OMB) for an extension of the currently approved information collection used to compile and generate the Federally Inspected Estimated Daily Slaughter Report (OMB 0581–0050).

DATES: Comments must be received by September 18, 2017.

ADDRESSES: Comments should be submitted electronically at *http://www.regulations.gov.* Comments may also be submitted to Sam Jones-Ellard, Assistant to the Director, Livestock, Poultry, and Grain Market News Division, Livestock, Poultry, and Seed Program, Agricultural Marketing Service, USDA; Room 2619–S; Stop 0252; 1400 Independence Avenue SW., Washington, DC 20250–0252. All comments should reference docket number AMS–LPS–17–0030, the date of submission, and the page number of this issue of the **Federal Register**. All comments received will be posted without change, including any personal information provided, and will be made available for public inspection at the above physical address during regular business hours.

FOR FURTHER INFORMATION CONTACT: Sam Jones-Ellard, Assistant to the Director, Livestock, Poultry, and Grain Market News Division, AMS, USDA, by telephone at (202) 720–6231, or via email at *Samuel.Jones@ams.usda.gov.*

SUPPLEMENTARY INFORMATION:

Title: Plan for Estimating Daily Livestock Slaughter Under Federal Inspection.

OMB Number: 0581–0050.

Expiration Date of Approval: 01–31–2018.

Type of Request: Extension of a currently approved information collection.

Abstract: The Agricultural Marketing Act of 1946 (7 U.S.C. 1621–1627) section 203(g) directs and authorizes the collection and dissemination of marketing information including adequate outlook information, on a market area basis, for the purpose of anticipating and meeting consumer requirements, aiding in the maintenance of farm income, and to bring about a balance between production and utilization.

The USDA issues a Market News report estimating daily livestock slaughter under Federal inspection. This report is compiled by AMS on a voluntary basis in cooperation with the livestock and meat industry. Market News reporting must be timely, accurate, and continuous if it is to be useful to producers, processors, and the trade in general. The daily livestock slaughter estimates are provided at the request of industry and are used to make production and marketing decisions.

The Estimated Daily Livestock Slaughter Under Federal Inspection Report is used by a wide range of industry contacts, including packers, processors, producers, brokers, and retailers of meat and meat products. The livestock and meat industry requested that USDA issue slaughter estimates (daily and weekly), by species, for cattle, calves, hogs, and sheep to assist them in making immediate production and marketing decisions and as a guide to the volume of meat in the marketing channel. The information requested from respondents includes their estimation of the current day's slaughter at their plant(s) and the actual slaughter for the previous day. Also, the Government is a large purchaser of meat and related products and this report assists other Government agencies in providing timely information on the quantity of meat entering the processing channels.

The information must be collected, compiled, and disseminated by an impartial third-party, in a manner which protects the confidentiality of the reporting entity. AMS is in the best position to provide this service.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average .0333 hours per response.

Respondents: Business or other for-profit entities, individuals or households, farms, and the Federal Government.

Estimated Number of Respondents: 58 respondents.

Estimated Number of Responses per Respondent: 260 responses per respondent.

Estimated Number of Responses: 15,080 responses.

Estimated Total Annual Burden on Respondents: 502 hours.

Comments are invited on: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of AMS, including whether the information will have practical utility; (2) the accuracy of AMS estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

All responses to this notice will be summarized and included in the request for OMB approval. All comments will become a matter of public record.

Dated: July 14, 2017.

Bruce Summers,

Acting Administrator, Agricultural Marketing Service.

[FR Doc. 2017–15129 Filed 7–18–17; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Farm Service Agency

Information Collection Request; Certified State Mediation Program

AGENCY: Farm Service Agency, USDA.

ACTION: Notice of information collection; request for comment.

SUMMARY: In accordance with the Paperwork Burden Act of 1995, the Farm Service Agency (FSA) is requesting comments from all interested individuals and organizations for a revision with an extension of a currently approved Information Collection Request that supports the Certified State Mediation Program. The information collection is necessary to ensure that the grant program is administered properly. The collection of information is used to determine whether participants meet the eligibility requirements to be a recipient of grant funds. Lack of adequate information to make the determination could result in the improper administration of Federal grant funds.

DATES: We will consider comments we receive by September 18, 2017.

ADDRESSES: We invite you to submit comments on this notice. In your comment, include volume, date, and page number of this issue of the **Federal Register**. You may submit comments by any of the following methods:

- *Federal eRulemaking Portal:* Go to: *www.regulations.gov.* Follow the online instructions for submitting comments.
- *Mail, hand delivery, or courier:* Tracy Jones, Agricultural Loan and Grants Program Specialist, USDA, FSA, Stop 0521, 1400 Independence Avenue SW., Washington, DC 20250.

You may also send comments to the Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503. Copies of the information collection may be requested by contacting Tracy Jones at the above address.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, Tracy Jones (202) 720–6771.

SUPPLEMENTARY INFORMATION:

Title: Certified State Mediation Program (7 CFR 785).

OMB Control Number: 0560–0165.

Expiration Date of Approval: December 31, 2017.

Type of Request: Revision and extension.

Abstract: FSA administers the Certified State Mediation Program (Program) according to Subtitles A and B of Title V of the Agricultural Credit Act of 1987 (7 U.S.C. 5106).

To effectively administer the Program, FSA requires an application for recertification, which includes submission of a letter from the State, a letter from the grantee, SF–424, SF–424A, SF–424B, and SF–425. Approved grantees provide a mid-year report as well as an annual report that includes information on mediation services provided during the preceding Federal fiscal year, assessment of the performance and effectiveness of the State's Program, and any other matters related to the Program as the State elects to include. In addition, approved grantees complete SF–270 to request either advance funding or reimbursement of expenses already paid. The information requested is necessary for FSA to determine the grantee's eligibility and administer the Program effectively.

The number of state-certified mediation programs has increased over the past several years. The increase in burden hours reflects this change.

For the following estimated total annual burden on respondents, the formula used to calculate the total burden hours is the estimated average time per response multiplied by the estimated total annual responses.

Estimate of Average Time To Respond: Public reporting burden for collecting information under this notice is estimated to average 2.08 hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collections of information.

Type of Respondents: State.

Estimated Number of Respondents: 164.

Estimated Average Number of Responses per Respondent: 1.50.

Estimated Total Annual Responses: 246.

Estimated Average Time per Response: 2.083.

Estimated Total Annual Burden on Respondents: 512.5 hours.

We are requesting comments on all aspects of this information collection to help FSA:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of burden of the collection of information including the validity of the methodology and assumptions used;

(3) Evaluate the quality, ability and clarity of the information technology; and

(4) Minimize the burden of the information collection on those who respond through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

All comments received in response to this notice, including names and addresses when provided, will be made a matter of public record. Comments will be summarized and included in the submission for Office of Management and Budget approval.

Chris P. Beyerhelm,

Acting Administrator, Farm Service Agency.

[FR Doc. 2017–15066 Filed 7–18–17; 8:45 am]

BILLING CODE 3410–05–P

DEPARTMENT OF AGRICULTURE

Forest Service

Deschutes National Forest; Deschutes and Klamath Counties, Oregon; Ringo Project Draft Environmental Impact Statement and Forest Plan Amendment

AGENCY: Forest Service, USDA.

ACTION: Notice to extend the public comment period for the Ringo Draft Environmental Impact Statement for a proposed Forest Plan amendment.

SUMMARY: The Deschutes National Forest is issuing this notice to advise the public of a 45-day extension to the public comment period on the project-specific Forest Plan amendment proposed in the Ringo Project Draft Environmental Impact Statement (DEIS). This extended 45-day comment period is for the amendment, which includes the substantive provisions and relevant analysis.

DATES: The comment period ends September 5, 2017. All relevant comments received during the extended public comment period related to the proposed amendment, including the substantive provisions, will be considered in the preparation of the Final Environmental Impact Statement (FEIS).

ADDRESSES: Comments may be submitted by any one of the following methods:

- *Electronic Submissions:* Comments can be filed electronically at: *comments-pacificnorthwest-deschutes-crescent@fs.fed.us.* Electronic comments must be submitted as part of the email message or as an attachment in plain text (.txt), Microsoft Word (.doc), rich text format (.rtf), or portable document format (.pdf). Emails submitted to addresses other than the one listed above, or in formats other than those listed or containing viruses, will be rejected.
- *Mail:* Written, specific comments must be submitted to Daniel Rife, District Ranger, Crescent Ranger District, at P.O. Box 208, (136471 Hwy. 97 N.) Crescent, Oregon 97733, or FAX at (541) 433–3224.

Instructions: Comments sent by any other method, to any other address or individual, or received after the end of the comment period may not be considered by the forest. All comments received are part of the public record and will generally be posted for public viewing without change. All personal identifying information (*e.g.,* name, address, etc.), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible.

This opportunity for comment applies *only* to the analysis associated with the proposed Forest Plan Amendment. Previously submitted comments will be considered and should not be resubmitted. Previous commenters will have eligibility to object under 26 CFR 218.5.

FOR FURTHER INFORMATION CONTACT: Joseph Bowles, Project Team Leader, Crescent Ranger District, Deschutes National Forest, (541) 433–3200, or via email at *jkbowles@fs.fed.us.* Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern Time, Monday through Friday. Electronic copies of the Draft Environmental Impact Statement may be found on the Forest Service Web site at *http://data.ecosystem-management.org/nepaweb/nepa_project_exp.php?project=46900.*

SUPPLEMENTARY INFORMATION: The original Notice of Availability published in the **Federal Register** on March 17, 2017 (82 FR 14217). The 2012 Planning Rule, as amended, requires identification in the initial notice of the amendment of the substantive provisions that are likely to be directly related to the amendment. The Notice of Intent (NOI) did not identify the substantive provisions, and the analysis in the DEIS did not identify nor address the substantive provisions.

As identified in the DEIS, the Ringo Project would be exempt from the following Standard and Guideline of the 1990 Deschutes Land and Resource Management Plan (LRMP):

Scenic Views, Foreground (M9–90; LRMP p. 4–131), ''*Low intensity prescribed fires will be used to meet and promote the Desired Visual Condition within each stand type. Prescribed fire and other fuel management techniques will be used to minimize the hazard of large high intensity fire. In foreground areas, prescribed fires will be small, normally less than 5 acres and shaped to appear as natural occurrences. . . .*'' In the Ringo DEIS planning area several of these areas are along major access routes in fire-adapted ponderosa pine and mixed conifer. This site-specific Forest Plan Amendment will modify 242 acres of the Scenic Views, Foreground Standards and Guidelines (M9–90 in Scenic Views, LRMP 4–121) to allow an increase in the size of prescribed burn units while utilizing underburning to mimic natural process and creating a mosaic pattern of burning on the landscape.

Substantive provisions of 36 CFR 219.8 through 219.11 that apply to the proposed amendment for Ringo DEIS Purpose and Need are:

219.8(a)(1)(v) Wildland fire and opportunities to restore fire adapted ecosystems.

The following two provisions would be applicable to the effects from implementing this Forest Plan Amendment.

219.10(a)(1) Aesthetic values, air quality, cultural and heritage resources, ecosystem services, fish and wildlife species, forage, geologic features, grazing and rangelands, habitat and habitat connectivity, recreation settings and opportunities, riparian areas, scenery, soil, surface and subsurface water quality, timber, trails, vegetation, viewsheds, wilderness, and other relevant resources and uses.

219.10(a)(7) Reasonably foreseeable risks to ecological, social, and economic sustainability.

Dated: June 23, 2017.

Jeanne M. Higgins,

Acting Associate Deputy Chief, National Forest System.

[FR Doc. 2017–14821 Filed 7–18–17; 8:45 am]

BILLING CODE 3411–15–P

DEPARTMENT OF AGRICULTURE

National Agricultural Statistics Service

Notice of Intent To Request an Early Revision and Merger of Two Currently Approved Information Collections

AGENCY: National Agricultural Statistics Service, USDA.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 this notice announces the intention of the National Agricultural Statistics Service (NASS) to request revision to the currently approved information collection, the Bee and Honey survey docket (0535–0153). In addition NASS plans to merge this docket with the currently approved Colony Loss survey docket (0535–0255). Revision to burden hours will be needed due to a changes in the size of the target population, sample design, and the inclusion of the Colony Loss surveys.

DATES: Comments on this notice must be received by September 18, 2017 to be assured of consideration.

ADDRESSES: You may submit comments, identified by docket number 0535–0153, by any of the following methods:

- *Email: ombofficer@nass.usda.gov.* Include docket number above in the subject line of the message.
- *Efax:* (855) 838–6382.
- *Mail:* Mail any paper, disk, or CD–ROM submissions to: David Hancock, NASS Clearance Officer, U.S. Department of Agriculture, Room 5336 South Building, 1400 Independence Avenue SW., Washington, DC 20250–2024.
- *Hand Delivery/Courier:* Hand deliver to: David Hancock, NASS Clearance Officer, U.S. Department of Agriculture, Room 5336 South Building, 1400 Independence Avenue SW., Washington, DC 20250–2024.

FOR FURTHER INFORMATION CONTACT: R. Renee Picanso, Associate Administrator, National Agricultural Statistics Service, U.S. Department of Agriculture, (202) 720–4333. Copies of this information collection and related instructions can be obtained without charge from David Hancock, NASS—OMB Clearance Officer, at (202) 690–2388 or at *ombofficer@nass.usda.gov.*

SUPPLEMENTARY INFORMATION:

Title: Honey and Honey Bee Surveys.

OMB Control Number: 0535–0153.

Expiration Date of Approval: December 31, 2018.

Type of Request: Intent to revise and extend a currently approved information collection for a period of three years and to merge another approved group of surveys (Colony Loss Surveys) into this request.

Abstract: The primary objective of the National Agricultural Statistics Service (NASS) is to prepare and issue state and national estimates of crop and livestock production, livestock products, prices, and disposition; as well as economic statistics, environmental statistics related to agriculture, and also to conduct the Census of Agriculture.

In this request for renewal of the Bee and Honey (0535–0153) docket, NASS will incorporate the two surveys (operations with fewer than 5 colonies and operations with 5 or more colonies) conducted under the Colony Loss (0535–0255) docket with the honey production surveys included in this docket. The operations with 5 or more colonies will continue to receive quarterly loss questionnaires and an annual honey production survey. The

operations with less than 5 colonies will receive one combined, annual questionnaire that contains the same questions as asked under the currently approved dockets. The sample is adjusted so that the same group of operators who qualify for the honey survey also qualify for the loss survey.

The title of this revised docket will now be Honey and Honey Bee Surveys. As pollinators, honey bees are vital to the agricultural industry for producing food for the world's population. USDA, NASS has found that during 2015, colonies losses by quarter ranged from 12 to 18 percent. Overall, from January 1, 2015 to January 1, 2016, the total number of colonies in the United States decreased by 8 percent.

Additional data is needed to accurately describe the costs associated with pest/disease control, wintering fees, and replacement worker and queen bees. USDA and the Environmental Protection Agency (EPA), in consultation with other relevant Federal partners, are scaling up efforts to address the decline of honey bee health with a goal of ensuring the recovery of this critical subset of pollinators. NASS supports the Pollinator Research Action Plan, published May 19, 2015, which emphasizes the importance of coordinated action to identify the extent and causal factors in honey bee mortality.

Authority: These data will be collected under the authority of 7 U.S.C. 2204(a). Individually identifiable data collected under this authority are governed by Section 1770 of the Food Security Act of 1985, 7 U.S.C. 2276, which requires USDA to afford strict confidentiality to non-aggregated data provided by respondents. This notice is submitted in accordance with the Paperwork Reduction Act of 1995 Public Law 104–13 (44 U.S.C. 3501, *et seq.*) and Office of Management and Budget regulations at 5 CFR part 1320. NASS also complies with OMB Implementation Guidance, ''Implementation Guidance for Title V of the E-Government Act, Confidential Information Protection and Statistical Efficiency Act of 2002 (CIPSEA),'' **Federal Register,** Vol. 72, No. 115, June 15, 2007, p. 33362.

Estimate of Burden: Public reporting burden for this collection of information for operations with five or more colonies is estimated to average 20 minutes per response for the annual Bee and Honey survey and 10 minutes per respondent for the quarterly Colony Loss Survey. Operations with less than five colonies will receive the newly combined questionnaire (Bee and Honey and Colony Loss) which is estimated to average 20 minutes per response. Publicity materials and instruction sheets will account for 5 minutes of additional burden per respondent. Respondents who refuse to complete a survey will be allotted 2 minutes of burden per attempt to collect the data.

Respondents: Farmers.

Estimated Number of Respondents: 22,500.

Estimated Total Annual Burden on Respondents: With an estimated response rate of approximately 80%, we estimate the total burden to be approximately 9,200 hours.

Comments: Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, through the use of appropriate automated, electronic, mechanical, technological or other forms of information technology collection methods.

All responses to this notice will become a matter of public record and be summarized in the request for OMB approval.

Signed at Washington, DC, July 5, 2017.

Hubert Hamer,

Administrator.

[FR Doc. 2017–15156 Filed 7–18–17; 8:45 am]

BILLING CODE 3410–20–P

DEPARTMENT OF COMMERCE

Census Bureau

Proposed Information Collection; Comment Request; Annual Retail Trade Survey

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 September 18, 2017.

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 *PRAcomments@doc.gov*).

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument(s) and instructions should be directed to Chris Savage, U.S. Census Bureau, Economy Wide-Statistics Division, Room 8K045, 4600 Silver Hill Road, Washington, DC 20233–6500, (301) 763–4834, (or via Email at *john.c.savage@census.gov*).

SUPPLEMENTARY INFORMATION:

I. Abstract

The Annual Retail Trade Survey (ARTS) covers employer firms with establishments located in the United States and classified in the Retail Trade sector as defined by the 2012 North American Industry Classification System (NAICS).

The Census Bureau selects firms for this survey from the Business Register (BR) using a stratified random sample where strata are defined by industry and annual sales. The BR is the Census Bureau's master business list and contains basic economic information for more than 7.4 million employer business and over 22.5 million non-employer businesses. The BR contains information collected through direct data collections as well as administrative record information from other federal agencies. The Census Bureau updates the ARTS sample quarterly to reflect employer business ''births'' and ''deaths.'' The births reflect new employer businesses identified in the Business and Professional Classification Survey; deaths involve deleting firms and subunits of firms identified by their Employer Identification Numbers (EINs) when it is determined they are no longer active.

Through the ARTS survey, the Census Bureau asks firms to provide annual sales, annual e-commerce sales, year-end inventories held inside and outside the United States, sales taxes, total operating expenses, purchases, accounts receivables, and, for selected industries, sales by merchandise line. These data are used to satisfy a variety of public and business needs such as conducting economic market analyses, assessing company performance, and forecasting future demands. The Census Bureau publishes national data from the survey for selected retail trade industries approximately fifteen months after the end of the reference year.

Effective in survey year 2016 (collected in 2017), ARTS no longer includes firms in the accommodation and food services industries. These industries are now part of the Service Annual Survey (SAS). Also effective in survey year 2016, ARTS introduced a new sample and requested that firms provide two years of data in order to link the old and new samples. Linking the samples helps ensure that published estimates continue to be reliable and accurate. In survey year 2017 and subsequent years, ARTS will request only one year of data until a new sample is selected again in five years.

Every five years, in survey years ending in 2 and 7, ARTS requests data on detailed operating expenses from firms. During the survey year 2016 ARTS collection, detailed operating expenses are not collected. The last time ARTS collected detailed operating expenses was in 2013 for the 2012 survey year. The plan is to reinstate these questions in 2018 as part of the 2017 survey year ARTS data collection.

In an effort to reduce burden and meet the changing needs of data users, as of the 2016 survey year the Census Bureau is no longer requesting that department stores provide data regarding sales collected from leased departments.

The ARTS data is only collected electronically using the Census Bureau's secure online reporting instrument (Centurion). This electronic system of reporting is designed to allow respondents easier access, convenience and flexibility. Data is automatically stored and results are available immediately. In rare cases where the company has no access to the Internet, the Census Bureau can arrange for the company to provide data to an analyst via telephone.

II. Method of Collection

The Census Bureau collects this information via the Internet but in rare cases when respondents have no access to the Internet, it is collected by telephone.

III. Data

OMB Control Number: 0607–0013.

Form Number(s): SA44, SA44–A, SA44–C, SA44–D, SA44–E, SA44–N, SA44–S, SA44–T.

Type of Review: Regular submission.

Affected Public: Retail firms located in the United States.

Estimated Number of Respondents: 19,301.

Estimated Time per Response: 201.2 minutes (2017 survey year with additional items collected). 39.1 minutes (2018 and 2019 survey years).

Estimated Total Annual Burden Hours: 64,723 hours (2017 survey year with additional items collected). 12,578 hours (2018 and 2019).

Estimated Total Annual Cost to Public: $0.

Respondent's Obligation: Mandatory.

Legal Authority: Title 13, United States Code, Sections 131 and 182.

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) 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,

Departmental PRA Lead, Office of the Chief Information Officer.

[FR Doc. 2017–15112 Filed 7–18–17; 8:45 am]

BILLING CODE 3510–07–P

DEPARTMENT OF COMMERCE

Bureau of the Census

[Docket Number 170629607–7607–01]

Limited-Access Highway Classification Codes

AGENCY: Bureau of the Census, Commerce.

ACTION: Notice of final change.

SUMMARY: The Bureau of the Census (U.S. Census Bureau) publishes this notice to announce the upcoming change in the classification of limited-access highways in the Census Bureau's Master Address File/Topologically Integrated Referencing and Encoding (MAF/TIGER) System. The change assigns all limited-access highways a MAF/TIGER Feature Classification Code (MTFCC) of S1100 (Primary Roads). Previously, the classification code for limited-access highways was either S1100 (Primary Roads) or S1200 (Secondary Roads).

DATES: This notice will be effective on August 18, 2017.

FOR FURTHER INFORMATION CONTACT: David Cackowski, (301) 763–5423, or at *g.david.cackowski@census.gov,* Geography Division, U.S. Census Bureau, 4600 Silver Hill Road, Washington, DC 20233; or also by email at *geo.geography@census.gov.*

SUPPLEMENTARY INFORMATION:

A. Background

MAF/TIGER System is an abbreviation for the Master Address File/Topologically Integrated Geographic Encoding and Referencing System. It is a digital (computer-readable) geographic database that automates the mapping and related geographic activities required to support the Census Bureau's census and survey programs. The Census Bureau developed TIGER to automate the geographic support processes needed to meet the major geographic needs of the 1990 census: Producing cartographic products to support data collection and map presentations, providing geographic structure for tabulation and dissemination of the collected statistical data, assigning residential and employer addresses to the correct geographic location and relating those locations to the geographic entities used for data tabulation, and so forth. During the 1990s, the Census Bureau developed an independent Master Address File (MAF) to support field operations and allocation of housing units for tabulations. After Census 2000, both the address-based MAF and geographic TIGER databases merged to form the MAF/TIGER System. The contents of the MAF/TIGER System undergo continuous updating and are made available to the public through a variety of TIGER products such as shapefiles, geodatabases, and web map services.

B. Final Change

The Census Bureau issued in the **Federal Register** a notice and request for comment on the limited-access highway code change on April 25, 2017 (82 FR 19020). We did not receive any comments on that initial notice, therefore this is an announcement of the upcoming final change. Please see the earlier **Federal Register** notice (82 FR 19020, April 25, 2017) for a discussion of the proposed changes and rationale for doing so.

The Census Bureau publishes this notice to announce the upcoming change in the classification of limited-access highways in the MAF/TIGER System. Generally, only interstate highways are currently in the S1100

classification, while non-interstate limited-access highways are classified as S1200. This change will make all limited-access highways S1100. The final description of the Primary Roads (S1100) classification is:

Primary roads are limited-access highways that connect to other roads only at interchanges and not at at-grade intersections. This category includes interstate highways, as well as all other highways with limited access (some of which are toll roads). Limited-access highways with only one lane in each direction, as well as those that are undivided, are also included under S1100.

The final description makes clear that secondary roads are not limited-access highways. The final description of Secondary Roads (S1200) is:

Secondary roads are main arteries that are not limited access, usually in the U.S. highway, state highway, or county highway systems. These roads have one or more lanes of traffic in each direction, may or may not be divided, and usually have at-grade intersections with many other roads and driveways. They often have both a local name and a route number.

Dated: July 13, 2017.

Ron S. Jarmin,

Performing the Non-Exclusive Functions and Duties of the Director, Bureau of the Census.

[FR Doc. 2017–15125 Filed 7–18–17; 8:45 am]

BILLING CODE 3510–07–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–580–890]

Emulsion Styrene-Butadiene Rubber From the Republic of Korea: Final Affirmative Determination of Sales at Less Than Fair Value, and Final Affirmative Determination of Critical Circumstances, in Part

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

SUMMARY: The Department of Commerce (the Department) determines that emulsion styrene-butadiene rubber (ESB rubber) from the Republic of Korea (Korea) is being, or is likely to be, sold in the United States at less than fair value (LTFV).

DATES: July 19, 2017.

FOR FURTHER INFORMATION CONTACT: Carrie Bethea or Kabir Archuletta, AD/CVD Operations, Office V, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–1491 or (202) 482–2593, respectively.

SUPPLEMENTARY INFORMATION:

Background

On February 24, 2017, the Department of Commerce published the *Preliminary Determination* of this antidumping duty investigation, as provided by section 735 of the Tariff Act of 1930, as amended (Act), in which the Department found that ESB rubber from Korea was sold at LTFV.[1] A summary of the events that occurred since the Department published the *Preliminary Determination,* as well as a full discussion of the issues raised by interested parties for this final determination, may be found in the Issues and Decision Memorandum.[2] The Issues and Decision Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov,* and to all parties in the Central Records Unit, Room B8024 of the main Department of Commerce building. In addition, a complete version of the Issues and Decision Memorandum can be accessed directly at *http://enforcement.trade.gov/frn/.*

Scope of the Investigation

The product covered by this investigation is ESB rubber from Korea. For a complete description of the scope of this investigation, *see* Appendix I.

Scope Comments

No interested party commented on the scope of the investigation as it appeared in the *Initiation Notice.*[3] Therefore, the scope of this investigation remains unchanged for this final determination.

Verification

As provided in section 782(i) of the Act, in April and June 2017, the Department conducted verification of the information reported by a mandatory respondent, LG Chem, Ltd. (LG Chem), and its U.S. affiliate, LG Chem America, Ltd., for use in the Department's final determination. The Department used standard verification procedures, including an examination of relevant accounting and production records and original source documents provided by the respondent.[4]

Because Daewoo International Corporation (Daewoo) and Kumho Petrochemical Co, Ltd (Kumho), mandatory respondents in this investigation, did not provide information requested by the Department, and the Department preliminarily determined Daewoo and Kumho to have been uncooperative, the Department did not verify their books and records and facilities.

Analysis of Comments Received

All issues raised in the case and rebuttal briefs that were submitted by parties in this investigation are addressed in the Issues and Decision Memorandum. A list of these issues is attached to this notice as Appendix II. Based on our analysis of the comments received and our findings at verification, we made certain changes to the margin calculation for LG Chem, and also the all-others rate.

Use of Adverse Facts Available

The Department found in the *Preliminary Determination* that it was appropriate to apply facts available with adverse inferences to Daewoo and Kumho. No interested parties commented on the preliminary application of adverse facts-available dumping margins to Daewoo and Kumho. For the final determination, the Department has not altered its analysis or decision to apply adverse facts-available to Daewoo and Kumho. For a full discussion of the Department's adverse facts available determination, *see* the *Preliminary Determination.*

All-Others Rate

Section 735(c)(5)(A) of the Act provides that in the final determination the Department shall determine an estimated all-others rate for all exporters

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[1] *See Emulsion Styrene-Butadiene Rubber from the Republic of Korea: Preliminary Affirmative Determination of Sales at Less Than Fair Value, Affirmative Determination of Critical Circumstances, in Part, Postponement of Final Determination, and Extension of Provisional Measures,* 82 FR 11536 (February 24, 2017) and accompanying Preliminary Decision Memorandum (Preliminary Decision Memorandum) (collectively, *Preliminary Determination).*

[2] *See* Memorandum, ''Issues and Decision Memorandum for the Final Determination in the Less-Than-Fair-Value Investigation of Emulsion Styrene-Butadiene Rubber from the Republic of Korea,'' dated concurrently with, and hereby adopted by, this notice (Issues and Decision Memorandum).

[3] *See Emulsion Styrene-Butadiene Rubber from Brazil, the Republic of Korea, Mexico and Poland: Initiation of Less Than Fair Value Investigations,* 81 FR 55438 (August 19, 2016) (*Initiation Notice*).

[4] Memorandum, ''Verification of the Cost Response of LG Chem, Ltd. in the Antidumping Duty Investigation of Emulsion Styrene-Butadiene Rubber from the Republic of South Korea,'' dated April 13, 2017; Memorandum, ''Verification of U.S. Sales of LG Chem America, Inc., in the Antidumping Duty Investigation of Emulsion Styrene-Butadiene Rubber from the Republic of Korea,'' dated May 3, 2017; Memorandum, ''Verification of LG Chem, Ltd., in the Antidumping Duty Investigation of Emulsion-Styrene Butadiene Rubber from the Republic of Korea,'' dated June 14, 2017.

and producers not individually examined. This rate shall be an amount equal to the weighted average of the estimated weighted-average dumping margins established for exporters and producers individually investigated, excluding any zero and *de minimis* margins, and any margins determined entirely under section 776 of the Act.

For the final determination, the Department assigned a rate based entirely on facts available to Daewoo and Kumho. Therefore, the only rate that is not zero, *de minimis* or based entirely on facts otherwise available is the rate calculated for LG Chem. Consequently, the rate calculated for LG Chem is also assigned as the rate for all-other producers and exporters, pursuant to section 735(c)(5)(A) of the Act.

Final Determination

The Department determines that the following estimated weighted-average dumping margins exist:

Exporter/producer	Estimated weighted-average dumping margin (percent)
Daewoo International Corporation	** 44.30
Kumho Petrochemical Co, Ltd	** 44.30
LG Chem, Ltd	9.66
All-Others	9.66

** (AFA).

Final Affirmative Determination of Critical Circumstances, in Part

In accordance with section 733(e) of the Act, the Department preliminarily found critical circumstances exist with respect to Daewoo and Kumho and do not exist with respect to LG Chem and the non-individually examined companies receiving the ''All-Others'' rate in this investigation. The Department did not receive comments concerning the preliminary affirmative determination of critical circumstances. For the final determination, the Department continues to find that, in accordance with 735(a)(3) of the Act, critical circumstances exist for Daewoo and Kumho. A discussion of the determination can be found in the ''Critical Circumstances'' section of the Issues and Decision Memarandum.

Continuation of Suspension of Liquidation

In accordance with section 735(c)(1)(B) of the Act, the Department will instruct U.S. Customs and Border Protection (CBP) to continue to suspend liquidation of all appropriate entries of ESB rubber from Korea as described in Appendix I of this notice, which were entered, or withdrawn from warehouse, for consumption on or after, February 24, 2017, the date of publication of the *Preliminary Determination* of this investigation in the **Federal Register**. Further, pursuant to section 735(c)(1)(B)(ii) of the Act and 19 CFR 351.210(d), the Department will instruct CBP to require a cash deposit equal to the estimated weighted-average dumping margin or the estimated all-others rate, as follows: (1) The cash deposit rate for the respondents listed above will be equal to the respondent-specific estimated weighted-average dumping margins determined in this final determination; (2) if the exporter is not a respondent identified above, but the producer is, then the cash deposit rate will be equal to the respondent-specific estimated weighted-average dumping margin established for that producer of the subject merchandise; and (3) the cash deposit rate for all other producers and exporters will be equal to the all-others estimated weighted-average dumping margin.

Because of the Department's affirmative determination of critical circumstances for Daewoo and Kumho, in accordance with section 735(a)(3) and (c)(4)(A) of the Act, suspension of liquidation of ESB rubber from Korea, shall continue to apply, for Daewoo and Kumho, to unliquidated entries of merchandise entered, or withdrawn from warehouse, for consumption on or after the date which is 90 days before the publication of the *Preliminary Determination.*

Disclosure

The Department intends to disclose to interested parties its calculations and analysis performed in this final determination within five days of any public announcement or, if there is no public announcement, within five days of the date of publication of this notice in accordance with 19 CFR 351.224(b).

International Trade Commission Notification

In accordance with section 735(d) of the Act, the Department will notify the International Trade Commission (ITC) of its final determination. Because the final determination in this proceeding is affirmative, in accordance with section 735(b)(2) of the Act, the ITC will make its final determination as to whether the domestic industry in the United States is materially injured, or threatened with material injury, by reason of imports of ESB rubber from Korea no later than 45 days after the Department's final determination. If the ITC determines that material injury or threat of material injury does not exist, the proceeding will be terminated and all securities posted will be refunded or canceled. If the ITC determines that such injury does exist, the Department will issue an antidumping duty order directing CBP to assess, upon further instruction by the Department, antidumping duties on appropriate imports of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the date of the suspension of liquidation.

Notification Regarding Administrative Protective Orders

This notice serves as a reminder to parties subject to an 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 return or 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 violation subject to sanction.

This determination and this notice are issued and published pursuant to sections 735(d) and 777(i)(1) of the Act and 19 CFR 351.210(c).

Dated: July 10, 2017.

Gary Taverman

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, performing the non-exclusive functions and duties of the Assistant Secretary for Enforcement and Compliance.

Appendix I

Scope of the Investigation

For purposes of this investigation, the product covered is cold-polymerized emulsion styrene-butadiene rubber (ESB rubber). The scope of the investigation includes, but is not limited to, ESB rubber in primary forms, bales, granules, crumbs, pellets, powders, plates, sheets, strip, *etc.* ESB rubber consists of non-pigmented rubbers and oil-extended non-pigmented rubbers, both of which contain at least one percent of organic acids from the emulsion polymerization process.

ESB rubber is produced and sold in accordance with a generally accepted set of product specifications issued by the International Institute of Synthetic Rubber Producers (IISRP). The scope of the investigation covers grades of ESB rubber included in the IISRP 1500 and 1700 series of synthetic rubbers. The 1500 grades are light in color and are often described as ''Clear'' or ''White Rubber.'' The 1700 grades are oil-extended and thus darker in color, and are often called ''Brown Rubber.''

Specifically excluded from the scope of this investigation are products which are manufactured by blending ESB rubber with

other polymers, high styrene resin master batch, carbon black master batch (*i.e.,* IISRP 1600 series and 1800 series) and latex (an intermediate product).

The products subject to this investigation are currently classifiable under subheadings 4002.19.0015 and 4002.19.0019 of the Harmonized Tariff Schedule of the United States (HTSUS). ESB rubber is described by Chemical Abstract Services (CAS) Registry No. 9003–55–8. This CAS number also refers to other types of styrene butadiene rubber. Although the HTSUS subheadings and CAS registry number are provided for convenience and customs purposes, the written description of the scope of this investigation is dispositive.

Appendix II

List of Topics Discussed in the Issues and Decision Memorandum

I. Summary
II. Background
III. Scope Comments
IV. Scope of the Investigation
V. Margin Calculations
VI. Discussion of the Issues
Comment 1: CEP Offset
Comment 2: Cost Adjustments Based on Transactions Disregarded Rule
Comment 3: Cost Adjustments Based on Verification Findings
Comment 4: Sales Expense Adjustments Based on Verification Findings
Comment 5: Duty Drawback Adjustment
VII. Recommendation

[FR Doc. 2017–14950 Filed 7–18–17; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–831]

Fresh Garlic From the People's Republic of China: Notice of Court Decision Not in Harmony With Final Rescission and Notice of Amended Final Results

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

SUMMARY: On May 26, 2017, the Court of International Trade (the CIT) sustained the Department of Commerce's (the Department) final remand results pertaining to the new shipper review of the antidumping duty order on fresh garlic from the People's Republic of China (PRC) for Shijiazhuang Goodman Trading Co., Ltd. (Goodman). The Department is notifying the public that the final judgment in this case is not in harmony with the final rescission of the new shipper review and that the Department has found Goodman eligible for a new shipper review resulting in an individually-determined dumping margin of $0.08/kg.

DATES: Applicable June 5, 2017.

FOR FURTHER INFORMATION CONTACT: Chien-Min Yang, AD/CVD Operations, Office VII, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–5484.

SUPPLEMENTARY INFORMATION:

Background

Goodman is a Chinese producer/exporter of fresh garlic and requested a new shipper review on November 27, 2012, and amended that request on December 6, 2012.[1] On January 2, 2013, the Department initiated the requested NSR covering the period November 1, 2011, through October 31, 2012.

On April 21, 2014, the Department issued the *Final Rescission.* In the *Final Rescission,* the Department determined that Goodman's sales were not *bona fide* and, accordingly, rescinded its new shipper review.[2] Goodman challenged the Department's findings in the *Final Rescission* at the CIT.

On March 22, 2016, the CIT remanded for the Department to reconsider its decision.[3]

Per the Court's instructions, the Department reconsidered its previous analysis and determined, under protest, Goodman's U.S. sales to be *bona fide.* The Department found Goodman to be eligible for a new shipper review and addressed comments raised in case briefs and rebuttal briefs during the new shipper review regarding the preliminarily-calculated rate. In the final remand results filed with the CIT on August 22, 2016 (Final Redetermination), the Department made changes to the surrogate values and re-calculated Goodman's individually-determined antidumping duty rate to be $0.08 per kilogram.

On May 26, 2017, the CIT sustained the Department's Final Redetermination in full.[4] Thus, the CIT affirmed the $0.08/kg dumping margin the Department calculated for Goodman in the Final Redetermination.

Timken Notice

In its decision in *Timken,*[5] as clarified by *Diamond Sawblades,*[6] the Court of Appeals for the Federal Circuit held that, pursuant to section 516A(e) of the Tariff Act of 1930, as amended (the Act), the Department must publish a notice of a court decision that is not "in harmony" with a Department determination and must suspend liquidation of entries pending a "conclusive" court decision. The CIT's May 26, 2017, final judgment sustaining the Final Redetermination constitutes a final decision of the Court that is not in harmony with the Department's *Final Rescission.* This notice is published in fulfillment of the *Timken* publication requirements. Accordingly, the Department will continue the suspension of liquidation of the subject merchandise pending a final and conclusive court decision.

Amended Final Results

Because there is now a final court decision, we are amending the *Final Rescission* with respect to the dumping margin calculated for Goodman. Based on the Final Redetermination, as affirmed by the CIT, the revised dumping margin for Goodman, from November 1, 2011, through October 31, 2012, is $0.08/kg.

In the event that the CIT's ruling is not appealed or, if appealed, is upheld by a final and conclusive court decision, the Department will instruct Customs and Border Protection (CBP) to assess antidumping duties on unliquidated entries of subject merchandise based on the revised dumping margin listed above.

Cash Deposit Requirements

Since the *Final Rescission,* the Department has not established a cash deposit rate for Goodman.[7] Therefore, the Department will issue revised cash deposit instructions to CBP, adjusting the cash deposit rate for Goodman to $0.08/kg, effective June 5, 2017.

Notification to Interested Parties

This notice is issued and published in accordance with section 516A(e)(1), 751(a)(1), and 777(i)(1) of the Act.

[1] *See* Goodman's letter, "Fresh Garlic from the People's Republic of China—Re-filing Request for Antidumping New Shipper Review of Shijiazhuang Goodman Trading Co., Ltd.," (December 6, 2012).

[2] *See Fresh Garlic from the People's Republic of China: Final Rescission of Antidumping Duty New Shipper Review of Shijiazhuang Goodman Trading Co., Ltd.,* 79 FR 22,098 (April 21, 2014) (*Final Rescission*), and accompanying Issues and Decision Memorandum.

[3] *See Shijiazhuang Goodman Trading Co.* v. *United States,* 172 F. Supp. 3d 1363, 1368–82 (Ct. Int'l Trade 2016).

[4] *See Shijiazhuang Goodman Trading Co., Ltd.* v. *United States,* CIT Slip Op. 17–63, Consol. Ct. No. 14–00101 (May 26, 2017).

[5] *See Timken Co.* v. *United States,* 893 F.2d 337, 341 (Fed. Cir. 1990) (*Timken*).

[6] *See Diamond Sawblades Mfrs. Coalition* v. *United States,* 626 F.3d 1374 (Fed. Cir. 2010) (*Diamond Sawblades*).

[7] *See Fresh Garlic from the People's Republic of China: Final Results and Partial Rescission of the 18th Antidumping Duty Administrative Review; 2011–2012,* 79 FR 36,721 (June 30, 2014) (*Final Results*).

Dated: July 13, 2017.

Gary Taverman,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, performing the non-exclusive functions and duties of the Assistant Secretary for Enforcement and Compliance.

[FR Doc. 2017–15140 Filed 7–18–17; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

[A–351–849]

Emulsion Styrene-Butadiene Rubber From Brazil: Final Affirmative Determination of Sales at Less Than Fair Value and Final Negative Determination of Critical Circumstances

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

SUMMARY: The Department of Commerce (Department) determines that emulsion styrene-butadiene rubber (ESB rubber) from Brazil is being, or is likely to be, sold in the United States at less than fair value (LTFV). The period of investigation (POI) is July 1, 2015, through June 30, 2016.

DATES: July 19, 2017.

FOR FURTHER INFORMATION CONTACT: Drew Jackson, 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) 482–4406.

SUPPLEMENTARY INFORMATION:

Background

On February 24, 2017, the Department published the *Preliminary Determination* of this antidumping duty LTFV investigation, as provided by section 735 of the Tariff Act of 1930, as amended (Act), in which the Department found that ESB rubber from Brazil sold at LTFV.[1] A summary of the events that have occurred since the Department published the *Preliminary Determination,* as well as a full discussion of the issues raised by interested parties for this final determination, may be found in the Issues and Decision Memorandum.[2] The Issues and Decision Memorandum is a public document and is on file electronically *via* Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov,* and to all parties in the Central Records Unit, Room B8024 of the main Department of Commerce building. In addition, a complete version of the Issues and Decision Memorandum can be accessed directly at *http://enforcement.trade.gov/frn/.*

Scope of the Investigation

The product covered by this investigation is ESB rubber from Brazil. For a complete description of the scope of this investigation, *see* Appendix I.

Scope Comments

No interested party commented on the scope of the investigation as it appeared in the *Initiation Notice.*[3] Therefore, we did not modify the scope language of this investigation remains unchanged for this final determination.

Verification

As provided in section 782(i) of the Act, in February and March 2017, the Department conducted verification of the information reported by the mandatory respondent ARLANXEO Brasil S.A. (ARLANXEO Brasil) and its U.S. affiliate, ARLANXEO U.S.A. LLC, for use in the Department's final determination.[4] The Department used standard verification procedures, including an examination of relevant accounting and production records and original source documents provided by the respondent.

Analysis of Comments Received

All issues raised in the case and rebuttal briefs that were submitted by parties in this investigation are addressed in the Issues and Decision Memorandum. A list of these issues is attached to this notice as Appendix II. Based on our analysis of the comments received and our findings at verifications, we made certain changes to the margin calculation for ARLANXEO Brasil, and also the all-others rate.

All-Others Rate

Section 735(c)(5)(A) of the Act provides that in the final determination the Department shall determine an estimated all-others rate for all exporters and producers not individually examined. This rate shall be an amount equal to the weighted average of the estimated weighted-average dumping margins established for exporters and producers individually investigated, excluding any zero and *de minimis* margins, and any margins determined entirely under section 776 of the Act. For the final determination, the Department calculated an individual estimated weighted-average dumping margin for ARLANXEO Brasil, the only individually examined exporter/producer in this investigation. Because the only individually calculated dumping margin is not zero, *de minimis,* or based entirely on facts otherwise available, the estimated weighted-average dumping margin calculated for ARLANXEO Brasil is the margin assigned to all-other producers and exporters, pursuant to section 735(c)(5)(A) of the Act.

Final Determination

The Department determines that the following estimated weighted-average dumping margins exist:

Exporter/producer	Estimated weighted-average dumping margins (percent)
ARLANXEO Brasil S.A.	19.61
All-Others	19.61

Final Negative Determination of Critical Circumstances

On January 25, 2017, the petitioners[5] filed a timely critical circumstances allegation, pursuant to section 733(e)(1) of the Act and 19 CFR 351.206(c)(1), alleging that critical circumstances exist with respect to imports of ESB rubber from Brazil.[6] On February 24, 2017, the

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[1] *See Emulsion Styrene-Butadiene Rubber from Brazil: Preliminary Affirmative Determination of Sales at Less Than Fair Value, Negative Determination of Critical Circumstances, Postponement of Final Determination, and Extension of Provisional Measures,* 82 FR 11538 (February 24, 2017), and accompanying Preliminary Decision Memorandum (collectively, *Preliminary Determination*).

[2] *See* Memorandum, ''Issues and Decision Memorandum for the Final Determination in the Less Than Fair Value Investigation of Emulsion Styrene-Butadiene Rubber From Brazil,'' dated concurrently with, and hereby adopted by, this notice (Issues and Decision Memorandum).

[3] *See Emulsion Styrene-Butadiene Rubber from Brazil, the Republic of Korea, Mexico and Poland: Initiation of Less Than Fair Value Investigations,* 81 FR 55438 (August 19, 2016) (*Initiation Notice*).

[4] *See* Memorandum, ''Verification of the Constructed Export Price Sales Questionnaire Responses of ARLANXEO U.S.A. LLC,'' dated April 13, 2017; Memorandum, ''Verification of the Home Market and Constructed Export Price Sales Questionnaire Responses of ARLANXEO Brasil S.A.,'' dated April 21, 2017; and Memorandum, ''Verification of the Cost Response of ARLANXEO Brasil S.A. in the Antidumping Duty Investigation of Certain Emulsion Styrene Butadiene Rubber from Brazil,'' dated May 15, 2017.

[5] Lion Elastomers LLC and East West Copolymers (collectively, the petitioners).

[6] *See* Letter to the Honorable Penny Pritzker, Secretary of Commerce, from the Petitioners, concerning, ''Emulsion Styrene-Butadiene Rubber

Department preliminarily determined that critical circumstances did not exist for the mandatory respondent ARLANXEO Brasil or the exporters and producers not individually investigated (*i.e.,* ''all-others''). In this final, the Department continues to find that, in accordance with 735(a)(3) of the Act, critical circumstances do not exist for ARLANXEO Brasil or the non-individually examined companies receiving the all-others rate in this investigation. A discussion of the determination can be found in the ''Negative Determination of Critical Circumstances'' section of the Issues and Decision Memorandum.

Continuation of Suspension of Liquidation

In accordance with section 735(c)(1)(B) of the Act, the Department will instruct U.S. Customs and Border Protection (CBP) to continue to suspend liquidation of all appropriate entries of ESB rubber from Brazil as described in Appendix I of this notice, which were entered, or withdrawn from warehouse, for consumption on or after February 24, 2017, the date of publication of the *Preliminary Determination* of this investigation in the **Federal Register.** Further, pursuant to section 735(c)(1)(B) of the Act and 19 CFR 351.210(d), the Department will instruct CBP to require a cash deposit equal to the estimated weighted-average dumping margin or the estimated all-others rate, as follows: (1) The cash deposit rate for the respondents listed above will be equal to the respondent-specific estimated weighted-average dumping margins determined in this final determination; (2) if the exporter is not a respondent identified above, but the producer is, then the cash deposit rate will be equal to the respondent-specific estimated weighted-average dumping margin established for that producer of the subject merchandise; and (3) the cash deposit rate for all other producers and exporters will be equal to the all-others estimated weighted-average dumping margin.

Disclosure

The Department intends to disclose to interested parties its calculations and analysis performed in this final determination within five days of any public announcement or, if there is no public announcement, within five days of the date of publication of this notice in accordance with 19 CFR 351.224(b).

(ESBR) from Brazil and South Korea: Critical Circumstances Allegation,'' dated January 25, 2017.

International Trade Commission Notification

In accordance with section 735(d) of the Act, the Department will notify the International Trade Commission (ITC) of its final affirmative determination. Because the final determination in this proceeding is affirmative, in accordance with section 735(b)(2) of the Act, the ITC will make its final determination as to whether the domestic industry in the United States is materially injured, or threatened with material injury, by reason of imports of ESB rubber from Brazil no later than 45 days after the Department's final determination. If the ITC determines that material injury or threat of material injury does not exist, the proceeding will be terminated and all securities posted will be refunded or canceled. If the ITC determines that such injury does exist, the Department will issue an antidumping duty order directing CBP to assess, upon further instruction by the Department, antidumping duties on appropriate imports of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the date of the suspension of liquidation.

Notification to Regarding Administrative Protective Orders

This notice serves as a reminder to parties subject to an 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 return or 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 violation subject to sanction.

This determination and this notice are issued and published pursuant to sections 735(d) and 777(i)(1) of the Act and 19 CFR 351.210(c).

Dated: July 10, 2017.

Gary Taverman,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, performing the non-exclusive functions and duties of the Assistant Secretary for Enforcement and Compliance.

Appendix I

Scope of the Investigation

For purposes of this investigation, the product covered is cold-polymerized emulsion styrene-butadiene rubber (ESB rubber). The scope of the investigation includes, but is not limited to, ESB rubber in primary forms, bales, granules, crumbs, pellets, powders, plates, sheets, strip, *etc.* ESB rubber consists of non-pigmented rubbers and oil-extended non-pigmented rubbers, both of which contain at least one percent of organic acids from the emulsion polymerization process.

ESB rubber is produced and sold in accordance with a generally accepted set of product specifications issued by the International Institute of Synthetic Rubber Producers (IISRP). The scope of the investigation covers grades of ESB rubber included in the IISRP 1500 and 1700 series of synthetic rubbers. The 1500 grades are light in color and are often described as ''Clear'' or ''White Rubber.'' The 1700 grades are oil-extended and thus darker in color, and are often called ''Brown Rubber.''

Specifically excluded from the scope of this investigation are products which are manufactured by blending ESB rubber with other polymers, high styrene resin master batch, carbon black master batch (*i.e.,* IISRP 1600 series and 1800 series) and latex (an intermediate product).

The products subject to this investigation are currently classifiable under subheadings 4002.19.0015 and 4002.19.0019 of the Harmonized Tariff Schedule of the United States (HTSUS). ESB rubber is described by Chemical Abstract Services (CAS) Registry No. 9003–55–8. This CAS number also refers to other types of styrene butadiene rubber. Although the HTSUS subheadings and CAS registry number are provided for convenience and customs purposes, the written description of the scope of this investigation is dispositive.

Appendix II

List of Topics Discussed in the Issues and Decision Memorandum

I. Summary
II. Background
III. Scope of the Investigation
IV. Scope Comments
V. Final Negative Determination of Critical Circumstances
VI. Margin Calculations
VII. Discussion of the Issues
Comment 1: Level of Trade
Comment 2: U.S. Indirect Selling Expenses
Comment 3: Domestic Indirect Selling Expense Clerical Error
VIII. Recommendation

[FR Doc. 2017–14954 Filed 7–18–17; 8:45 am]
BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

North American Free Trade Agreement (NAFTA), Article 1904 Binational Panel Review: Notice of Request for Panel Review

AGENCY: United States Section, NAFTA Secretariat, International Trade Administration, Department of Commerce

ACTION: Notice.

SUMMARY: A Request for Panel Review was filed on behalf of Maquilacero S.A. de C.V. with the United States Section

of the NAFTA Secretariat on July 12, 2017, pursuant to NAFTA Article 1904. Panel Review was requested of the Department of Commerce's final determination regarding Certain Circular Welded Non-Alloy Steel Pipe from Mexico. The final results of the antidumping duty administrative review and final determination of no shipments, 2014–2015, was published in the **Federal Register** on June 13, 2017 (82 FR 27039). The NAFTA Secretariat has assigned case number USA–MEX–2017–1904–01 to this request.

FOR FURTHER INFORMATION CONTACT: Paul E. Morris, United States Secretary, NAFTA Secretariat, Room 2061, 1401 Constitution Avenue NW., Washington, DC 20230, (202) 482–5438.

SUPPLEMENTARY INFORMATION: Chapter 19 of Article 1904 of NAFTA provides a dispute settlement mechanism involving trade remedy determinations issued by the Government of the United States, the Government of Canada, and the Government of Mexico. Following a Request for Panel Review, a Binational Panel is composed to review the trade remedy determination being challenged and issue a binding Panel Decision. There are established NAFTA Rules of Procedure for Article 1904 Binational Panel Reviews, which were adopted by the three governments for panels requested pursuant to Article 1904(2) of NAFTA which requires Requests for Panel Review to be published in accordance with Rule 35. For the complete Rules, please see *https://www.nafta-sec-alena.org/Home/Texts-of-the-Agreement/Rules-of-Procedure/Article-1904.*

The Rules provide that:

(a) A Party or interested person may challenge the final determination in whole or in part by filing a Complaint in accordance with Rule 39 within 30 days after the filing of the first Request for Panel Review (the deadline for filing a Complaint is August 11, 2017);

(b) A Party, investigating authority or interested person that does not file a Complaint but that intends to appear in support of any reviewable portion of the final determination may participate in the panel review by filing a Notice of Appearance in accordance with Rule 40 within 45 days after the filing of the first Request for Panel Review (the deadline for filing a Notice of Appearance is August 28, 2017); and

(c) The panel review shall be limited to the allegations of error of fact or law, including challenges to the jurisdiction of the investigating authority, that are set out in the Complaints filed in the panel review and to the procedural and substantive defenses raised in the panel review.

Dated: July 14, 2017.

Paul E. Morris,

U.S. Secretary, NAFTA Secretariat.

[FR Doc. 2017–15168 Filed 7–18–17; 8:45 am]

BILLING CODE 3510–GT–P

DEPARTMENT OF COMMERCE

International Trade Administration

[C–469–818]

Ripe Olives From Spain: Initiation of Countervailing Duty Investigation

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

DATES: Applicable July 12, 2017.

FOR FURTHER INFORMATION CONTACT: Jennifer Shore at (202) 482–2778, AD/CVD Operations, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW., Washington, DC 20230.

SUPPLEMENTARY INFORMATION:

The Petition

On June 22, 2017,[1] the Department of Commerce (Department) received a countervailing duty (CVD) petition concerning imports of ripe olives from Spain, filed in proper form, on behalf of the Coalition for Fair Trade in Ripe Olives and its individual members, Bell-Carter Foods, Inc. and Musco Family Olive Co. (collectively, the petitioner). The CVD Petition was accompanied by an antidumping duty (AD) Petition. The petitioners are domestic producers of processed olives, usually referred to as ''ripe olives.''

On June 23, 2017, June 27, 2017, and June 28, 2017, the Department requested additional information and clarification of certain aspects of the Petition.[2] The petitioner filed responses to these requests on June 27, 2017, June 30, 2017, and July 3, 2017.[3] On July 5, 2017, Associación de Exportadores e Industiales de Aceitunas de Mesa (ASEMESA), an interested party, requested the Department poll the domestic industry of olive growers and the workers employed by them.[4] On July 7, 2017, the petitioner submitted rebuttal comments to ASEMESA's polling request[5] final proposed scope language. ASEMESA submitted an additional argument and request for the Department to poll the domestic industry of olive growers on July 10, 2017.[6] Also on July 10, 2017, the Department held consultations with respect to the CVD Petition, the Government of Spain (GOS) and the European Commission (EC) provided comments on the countervailability of the alleged programs and requested clarification on the procedural timelines. The GOS and the EC submitted their comments in written form that same day.[7] On July 12, 2017, Acorsa USA, Inc., Atalanta Corporation, Mario Camacho Foods, LLC, Mitsui Foods, Inc., and Schreiber Foods International, Inc. revised and resubmitted their July 11, 2017, submission, which was previously rejected. However, this new submission was filed too late for us to consider.

In accordance with section 702(b)(1) of the Tariff Act of 1930, as amended (the Act), the petitioner alleges that the GOS and the European Union are providing countervailable subsidies within the meaning of sections 701 and 771(5) of the Act, to manufacturers, producers, or exporters of ripe olives from Spain, and that imports of such ripe olives are materially injuring, or threatening material injury to, an industry in the United States. Additionally, consistent with section 702(b)(1) of the Act, the Petition is accompanied by information reasonably available to the petitioner supporting its allegations of subsidy programs in Spain on which we are initiating a CVD investigation.

The Department finds that the petitioner filed the Petition on behalf of the domestic industry because the petitioner is an interested party, as

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[1] The petition was filed with the U.S. Department of Commerce (the Department) and the International Trade Commission (ITC) on June 21, 2017, after 12:00 noon, and pursuant to 19 CFR 207.10(a), are deemed to have been filed on the next business day, June 22, 2017. *See* Memorandum, ''Decision Memorandum Concerning the Filing Date of the Petition,'' dated June 23, 2017.

[2] *See* Department Letter re: General Issues Supplemental Questions, dated June 23, 2017 (General Issues Supplemental); Department Letter re: Second General Issues Supplemental Questions, dated June 28, 2017 (Second General Issues Supplemental); and Department Letter re: Countervailing Duty Petition Supplement Question, dated June 27, 2017.

[3] *See* The petitioner's July 3, 2017 Supplement to the CVD Petition (CVD Supplement).

[4] *See* ASEMESA's July 5, 2017 Industry Support Comments and Request to Poll Industry (July 5 ASEMESA Comments).

[5] *See* The petitioner's July 7, 2017 Final Scope Language and Response to Industry Support Comments (The petitioner's Rebuttal Comments).

[6] *See* ASEMESA's July 10, 2017 Industry Support Comments and Request to Poll Industry (July 10 ASEMESA Comments).

[7] *See* Ex-Parté Memorandum, ''Ripe Olives from Spain Countervailing Duty Petition: Consultations with Officials from Spain and European Union,'' dated July 11, 2017. *See, also* European Commission and the Government of Spain Consultation Comments, dated July 10, 2017.

defined by section 771(9)(F) of the Act. As discussed in the ''Determination of Industry Support for the Petition'' section, below, the Department also finds that the petitioner demonstrated sufficient industry support with respect to initiation of the requested CVD investigation.

Period of Investigation

Because the Petition was filed on June 22, 2017, the period of investigation (POI), the period for which we are measuring subsidies, is January 1, 2016, through December 31, 2016.

Scope of the Investigation

The products covered by this Petition are certain processed olives, usually referred to as ''ripe olives,'' from Spain. For a full description of the scope of this investigation, *see* the ''Scope of the Investigation,'' in the Appendix to this notice.

Comments on the Scope of the Investigation

During our review of the Petition, the Department issued questions to, and received responses from, the petitioner pertaining to the proposed scope to ensure that the scope language in the Petition accurately reflected the products for which the domestic industry is seeking relief.[8] As a result of those exchanges, the scope of the Petition was modified to clarify the description of merchandise covered by the Petition.

As discussed in the preamble to the Department's regulations,[9] we are setting aside a period of time for interested parties to raise issues regarding product coverage (*i.e.,* scope). The Department will consider all comments received and, if necessary, will consult with parties prior to the issuance of the preliminary determination. If scope comments include factual information (*see* 19 CFR 351.102(b)(21)), all such factual information should be limited to public information. The Department requests that all interested parties submit scope comments by 5:00 p.m. Eastern Standard Time (EST) on Tuesday, August 1, 2017, which is 20 calendar days from the signature date of this notice. Any rebuttal comments, which may include factual information (and also should be limited to public information), must be filed by 5:00 p.m. EST on Friday, August 11, 2017, which is ten calendar days after the deadline for initial comments.[10]

The Department requests that any factual information the parties consider relevant to the scope of the investigations be submitted during this time period. However, if a party subsequently finds that additional factual information pertaining to the scope may be relevant, the party may contact the Department and request permission to submit the additional information. All such comments and information must be filed on the records of each of the concurrent AD and CVD investigations.

Filing Requirements

All submissions to the Department must be filed electronically using Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS).[11] An electronically-filed document must be successfully received, in its entirety, by the time and date when it is due. Documents excepted from the electronic submission requirements must be filed manually (*i.e.,* in paper form) with Enforcement and Compliance's APO/Dockets Unit, Room 18022, U.S. Department of Commerce, 1401 Constitution Avenue NW., Washington, DC 20230, and stamped with the date and time of receipt by the applicable deadlines.

Consultations

Pursuant to section 702(b)(4)(A) of the Act, the Department notified representatives of the GOS and the EU of its receipt of the Petition and provided them with the opportunity for consultations regarding the CVD allegations.[12] On July 10, 2017, the Department held consultations with the GOS and the EU.[13] All letters and memoranda pertaining to these consultations are available via ACCESS.

Determination of Industry Support for the Petition

Section 702(b)(1) of the Act requires that a petition be filed on behalf of the domestic industry. Section 702(c)(4)(A) of the Act provides that a petition meets this requirement if the domestic producers or workers who support the petition account for: (i) At least 25 percent of the total production of the domestic like product; and (ii) more than 50 percent of the production of the domestic like product produced by that portion of the industry expressing support for, or opposition to, the petition. Moreover, section 702(c)(4)(D) of the Act provides that, if the petition does not establish support of domestic producers or workers accounting for more than 50 percent of the total production of the domestic like product, the Department shall: (i) Poll the industry or rely on other information in order to determine if there is support for the petition, as required by subparagraph (A); or (ii) determine industry support using a statistically valid sampling method to poll the ''industry.''

Section 771(4)(A) of the Act defines the ''industry'' as the producers as a whole of a domestic like product. Thus, to determine whether a petition has the requisite industry support, the statute directs the Department to look to producers and workers who produce the domestic like product. The ITC, which is responsible for determining whether ''the domestic industry'' has been injured, must also determine what constitutes a domestic like product in order to define the industry. While both the Department and the ITC must apply the same statutory definition regarding the domestic like product,[14] they do so for different purposes and pursuant to a separate and distinct authority. In addition, the Department's determination is subject to limitations of time and information. Although this may result in different definitions of the like product, such differences do not render the decision of either agency contrary to law.[15]

Section 771(10) of the Act defines the domestic like product as ''a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation under this title.'' Thus, the reference point from which the domestic like product analysis begins is ''the article subject to an investigation''

[8] *See* General Issues and AD Supplement, at 1–2; Second General Issues Supplement, at 1–3.

[9] *See Antidumping Duties; Countervailing Duties,* 62 FR 27296, 27323 (May 19, 1997).

[10] *See* 19 CFR 351.302(c)(3)(iv) and 19 CFR 351.303(b).

[11] *See Antidumping and Countervailing Duty Proceedings: Electronic Filing Procedures; Administrative Protective Order Procedures,* 76 FR 39263 (July 6, 2011); *see also Enforcement and Compliance; Change of Electronic Filing System Name,* 79 FR 69046 (November 20, 2014) for details of the Department's electronic filing requirements, which went into effect on August 5, 2011. Information on help using ACCESS can be found at *https://access.trade.gov/help.aspx* and a handbook can be found at *https://access.trade.gov/help/Handbook%20on%20Electronic%20Filling%20Procedures.pdf.*

[12] *See* Department Letter, ''Ripe Olives from Spain: Invitation for Consultations to Discuss the Countervailing Duty Petition,'' June 23, 2017.

[13] *See* Department Memorandum, ''Countervailing Duty Petition on Ripe Olives from Spain: Consultations,'' July 11, 2017.

[14] *See* section 771(10) of the Act.

[15] *See USEC, Inc.* v. *United States,* 132 F. Supp. 2d 1, 8 (CIT 2001) (citing *Algoma Steel Corp., Ltd.* v. *United States,* 688 F. Supp. 639, 644 (CIT 1988), *aff'd* 865 F.2d 240 (Fed. Cir. 1989)).

(*i.e.,* the class or kind of merchandise to be investigated, which normally will be the scope as defined in the Petition).

With regard to the domestic like product, the petitioner does not offer a definition of the domestic like product distinct from the scope of the investigation. Based on our analysis of the information submitted on the record, we have determined that ripe olives, as defined in the scope, constitutes a single domestic like product and we have analyzed industry support in terms of that domestic like product.[16]

In determining whether the petitioner has standing under section 702(c)(4)(A) of the Act, we considered the industry support data contained in the Petition with reference to the domestic like product as defined in the ''Scope of the Investigation,'' in the Appendix to this notice. The petitioner provided the 2016 production of the domestic like product by its members.[17] In addition, we relied on data the petitioner provided estimating the 2016 production of the domestic like product by the only other U.S. processor.[18] We relied on data the petitioner provided for purposes of measuring industry support.[19]

On July 5, 2017, we received comments on industry support from ASEMESA.[20] The petitioner responded to the letter from ASEMESA on July 7, 2017.[21] On July 10, 2017, we received comments on industry support collectively from ASEMESA, Industria Aceiyunera Merciense, S.A., DCOOOP, S. COOP. AND., Agro Sevilla Aceitunas, SOC. COOP. AND., Plasoliva, S.L., GOYA en Espana, S.A.U., Aceitunas Guadalquivir, S.L., Angel Camacho Alimentación, S.L., Internacional Olivarera S.A., F.J. Sanchez Sucesores, S.A.U., and Aceitunas Sevillanas S.A. (collectively, ASEMESA *et al.*).[22] For further discussion of these comments, *see* the AD Initiation Checklist, at Attachment II.

Our review of the data provided in the Petition, supplemental responses, and other information readily available to the Department indicates that the petitioner has established industry support for the Petition.[23] First, the Petition established support from domestic producers (or workers) accounting for more than 50 percent of the total production of the domestic like product and, as such, the Department is not required to take further action in order to evaluate industry support (*e.g.,* polling).[24] Second, the domestic producers (or workers) have met the statutory criteria for industry support under section 702(c)(4)(A)(i) of the Act because the domestic producers (or workers) who support the Petitions account for at least 25 percent of the total production of the domestic like product.[25] Finally, the domestic producers (or workers) have met the statutory criteria for industry support under section 702(c)(4)(A)(ii) of the Act because the domestic producers (or workers) who support the Petition account for more than 50 percent of the production of the domestic like product produced by that portion of the industry expressing support for, or opposition to, the Petition.[26] Accordingly, the Department determines that the Petition was filed on behalf of the domestic industry within the meaning of section 702(b)(1) of the Act.

The Department finds that the petitioner filed the Petition on behalf of the domestic industry because it is an interested party as defined in section 771(9)(G) of the Act and it has demonstrated sufficient industry support with respect to the CVD investigation that it is requesting that the Department initiate.[27]

Injury Test

Because Spain is a ''Subsidies Agreement Country'' within the meaning of section 701(b) of the Act, section 701(a)(2) of the Act applies to this investigation. Accordingly, the ITC must determine whether imports of the subject merchandise from Spain materially injure, or threaten material injury to, a U.S. industry.

Allegations and Evidence of Material Injury and Causation

The petitioner alleges that imports of the subject merchandise are benefitting from countervailable subsidies and that such imports are causing, or threaten to cause, material injury to the U.S. industry producing the domestic like product. The petitioner alleges that subject imports exceed the negligibility threshold provided for under section 771(24)(A) of the Act.[28]

The petitioner contends that the industry's injured condition is illustrated by reduced market share, underselling and price suppression or depression, lost sales and revenues, adverse impact on the domestic industry, including financial performance, production, and capacity utilization, and reduction in olive acreage under cultivation.[29] We assessed the allegations and supporting evidence regarding material injury, threat of material injury, and causation, and we determined that these allegations are properly supported by adequate evidence and meet the statutory requirements for initiation.[30]

Initiation of Countervailing Duty Investigation

Section 702(b)(1) of the Act requires the Department to initiate a CVD investigation whenever an interested party files a CVD petition on behalf of an industry that (1) alleges the elements necessary for the imposition of a duty under section 701(a) of the Act and (2) is accompanied by information reasonably available to the petitioner supporting the allegations.

The petitioner alleges that producers/exporters of ripe olives in Spain benefited from countervailable subsidies bestowed by the GOS and the EU. The Department examined the Petition and finds that it complies with the requirements of section 702(b)(1) of the Act. Therefore, in accordance with section 702(b)(1) of the Act, we are initiating a CVD investigation to determine whether manufacturers, producers, and/or exporters of ripe olives from Spain receive countervailable subsidies from the GOS and/or the EU, as alleged by the petitioner.

The Trade Preferences Extension Act of 2015 (TPEA) made numerous

[16] For a discussion of the domestic like product analysis in these cases, *see* Countervailing Duty Investigation Initiation Checklist: Ripe Olives from Spain (CVD Initiation Checklist), at Attachment II, Analysis of Industry Support for the Antidumping and Countervailing Duty Petitions Covering Ripe Olives from Spain (Attachment II); This checklist is dated concurrently with this notice and on file electronically via ACCESS. Access to documents filed via ACCESS is also available in the Central Records Unit, Room B8024 of the main Department of Commerce building.

[17] *See* Volume I of the Petition, at 5 and Exhibit I–3.

[18] *Id.,* at 5; *see also* General Issues and AD Supplement, at 2 and Exhibit I–17.

[19] *Id.* For further discussion, *see* AD Initiation Checklist, at Attachment II.

[20] *See* Letter from ASEMESA to the Department, re: ''Industry Support Comments on the Petitions for Antidumping and Countervailing Duties and Request to Poll Industry,'' dated July 5, 2017.

[21] *See* July 7, 2017, Response.

[22] *See* Letter from ASEMESA *et al* to the Department, re: ''Request to Poll Industry,'' dated July 10, 2017.

[23] *See* CVD Initiation Checklist, at Attachment II.

[24] *See* section 702(c)(4)(D) of the Act; *see also* CVD Initiation Checklist, at Attachment II.

[25] *See* CVD Initiation Checklist, at Attachment II.

[26] *Id.*

[27] *Id.*

[28] *See* Volume I of the Petition, at 12, and Exhibit I–6A.

[29] *Id.,* at 18–34 and Exhibits I–6 and I–8—I–16.

[30] *See* CVD Initiation Checklist, at Attachment III, Analysis of Allegations and Evidence of Material Injury and Causation for the Antidumping and Countervailing Duty Petitions Covering Ripe Olives from Spain (Attachment III).

amendments to the AD and CVD laws.[31] The TPEA does not specify dates of application for those amendments. On August 6, 2015, the Department published an interpretative rule, in which it announced the applicability dates for each amendment to the Act, except for amendments contained in section 771(7) of the Act, which relate to determinations of material injury by the ITC.[32] The amendments to sections 776 and 782 of the Act are applicable to all determinations made on or after August 6, 2015, and, therefore, apply to this CVD investigation.[33]

Based on our review of the Petition, we find that there is sufficient information to initiate a CVD investigation on the six alleged programs. For a full discussion of the basis for our decision to initiate on each program, *see* CVD Initiation Checklist. A public version of the initiation checklist for this investigation is available on ACCESS.

In accordance with section 703(b)(1) of the Act and 19 CFR 351.205(b)(1), unless postponed, we will make our preliminary determination in this investigation no later than 65 days after the date of initiation.

Respondent Selection

The petitioner named numerous companies as producers/exporters of ripe olives from Spain.[34] The Department intends to follow its standard practice in CVD investigations and calculate company-specific subsidy rates in this investigation. In the event the Department determines that the number of companies is large and it cannot individually examine each company based upon the Department's resources, where appropriate, the Department intends to select mandatory respondents based on U.S. Customs and Border Protection (CBP) data for U.S. imports of ripe olives from Spain during the period of investigation under the appropriate Harmonized Tariff Schedule of the United States (HTSUS) numbers listed in the ''Scope of the Investigation,'' in the Appendix.

On July 6, 2017, the Department released CBP data under Administrative Protective Order (APO) to all parties with access to information protected by APO and indicated that interested parties wishing to comment regarding the CBP data must do so within three business days of the announcement of the initiation of the CVD investigation.[35]

Interested parties must submit applications for disclosure under APO in accordance with 19 CFR 351.305(b). Instructions for filing such applications may be found on the Department's Web site at *http://enforcement.trade.gov/apo.*

Comments for this investigation must be filed electronically using ACCESS. An electronically-filed document must be received successfully in its entirety by the Department's electronic records system, ACCESS, by 5:00 p.m. EST, by the dates noted above. We intend to finalize our decision regarding respondent selection within 20 days of publication of this notice.

Distribution of Copies of the Petition

In accordance with section 702(b)(4)(A)(i) of the Act and 19 CFR 351.202(f), a copy of the public version of the Petition has been provided to the GOS and the European Commission via ACCESS. Because of the particularly large number of producers/exporters identified in the Petition,[36] the Department considers the service of the public version of the Petition to the foreign producers/exporters satisfied by delivery of the public version to the GOS consistent with 19 CFR 351.203(c)(2).

ITC Notification

We will notify the ITC of our initiation, as required by section 702(d) of the Act.

Preliminary Determination by the ITC

The ITC will preliminarily determine, within 45 days of the date on which the Petition was filed, whether there is a reasonable indication that imports of ripe olives in Spain are materially injuring, or threatening material injury to, a U.S. industry.[37] A negative ITC determination will result in the investigation being terminated;[38] otherwise, the investigation will proceed according to statutory and regulatory time limits.

Submission of Factual Information

Factual information is defined in 19 CFR 351.102(b)(21) as: (i) Evidence submitted in response to questionnaires; (ii) evidence submitted in support of allegations; (iii) publicly available information to value factors under 19 CFR 351.408(c) or to measure the adequacy of remuneration under 19 CFR 351.511(a)(2); (iv) evidence placed on the record by the Department; and (v) evidence other than factual information described in (i) through (iv). The regulation requires any party, when submitting factual information, to specify under which subsection of 19 CFR 351.102(b)(21) the information is being submitted and, if the information is submitted to rebut, clarify, or correct factual information already on the record, to provide an explanation identifying the information already on the record that the factual information seeks to rebut, clarify, or correct. Time limits for the submission of factual information are addressed in 19 CFR 351.301, which provides specific time limits based on the type of factual information being submitted. Interested parties should review the regulations prior to submitting factual information in this investigation.

Extensions of Time Limits

Parties may request an extension of time limits before the expiration of a time limit established under Part 351, or as otherwise specified by the Secretary. In general, an extension request will be considered untimely if it is filed after the expiration of the time limit. For submissions that are due from multiple parties simultaneously, an extension request will be considered untimely if it is filed after 10:00 a.m. ET on the due date. Under certain circumstances, we may elect to specify a different deadline after which extension requests will be considered untimely for submissions that are due from multiple parties simultaneously. In such a case, we will inform parties in the letter or memorandum setting forth the deadline (including a specified time) by which extension requests must be filed to be considered timely. An extension request must be made in a separate, stand-alone submission; under limited circumstances we will grant untimely-filed requests for the extension of time limits. Review *Extension of Time Limits; Final Rule,* 78 FR 57790 (September 20, 2013), available at *http://www.gpo.gov/fdsys/pkg/FR-2013-09-20/html/2013-22853.htm,* prior to submitting factual information in this investigation.

Certification Requirements

Any party submitting factual information in an AD or CVD proceeding must certify the accuracy and completeness of that information.[39]

[31] *See* Trade Preferences Extension Act of 2015, Public Law 114–27, 129 Stat. 362 (2015).

[32] *See Dates of Application of Amendments to the Antidumping and Countervailing Duty Laws Made by the Trade Preferences Extension Act of 2015,* 80 FR 46793 (August 6, 2015) (*Applicability Notice*).

[33] *Id.,* at 46794–95. The 2015 amendments may be found at *https://www.congress.gov/bill/114th-congress/house-bill/1295/text/pl.*

[34] *See* Petition, Volume I, at 28 and Exhibit 61.

[35] *See* Memorandum, ''*Ripe Olives from Spain Countervailing Duty Petition:* Release of Customs Data from U.S. Customs and Border Protection Release of CBP Data,'' dated July 6, 2017.

[36] *See* Petition, Volume I at Exhibit 61.

[37] *See* section 703(a)(2) of the Act.

[38] *See* section 703(a)(1) of the Act.

[39] *See* section 782(b) of the Act.

Parties must use the certification formats provided in 19 CFR 351.303(g).[40] The Department intends to reject factual submissions if the submitting party does not comply with the applicable certification requirements.

Notification to Interested Parties

Interested parties must submit applications for disclosure under APO in accordance with 19 CFR 351.305. On January 22, 2008, the Department published *Antidumping and Countervailing Duty Proceedings: Documents Submission Procedures; APO Procedures,* 73 FR 3634 (January 22, 2008). Parties wishing to participate in this investigation should ensure that they meet the requirements of these procedures (*e.g.,* the filing letters of appearance, as discussed at 19 CFR 351.103(d)).

This notice is issued and published pursuant to sections 702 and 777(i) of the Act.

Dated: July 12, 2017.

Gary Taverman,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, performing the non-exclusive functions and duties of the Assistant Secretary for Enforcement and Compliance.

Appendix—Scope of the Investigation

The products covered by this Petition are certain processed olives, usually referred to as ''ripe olives.'' The subject merchandise includes all colors of olives; all shapes and sizes of olives, whether pitted or not pitted, and whether whole, sliced, chopped, minced, wedged, broken, or otherwise reduced in size; all types of packaging, whether for consumer (retail) or institutional (food service) sale, and whether canned or packaged in glass, metal, plastic, multi-layered airtight containers (including pouches), or otherwise; and all manners of preparation and preservation, whether low acid or acidified, stuffed or not stuffed, with or without flavoring and/or saline solution, and including in ambient, refrigerated, or frozen conditions.

Included are all ripe olives grown, processed in whole or in part, or packaged in Spain. Subject merchandise includes ripe olives that have been further processed in Spain or a third country, including but not limited to curing, fermenting, rinsing, oxidizing, pitting, slicing, chopping, segmenting, wedging, stuffing, packaging, or heat treating, or any other processing that would not otherwise remove the merchandise from the scope of the investigation if performed in Spain.

[40] *See also Certification of Factual Information to Import Administration During Antidumping and Countervailing Duty Proceedings,* 78 FR 42678 (July 17, 2013) (*Final Rule*). Answers to frequently asked questions regarding the *Final Rule* are available at *http://enforcement.trade.gov/tlei/notices/factual_info_final_rule_FAQ_07172013.pdf.*

Excluded from the scope are: (1) Specialty olives[41] (including ''Spanish-style,'' ''Sicilian-style,'' and other similar olives) that have been processed by fermentation only, or by being cured in an alkaline solution for not longer than 12 hours and subsequently fermented; and (2) provisionally prepared olives unsuitable for immediate consumption (currently classifiable in subheading 0711.20 of the Harmonized Tariff Schedule of the United States (HTSUS)).

The merchandise subject to this petition is currently classifiable under subheadings 005.70.0230, 2005.70.0260, 2005.70.0430, 2005.70.0460, 2005.70.5030, 2005.70.5060, 2005.70.6020, 2005.70.6030, 2005.70.6050, 2005.70.6060, 2005.70.6070, 2005.70.7000, 2005.70.7510, 2005.70.7515, 2005.70.7520, and 2005.70.7525 HTSUS. Subject merchandise may also be imported under subheadings 2005.70.0600, 2005.70.0800, 2005.70.1200, 2005.70.1600, 2005.70.1800, 2005.70.2300, 2005.70.2510, 2005.70.2520, 2005.70.2530, 2005.70.2540, 2005.70.2550, 2005.70.2560, 2005.70.9100, 2005.70.9300, and 2005.70.9700. Although HTSUS subheadings are provided for convenience and US Customs purposes, they do not define the scope of the petition; rather, the written description of the subject merchandise is dispositive.

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[41] Some of the major types of specialty olives and their curing methods are:

''Spanish-style'' green olives. Spanish-style green olives have a mildly salty, slightly bitter taste, and are usually pitted and stuffed. This style of olive is primarily produced in Spain and can be made from various olive varieties. Most are stuffed with pimento; other popular stuffings are jalapeno, garlic, and cheese. The raw olives that are used to produce Spanish-style green olives are picked while they are unripe, after which they are submerged in an alkaline solution for typically less than a day to partially remove their bitterness, rinsed, and fermented in a strong salt brine, giving them their characteristic flavor.

''Sicilian-style'' green olives. Sicilian-style olives are large, firm green olives with a natural bitter and savory flavor. This style of olive is produced in small quantities in the United States using a Sevillano variety of olive and harvested green with a firm texture. Sicilian-style olives are processed using a brine-cured method, and undergo a full fermentation in a salt and lactic acid brine for 4 to 9 months. These olives may be sold whole unpitted, pitted, or stuffed.

''Kalamata'' olives: Kalamata olives are slightly curved in shape, tender in texture, and purple in color, and have a rich natural tangy and savory flavor. This style of olive is produced in Greece using a Kalamata variety olive. The olives are harvested after they are fully ripened on the tree, and typically use a brine-cured fermentation method over 4 to 9 months in a salt brine.

Other specialty olives in a full range of colors, sizes, and origins, typically fermented in a salt brine for 3 months or more.

DEPARTMENT OF COMMERCE

International Trade Administration

[A–469–817]

Ripe Olives From Spain: Initiation of Less-Than-Fair-Value Investigation

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

DATES: Applicable July 12, 2017.

FOR FURTHER INFORMATION CONTACT: Catherine Cartsos at (202) 482–1757, or Peter Zukowski at (202) 482–0189, AD/CVD Operations, Enforcement and Compliance, U.S. Department of Commerce, 1401 Constitution Avenue NW., Washington, DC 20230.

SUPPLEMENTARY INFORMATION:

The Petition

On June 22, 2017,[1] the Department received an antidumping duty (AD) Petition concerning imports of ripe olives from Spain, filed in proper form, on behalf of the Coalition for Fair Trade in Ripe Olives, which consists of domestic processors Bell-Carter Foods, Inc. and Musco Family Olive Co. (collectively, the petitioner). The AD Petition was accompanied by a countervailing duty (CVD) Petition. The petitioners are domestic producers of processed olives, usually referred to as ''ripe olives.''

On June 23, 2017, June 27, 2017, and June 28, 2017, the Department requested additional information and clarification of certain aspects of the Petition.[2] The petitioner filed responses to these requests on June 27, 2017, and June 30, 2017.[3] On July 5, 2017, Associación de Exportadores e Industiales de Aceitunas de Mesa (ASEMESA), an interested party, requested the Department poll the

[1] The petition was filed with the U.S. Department of Commerce (the Department) and the International Trade Commission (ITC) on June 21, 2017, after 12:00 noon, and pursuant to 19 CFR 207.10(a), are deemed to have been filed on the next business day, June 22, 2017. *See* Memorandum, ''Decision Memorandum Concerning the Filing Date of the Petition,'' dated June 23, 2017.

[2] *See* Letters from the Department to the petitioner, regarding ''Petition for the Imposition of Antidumping Duties on Imports of Ripe Olives from Spain: Supplemental Questions,'' dated June 23, 2017; Letter from the Department to the petitioner, regarding ''Petition for the Imposition of Antidumping Duties on Imports of Ripe Olives from Spain: Supplemental Questions,'' dated June 28, 2017.

[3] *See* Letter from the petitioner to the Department, regarding ''Ripe Olives from Spain; Response to the Department's Supplemental Questionnaires'' dated June 27, 2017, (General Issues and AD Supplement); Letter from the petitioner to the Department, regarding ''Ripe Olives from Spain; Response to the Department's Second General Issues Supplemental Questionnaire,'' dated June 30, 2017, (Second General Issues Supplement).

domestic industry of olive growers and the workers employed by them.[4] On July 7, 2017, the petitioner submitted rebuttal comments to ASEMESA's polling request [5] and its final proposed scope language. ASEMESA submitted an additional argument and request for the Department to poll the domestic industry of olive growers on July 10, 2017.[6] On July 12, 2017, Acorsa USA, Inc., Atalanta Corporation, Mario Camacho Foods, LLC, Mitsui Foods, Inc., and Schreiber Foods International, Inc. revised and resubmitted their July 11, 2017, submission, which was previously rejected. However, this new submission was filed too late for us to consider.

In accordance with section 732(b) of the Tariff Act of 1930, as amended (the Act), the petitioner alleges that imports of ripe olives from Spain are being, or are likely to be, sold in the United States at less than fair value within the meaning of section 731 of the Act, and that such imports are materially injuring, or threatening material injury to, an industry in the United States. Additionally, consistent with section 732(b)(1) of the Act, the Petition is accompanied by information reasonably available to the petitioner supporting its allegations.

The Department finds that the petitioner filed this Petition on behalf of the domestic industry because the petitioner is an interested party as defined in section 771(9)(G) of the Act. As discussed in the ''Determination of Industry Support for the Petition'' section, below, the Department also finds that the petitioner demonstrated sufficient industry support with respect to initiation of the requested AD investigation.

Period of Investigation

Because the Petition was filed on June 22, 2017, the period of investigation (POI) is April 1, 2016, through March 31, 2017.

Scope of the Investigation

The products covered by this investigation are certain processed olives, usually referred to as ''ripe olives,'' from Spain. For a full description of the scope of this investigation, *see* the ''Scope of the Investigation,'' in the Appendix to this notice.

Comments on Scope of the Investigation

During our review of the Petition, the Department issued questions to, and received responses from, the petitioner pertaining to the proposed scope to ensure that the scope language in the Petition accurately reflected the products for which the domestic industry is seeking relief.[7] As a result of those exchanges, the scope of the Petition was modified to clarify the description of merchandise covered by the Petition.

As discussed in the preamble to the Department's regulations,[8] we are setting aside a period for interested parties to raise issues regarding product coverage (*i.e.,* scope). The Department will consider all comments received from parties and, if necessary, will consult with parties prior to the issuance of the preliminary determination. If scope comments include factual information (*see* 19 CFR 351.102(b)(21)), all such factual information should be limited to public information. The Department requests that all interested parties submit scope comments by 5:00 p.m. Eastern Standard Time (EST) on Tuesday, August 1, 2017, which is 20 calendar days from the signature date of this notice. Any rebuttal comments, which may include factual information (and also should be limited to public information), must be filed by 5:00 p.m. EST on Friday, August 11, 2017, which is ten calendar days after the deadline for initial comments.[9]

The Department requests that any factual information the parties consider relevant to the scope of the investigation be submitted during this time period. However, if a party subsequently finds that additional factual information pertaining to the scope of the investigation may be relevant, the party may contact the Department and request permission to submit the additional information. All such comments and information must be filed on the records of each of the concurrent AD and CVD investigations.

Filing Requirements

All submissions to the Department must be filed electronically using Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS).[10] An electronically-filed document must be successfully received, in its entirety, by the time and date when it is due. Documents excepted from the electronic submission requirements must be filed manually (*i.e.,* in paper form) with Enforcement and Compliance's APO/Dockets Unit, Room 18022, U.S. Department of Commerce, 1401 Constitution Avenue NW., Washington, DC 20230, and stamped with the date and time of receipt by the applicable deadlines.

Comments on Product Characteristics for AD Questionnaire

The Department will provide interested parties an opportunity to comment on the appropriate physical characteristics of ripe olives to be reported in response to the Department's AD questionnaire. This information will be used to identify the key physical characteristics of the merchandise under consideration in order to report the relevant costs of production accurately, as well as to develop appropriate product-comparison criteria.

Interested parties may provide any information or comments that they feel are relevant to the development of an accurate list of physical characteristics. Specifically, they may provide comments as to which characteristics are appropriate to use as: (1) General product characteristics; and (2) product-comparison criteria. We note that it is not always appropriate to use all product characteristics as product-comparison criteria. We base product-comparison criteria on meaningful commercial differences among products. In other words, although there may be some physical product characteristics utilized by manufacturers to describe ripe olives, it may be that only a select few product characteristics take into account commercially meaningful physical characteristics. In addition, interested parties may comment on the order in which the physical characteristics should be used in matching products. Generally, the Department attempts to list the most important physical characteristics first

[4] *See* ASEMESA's July 5, 2017 Industry Support Comments and Request to Poll Industry (July 5 ASEMESA Comments).

[5] *See* The petitioner's July 7, 2017 Final Scope Language and Response to Industry Support Comments (The petitioner's Rebuttal Comments).

[6] *See* ASEMESA's July 10, 2017 Industry Support Comments and Request to Poll Industry (July 10 ASEMESA Comments).

[7] *See* General Issues and AD Supplement, at 1–2; Second General Issues Supplement, at 1–3.

[8] *See Antidumping Duties; Countervailing Duties, Final Rule,* 62 FR 27296, 27323 (May 19, 1997).

[9] *See* 19 CFR 351.302(c)(3)(iv) and 19 CFR 351.303(b).

[10] *See Antidumping and Countervailing Duty Proceedings: Electronic Filing Procedures; Administrative Protective Order Procedures,* 76 FR 39263 (July 6, 2011); *see also Enforcement and Compliance; Change of Electronic Filing System Name,* 79 FR 69046 (November 20, 2014) for details of the Department's electronic filing requirements, which went into effect on August 5, 2011. Information on help using ACCESS can be found at *https://access.trade.gov/help.aspx* and a handbook can be found at *https://access.trade.gov/help/Handbook%20on%20Electronic%20Filling%20Procedures.pdf.*

and the least important characteristics last.

In order to consider the suggestions of interested parties in developing and issuing the AD questionnaire, all product characteristic comments must be filed by 5:00 p.m. ET on August 1, 2017, which is 20 calendar days from the signature date of this notice. Any rebuttal comments, must be filed by 5:00 p.m. ET on August 11, 2017. All comments and submissions to the Department must be filed electronically using ACCESS, as explained above.

Determination of Industry Support for the Petition

Section 732(b)(1) of the Act requires that a petition be filed on behalf of the domestic industry. Section 732(c)(4)(A) of the Act provides that a petition meets this requirement if the domestic producers or workers who support the petition account for: (i) At least 25 percent of the total production of the domestic like product; and (ii) more than 50 percent of the production of the domestic like product produced by that portion of the industry expressing support for, or opposition to, the petition. Moreover, section 732(c)(4)(D) of the Act provides that, if the petition does not establish support of domestic producers or workers accounting for more than 50 percent of the total production of the domestic like product, the Department shall: (i) Poll the industry or rely on other information in order to determine if there is support for the petition, as required by subparagraph (A); or (ii) determine industry support using a statistically valid sampling method to poll the ''industry.''

Section 771(4)(A) of the Act defines the ''industry'' as the producers as a whole of a domestic like product. Thus, to determine whether a petition has the requisite industry support, the statute directs the Department to look to producers and workers who produce the domestic like product. The ITC, which is responsible for determining whether ''the domestic industry'' has been injured, must also determine what constitutes a domestic like product in order to define the industry. While both the Department and the ITC must apply the same statutory definition regarding the domestic like product,[11] they do so for different purposes and pursuant to a separate and distinct authority. In addition, the Department's determination is subject to limitations of time and information. Although this may result in different definitions of the like product, such differences do not render the decision of either agency contrary to law.[12]

Section 771(10) of the Act defines the domestic like product as ''a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation under this title.'' Thus, the reference point from which the domestic like product analysis begins is ''the article subject to an investigation'' (*i.e.,* the class or kind of merchandise to be investigated, which normally will be the scope as defined in the Petition).

With regard to the domestic like product, the petitioner does not offer a definition of the domestic like product distinct from the scope of the investigation. Based on our analysis of the information submitted on the record, we have determined that ripe olives, as defined in the scope, constitutes a single domestic like product and we have analyzed industry support in terms of that domestic like product.[13]

In determining whether the petitioner has standing under section 732(c)(4)(A) of the Act, we considered the industry support data contained in the Petition with reference to the domestic like product as defined in the ''Scope of the Investigation,'' in the Appendix to this notice. The petitioner provided the 2016 production of the domestic like product by its members.[14] In addition, we relied on data the petitioner provided estimating the 2016 production of the domestic like product by the only other U.S. processor.[15] We relied on data the petitioner provided for purposes of measuring industry support.[16]

On July 5, 2017, we received comments on industry support from ASEMESA.[17] The petitioner responded to the letter from ASEMESA on July 7, 2017.[18] On July 10, 2017, we received comments on industry support collectively from ASEMESA, Industria Aceiyunera Merciense, S.A., DCOOOP, S. COOP. AND., Agro Sevilla Aceitunas, SOC. COOP. AND., Plasoliva, S.L., GOYA en Espana, S.A.U., Aceitunas Guadalquivir, S.L., Angel Camacho Alimentación, S.L., Internacional Olivarera S.A., F.J. Sanchez Sucesores, S.A.U., and Aceitunas Sevillanas S.A. (collectively, ASEMESA *et al.*).[19] For further discussion of these comments, *see* the AD Initiation Checklist, at Attachment II.

Our review of the data provided in the Petition, supplemental responses, and other information readily available to the Department indicates that the petitioner has established industry support for the Petition.[20] First, the Petition established support from domestic producers (or workers) accounting for more than 50 percent of the total production of the domestic like product and, as such, the Department is not required to take further action in order to evaluate industry support (*e.g.,* polling).[21] Second, the domestic producers (or workers) have met the statutory criteria for industry support under section 732(c)(4)(A)(i) of the Act because the domestic producers (or workers) who support the Petitions account for at least 25 percent of the total production of the domestic like product.[22] Finally, the domestic producers (or workers) have met the statutory criteria for industry support under section 732(c)(4)(A)(ii) of the Act because the domestic producers (or workers) who support the Petition account for more than 50 percent of the production of the domestic like product produced by that portion of the industry expressing support for, or opposition to, the Petition.[23] Accordingly, the Department determines that the Petition was filed on behalf of the domestic industry within the meaning of section 732(b)(1) of the Act.

The Department finds that the petitioner filed the Petition on behalf of the domestic industry because it is an interested party as defined in section 771(9)(G) of the Act and it has demonstrated sufficient industry support with respect to the AD

[11] *See* section 771(10) of the Act.

[12] *See USEC, Inc.* v. *United States,* 132 F. Supp. 2d 1, 8 (CIT 2001) (citing *Algoma Steel Corp., Ltd.* v. *United States,* 688 F. Supp. 639, 644 (CIT 1988), *aff'd* 865 F.2d 240 (Fed. Cir. 1989)).

[13] For a discussion of the domestic like product analysis in these cases, *see* Antidumping Duty Investigation Initiation Checklist: Ripe Olives from Spain (AD Initiation Checklist), at Attachment II, Analysis of Industry Support for the Antidumping and Countervailing Duty Petitions Covering Ripe Olives from Spain (Attachment II); This checklist is dated concurrently with this notice and on file electronically via ACCESS. Access to documents filed via ACCESS is also available in the Central Records Unit, Room B8024 of the main Department of Commerce building.

[14] *See* Volume I of the Petition, at 5 and Exhibit I–3.

[15] *Id.,* at 5; *see also* General Issues and AD Supplement, at 2 and Exhibit I–17.

[16] *Id.* For further discussion, *see* AD Initiation Checklist, at Attachment II.

[17] *See* Letter from ASEMESA to the Department, re: ''Industry Support Comments on the Petitions for Antidumping and Countervailing Duties and Request to Poll Industry,'' dated July 5, 2017.

[18] *See* July 7, 2017, Response.

[19] *See* Letter from ASEMESA *et al.* to the Department, re: ''Request to Poll Industry,'' dated July 10, 2017.

[20] *See* AD Initiation Checklist, at Attachment II.

[21] *See* section 732(c)(4)(D) of the Act; *see also* AD Initiation Checklist, at Attachment II.

[22] *See* AD Initiation Checklist, at Attachment II.

[23] *Id.*

investigation that it is requesting that the Department initiate.[24]

Allegations and Evidence of Material Injury and Causation

The petitioner alleges that the U.S. industry producing the domestic like product is being materially injured, or is threatened with material injury, by reason of the imports of the subject merchandise sold at less than normal value (NV). In addition, the petitioner alleges that subject imports exceed the negligibility threshold provided for under section 771(24)(A) of the Act.[25]

The petitioner contends that the industry's injured condition is illustrated by reduced market share; underselling and price suppression or depression; lost sales and revenues; adverse impact on the domestic industry, including financial performance, production, and capacity utilization; reduction in olive acreage under cultivation; and magnitude of the alleged margins of dumping.[26] We have assessed the allegations and supporting evidence regarding material injury, threat of material injury, and causation, and we have determined that these allegations are properly supported by adequate evidence, and meet the statutory requirements for initiation.[27]

Allegations of Sales at Less Than Fair Value

The following is a description of the allegation of sales at less than fair value upon which the Department based its decision to initiate an AD investigation of imports of ripe olives from Spain. The sources of data for the deductions and adjustments relating to U.S. price and NV are discussed in greater detail in the AD Initiation Checklist.

Export Price

The petitioner based U.S. price on export price (EP) using average unit values of publicly available import data.[28] The petitioner made deductions from U.S. price for movement expenses to derive the ex-factory net U.S. EP.[29]

Normal Value

The petitioner was unable to obtain home market or third country prices for ripe olives and calculated NV based on constructed value (CV).[30] For further discussion of the cost of production (COP) and CV, *see* the section ''Normal Value Based on Constructed Value'' below.[31]

Normal Value Based on Constructed Value

As noted above, the petitioner was unable to obtain home market or third country prices; accordingly, the petitioner based NV on CV.[32] Pursuant to section 773(e) of the Act, CV consists of the cost of manufacturing (COM), selling, general, and administrative (SG&A) expenses, financial expenses, packing expenses and profit. The petitioner calculated the COM based on the input factors of production and usage rates from a U.S. producer of ripe olives. The input factors of production were valued using publicly available data on costs specific to Spain, during the proposed POI.[33] Specifically, the prices for raw materials and packing inputs were valued using publicly available Spanish import data.[34] For labor costs, the petitioner multiplied the labor usage factors by Spanish labor rates derived from publicly available sources.[35] To determine factory overhead, SG&A, financial expenses, and profit, the petitioner relied on financial statements of a Spanish company that is a producer of comparable merchandise operating in Spain.[36]

Fair Value Comparisons

Based on the data provided by the petitioner, there is reason to believe that imports of ripe olives from Spain are being, or are likely to be, sold in the United States at less than fair value. Based on comparisons of EP to NV in accordance with sections 772 and 773 of the Act, the estimated dumping margins for ripe olives form Spain are 78.00 and 223.00 percent.[37]

Initiation of Less-Than-Fair-Value Investigation

Based upon the examination of the AD Petition, we find that the Petition meets the requirements of section 732 of the Act. Therefore, we are initiating an AD investigation to determine whether imports of ripe olives from Spain are being, or are likely to be, sold in the United States at less than fair value. In accordance with section 733(b)(1)(A) of the Act and 19 CFR 351.205(b)(1), unless postponed, we will make our preliminary determination no later than 140 days after the date of this initiation.

The Trade Preferences Extension Act of 2015 (TPEA) made numerous amendments to the AD and CVD laws.[38] The TPEA does not specify dates of application for those amendments. On August 6, 2015, the Department published an interpretative rule, in which it announced the applicability dates for each amendment to the Act, except for amendments contained in section 771(7) of the Act, which relate to determinations of material injury by the ITC.[39] The amendments to sections 771(15), 773, 776, and 782 of the Act are applicable to all determinations made on or after August 6, 2015, and, therefore, apply to this AD investigation.[40]

Respondent Selection

The petitioner identified numerous companies in Spain as producers/exporters of ripe olives.[41] In the event the Department determines that the number of companies is large and it cannot individually examine each company based upon the Department's resources, where appropriate, the Department intends to select mandatory respondents based on U.S. Customs and Border Protection (CBP) data for U.S. imports of ripe olives from Spain during the period of the investigation under the appropriate Harmonized Tariff Schedule of the United States (HTSUS) numbers listed in the ''Scope of the Investigation,'' in the Appendix.

We intend to release CBP data under Administrative Protective Order (APO) to all parties with access to information protected by APO within five business days of the announcement of the initiation of this investigation.

Interested parties must submit applications for disclosure under APO in accordance with 19 CFR 351.305(b). Instructions for filing such applications

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[24] *Id.*

[25] *See* Volume I of the Petition, at 12, and Exhibit I–6A.

[26] *Id.*, at 18–34 and Exhibits I–6 and I–8—I–16.

[27] *See* AD Initiation Checklist, at Attachment III, Analysis of Allegations and Evidence of Material Injury and Causation for the Antidumping and Countervailing Duty Petitions Covering Ripe Olives from Spain (Attachment III).

[28] *See* AD Initiation Checklist.

[29] *See* AD Initiation Checklist.

[30] *See* AD Initiation Checklist.

[31] In accordance with section 505(a) of the Trade Preferences Extension Act of 2015, amending section 773(b)(2) of the Act, for this investigation, the Department will request information necessary to calculate the CV and COP to determine whether there are reasonable grounds to believe or suspect that sales of the foreign like product have been made at prices that represent less than the COP of the product. The Department no longer requires a COP allegation to conduct this analysis.

[32] *See Id.*

[33] *See* AD Initiation Checklist.

[34] *See Id.*

[35] *See Id.*

[36] *See Id.*

[37] *See* AD Initiation Checklist.

[38] *See* Trade Preferences Extension Act of 2015, Public Law 114–27, 129 Stat. 362 (2015).

[39] *See Dates of Application of Amendments to the Antidumping and Countervailing Duty Laws Made by the Trade Preferences Extension Act of 2015,* 80 FR 46793 (August 6, 2015).

[40] *Id.* at 46794–95. The 2015 amendments may be found at *https://www.congress.gov/bill/114th-congress/house-bill/1295/text/pl.*

[41] *See* Volume I at Exhibit I–5 and AD Initiation Checklist.

may be found on the Department's Web site at *http://enforcement.trade.gov/apo.*

Comments for this investigation must be filed electronically using ACCESS. An electronically-filed document must be received successfully in its entirety by the Department's electronic records system, ACCESS, by 5:00 p.m. EST, by the dates noted above. We intend to finalize our decision regarding respondent selection within 20 days of publication of this notice.

Distribution of Copies of the Petition

In accordance with section 732(b)(3)(A)(i) of the Act and 19 CFR 351.202(f), a copy of the public version of the Petition has been provided to the Government of Spain (GOS) and the European Commission via ACCESS. Because of the particularly large number of producers/exporters identified in the Petition, the Department considers the service of the public version of the Petition to the foreign producers/exporters satisfied by delivery of the public version to the GOS consistent with 19 CFR 351.203(c)(2).

ITC Notification

We will notify the ITC of our initiation, as required by section 732(d) of the Act.

Preliminary Determination by the ITC

The ITC will preliminarily determine, within 45 days after the date on which the Petition was filed, whether there is a reasonable indication that imports of ripe olives from Spain are materially injuring or threatening material injury to a U.S. industry.[42] A negative ITC determination will result in the investigation being terminated;[43] otherwise, the investigation will proceed according to statutory and regulatory time limits.

Submission of Factual Information

Factual information is defined in 19 CFR 351.102(b)(21) as: (i) Evidence submitted in response to questionnaires; (ii) evidence submitted in support of allegations; (iii) publicly available information to value factors under 19 CFR 351.408(c) or to measure the adequacy of remuneration under 19 CFR 351.511(a)(2); (iv) evidence placed on the record by the Department; and (v) evidence other than factual information described in (i) through (iv). The regulation requires any party, when submitting factual information, to specify under which subsection of 19 CFR 351.102(b)(21) the information is being submitted and, if the information is submitted to rebut, clarify, or correct factual information already on the record, to provide an explanation identifying the information already on the record that the factual information seeks to rebut, clarify, or correct. Time limits for the submission of factual information are addressed in 19 CFR 351.301, which provides specific time limits based on the type of factual information being submitted. Interested parties should review the regulations prior to submitting factual information in this investigation.

Extensions of Time Limits

Parties may request an extension of time limits before the expiration of a time limit established under Part 351, or as otherwise specified by the Secretary. In general, an extension request will be considered untimely if it is filed after the expiration of the time limit. For submissions that are due from multiple parties simultaneously, an extension request will be considered untimely if it is filed after 10:00 a.m. ET on the due date. Under certain circumstances, we may elect to specify a different deadline after which extension requests will be considered untimely for submissions that are due from multiple parties simultaneously. In such a case, we will inform parties in the letter or memorandum setting forth the deadline (including a specified time) by which extension requests must be filed to be considered timely. An extension request must be made in a separate, stand-alone submission; under limited circumstances we will grant untimely-filed requests for the extension of time limits. Review *Extension of Time Limits; Final Rule,* 78 FR 57790 (September 20, 2013), available at *http://www.gpo.gov/fdsys/pkg/FR-2013-09-20/html/2013-22853.htm,* prior to submitting factual information in this investigation.

Certification Requirements

Any party submitting factual information in an AD or CVD proceeding must certify to the accuracy and completeness of that information.[44] Parties must use the certifications formats provided in 19 CFR 351.303(g).[45] The Department intends to reject factual submissions if the submitting party does not comply with applicable certification requirements.

Notification to Interested Parties

Interested parties must submit applications for disclosure under APO in accordance with 19 CFR 351.305. On January 22, 2008, the Department published *Antidumping and Countervailing Duty Proceedings: Documents Submission Procedures; APO Procedures,* 73 FR 3634 (January 22, 2008). Parties wishing to participate in this investigation should ensure that they meet the requirements of these procedures (*e.g.,* the filing of letters of appearance as discussed in 19 CFR 351.103(d)).

This notice is issued and published pursuant to sections 732(c)(2) and 777(i) of the Act, and 19 CFR 351.203(c).

Dated: July 12, 2017.

Gary Taverman,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, performing the non-exclusive functions and duties of the Assistant Secretary for Enforcement and Compliance.

Appendix—Scope of the Investigation

The products covered by this investigation are certain processed olives, usually referred to as ''ripe olives.'' The subject merchandise includes all colors of olives; all shapes and sizes of olives, whether pitted or not pitted, and whether whole, sliced, chopped, minced, wedged, broken, or otherwise reduced in size; all types of packaging, whether for consumer (retail) or institutional (food service) sale, and whether canned or packaged in glass, metal, plastic, multi-layered airtight containers (including pouches), or otherwise; and all manners of preparation and preservation, whether low acid or acidified, stuffed or not stuffed, with or without flavoring and/or saline solution, and including in ambient, refrigerated, or frozen conditions.

Included are all ripe olives grown, processed in whole or in part, or packaged in Spain. Subject merchandise includes ripe olives that have been further processed in Spain or a third country, including but not limited to curing, fermenting, rinsing, oxidizing, pitting, slicing, chopping, segmenting, wedging, stuffing, packaging, or heat treating, or any other processing that would not otherwise remove the merchandise from the scope of the investigation if performed in Spain.

Excluded from the scope are: (1) Specialty olives[1] (including ''Spanish-style,'' ''Sicilian-

[42] *See* section 733(a) of the Act.

[43] *Id.*

[44] *See* section 782(b) of the Act.

[45] *See Certification of Factual Information to Import Administration during Antidumping and Countervailing Duty Proceedings,* 78 FR 42678 (July 17, 2013) (*Final Rule*); *see also* frequently asked questions regarding the *Final Rule,* available at *http://enforcement.trade.gov/tlei/notices/factual_info_final_rule_FAQ_07172013.pdf.*

[1] Some of the major types of specialty olives and their curing methods are:

''Spanish-style'' green olives. Spanish-style green olives have a mildly salty, slightly bitter taste, and are usually pitted and stuffed. This style of olive is primarily produced in Spain and can be made from various olive varieties. Most are stuffed with pimento; other popular stuffings are jalapeno, garlic, and cheese. The raw olives that are used to produce Spanish-style green olives are picked while they are unripe, after which they are submerged in an alkaline solution for typically less than a day to partially remove their bitterness, rinsed, and fermented in a strong salt brine, giving them their characteristic flavor.

style,'' and other similar olives) that have been processed by fermentation only, or by being cured in an alkaline solution for not longer than 12 hours and subsequently fermented; and (2) provisionally prepared olives unsuitable for immediate consumption (currently classifiable in subheading 0711.20 of the Harmonized Tariff Schedule of the United States (HTSUS)).

The merchandise subject to this investigation is currently classifiable under subheadings 2005.70.0230, 2005.70.0260, 2005.70.0430, 2005.70.0460, 2005.70.5030, 2005.70.5060, 2005.70.6020, 2005.70.6030, 2005.70.6050, 2005.70.6060, 2005.70.6070, 2005.70.7000, 2005.70.7510, 2005.70.7515, 2005.70.7520, and 2005.70.7525 HTSUS. Subject merchandise may also be imported under subheadings 2005.70.0600, 2005.70.0800, 2005.70.1200, 2005.70.1600, 2005.70.1800, 2005.70.2300, 2005.70.2510, 2005.70.2520, 2005.70.2530, 2005.70.2540, 2005.70.2550, 2005.70.2560, 2005.70.9100, 2005.70.9300, and 2005.70.9700. Although HTSUS subheadings are provided for convenience and US Customs purposes, they do not define the scope of the investigation; rather, the written description of the subject merchandise is dispositive.

''Sicilian-style'' green olives. Sicilian-style olives are large, firm green olives with a natural bitter and savory flavor. This style of olive is produced in small quantities in the United States using a Sevillano variety of olive and harvested green with a firm texture. Sicilian-style olives are processed using a brine-cured method, and undergo a full fermentation in a salt and lactic acid brine for 4 to 9 months. These olives may be sold whole unpitted, pitted, or stuffed.

''Kalamata'' olives: Kalamata olives are slightly curved in shape, tender in texture, and purple in color, and have a rich natural tangy and savory flavor. This style of olive is produced in Greece using a Kalamata variety olive. The olives are harvested after they are fully ripened on the tree, and typically use a brine-cured fermentation method over 4 to 9 months in a salt brine.

Other specialty olives in a full range of colors, sizes, and origins, typically fermented in a salt brine for 3 months or more.

[FR Doc. 2017–15142 Filed 7–18–17; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–952]

Narrow Woven Ribbon With Woven Selvedge From the People's Republic of China: Preliminary Results of Administrative Review and Preliminary Partial Rescission of Antidumping Duty Administrative Review; 2015–2016

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

SUMMARY: The Department of Commerce (Department) is conducting an administrative review of the antidumping duty order on narrow woven ribbons with woven selvedge (woven ribbons) from the People's Republic of China (PRC) for the period of review (POR) September 1, 2015 through August 31, 2016. This review covers two PRC companies: Huzhou Kingdom Coating Industry Co., Ltd. (Huzhou Kingdom) and Huzhou Unifull Label Fabric Co., Ltd. (Huzhou Unifull). The Department preliminarily finds that neither Huzhou Unifull nor Huzhou Kingdom established eligibility for a separate rate, as Huzhou Unifull had no entries of subject merchandise during the POR and Huzhou Kingdom failed to participate in the proceeding. Furthermore, the Department is rescinding administrative review with respect to Huzhou BeiHeng Textile Co., Ltd. (Huzhou BeiHeng) and Huzhou Siny Label Material Co., Ltd. (Huzhou Siny). Interested parties are invited to comment on these preliminary results.

DATES: Applicable July 19, 2017.

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

SUPPLEMENTARY INFORMATION:

Background

On September 17, 2010, the Department published in the **Federal Register** an amended antidumping duty order on woven ribbons from the PRC.[1] On September 8, 2016, the Department published in the **Federal Register** a notice of opportunity to request an administrative review of the Order.[2] On September 27, 2016, Avery Dennison Corporation (Avery Dennison) timely requested a review of four companies: Huzhou BeiHeng, Huzhou Siny, Huzhou Kingdom, and Huzhou Unifull.[3] Additionally, on September 30, 2016, Berwick Offray LLC and its subsidiary Lion Ribbon Company, LLC (the petitioner) timely requested a review [4] of the producer/exporter Yama Ribbons and Bows Co., Ltd. (Yama Ribbons). However, the Department determined in the underlying investigation that merchandise produced and exported by Yama Ribbons is excluded from the antidumping duty order; as a result, the Department did not initiate an administrative review on Yama Ribbons.[5] On November 9, 2016, the Department initiated a review of four companies: Huzhou BeiHeng, Huzhou Siny, Huzhou Kingdom, and Huzhou Unifull.[6] On May 31, 2017, the Department extended the deadline for the preliminary results by a total of 26 days until June 28, 2017.[7] On June 28, 2017, the Department extended the deadline for the preliminary results by an additional 14 days until July 12, 2017.[8]

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.[9]

[1] *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).

[2] *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review*, 81 FR 62096 (September 8, 2016).

[3] *See* Letter from Avery Dennison to the Department, Re: ''Narrow Woven Ribbons with Woven Selvedge from China: Request for Administrative Review,'' dated September 27, 2016.

[4] *See* Letter from petitioner to the Department, Re: ''Narrow Woven Ribbons with Woven Selvedge from the People's Republic of China/Petitioner's Request for Administrative Review,'' dated September 30, 2016.

[5] *See Order*, 75 FR 56982.

[6] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 81 FR 78778 (November 9, 2016) (*Initiation Notice*).

[7] *See* Memorandum from Aleksandras Nakutis to Gary Taverman, Deputy Assistant Secretary, regarding ''Narrow Woven Ribbons with Woven Selvedge from the People's Republic of China: Extension of Preliminary Results of Antidumping Duty Administrative Review,'' dated May 31, 2017.

[8] *See* Memorandum from Aleksandras Nakutis to Gary Taverman, regarding ''Narrow Woven Ribbons with Woven Selvedge from the People's Republic of China: Extension of Preliminary Results of Antidumping Duty Administrative Review,'' dated June 28, 2017.

[9] 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 James Maeder, Senior Director performing the duties of Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, to Gary Taverman, Deputy Assistant Secretary for Antidumping and Countervailing Duty

Continued

Methodology

The Department is conducting this review in accordance with section 751(a)(1)(B) of the Tariff Act of 1930, as amended (the Act). For a full description of the methodology underlying our conclusions, *see* Preliminary Decision Memorandum. This memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *http://access.trade.gov* and in the Central Records Unit, room B8024 of the main Department of Commerce building. In addition, a complete version of the Preliminary Results Decision Memorandum can be accessed directly on the Internet at *http://enforcement.trade.gov/frn/index.html.* The signed Preliminary Results Decision Memorandum and the electronic versions of the Preliminary Decision Memorandum are identical in content.

Preliminary Results of Review

The Department preliminarily finds that both Huzhou Kingdom and Huzhou Unifull have failed to demonstrate eligibility for a separate rate and, therefore, they are considered part of the PRC-wide entity. The Department finds that Huzhou Kingdom did not submit a certification of no sales, a separate rate application, or a separate rate certification. With respect to Huzhou Unifull, the Department preliminary finds there are no reviewable entries during the POR and, thus, Huzhou Unifull has failed to demonstrate eligibility for a separate rate. Both Avery Dennison and Huzhou Unifull submitted the same CBP Form 7501 to indicate an entry of subject merchandise by Huzhou Unifull. However, after examination, the Department determines that the CBP Form 7501 does not correspond to a sale by Huzhou Unifull and as such, found there are no reviewable entries of subject merchandise during the POR.[10]

Partial Rescission of Antidumping Duty Administrative Review

Pursuant to 19 CFR 351.213(d)(1), the Department will rescind an administrative review, in whole or in part, if a party that requested the review withdraws its request within 90 days of the date of publication of the notice of initiation of the requested review. Huzhou BeiHeng and Huzhou Siny withdrew their respective requests for an administrative review within 90 days of the date of publication of *Initiation Notice.*[11] Accordingly, the Department is rescinding this review with respect to Huzhou BeiHeng and Huzhou Siny, in accordance with 19 CFR 351.213(d)(1).[12]

Disclosure and Public Comment

Interested parties are invited to comment on the preliminary results and may submit case briefs and/or written comments, filed electronically using ACCESS, within 30 days of the date of publication of this notice, pursuant to 19 CFR 351.309(c)(1)(ii). Rebuttal briefs, limited to issues raised in the case briefs, will be due five days after the due date for case briefs, pursuant to 19 CFR 351.309(d). Parties who submit case or rebuttal briefs in this proceeding are requested to submit with each argument a statement of the issue, a summary of the argument not to exceed five pages, and a table of statutes, regulations, and cases cited, in accordance with 19 CFR 351.309(c)(2) and (d)(2).

Pursuant to 19 CFR 351.310(c), interested parties, who wish to request a hearing, or to participate in a hearing if one is requested, must submit a written request to the Assistant Secretary for Enforcement and Compliance, U.S. Department of Commerce, filed electronically using ACCESS. Electronically filed case briefs/written comments and hearing requests must be received successfully in their entirety by the Department's electronic records system, ACCESS, by 5:00 p.m. Eastern Standard Time, within 30 days after the date of publication of this notice.[13] Hearing requests should contain: (1) The party's name, address and telephone number; (2) the number of participants; and (3) a list of issues to be discussed. Issues raised in the hearing will be limited to those issues raised in the respective case briefs. If a request for a hearing is made, parties will be notified of the time and date of the hearing which will be held at the U.S. Department of Commerce, 1401 Constitution Avenue NW., Washington DC 20230. Unless the deadline is extended pursuant to section 751(a)(3)(A) of the Act and 19 CFR 351.213(h)(2), the Department intends to issue the final results of this administrative review, including the results of its analysis of the issues raised in any written briefs, not later than 120 days after the date of publication of this notice, pursuant to section 751(a)(3)(A) of the Act.

Assessment Rates

Upon issuance of the final results, the Department will determine, and U.S. Customs and Border Protection (CBP) shall assess, antidumping duties on all appropriate entries covered by this review.[14] The Department intends to issue assessment instructions to CBP 15 days after the publication date of the final results of this review. For the companies for which this review is rescinded, antidumping duties shall be assessed at rates equal to the cash deposit of estimated antidumping duties required at the time of entry, or withdrawal from warehouse, for consumption, in accordance with 19 CFR 351.212(c)(l)(i). The Department intends to issue appropriate assessment instructions directly to CBP 15 days after publication of this notice.

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 exported by Huzhou Kingdom, the cash deposit rate is the PRC-wide rate of 247.26 percent; (2) for exports of merchandise exported by Huzhou Unifull, the cash deposit rate is the PRC-wide rate of 247.26; (3) for previously investigated or reviewed PRC and non-PRC exporters which are not under review in this segment of the proceeding but which have separate rates, the cash deposit rate will continue to be the exporter-specific rate published for the most recent period; (4) for all PRC exporters of subject merchandise that

Operations, performing the non-exclusive functions and duties of the Assistant Secretary for Enforcement and Compliance (''Preliminary Decision Memorandum''), dated concurrently with this notice.

[10] *See* Preliminary Decision Memo.

[11] *See* letter from Avery Dennison to the Department, Re: ''Narrow Woven Ribbons with Woven Selvedge from China: Withdrawal from the Administrative Review,'' dated February 7, 2017.

[12] See Appendix. As stated in *Change in Practice in NME Reviews,* the Department no longer considers the non-market economy (NME) entity as an exporter conditionally subject to administrative reviews. *See Antidumping Proceedings: Announcement of Change in Department Practice for Respondent Selection in Antidumping Duty Proceedings and Conditional Review of the Nonmarket Economy Entity in NME Antidumping Duty Proceedings,* 78 FR 65963 (November 4, 2013) (*Change in Practice in NME Reviews*). The PRC-wide entity is not subject to this administrative review because no interested party requested a review of the entity. *See Initiation Notice,* 81 FR at 78778 (November 9, 2016).

[13] *See* 19 CFR 351.310(c).

[14] *See* 19 CFR 351.212(b)(1).

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 (5) 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

This notice also serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Department's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

We are issuing and publishing these results in accordance with sections 751(a)(1) and 777(i)(1) of the Act and 19 CFR 351.213.

Dated: July 12, 2017.

Gary Taverman

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, performing the non-exclusive functions and duties of the Assistant Secretary for Enforcement and Compliance.

Appendix

List of Topics Discussed in the Preliminary Results Decision Memorandum

Summary
Background
Scope of the Order
Discussion of the Methodology
Preliminary Partial Rescission of Antidumping Duty Administrative Review
Companies That Did Not Establish Eligibility for a Separate Rate
Recommendation

[FR Doc. 2017–15139 Filed 7–18–17; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–455–805]

Emulsion Styrene-Butadiene Rubber From Poland: Final Affirmative Determination of Sales at Less Than Fair Value

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

SUMMARY: The Department of Commerce (the Department) determines that emulsion styrene-butadiene rubber (ESB rubber) from Poland is being, or is likely to be, sold in the United States at less than fair value (LTFV). The period of investigation (POI) is July 1, 2015, through June 30, 2016.

DATES: July 19, 2017.

FOR FURTHER INFORMATION CONTACT: Stephen Bailey, 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) 482–0193.

SUPPLEMENTARY INFORMATION:

Background

On February 24, 2017, the Department published the *Preliminary Determination* of this antidumping LTFV investigation, as provided by Section 735 of the Tariff Act of 1930, as amended (Act), in which the Department found that ESB rubber from Poland was sold at LTFV.[1] A summary of the events that occurred since the Department published the *Preliminary Determination,* as well as a full discussion of the issues raised by interested parties for this final determination, may be found in the Issues and Decision Memorandum.[2] The Issues and Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov,* and it is available to all parties in the Central Records Unit, Room B–8024 of the main Department of Commerce building. In addition, a complete version of the Issues and Decision Memorandum can be accessed directly at *http://enforcement.trade.gov/frn/.*

Scope of the Investigation

The product covered by this investigation is ESB rubber from Poland. For a complete description of the scope of this investigation, *see* Appendix I.

Scope Comments

No interested party commented on the scope of the investigation as it appeared in the *Initiation Notice.*[3] Therefore, the scope of this investigation remains unchanged for this final determination.

Verification

As provided in section 782(i) of the Act, in February, March, and April 2017, the Department conducted verification of the information reported by the mandatory respondent Synthos Dwory (Synthos), for use in the Department's final determination. The Department used standard verification procedures, including an examination of relevant accounting and production records, and original source documents provided by the respondent.[4]

Analysis of Comments Received

The issues raised in the case brief that was submitted by petitioners[5] in this investigation are addressed in the Issues and Decision Memorandum. A list of these issues is attached to this notice as Appendix II. Based on our analysis of the comments received and our findings at verification, we made no changes to the margin calculation for Synthos.

All-Others Rate

Section 735(c)(5)(A) of the Act provides that in the final determination the Department shall determine an estimated all-others rate for all exporters and producers not individually examined. This rate shall be an amount equal to the weighted-average of the estimated weighted-average dumping margins established for exporters and producers individually investigated, excluding any zero and *de minimis* margins, and any margins determined entirely under section 776 of the Act.

For the final determination, the Department calculated an individual estimated weighted-average dumping margin for Synthos, the only individually examined exporter/producer in this investigation. Because the only individually calculated dumping margin is not zero, *de*

[1] *See Emulsion Styrene-Butadiene Rubber from Poland: Preliminary Affirmative Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Extension of Provisional Measures,* 82 FR 11531 (February 24, 2017), and accompanying Preliminary Decision Memorandum (collectively, *Preliminary Determination).*

[2] *See* Memorandum, ''Issues and Decision Memorandum for the Final Affirmative Determination in the Less Than Fair Value Investigation of Emulsion Styrene-Butadiene Rubber from Poland,'' dated concurrently with, and hereby adopted by, this notice (Issues and Decision Memorandum).

[3] *See Emulsion Styrene-Butadiene Rubber from Brazil, the Republic of Korea, Mexico and Poland: Initiation of Less Than Fair Value Investigations,* 81 FR 55438 (August 19, 2016) *(Initiation Notice).*

[4] For discussion of our verification findings, *see* the following memoranda: Memorandum, ''Verification of the Sales Response of Synthos Dwory in the Antidumping Investigation of Emulsion Styrene Butadiene from Poland,'' dated April 12, 2017 and Memorandum, ''Verification of the Cost Response of Synthos Dwory 7 Spolka z ograniczona odpowiedzialnoscia sp. j. in the Antidumping Duty Investigation of Emulsion Styrene Butadiene Rubber from Poland,'' dated May 15, 2017.

[5] Lion Elastomers LLC and East West Copolymers (petitioners).

minimis, or based entirely on facts otherwise available, the estimated weighted-average dumping margin calculated for Synthos is the margin assigned to all-other producers and exporters, pursuant to section 735(c)(5)(A) of the Act.

Final Determination

The final weighted-average dumping margins are as follows:

Exporter/producer	Dumping margin (percent)
Synthos Dwory	25.43
All-Others	25.43

Continuation of Suspension of Liquidation

In accordance with section 735(c)(1)(B) of the Act, the Department will instruct U.S. Customs and Border Protection (CBP) to continue to suspend liquidation of all appropriate entries of ESB rubber from Poland as described in Appendix I of this notice, which were entered, or withdrawn from warehouse, for consumption on or after February 24, 2017, the date of publication of the *Preliminary Determination* of this investigation in the **Federal Register.** Further, pursuant to section 735(c)(1)(B)(ii) of the Act and 19 CFR 351.210(d), the Department will instruct CBP to require a cash deposit equal to the estimated weighted-average dumping margin or the estimated all-others rate, as follows: (1) The cash deposit rate for the respondents listed above will be equal to the respondent-specific estimated weighted-average dumping margin determined in this final determination; (2) if the exporter is not a respondent identified above, but the producer is, then the cash deposit rate will be equal to the respondent-specific estimated weighted-average dumping margin established for that producer of the subject merchandise; and (3) the cash deposit rate for all other producers and exporters will be equal to the all-others estimated weighted-average dumping margin.

Disclosure

The Department intends to disclose to interested parties its calculations and analysis performed in this final determination within five days of any public announcement or, if there is no public announcement, within five days of the date of publication of this notice in accordance with 19 CFR 351.224(b).

International Trade Commission Notification

In accordance with section 735(d) of the Act, the Department will notify the International Trade Commission (ITC) of its final determination. Because the final determination in this proceeding is affirmative, in accordance with section 735(b)(2) of the Act, the ITC will make its final determination as to whether the domestic industry in the United States is materially injured, or threatened with material injury, by reason of imports of ESB rubber from Poland no later than 45 days after the Department's final determination. If the ITC determines that material injury or threat of material injury does not exist, the proceeding will be terminated and all securities posted will be refunded or canceled. If the ITC determines that such injury does exist, the Department will issue an antidumping duty order directing CBP to assess, upon further instruction by the Department, antidumping duties on appropriate imports of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the date of the suspension of liquidation.

Notification Regarding Administrative Protective Orders

This notice serves as a reminder to parties subject to an 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 return or 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 violation subject to sanction.

This determination and this notice are issued and published pursuant to sections 735(d) and 777(i)(1) of the Act.

Dated: July 10, 2017.

Gary Taverman,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, performing the non-exclusive functions and duties of the Assistant Secretary for Enforcement and Compliance.

Appendix I

Scope of the Investigation

For purposes of this investigation, the product covered is cold-polymerized emulsion styrene-butadiene rubber (ESB rubber). The scope of the investigation includes, but is not limited to, ESB rubber in primary forms, bales, granules, crumbs, pellets, powders, plates, sheets, strip, *etc.* ESB rubber consists of non-pigmented rubbers and oil-extended non-pigmented rubbers, both of which contain at least one percent of organic acids from the emulsion polymerization process.

ESB rubber is produced and sold in accordance with a generally accepted set of product specifications issued by the International Institute of Synthetic Rubber Producers (IISRP). The scope of the investigation covers grades of ESB rubber included in the IISRP 1500 and 1700 series of synthetic rubbers. The 1500 grades are light in color and are often described as "Clear" or "White Rubber." The 1700 grades are oil-extended and thus darker in color, and are often called "Brown Rubber."

Specifically excluded from the scope of this investigation are products which are manufactured by blending ESB rubber with other polymers, high styrene resin master batch, carbon black master batch (*i.e.,* IISRP 1600 series and 1800 series) and latex (an intermediate product).

The products subject to this investigation are currently classifiable under subheadings 4002.19.0015 and 4002.19.0019 of the Harmonized Tariff Schedule of the United States (HTSUS). ESB rubber is described by Chemical Abstract Services (CAS) Registry No. 9003–55–8. This CAS number also refers to other types of styrene butadiene rubber. Although the HTSUS subheadings and CAS registry number are provided for convenience and customs purposes, the written description of the scope of this investigation is dispositive.

Appendix II

List of Topics in the Issues and Decision Memorandum

I. Summary
II. Background
III. Scope of the Investigation
IV. Discussion of the Issues: Comment 1: Selling, General and Administrative Expenses
V. Recommendation

[FR Doc. 2017–14952 Filed 7–18–17; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–201–848]

Emulsion Styrene-Butadiene Rubber From Mexico: Final Affirmative Determination of Sales at Less Than Fair Value

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

SUMMARY: The Department of Commerce (Department) determines that emulsion styrene-butadiene rubber (ESB rubber) from Mexico is being, or is likely to be, sold in the United States at less than fair value (LTFV). The period of investigation (POI) is July 1, 2015, through June 30, 2016.

DATES: July 19, 2017.

FOR FURTHER INFORMATION CONTACT: Julia Hancock or Javier Barrientos, AD/CVD

Operations, Office V, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–1394 or (202) 482–2243, respectively.

SUPPLEMENTARY INFORMATION:

Background

On February 24, 2017, the Department of Commerce (Department) published the *Preliminary Determination* of this antidumping duty LTFV investigation, as provided by section 735 of the Tariff Act of 1930, as amended (Act), in which the Department found that ESB rubber from Mexico was sold at LTFV.[1] A summary of the events that have occurred since the Department published the *Preliminary Determination,* as well as a full discussion of the issues raised by interested parties for this final determination, may be found in the Issues and Decision Memorandum.[2] The Issues and Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov,* and to all parties in the Central Records Unit, room B8024 of the main Department of Commerce building. In addition, a complete version of the Issues and Decision Memorandum can be accessed directly at *http://enforcement.trade.gov/frn/.*

Scope of the Investigation

The product covered by this investigation is ESB rubber from Mexico. For a complete description of the scope of this investigation, *see* Appendix I.

Scope Comments

No interested party commented on the scope of the investigation as it appeared in the *Initiation Notice.*[3] Therefore, the scope of this investigation remains unchanged for this final determination.

Verification

As provided in section 782(i) of the Act, in March and April 2017, the Department conducted verification of the information reported by the mandatory respondent Industrias Negromex S.A. de C.V.—Planta Altamira (Negromex) for use in the Department's final determination. The Department used standard verification procedures, including an examination of relevant accounting and production records and original source documents provided by the respondent.

Analysis of Comments Received

All issues raised in the case and rebuttal briefs that were submitted by parties in this investigation are addressed in the Issues and Decision Memorandum. A list of these issues is attached to this notice as Appendix II. Based on our analysis of the comments received and our findings at verification, we made certain changes to the margin calculation for Negromex, and also the all-others rate.

All-Others Rate

Section 735(c)(5)(A) of the Act provides that in the final determination the Department shall determine an estimated all-others rate for all exporters and producers not individually examined. This rate shall be an amount equal to the weighted average of the estimated weighted-average dumping margins established for exporters and producers individually investigated, excluding any zero and *de minimis* margins, and any margins determined entirely under section 776 of the Act.

For the final determination, the Department calculated an individual estimated weighted-average dumping margin for Negromex, the only individually examined exporter/producer in this investigation. Because the only individually calculated dumping margin is not zero, *de minimis,* or based entirely on facts otherwise available, the estimated weighted-average dumping margin calculated for Negromex is the margin assigned to all-other producers and exporters, pursuant to section 735(c)(5)(A) of the Act.

Final Determination

The Department determines that the following estimated weighted-average dumping margins exist:

Exporter/producer	Estimated weighted-average dumping margin (percent)
Industrias Negromex S.A. de C.V.—Planta Altamira (Negromex)	19.52
All-Others	19.52

Continuation of Suspension of Liquidation

In accordance with section 735(c)(1)(B) of the Act, the Department will instruct U.S. Customs and Border Protection (CBP) to continue to suspend liquidation of all appropriate entries of ESB rubber from Mexico as described in Appendix I of this notice, which were entered, or withdrawn from warehouse, for consumption on or after February 24, 2017, the date of publication of the *Preliminary Determination* of this investigation in the **Federal Register**. Further, pursuant to section 735(c)(1)(B)(ii) of the Act and 19 CFR 351.210(d), the Department will instruct CBP to require a cash deposit equal to the estimated weighted-average dumping margin or the estimated all-others rate, as follows: (1) The cash deposit rate for the respondents listed above will be equal to the respondent-specific estimated weighted-average dumping margin determined in this final determination; (2) if the exporter is not a respondent identified above, but the producer is, then the cash deposit rate will be equal to the respondent-specific estimated weighted-average dumping margin established for that producer of the subject merchandise; and (3) the cash deposit rate for all other producers and exporters will be equal to the all-others estimated weighted-average dumping margin.

Disclosure

The Department intends to disclose to interested parties its calculations and analysis performed in this final determination within five days of any public announcement or, if there is no public announcement, within five days of the date of publication of this notice in accordance with 19 CFR 351.224(b).

International Trade Commission Notification

In accordance with section 735(d) of the Act, the Department will notify the International Trade Commission (ITC) of its final determination. Because the final determination in this proceeding is affirmative, in accordance with section 735(b)(2) of the Act, the ITC will make its final determination as to whether the domestic industry in the United States

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[1] *See Emulsion Styrene-Butadiene Rubber from Mexico: Preliminary Affirmative Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Extension of Provisional Measures,* 82 FR 11534 (February 24, 2017), and accompanying Preliminary Decision Memorandum (collectively, *Preliminary Determination*).

[2] *See* ''Issues and Decision Memorandum for the Final Determination in the Less-Than-Fair-Value Investigation of Emulsion Styrene-Butadiene Rubber from Mexico,'' dated concurrently with, and hereby adopted by, this notice (Issues and Decision Memorandum).

[3] *See Emulsion Styrene-Butadiene Rubber from Brazil, the Republic of Korea, Mexico and Poland: Initiation of Less Than Fair Value Investigations,* 81 FR 55438 (August 19, 2016) *(Initiation Notice).*

is materially injured, or threatened with material injury, by reason of imports of ESB rubber from Mexico no later than 45 days after the Department's final determination. If the ITC determines that material injury or threat of material injury does not exist, the proceeding will be terminated and all securities posted will be refunded or canceled. If the ITC determines that such injury does exist, the Department will issue an antidumping duty order directing CBP to assess, upon further instruction by the Department, antidumping duties on appropriate imports of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the date of the suspension of liquidation.

Notification Regarding Administrative Protective Orders

This notice serves as a reminder to parties subject to an 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 return or 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 violation subject to sanction.

This determination and this notice are issued and published pursuant to sections 735(d) and 777(i)(1) of the Act.

Dated: July 10, 2017.

Gary Taverman,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, performing the non-exclusive functions and duties of the Assistant Secretary for Enforcement and Compliance.

Appendix I

Scope of the Investigation

For purposes of this investigation, the product covered is cold-polymerized emulsion styrene-butadiene rubber (ESB rubber). The scope of the investigation includes, but is not limited to, ESB rubber in primary forms, bales, granules, crumbs, pellets, powders, plates, sheets, strip, etc. ESB rubber consists of non-pigmented rubbers and oil-extended non-pigmented rubbers, both of which contain at least one percent of organic acids from the emulsion polymerization process.

ESB rubber is produced and sold in accordance with a generally accepted set of product specifications issued by the International Institute of Synthetic Rubber Producers (IISRP). The scope of the investigation covers grades of ESB rubber included in the IISRP 1500 and 1700 series of synthetic rubbers. The 1500 grades are light in color and are often described as ''Clear'' or ''White Rubber.'' The 1700 grades are oil-extended and thus darker in color, and are often called ''Brown Rubber.''

Specifically excluded from the scope of this investigation are products which are manufactured by blending ESB rubber with other polymers, high styrene resin master batch, carbon black master batch (*i.e.,* IISRP 1600 series and 1800 series) and latex (an intermediate product).

The products subject to this investigation are currently classifiable under subheadings 4002.19.0015 and 4002.19.0019 of the Harmonized Tariff Schedule of the United States (HTSUS). ESB rubber is described by Chemical Abstract Services (CAS) Registry No. 9003–55–8. This CAS number also refers to other types of styrene butadiene rubber. Although the HTSUS subheadings and CAS registry number are provided for convenience and customs purposes, the written description of the scope of this investigation is dispositive.

Appendix II

List of Topics Discussed in the Issues and Decision Memorandum

I. Summary
II. Background
III. Scope Comments
IV. Scope of the Investigation
V. Margin Calculations
VI. Discussion of the Issues
- Comment 1: Partial Adverse Fact Available for Negromex's Financial Expense Rate
- Comment 2: Partial Adverse Facts Available for Negromex's Domestic Brokerage and Handling Expenses, U.S. Brokerage and Handling Expenses, and U.S. Inland Freight From Warehouse to Customer Expenses
- Comment 3: Partial Adverse Facts Available for Certain Unreported Sales
- Comment 4: Eligibility for a CEP Offset
- Comment 5: Recalculation of Negromex's G&A Expense Rate
- Comment 6: Billing Adjustment
- Comment 7: Treatment of Freight Expenses Included in Resirene's SG&A
- Comment 8: Apply the Market Price of Styrene to Negromex's COM
- Comment 9: Treatment of Technology Expenses in Negromex's G&A Ratio
- Comment 10: Short-Term Interest Rate for Negromex's Credit Expenses

VII. Recommendation

[FR Doc. 2017–14951 Filed 7–18–17; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[Docket No. 150902810–7646–01]

RIN 0648–XE167

Listing Endangered or Threatened Species; 90-Day Finding on a Petition To List the Winter-Run Puget Sound Chum Salmon in the Nisqually River System and Chambers Creek as a Threatened or Endangered Evolutionarily Significant Unit Under the Endangered Species Act

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

ACTION: Notice of 90-day petition finding.

SUMMARY: We, NMFS, announce a 90-Day finding on a petition to list the winter-run Puget Sound chum salmon (*Oncorhynchus keta*) in the Nisqually River system and Chambers Creek as a threatened or endangered evolutionarily significant unit (ESU) under the Endangered Species Act (ESA) and to designate critical habitat concurrently with the listing. We find that the petition and information in our files do not present substantial scientific or commercial information indicating that the winter-run chum salmon from the Nisqually River system and Chambers Creek qualify as an ESU under the ESA. As such, we find that the petition does not present substantial scientific or commercial information indicating that the winter-run chum salmon in the Nisqually River system and Chambers Creek are a ''species'' eligible for listing under the ESA.

ADDRESSES: Electronic copies of the petition and other materials are available on the NMFS West Coast Region Web site at *www.westcoast.fisheries.noaa.gov*.

FOR FURTHER INFORMATION CONTACT: Gary Rule, NMFS West Coast Region, at *gary.rule@noaa.gov,* (503) 230–5424; or Maggie Miller, NMFS Office of Protected Resources, at *margaret.h.miller@noaa.gov,* (301) 427–8457.

SUPPLEMENTARY INFORMATION:

Background

On June 29, 2015, we received a petition from Mr. Sam Wright (Olympia, Washington) to list the winter-run Puget Sound chum salmon (*Oncorhynchus keta*) in the Nisqually River system and Chambers Creek as a threatened or endangered ESU under the ESA and to

designate critical habitat concurrently with the listing. The petitioner asserts that (1) the designation of these two winter-run chum salmon populations as an ESU is justified because these populations are the only known winter-run chum salmon populations in the world, (2) a diverging trend in abundance between the Chambers Creek population and the fall-run chum salmon populations in southern Puget Sound renders the Nisqually River population as the only viable winter-run population and justifies an ESA listing of the petitioner's proposed ESU as threatened or endangered, and (3) NMFS's ''Status Review of Chum Salmon from Washington, Oregon, and California (NOAA Technical Memorandum NMFS–NWFSC–32)'' (Johnson *et al.* 1997) did not address ''global warming'' or ''climate change.'' Copies of the petition are available upon request (see **ADDRESSES**).

ESA Statutory, Regulatory, Policy Provisions, and Evaluation Framework

Section 4(b)(3)(A) of the ESA of 1973, as amended (16 U.S.C. 1531 *et seq.*), requires, to the maximum extent practicable, that within 90 days of receipt of a petition to list a species as threatened or endangered, the Secretary of Commerce make a finding on whether that petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted, and to promptly publish such finding in the **Federal Register** (16 U.S.C. 1533(b)(3)(A)). When it is found that substantial scientific or commercial information in a petition indicates the petitioned action may be warranted (a ''positive 90-day finding''), we are required to promptly commence a review of the status of the species concerned during which we will conduct a comprehensive review of the best available scientific and commercial information. In such cases, we conclude the review with a finding as to whether, in fact, the petitioned action is warranted within 12 months of receipt of the petition. Because the finding at the 12-month stage is based on a more thorough review of the available information, as compared to the narrow scope of review at the 90-day stage, a ''may be warranted'' finding does not prejudge the outcome of the status review.

Under the ESA, a listing determination may address a species, which is defined to also include subspecies and, for any vertebrate species, any distinct population segment (DPS) that interbreeds when mature (16 U.S.C. 1532(16)). To identify the proper taxonomic unit for consideration in a salmon listing determination, we apply our Policy on Applying the Definition of Species under the ESA to Pacific Salmon (ESU Policy) (56 FR 58612; November 20, 1991). Under this policy, populations of salmon substantially reproductively isolated from other conspecific populations and representing an important component in the evolutionary legacy of the biological species are considered to be an ESU. In our listing determinations for Pacific salmon under the ESA, we have treated an ESU as constituting a DPS, and hence a ''species,'' under the ESA. A species, subspecies, or ESU is ''endangered'' if it is in danger of extinction throughout all or a significant portion of its range, and ''threatened'' if it is likely to become endangered within the foreseeable future throughout all or a significant portion of its range (ESA sections 3(6) and 3(20), respectively, 16 U.S.C. 1532(6) and (20)). Pursuant to the ESA and our implementing regulations, we determine whether species are threatened or endangered based on any one or a combination of the following five section 4(a)(1) factors: The present or threatened destruction, modification, or curtailment of habitat or range; overutilization for commercial, recreational, scientific, or educational purposes; disease or predation; inadequacy of existing regulatory mechanisms; and any other natural or manmade factors affecting the species' existence (16 U.S.C. 1533(a)(1), 50 CFR 424.11(c)).

At the 90-day finding stage, we evaluate the petitioners' request based upon the information in the petition including its references and the information readily available in our files. We do not conduct additional research, and we do not solicit information from parties outside the agency to help us in evaluating the petition. We will accept the petitioners' sources and characterizations of the information presented if they appear to be based on accepted scientific principles, unless we have specific information in our files that indicates the petition's information is incorrect, unreliable, obsolete, or otherwise irrelevant to the requested action. Information that is susceptible to more than one interpretation or that is contradicted by other available information will not be dismissed at the 90-day finding stage, so long as it is reliable and a reasonable person would conclude it supports the petitioners' assertions. In other words, conclusive information indicating the species may meet the ESA's requirements for listing is not required to make a positive 90-day finding. We will not conclude that a lack of specific information alone necessitates a negative 90-day finding if a reasonable person would conclude that the unknown information itself suggests the species may be at risk of extinction presently or within the foreseeable future.

To make a 90-day finding on a petition to list a species, we evaluate whether the petition presents substantial scientific or commercial information indicating the subject species may be either threatened or endangered, as defined by the ESA. ESA-implementing regulations issued jointly by NMFS and U.S. Fish and Wildlife Service (50 CFR 424.14(i)) define ''substantial information'' in the context of reviewing a petition to list, delist, or reclassify a species as credible scientific information in support of the petition's claims such that a reasonable person conducting an impartial scientific review would conclude that the revision proposed in the petition may be warranted. Conclusions drawn in the petition without the support of credible scientific information will not be considered ''substantial information.'' The ''substantial scientific or commercial information'' standard must be applied in light of any prior reviews or findings we have made on the listing status of the species that is the subject of the petition. Where we have already conducted a finding on, or review of, the listing status of that species (whether in response to a petition or on our own initiative), we will evaluate any petition received thereafter seeking to list, delist, or reclassify that species to determine whether a reasonable person conducting an impartial scientific review would conclude that the action proposed in the petition may be warranted despite the previous review or finding. Where the prior review resulted in a final agency action, a petitioned action generally would not be considered to present substantial scientific and commercial information indicating that the action may be warranted unless the petition provides new information not previously considered.

In evaluating the petition, we first evaluate whether the information presented in the petition, along with the information readily available in our files, indicates that the petitioned entity constitutes a ''species'' eligible for listing under the ESA. Next, we evaluate whether the information indicates that the species faces an extinction risk that is cause for concern; this may be indicated in information expressly discussing the species' status and

trends, or in information describing impacts and threats to the species. We evaluate any information on specific demographic factors pertinent to evaluating extinction risk for the species (*e.g.,* population abundance and trends, productivity, spatial structure, age structure, sex ratio, diversity, current and historical range, habitat integrity or fragmentation), and the potential contribution of identified demographic risks to extinction risk for the species. We then evaluate the potential links between these demographic risks and the causative impacts and threats identified in section 4(a)(1).

Information presented on impacts or threats should be specific to the species and should reasonably suggest that one or more of these factors may be operative threats that act or have acted on the species to the point that it may warrant protection under the ESA. Broad statements about generalized threats to the species, or identification of factors that could negatively impact a species, do not constitute substantial information indicating that listing may be warranted. We look for information indicating that not only is the particular species exposed to a factor, but that the species may be responding in a negative fashion; then we assess the potential significance of that negative response.

Many petitions identify risk classifications made by nongovernmental organizations, such as the International Union on the Conservation of Nature (IUCN), the American Fisheries Society, or NatureServe, as evidence of extinction risk for a species. Risk classifications by such organizations or made under other Federal or state statutes may be informative, but such classification alone will not alone provide sufficient basis for a positive 90-day finding under the ESA. For example, as explained by NatureServe, their assessments of a species' conservation status do ''not constitute a recommendation by NatureServe for listing under the U.S. Endangered Species Act'' because NatureServe assessments ''have different criteria, evidence requirements, purposes and taxonomic coverage than government lists of endangered and threatened species, and therefore these two types of lists should not be expected to coincide'' (*http://www.natureserve.org/prodServices/pdf/NatureServeStatusAssessmentsListing-Dec%202008.pdf*). Additionally, species classifications under IUCN and the ESA are not equivalent; data standards, criteria used to evaluate species, and treatment of uncertainty are also not necessarily the same. Thus, when a petition cites such classifications, we will evaluate the source of information that the classification is based upon in light of the standards on extinction risk and impacts or threats discussed above.

Previous Reviews of Puget Sound/Strait of Georgia Chum Salmon Under the ESA

On March 14, 1994, NMFS was petitioned by the Professional Resources Organization—Salmon (PRO—Salmon) to list Washington's Hood Canal, Discovery Bay, and Sequim Bay summer-run chum salmon (*Oncorhynchus keta*) as threatened or endangered species under the ESA (PRO—Salmon 1994). A second petition, received April 4, 1994, from the ''Save Allison Springs'' Citizens Committee (1994), requested listing of fall chum salmon found in the following southern Puget Sound streams or bays: Allison Springs, McLane Creek, tributaries of McLane Creek (Swift Creek and Beatty Creek), Perry Creek, and the southern section of Mud Bay/Eld Inlet. A third petition, received by NMFS on May 20, 1994, was submitted by Trout Unlimited (1994) and requested listing the Hood Canal summer chum. As the result of these three petitions, NMFS assembled a Biological Review Team (BRT) and initiated an ESA status review of all chum salmon populations in Washington, Oregon, and California. In December 1997, the status review was published as Johnson *et al.* (1997). In the status review, the BRT identified four ESUs—the Puget Sound/Strait of Georgia ESU, Hood Canal summer-run ESU, Pacific Coast ESU, and Columbia River ESU. The winter-run chum salmon populations in the Nisqually River system and Chambers Creek were identified as part of the Puget Sound/Strait of Georgia ESU. Despite these populations being one of the more genetically distinct populations in Puget Sound, the BRT (1) did not consider those differences distinct enough to warrant designating them as a separate ESU and (2) determined that these populations, along with the summer-run Puget Sound populations, reflected patterns of diversity within a large and complex ESU. The BRT determined that the Puget Sound/Strait of Georgia chum salmon ESU was not presently at risk of extinction nor was it likely to become endangered in the foreseeable future throughout all or a significant portion of its range. The BRT found that the (1) the Puget Sound/Strait of Georgia chum salmon ESU's abundance was at or near the historical annual run levels of over one million fish, (2) the majority of the populations had stable or increasing population trends, and (3) all populations with statistically significant trends were increasing. The Pacific Coast chum salmon ESU, with its large geographic area and considerable diversity, was also not considered warranted for ESA listing. The BRT, however, determined that the Hood Canal summer-run chum salmon ESU and Columbia River chum salmon ESU are likely to become endangered in the foreseeable future if present conditions continue. NMFS listed these ESUs as threatened species under the ESA on March 25, 1999 (64 FR 14507).

Analysis of Petition and Information Readily Available in NMFS Files

As mentioned above, in analyzing the request of the petitioner, we first evaluate whether the information presented in the petition, along with information readily available in our files, indicates that the petitioned entity constitutes a ''species'' eligible for listing under the ESA. Because the petition specifically requests listing of an ESU, we evaluate whether the information indicates that the petitioned entities, the winter-run Puget Sound chum salmon in the Nisqually River system and Chambers Creek, constitute an ESU pursuant to our ESU Policy.

When identifying an ESU, our ESU Policy (56 FR 58612; November 20, 1991) stipulates two elements that must be considered: (1) It must be substantially reproductively isolated from other nonspecific population units, and (2) it must represent an important component in the evolutionary legacy of the species. In terms of reproductive isolation, the ESU Policy states that reproductive isolation does not have to be absolute, but it must be strong enough to permit evolutionarily important differences to accrue in different population units. Insights into the extent of reproductive isolation can be provided by movements of tagged fish, recolonization rates of other populations, measurements of genetic differences between population, and evaluations of the efficacy of natural barriers. In terms of evolutionary legacy of the species, that criterion would be met if the population contributed substantially to the ecological/genetic diversity of the species as a whole. To make that determination, the following questions are relevant: Is the population genetically distinct from other conspecific populations (genetic component)? Does the population occupy unusual or distinctive habitat (ecological component)? Does the population show evidence of unusual or distinctive adaptation to its environment (life-history component)?

In evaluating this petition, we looked for information to suggest that the

petitioned entities, the winter-run Puget Sound chum salmon in the Nisqually River system and Chambers Creek populations, may qualify as an ESU under both the reproductive isolation and evolutionary legacy of the species criteria of our ESU Policy. Our evaluation is discussed below.

Qualification of the Winter-Run Puget Sound Chum Salmon in the Nisqually River System and Chambers Creek as an ESU

The petitioner asserts that (1) the designation of these two winter-run chum salmon populations as an ESU is justified because they are the only known winter-run chum salmon populations in the world, (2) a diverging trend in abundance between the Chambers Creek population and the fall-run chum salmon populations in southern Puget Sound renders the Nisqually River population as the only viable winter-run population and justifies an ESA listing of the petitioner's proposed ESU as threatened or endangered, and (3) Johnson *et al.* (1997) did not address ''global warming'' or ''climate change.'' To make the argument for identifying these two populations as an ESU, the petitioner relies almost exclusively on information from Johnson *et al.* (1997). The only other information that the petitioner presents is abundance data for the Chambers Creek (1968 through 2008) and Nisqually River (1968 through 2013) winter-run chum salmon populations. To direct our decision, we will first analyze the petition's assertion that these two winter-run chum salmon populations are a separate ESU; and if we determine that to be true, we will then analyze the other two assertions described above.

As stated previously, NMFS received three petitions in 1994 to list several populations of chum salmon in Puget Sound. In response to these petitions and to address general concerns about the species, NMFS assembled a BRT to conduct a status review of chum salmon to identify the ESUs and determine their statuses throughout the Pacific Northwest. The findings were published as Johnson et al. (1997). Based upon genetic, ecological, and life-history components, the BRT was able to analyze and group West Coast chum salmon populations into four different chum salmon ESUs. For these ESUs, the BRT analyzed the following available information.

For the genetic component, the BRT analyzed the genetic variability at 39 polymorphic loci in 153 samples collected from 105 locations in southern British Columbia, Washington, and Oregon (Phelps et al. 1994; Johnson et al. 1997). Seventy-two of those 105 locations were from Puget Sound including the Chambers Creek and Nisqually River winter-run populations. From that analysis, the Hood Canal and Strait of Juan de Fuca summer-run chum salmon were determined to be genetically distinct from the other Puget Sound populations and were described as the Hood Canal summer-run ESU. Genetically, the remaining Puget Sound and Hood Canal locations were clustered together with the winter-run chum salmon as genetic outliers most closely related to the fall-run Hood Canal and northern Puget Sound populations. Additional samples and analysis (Phelps 1995) resulted in three distinct clusters of samples: (1) Summer-run chum salmon of Hood Canal and Strait of Juan de Fuca; (2) Puget Sound fall-run and southern Puget Sound winter- and summer-run chum salmon; and (3) Strait of Juan de Fuca, coastal Washington, and Oregon fall-run chum salmon (Johnson et al. 1997). Recently, Waples (2015) analyzed genetic diversity and population structure from 174 chum salmon individuals at 10 Puget Sound/Strait of Georgia locations—including one Hood Canal summer-run ESU location (Hamma Hamma River), the Nisqually River winter-run location, and eight other Puget Sound/Strait of Georgia locations. In a F_{ST} matrix and phylogenetic tree analysis, the Hamma Hamma River location was most genetically diverse followed by the Nisqually River winter-run. A principle component analysis (PCA) evaluating the genetic relationships between the individuals from all 10 locations showed that the Hamma Hamma River location was the most genetically distinct with the other nine locations clustered together (including the Nisqually River winter-run). In response to this current petition, NMFS's Northwest Fishery Science Center (NWFSC) examined the available data concerning the winter-run chum salmon from the Nisqually River system and Chambers Creek. An analysis of these data (J. Hard, Supervisory Research Fishery Biologist, NWFSC, email September 2, 2015) confirmed the earlier conclusions from Johnson et al. (1997) that ''the winter-run fish cluster closely with fall-run fish in Puget Sound and Hood Canal'' and that ''there is no clear genetic evidence to support the idea that the winter-run chum salmon in Puget Sound are substantially reproductively isolated from other chum salmon populations in southern Puget Sound.''

In examining the ecological component, neither the Nisqually River nor Chambers Creek watersheds are isolated geographically or reproductively from other chum salmon populations in southern Puget Sound; therefore, it does not qualify as an ESU. While there is no need to determine whether this cluster represents an important component in the evolutionary legacy of the species (2nd criterion of the ESU Policy), we include this information in order to be thorough. Both the Nisqually River and Chambers Creek watersheds have supported both summer- and fall-run chum salmon in the past, along with winter-run chum salmon (Johnson et al. 1997), so there is nothing unique preventing these watersheds from supporting multiple chum salmon runs. No additional ecological information was provided by the petitioner nor found in our files.

For the life history component, Johnson et al. (1997) stated that ''the distinctiveness of the winter-run populations was not sufficient to designate these populations as a separate ESU. Rather, the team concluded that these populations, along with the summer-run populations in southern Puget Sound, reflect patterns of diversity within a relatively large and complex ESU.'' No additional life history information was provided by the petitioner nor found in our files; therefore, we find the conclusions in Johnson et al. (1997) remain valid. We conclude that the winter-run cluster does not represent an important component in the evolutionary legacy of the species.

After reviewing the genetic, ecological, and life history components of these two winter-run chum salmon populations, we have concluded that these populations are not distinct from the other populations within the Puget Sound/Strait of Georgia ESU and do not meet our criteria for identification as a separate ESU. Therefore, based upon the information from the petitioner and the data found in our files, we conclude that these populations are not a separate ESU and do not qualify for listing under the ESA.

Other Information Provided by the Petitioner

The petitioner also provided additional information on abundance for the two winter-run chum salmon populations and climate change. Since we determined that these two winter-run chum salmon populations do not qualify as an ESU, these two items were not analyzed.

Petition Finding

After reviewing the information contained in the petition, as well as information readily available in our files, and based on the above analysis, we conclude that the petition does not present substantial scientific or commercial information indicating that the petitioned action of identifying the winter-run Puget Sound chum salmon (*Oncorhynchus keta*) in the Nisqually River system and Chambers Creek as an ESU may be warranted. As such, we find that the petition does not present substantial scientific or commercial information indicating that the winter-run Puget Sound chum salmon in the Nisqually River system and Chambers Creek populations are ''species'' eligible for listing under the ESA.

References Cited

The complete citations for the references used in this document can be obtained by contacting NMFS (See **FOR FURTHER INFORMATION CONTACT**) or on our Web site at: *www.westcoast.fisheries.noaa.gov*.

Authority: The authority for this action is the Endangered Species Act of 1973, as amended (16. U.S.C. 1531 *et seq.*).

Dated: July 13, 2017.

Samuel D. Rauch, III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

[FR Doc. 2017–15065 Filed 7–18–17; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XF554

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) Groundfish Management Team (GMT) will hold two webinars that are open to the public.

DATES: The GMT webinars will be held Wednesday, August 2, 2017 from 10 a.m. until 12 p.m. and Wednesday, September 6, 2017, from 8 a.m. to 12 p.m. Webinar end times are estimates, meetings will adjourn when business for each day is completed.

ADDRESSES: The following login instructions will work for any of the webinars in this series. To attend the webinar (1) join the meeting by visiting this link *http://www.gotomeeting.com/online/webinar/join-webinar;* (2) enter the Webinar ID: 740–284–043, and (3) enter your name and email address (required). After logging in to the webinar, please (1) dial this TOLL number (+1) (914) 614–3221 (not a toll-free number); (2) enter the attendee phone audio access code 572–823–832; and (3) then enter your audio phone pin (shown after joining the webinar). NOTE: We have disabled Mic/Speakers as on option and require all participants to use a telephone or cell phone to participate. Technical Information and System Requirements: PC-based attendees are required to use Windows® 7, Vista, or XP; Mac®-based attendees are required to use Mac OS® X 10.5 or newer; Mobile attendees are required to use iPhone®, iPad®, Android™ phone or Android tablet (See the GoToMeeting WebinarApps). You may send an email to Mr. Kris Kleinschmidt at *Kris.Kleinschmidt@noaa.gov* or contact him at 503–820–2280, extension 411 for technical assistance. A public listening station will also be available at the Pacific Council office.

Council address: Pacific Council, 7700 NE Ambassador Place, Suite 101, Portland, Oregon 97220–1384; telephone: 503–820–2280.

FOR FURTHER INFORMATION CONTACT: Ms. Kelly Ames, Pacific Council, 503–820–2426.

SUPPLEMENTARY INFORMATION: The primary purpose of the GMT webinars are to prepare for the September 2017 Pacific Council meeting. A detailed agenda for each webinar will be available on the Pacific Council's Web site prior to the meeting. The GMT may also address other assignments relating to groundfish management. No management actions will be decided by the GMT. The GMT's task will be to develop recommendations for consideration by the Pacific Council at its meetings in 2017.

Although nonemergency issues not contained in the meeting agenda may be discussed, those issues may not be the subject of formal action during these meetings. 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 public listening station is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Mr. Kris Kleinschmidt at 503–820–2411 at least ten business days prior to the meeting date.

Dated: July 14, 2017.

Tracey L. Thompson,

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

[FR Doc. 2017–15138 Filed 7–18–17; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0649–XF555

Gulf of Mexico Fishery Management Council; Public Meeting

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

ACTION: Notice of a public meeting.

SUMMARY: The Gulf of Mexico Fishery Management Council will hold a one-day meeting of its Outreach and Education Technical Committee.

DATES: The meeting will convene on Tuesday, August 1, 2017, 9 a.m.–4 p.m., EDT.

ADDRESSES: The meeting will be held at the Gulf Council Office.

Council address: Gulf of Mexico Fishery Management Council, 2203 N. Lois Avenue, Suite 1100, Tampa, FL 33607; telephone: (813) 348–1630.

FOR FURTHER INFORMATION CONTACT: Emily Muehlstein, Public Information Officer, Gulf of Mexico Fishery Management Council; *emily.muehlstein@gulfcouncil.org,* telephone: (813) 348–1630.

SUPPLEMENTARY INFORMATION:

Agenda

Tuesday, August 1, 2017; 9 a.m. until 4 p.m.

The committee will begin with introductions and adoption of agenda, approval of the June 2016 meeting summary, and discuss the use of proxy attendees. The committee will review and discuss agency efforts and identify the agency point person for Fish Measurement (triggerfish) Outreach, Barotrauma and Use of Venting and Descending Tools Outreach, Lionfish

Outreach, and Anecdotal (angler reported) Data Collection.

The committee will review the Fisherman's Conservation Best Practices Web page; and discuss any other business.

Meeting Adjourns

The meeting will be broadcast via webinar. You may listen in by registering for Outreach & Education Technical Committee on Tuesday, August 1, 2017 at: *https://register.gotowebinar.com/register/2487568475712856322*.

The Agenda is subject to change, and the latest version along with other meeting materials will be posted on the Council's file server. To access the file server, the URL is *https://public.gulfcouncil.org:5001/webman/index.cgi,* or go to the Council's Web site and click on the FTP link in the lower left of the Council Web site (*http://www.gulfcouncil.org*). The username and password are both ''gulfguest''. Click on the ''Library Folder'', then scroll down to ''Outreach & Education Technical Committee meeting—2017–08''.

Although other non-emergency issues not on the agenda may come before the Technical Committee for discussion, in accordance with the Magnuson-Stevens Fishery Conservation and Management Act, those issues may not be the subject of formal action during this meeting. Actions of the Technical Committee will be restricted to those issues specifically identified in the agenda and any issues arising after publication of this notice 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 Council's intent to take 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 Kathy Pereira at the Gulf Council Office (see **ADDRESSES**), at least 5 working days prior to the meeting.

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

Dated: July 14, 2017.

Tracey L. Thompson,

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

[FR Doc. 2017–15150 Filed 7–18–17; 8:45 am]

BILLING CODE 3510–22–P

COMMODITY FUTURES TRADING COMMISSION

Agency Information Collection Activities Under OMB Review

AGENCY: Commodity Futures Trading Commission.

ACTION: Notice of review.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995 (PRA), this notice announces that the Information Collection Request (ICR) abstracted below has been forwarded to the Office of Management and Budget (OMB) for review and comment. The ICR describes the nature of the information collection and its expected costs and burden.

DATES: Comments must be submitted on or before August 18, 2017.

ADDRESSES: Comments regarding the burden estimated or any other aspect of the information collection, including suggestions for reducing the burden, may be submitted directly to the Office of Information and Regulatory Affairs (OIRA) in OMB, within 30 days of the notice's publication, by email at *OIRAsubmissions@omb.eop.gov.* Please identify the comments by OMB Control No. 3038–0103. Please provide the Commission with a copy of all submitted comments at the address listed below. Please refer to OMB Reference No. 3038–0103, found on *http://reginfo.gov.* Comments may also be mailed to the Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for the Commodity Futures Trading Commission, 725 17th Street, NW., Washington, DC 20503, and to Christopher Kirkpatrick, Secretary of the Commission, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW., Washington, DC 20581; or through the Agency's Web site at *http://comments.cftc.gov.* Follow the instructions for submitting comments through the Web site.

A copy of the supporting statements for the collection of information discussed above may be obtained by visiting *http://reginfo.gov.* All comments must be submitted in English, or if not, accompanied by an English translation. Comments will be posted as received to *http://www.cftc.gov.*

FOR FURTHER INFORMATION CONTACT: Richard Mo, Special Counsel, Division of Market Oversight, at 202–418–7637 or *rmo@cftc.gov* or David E. Aron, Special Counsel, Division of Market Oversight, at 202–418–6621 or *daron@cftc.gov,* and refer to OMB Control No 3038–0103.

SUPPLEMENTARY INFORMATION:

Title: Ownership and Control Reports, Forms 102/102S, 40/40S, and 71 (Trader and Account Identification Reports) (OMB Control No. 3038–0103). This is a request for extension of a currently approved information collection.

Abstract: The Ownership and Control Reports (OCR) rules [1] created new information collection requirements via §§ 17.01, 18.04, 18.05, and 20.5. Specifically, § 17.01 provides for the filing of Form 102A, Form 102B and Form 71, as follows:

- Pursuant to § 17.01(a), futures commission merchants (''FCMs''), clearing members, and foreign brokers shall identify new special accounts to the Commission on Form 102A;[2]
- pursuant to § 17.01(b), clearing members shall identify volume threshold accounts to the Commission on Form 102B; and
- pursuant to § 17.01(c), omnibus volume threshold account originators and omnibus reportable sub-account originators shall identify reportable sub-accounts to the Commission on Form 71 when requested via a special call by the Commission or its designee.

Additional reporting requirements arise from § 18.04, which results in the collection of information via Form 40 from and regarding traders who own, hold, or control reportable positions; volume threshold account controllers; persons who own volume threshold accounts; reportable sub-account controllers; and persons who own reportable sub-accounts.

Reporting requirements also arise from § 20.5(a), which requires 102S reporting entities to submit Form 102S for swap counterparty or customer consolidated accounts with reportable positions. In addition, § 20.5(b) requires every person subject to books or records under current § 20.6 to complete a 40S filing after a special call upon such person by the Commission.

In addition to the reporting requirements summarized above, § 18.05 imposes recordkeeping requirements upon: (1) Traders who own, hold, or control a reportable futures or options on futures position; (2) volume threshold account

[1] See Commission, Final Rule: Ownership and Control Reports, Forms 102/102S, 40/40S, and 71, 78 FR 69178 (November 18, 2013). Terms used herein and not otherwise defined herein shall have the meaning assigned to such terms in the OCR rules or in the Commission's regulations.

[2] Form 102A is an updated version of old Form 102, which was titled ''Identification of Special Accounts.'' Form 102A collects information with respect to position-based special accounts in the futures market. Form 102A also requires clearing members to identify the individual trading accounts underlying these special accounts.

controllers; (3) persons who own volume threshold accounts; (4) reportable sub-account controllers; and (5) persons who own reportable sub-accounts.

A 60-day notice of intent to renew collection 3038–0103 (the ''60-Day Notice'') was published in the **Federal Register** at 82 FR 12944 (March 8, 2017). In response to the 60-day Notice, the Commission received four comment letters from four entities, namely (a) the National Rural Electric Cooperative Association; (b) the Commercial Energy Working Group; (c) the International Energy Credit Association; and (d) Capital Confirmation, Inc. (non-substantive comment). The comment letters are available through the Commission's Web site at: *https://comments.cftc.gov/PublicComments/CommentList.aspx?id=1781.*

Burden Statement: The Commission is updating its burden estimates in response to comment letters received. The Commission estimates the burden of this collection of information as follows:

Type of respondent	Number of reporting parties per year	Annualized burden per reporting party (hours)	Total annual industry burden (hours)	Estimated wage rate	Annual industry costs
Form 102A					
FCMs, clearing members, and foreign brokers	260	106	27,560	$75.13	$2,070,583
Form 102B					
Clearing members	175	106	18,550	$75.13	$1,393,662
Form 71					
Originators of omnibus volume threshold accounts or omnibus reportable sub-accounts	762	8	6,096	$75.13	$457,992
Form 40 (arising from Form 102A)					
Special account owners and controllers	5,250	5	26,250	$75.13	$1,972,163
Form 40 (arising from Form 102B and Form 71)					
Volume threshold account controllers and owners, reportable sub-account controllers and owners	18,920	5	94,600	$75.13	$7,107,298
Form 102S					
Clearing members and swap dealers	39	106	4,134	$75.13	$310,587
Form 40S					
Persons subject to books and records requirements under § 20.6	2,508	5	12,540	$75.13	$942,130
§ 18.05 Recordkeeping Burden					
Volume threshold account controllers and owners, reportable sub-account controllers and owners, and traders who own, hold, or control reportable futures or option positions	53	5	265	$75.13	$19,909

Authority: 44 U.S.C. 3501 *et seq.*

Dated: July 12, 2017.

Robert N. Sidman,

Deputy Secretary of the Commission.

[FR Doc. 2017–15091 Filed 7–18–17; 8:45 am]

BILLING CODE 6351–01–P

BUREAU OF CONSUMER FINANCIAL PROTECTION

[Docket No. CFPB–2017–0019]

Agency Information Collection Activities: Comment Request

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Notice and request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (PRA), the Bureau of Consumer Financial Protection (Bureau) is requesting to renew the Office of Management and Budget (OMB) approval for an existing information collection titled, ''CFPB's Consumer Response Intake Form.''

DATES: Written comments are encouraged and must be received on or before September 18, 2017 to be assured of consideration.

ADDRESSES: You may submit comments, identified by the title of the information collection, OMB Control Number (see below), and docket number (see above), by any of the following methods:

- *Electronic: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Consumer Financial Protection Bureau (Attention: PRA Office), 1700 G Street, NW., Washington, DC 20552.
- *Hand Delivery/Courier:* Consumer Financial Protection Bureau (Attention: PRA Office), 1275 First Street NE., Washington, DC 20002.

Please note that comments submitted after the comment period will not be accepted. In general, all comments received will become public records, including any personal information provided. Sensitive personal information, such as account numbers

or Social Security numbers, should not be included.

FOR FURTHER INFORMATION CONTACT: Documentation prepared in support of this information collection request is available at *www.regulations.gov.* Requests for additional information should be directed to the Consumer Financial Protection Bureau, (Attention: PRA Office), 1700 G Street NW., Washington, DC 20552, (202) 435–9575, or email: *CFPB_PRA@cfpb.gov. Please do not submit comments to this mailbox.*

SUPPLEMENTARY INFORMATION:

Title of Collection: CFPB's Consumer Response Intake Form.

OMB Control Number: 3170–0011.

Type of Review: Extension with change to a currently approved collection.

Affected Public: Individuals or households.

Estimated Number of Respondents: 3,000,000.

Estimated Total Annual Burden Hours: 387,500.

Abstract: The Intake Form is designed to aid consumers in the submission of complaints, inquiries, and feedback and to help the Bureau fulfill its statutory requirements.[1] Consumers are able to complete and submit information through the Intake Form electronically on the Bureau's Web site. Alternatively, respondents may request that the Bureau mail a paper copy of the Intake Form, and then mail or fax it back to the Bureau; or call to submit a complaint by telephone. The questions within the Intake Form prompt respondents for a description of, and key facts about, the complaint at issue, the desired resolution, contact and account information, information about the company they are submitting a complaint about, and previous action taken to attempt to resolve the complaint.

Request for Comments: Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the Bureau, including whether the information will have practical utility; (b) The accuracy of the Bureau's estimate of the burden of the collection of information, including the validity of the methods and the 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. Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record.

[1] *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, Title X, Sections 1013(b)(3), 1021(c)(2), and 1034, codified at 12 U.S.C. 5493(b)(3), 5511(c)(2), and 5534.

Dated: July 11, 2017.

Darrin A. King,

Paperwork Reduction Act Officer, Bureau of Consumer Financial Protection.

[FR Doc. 2017–15110 Filed 7–18–17; 8:45 am]

BILLING CODE 4810–AM–P

BUREAU OF CONSUMER FINANCIAL PROTECTION

[Docket No. CFPB–2017–0022]

Agency Information Collection Activities: Comment Request

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Notice and request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (PRA), the Bureau of Consumer Financial Protection (Bureau) is requesting to renew the Office of Management and Budget (OMB) approval for an existing information collection titled, ''Generic Information Collection Plan for Consumer Complaint and Information Collection System (Testing and Feedback).''

DATES: Written comments are encouraged and must be received on or before September 18, 2017 to be assured of consideration.

ADDRESSES: You may submit comments, identified by the title of the information collection, OMB Control Number (see below), and docket number (see above), by any of the following methods:

- *Electronic: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Consumer Financial Protection Bureau (Attention: PRA Office), 1700 G Street NW., Washington, DC 20552.
- *Hand Delivery/Courier:* Consumer Financial Protection Bureau (Attention: PRA Office), 1275 First Street NE., Washington, DC 20002.

Please note that comments submitted after the comment period will not be accepted. In general, all comments received will become public records, including any personal information provided. Sensitive personal information, such as account numbers or Social Security numbers, should not be included.

FOR FURTHER INFORMATION CONTACT: Documentation prepared in support of this information collection request is available at *www.regulations.gov*. Requests for additional information should be directed to the Consumer Financial Protection Bureau, (Attention: PRA Office), 1700 G Street NW., Washington, DC 20552, (202) 435–9575, or email: *CFPB_PRA@cfpb.gov*. Please do not submit comments to this mailbox.

SUPPLEMENTARY INFORMATION:

Title of Collection: Generic Information Collection Plan for Consumer Complaint and Information Collection System (Testing and Feedback).

OMB Control Number: 3170–0442.

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

Affected Public: Individuals or households.

Estimated Number of Respondents: 710,000.

Estimated Total Annual Burden Hours: 118,334.

Abstract: Over the past several years, the CFPB has undertaken a variety of service delivery-focused activities contemplated by the Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–2013 (Dodd-Frank Act). These activities, which include consumer complaint and inquiry processing, referral, and monitoring, involve several interrelated systems.[1] The streamlined process of the generic clearance will continue to allow the Bureau to implement these systems efficiently, in line with the Bureau's commitment to continuous improvement of its delivery of services through iterative testing and feedback collection.

This is a routine request for OMB to renew its approval of the collections of information currently approved under this OMB control number. The Bureau is not proposing any new or revised collections of information pursuant to this request.

Request for Comments: Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the Bureau, including whether the information will have practical utility; (b) The accuracy of the Bureau's estimate of the burden of the collection of information, including the validity of

[1] These interrelated systems include secure, web-based portals that allow consumers, companies, and agencies to access complaints and an online ''Tell Your Story'' feature that allows consumers to share feedback about their experiences in the consumer financial marketplace.

the methods and the 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. Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record.

Dated: July 11, 2017.

Darrin A. King,

Paperwork Reduction Act Officer, Bureau of Consumer Financial Protection.

[FR Doc. 2017–15105 Filed 7–18–17; 8:45 am]

BILLING CODE 4810–AM–P

CORPORATION FOR NATIONAL AND COMMUNITY SERVICE

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; Financial Management Survey

AGENCY: Corporation for National and Community Service.

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, CNCS is proposing to renew an information collection.

DATES: Written comments must be submitted to the individual and office listed in the **ADDRESSES** section by September 18, 2017.

ADDRESSES: To access and review all the documents related to information collection listed in this notice, please use *http://regulations.gov*. You may submit comments, identified by the title of the information collection activity, by any of the following methods:

(1) *By mail sent to:* Corporation for National and Community Service, Doug Godesky, Senior Grants Officer, Office of Grants Management, CNCS, 250 E. Street SW., Washington, DC 20525.

(2) By hand delivery or by courier to the CNCS mailroom at Room 8100 at the mail address given in paragraph (1) above, between 9:00 a.m. and 4:00 p.m. Eastern Time, Monday through Friday, except Federal holidays.

(3) Electronically through *www.regulations.gov*.

Individuals who use a telecommunications device for the deaf (TTY–TDD) may call 1–800–833–3722 between 8:00 a.m. and 8:00 p.m. Eastern Time, Monday through Friday.

FOR FURTHER INFORMATION CONTACT: Douglas Godesky, Senior Grants Officer, 202–606–6967 or by email at *dgodesky@cns.gov*.

SUPPLEMENTARY INFORMATION: CNCS is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of CNCS, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are expected to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology (*e.g.,* permitting electronic submissions of responses).

Comments submitted in response to this notice will be summarized and/or included in the request for Office of Management and Budget approval of the information collection request; they will also become a matter of public record.

Current Action

Title of Collection: Financial Management Survey.

OMB Control Number: 3045–0102.

Type of Review: Renewal.

Respondents/Affected Public: Organizations that are first time grant recipients to the CNCS.

Total Estimated Number of Respondents: 20.

Total Estimated Frequency: Once.

Total Estimated Average Time per Response: Averages 1.75 hours.

Total Estimated Number of Annual Burden Hours: 35 hours.

Total Burden Cost (capital/startup): None.

Total Burden Cost (operating/maintenance): None.

Abstract

Organizations that are receiving CNCS grant funds for the first time complete the form. It can be completed and submitted via email. The survey requests some existing organizational documents, such as an IRS Form 990 and audited financial statements. Organizations can provide those documents electronically or submit them on paper. CNCS seeks to renew the current information collection. The renewed information collection includes the correction of minor administrative and typographical errors and simplifies the submission instructions. The information collection will otherwise be used in the same manner as the existing application. CNCS also seeks to continue using the current application until the revised application is approved by OMB. The current application is due to expire on September 30, 2017.

Dated: July 13, 2017.

Douglas Godesky,

Senior Grants Officer, Office of Grants Management, Corporation for National and Community Service.

[FR Doc. 2017–15070 Filed 7–18–17; 8:45 am]

BILLING CODE 6050–28–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Transmittal No. 16–73]

36(b)(1) Arms Sales Notification

AGENCY: Defense Security Cooperation Agency, Department of Defense.

ACTION: Notice.

SUMMARY: The Department of Defense is publishing the unclassified text of a section 36(b)(1) arms sales notification.

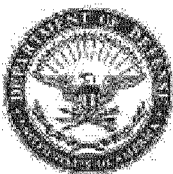
FOR FURTHER INFORMATION CONTACT: Kathy Valadez, (703) 697–9217 or Pamela Young, (703) 697–9107; DSCA/DSA–RAN.

SUPPLEMENTARY INFORMATION: This 36(b)(1) arms sales notification is published to fulfill the requirements of section 155 of Public Law 104–164 dated July 21, 1996. The following is a copy of a letter to the Speaker of the House of Representatives, Transmittal 16–73 with attached Policy Justification and Sensitivity of Technology.

Dated: July 13, 2017.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer,Department of Defense.



DEFENSE SECURITY COOPERATION AGENCY
201 12TH STREET SOUTH, STE 203
ARLINGTON, VA 22202-5408

JUN 29 2017

The Honorable Paul D. Ryan
Speaker of the House
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Speaker:

Pursuant to the reporting requirements of Section 36(b)(1) of the Arms Export Control Act, as amended, we are forwarding herewith Transmittal No. 16-73, concerning the Department of the Air Force proposed Letter(s) of Acceptance to the Taipei Economic and Cultural Representative Office in the United States for defense articles and services estimated to cost $185.5 million. After this letter is delivered to our office, we plan to issue a news release to notify the public of this proposed sale.

Sincerely,

J. W. Rixey
Vice Admiral, USN
Director

Enclosures:
1. Transmittal
2. Policy Justification
3. Sensitivity of Technology

Transmittal No. 16–73

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act, as Amended

(i) *Prospective Purchaser:* Taipei Economic and Cultural Representative Office (TECRO) in the United States

(ii) *Total Estimated Value:*

Major Defense Equipment*	$83.5 million
Other	102.0 million
Total	185.5 million

(iii) *Description and Quantity or Quantities of Articles or Services under Consideration for Purchase:*

Major Defense Equipment (MDE):

Fifty-six (56) AGM–154C Joint Standoff Weapons (JSOWs)

Non-MDE includes:

JSOW integration, captive flight vehicles, dummy training missiles, missile containers, spare and repair parts, support and test equipment, Joint Mission Planning System updates, publications and technical documentation, personnel training and training equipment, U.S. Government and contractor engineering, technical and logistics support services, and other related elements of logistical and program support.

(iv) *Military Department:* Air Force (QBZ)

(v) *Prior Related Cases, if any:* None

(vi) *Sales Commission, Fee. etc., Paid, Offered or Agreed to be Paid:* None

(vii) *Sensitivity of Technology Contained in the Defense Article or Defense Services Proposed to be Sold:* See Attached Annex

(viii) *Date Report Delivered to Congress:* 29 JUN 2017

* As defined in Section 47(6) of the Arms Export Control Act.

POLICY JUSTIFICATION

Taipei Economic and Cultural Representative Office (TECRO) in the United States—AGM–154C Joint Standoff Weapon (JSOW) Missiles

TECRO requested a possible sale of fifty-six (56) AGM–154C JSOW Air-to-Ground Missiles. This request also includes: JSOW integration, captive flight vehicles, dummy training missiles, missile containers, spare and repair parts, support and test equipment, Joint Mission Planning System updates, publications and technical documentation, personnel training and training equipment, U.S. Government and contractor engineering, technical and logistics support services, and other related elements of logistical and program support. The total estimated program cost is $185.5 million.

This proposed sale is consistent with U.S. law and policy as expressed in Public Law 96–8.

This proposed sale serves U.S. national, economic, and security interests by supporting the recipient's continuing efforts to modernize its armed forces and to maintain a credible defensive capability. The proposed sale will help improve the security of the recipient and assist in maintaining political stability, military balance, and economic progress in the region.

The proposed sale will improve the recipient's capability in current and future defensive efforts. The recipient will use the enhanced capability as a deterrent to regional threats and to strengthen homeland defense. The recipient will have no difficulty absorbing this equipment into its armed forces.

The proposed sale of this equipment and support will not alter the basic military balance in the region.

Currently, market research is being conducted to determine the viability of a qualified contractor in accordance with Federal Acquisition Regulations. The purchaser typically requests offsets, but any offsets will be determined between the purchaser and the contractor.

Implementation of this proposed sale will not require the assignment of any additional U.S. Government or contractor representatives outside the United States.

There will be no adverse impact on U.S. defense readiness as a result of this proposed sale.

Transmittal No. 16–73

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(l) of the Arms Export Control Act

Annex

Item No. vii

(vii) *Sensitivity of Technology:*

1. The AGM–154C Joint Standoff Weapon (JSOW) is a low observable, 1,000 lb. class, inertial navigation and global positioning satellite guided family of air-to-ground glide weapons. JSOW consists of a common airframe and avionics that provides for a modular payload assembly to attack stationary and moving massed flight-armored and armored vehicle columns, surface-to-air, soft to hard, relocatable, and fixed targets. JSOW provides combat forces with an all-weather, day/night/multiple kills per pass, launch and leave, and standoff capability.

2. The highest classification of the hardware to be exported is SECRET. The highest classification of the technical documentation to be exported is SECRET, but no radar cross section and infrared signature data nor U.S.-only tactics or tactical doctrine will be disclosed. The highest classification of the software to be exported is SECRET; however, no software source code will be disclosed. All reprogramming of missile microprocessor memories must be accomplished by U.S. Government personnel or U.S. Government approved contractors.

3. If a technologically advanced adversary were to obtain knowledge of the specific hardware and software elements, the information could be used to develop countermeasures that might reduce weapon system effectiveness or be used in the development of a system with similar or advanced capabilities.

4. This sale is necessary in furtherance of the U.S. foreign policy and national security objectives outlined in the Policy Justification. Moreover, the benefits to be derived from this sale, as outlined in the Policy Justification, outweigh the potential damage that could result if the sensitive technology were revealed to unauthorized persons.

5. All defense articles and services listed in this transmittal are authorized for release and export to the Taipei Economic and Cultural Representative Office (TECRO) in the United States.

[FR Doc. 2017–15096 Filed 7–18–17; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Transmittal No. 16–67]

Arms Sales Notification

AGENCY: Defense Security Cooperation Agency, Department of Defense.

ACTION: Notice.

SUMMARY: The Department of Defense is publishing the unclassified text of an arms sales notification.

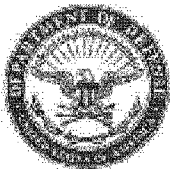
FOR FURTHER INFORMATION CONTACT: Kathy Valadez, (703) 697–9217 or Pamela Young, (703) 697–9107; DSCA/DSA–RAN.

SUPPLEMENTARY INFORMATION: This 36(b)(1) arms sales notification is published to fulfill the requirements of section 155 of Public Law 104–164 dated July 21, 1996. The following is a copy of a letter to the Speaker of the House of Representatives, Transmittal 16–67 with attached Policy Justification and Sensitivity of Technology.

Dated: July 13, 2017.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.



DEFENSE SECURITY COOPERATION AGENCY
201 12TH STREET SOUTH, STE 203
ARLINGTON, VA 22202-5408

JUN 29 2017

The Honorable Paul D. Ryan
Speaker of the House
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Speaker:

Pursuant to the reporting requirements of Section 36(b)(1) of the Arms Export Control Act, as amended, we are forwarding herewith Transmittal No. 16-67, concerning the Department of the Navy's proposed Letter(s) of Acceptance to the Taipei Economic and Cultural Representative Office in the United States for defense articles and services estimated to cost $125 million. After this letter is delivered to our office, we plan to issue a news release to notify the public of this proposed sale.

Sincerely,

J.W. Rixey
Vice Admiral, USN
Director

Enclosures:
1. Transmittal
2. Policy Justification
3. Sensitivity of Technology

Transmittal No. 16–67

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(l) of the Arms Export Control Act, as Amended

(i) *Prospective Purchaser:* Taipei Economic and Cultural Representative Office (TECRO) in the United States

(ii) *Total Estimated Value:*

Major Defense Equipment*	$100 million
Other	25 million
Total	125 million

(iii) *Description and Quantity or Quantities of Articles or Services under Consideration for Purchase:*

Major Defense Equipment (MDE):

Sixteen (16) Standard Missile-2 (SM–2) Block IIIA All-Up Rounds (AUR)

Forty-seven (47) MK 93 MOD 1 SM–2 Block IIIA Guidance Sections (GSs)

Five (5) MK 45 MOD 14 SM–2 Block IIIA Target Detecting Device (TDDs) Shrouds

Non-MDE includes:

Seventeen (17) MK 11 MOD6 SM–2 Block IIIA Autopilot Battery Units (APBUs) maneuverability upgrades on the GSs, sixty-nine (69) section containers and sixteen (16) AUR containers, operator manuals and technical documentation, U.S. Government and contractor engineering, technical and logistics support services.

(iv) *Military Department:* Navy (LHT)

(v) *Prior Related Cases, if any:* FMS Cases TW–P–LGQ

(vi) *Sales Commission, Fee., etc., Paid, Offered, or Agreed to be Paid:* None

(vii) *Sensitivity of Technology Contained in the Defense Article or Defense Services Proposed to be Sold:* See attached annex

(viii) *Date Report Delivered to Congress:* 29 JUN 2017

*as defined in Section 47(6) of the Arms Export Control Act.

POLICY JUSTIFICATION

Taipei Economic and Cultural Representative Office (TECRO) in the United States—SM–2 Block IIIA Standard Missiles and Components

TECRO has requested a possible sale of sixteen (16) Standard Missile-2 (SM–2) Block IIIA All Up Rounds (AUR), forty-seven (47) MK 93 MOD 1 SM–2 Block IIIA Guidance Sections (GSs), and five (5) MK 45 MOD 14 SM–2 Block IIIA Target Detecting Devices (TDDs) Shrouds. This request also includes Seventeen (17) MK 11 MOD6 SM–2 Block IIIA Autopilot Battery Units (APBUs) maneuverability upgrades on the GSs, sixty-nine (69) section containers and sixteen (16) AUR containers, operator manuals and technical documentation, U.S. Government and contractor engineering, technical and logistics support services. The total estimated program cost is $125 million.

This proposed sale is consistent with United States law and policy, as expressed in Public Law 96–8.

This proposed sale serves U.S. national, economic and security interests by supporting the recipient's continuing efforts to modernize its armed forces and enhance its defensive capabilities. The proposed sale will help improve the security of the recipient and assist in maintaining political stability, military balance and economic progress in the region.

The proposed sale will improve the recipient's capability in current and future defensive efforts. The recipient will use the enhanced capability as a deterrent to regional threats and to strengthen homeland defense. The SM–2 Block IIIA missiles and components proposed in this purchase will be used to supplement existing inventories of SM–2 Block IIIAs to be used for self-defense against air and cruise missile threats onboard their destroyer-class surface ships. The recipient will have no difficulty absorbing this equipment into its armed forces.

The proposed sale of this equipment and support will not alter the military balance in the region.

The prime contractor will be Raytheon Missiles Systems Company of Tucson, Arizona. There are no known offset agreements proposed in connection with this potential sale.

It is estimated that during implementation of this proposed sale, a number of U.S. Government and contractor representatives will be assigned to the recipient or travel there intermittently during the program.

There will be no adverse impact on U.S. defense readiness as a result of this proposed sale.

Transmittal No. 16–67

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(l) of the Arms Export Control Act

Annex

Item No. vii

(vii) *Sensitivity of Technology:*

1. A completely assembled STANDARD Missile-2 (SM–2) Block IIIA with or without a conventional warhead, whether a tactical or inert (training) configuration, is classified CONFIDENTIAL. Missile component hardware includes: Guidance Section (classified CONFIDENTIAL), Target Detection Device (classified CONFIDENTIAL), Warhead (UNCLASSIFIED), Rocket Motor (UNCLASSIFIED), Steering Control Section (UNCLASSIFIED), Safe and Arming Device (UNCLASSIFIED), and Autopilot Battery Unit (classified CONFIDENTIAL).

2. SM–2 operator and maintenance documentation is considered CONFIDENTIAL. Shipboard operation/firing guidance is considered CONFIDENTIAL. Pre-firing missile assembly/pedigree information is UNCLASSIFIED.

3. If a technologically advanced adversary were to obtain knowledge of the specific hardware and software elements, the information could be used to develop countermeasures that might reduce weapon system effectiveness or be used in the development of a system with similar or advanced capabilities.

4. A determination has been made that recipient can provide substantially the same degree of protection for the sensitive technology being released as the U.S. Government. This sale is necessary in furtherance of the U.S. foreign policy and national security objectives outlined in the Policy Justification.

5. All defense articles and services listed in this transmittal have been authorized for release and export to the Taipei Economic and Cultural Representative Office (TECRO) in the United States.

[FR Doc. 2017–15092 Filed 7–18–17; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Transmittal No. 16–68]

36(b)(1) Arms Sales Notification

AGENCY: Defense Security Cooperation Agency, Department of Defense.

ACTION: Notice.

SUMMARY: The Department of Defense is publishing the unclassified text of a section 36(b)(1) arms sales notification.

FOR FURTHER INFORMATION CONTACT: Kathy Valadez, (703) 697–9217 or Pamela Young, (703) 697–9107; DSCA/DSA–RAN.

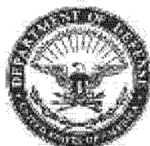
SUPPLEMENTARY INFORMATION: This 36(b)(1) arms sales notification is published to fulfill the requirements of section 155 of Public Law 104–164 dated July 21, 1996. The following is a copy of a letter to the Speaker of the House of Representatives, Transmittal 16–68 with attached Policy Justification.

Dated: July 13, 2017.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

BILLING CODE 5001–06–P



DEFENSE SECURITY COOPERATION AGENCY
201 12TH STREET SOUTH, STE 203
ARLINGTON, VA 22202-5408

JUN 29 2017

The Honorable Paul D. Ryan
Speaker of the House
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Speaker:

Pursuant to the reporting requirements of Section 36(b)(1) of the Arms Export Control Act, as amended, we are forwarding herewith Transmittal No. 16-68, concerning the Department of the Navy's proposed Letter(s) of Acceptance to the Taipei Economic and Cultural Representative Office in the United States for defense articles and services estimated to cost $175 million. After this letter is delivered to our office, we plan to issue a news release to notify the public of this proposed sale.

Sincerely,

J. W. Rixey
Vice Admiral, USN
Director

Enclosures:
1. Transmittal
2. Policy Justification
3. Sensitivity of Technology

BILLING CODE 5001–06–C

Transmittal No. 16–68

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(l) of the Arms Export Control Act, as amended

(i) *Prospective Purchaser:* Taipei Economic and Cultural Representative Office (TECRO) in the United States

(ii) *Total Estimated Value:*

Major Defense Equipment *	$100 million
Other	75 million
TOTAL	175 million

(iii) *Description and Quantity or Quantities of Articles or Services under Consideration for Purchase:*

Major Defense Equipment (MDE):

One hundred sixty-eight (168) MK–54 Lightweight Torpedo (LWT) Conversion Kits

Non-MDE includes:

Shipping containers, operator manuals and technical documentation, U.S. Government and contractor engineering, technical and logistics support services.

(iv) *Military Department:* Navy

(v) *Prior Related Cases, if any:* FMS Cases TW–P–AJX and TW–P–AKB

(vi) *Sales Commission, Fee, etc., Paid, Offered, or Agreed to be Paid:* None

(vii) *Sensitivity of Technology Contained in the Defense Article or Defense Services Proposed to be Sold:* See Attached annex

(viii) *Date Report Delivered to Congress:* 29 JUN 2017

* as defined in Section 47(6) of the Arms Export Control Act.

POLICY JUSTIFICATION

Taipei Economic and Cultural Representative Office (TECRO) in the United States— MK–54 Lightweight Torpedo (LWT) Conversion Kits

TECRO has requested a possible sale of MK–54 Lightweight Torpedo (LWT) Conversion Kits. This request provides the recipient with MK–54 LWTs in support of their LWT program. This sale will include LWT containers, torpedo support, torpedo spare parts, publications, training, weapon system support, engineering and technical assistance for the upgrade and conversion of one hundred sixty eight (168) MK–46 Mod 5 Torpedoes to the MK–54 Lightweight Torpedo (LWT) configuration. The total estimated program cost is $175 million.

This proposed sale is consistent with United States law and policy, as expressed in Public Law 96–8.

This proposed sale serves U.S. national, economic and security interests by supporting the recipients continuing efforts to modernize its armed forces and enhance its defensive capabilities. The proposed sale will help improve the security of the recipient and assist in maintaining political stability, military balance and economic progress in the region.

The proposed sale will improve the recipient's capability in current and future defensive efforts. The recipient will use the enhance capability as a deterrent to regional threats and to strengthen homeland defense. The recipient will have no difficulty absorbing this equipment into its armed forces.

The proposed sale of this equipment and support will not alter the basic military balance in the region.

The will be various contactors involved in this case.

There are no known offset agreements proposed in connection with this potential sale.

It is estimated that during implementation of this proposed sale, a number of U.S. Government and contractor representatives will be assigned to the recipient or travel there intermittently during the program .

There will be no adverse impact on U.S. defense readiness as a result of this proposed sale.

Annex Item No vii

(vii) *Sensitivity of Technology:*

1. The MK 54 Lightweight Torpedo (LWT) has been in service in the U.S. Navy (USN) since 2004. The version offered in this sale is the MK54 Mod 0 of the system. The purchaser currently does not have this weapon system in its inventory. The proposed sale consists 168 MK–54 Mod 0 LWT conversion kits, containers, spare and repair parts, weapon system support and integration, personnel training, training equipment, test equipment, U.S. Government and contractor engineering, technical and logistical support services and other related elements of logistical support.

a. Although the MK 54 Mod 0 LWT is considered state-of-the-art-technology, there is no Critical Program Information associated with the MK 54 Mod 0 LWT hardware, technical documentation or software. The highest classification of the hardware to be exported is SECRET. The highest classification of the technical manual that will be exported is CONFIDENTIAL. The technical manual is required for operation of the MK 54 Mod 0 LWT. The highest classification of the software to be exported is SECRET.

2. Loss of hardware, software, publications or other items associated with the proposed sale to a technologically advanced or competent adversary, poses the risk of the destruction of the countermeasures or replication and/or improvements to the adversary's Undersea Weapon Systems, weakening U.S. defense capabilities.

3. If a technologically advanced adversary were to obtain knowledge of the specific hardware and software elements, the information could be used to develop countermeasures which might reduce weapon system effectiveness or be used in development of a system with similar or advanced capabilities.

4. A determination has been made that the recipient country can provide substantially the same degree of protection for the sensitive technology being released as the U.S. Government. This sale is necessary in furtherance of the U.S. foreign policy and national security objectives in the Policy justification.

5. All defense articles and services listed in this transmittal have been authorized for release and export to the government of Taipei Economic and Cultural Representative Office (TECRO) in the United States.

[FR Doc. 2017–15072 Filed 7–18–17; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Defense Business Board; Notice of Federal Advisory Committee Meeting

AGENCY: Deputy Chief Management Officer, Department of Defense.

ACTION: Notice of Federal Advisory Committee meeting.

SUMMARY: The Department of Defense (DoD) is publishing this notice to announce that the following Federal Advisory Committee meeting of the Defense Business Board will take place.

DATES: Open to the public Wednesday, August 2, 2017 from 9:30 a.m. to 11:00 a.m.

ADDRESSES: The address for the open meeting is Room 3E863 in the Pentagon, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Roma Laster, (703) 695–7563 (Voice), (703) 614–4365 (Facsimile), *roma.k.laster.civ@mail.mil* (Email). Mailing address is Defense Business Board, 1155 Defense Pentagon, Room 5B1088A, Washington, DC 20301–1155, Web site: *http://dbb.defense.gov/.* The most up-to-date changes to the meeting agenda can be found on the Web site.

SUPPLEMENTARY INFORMATION: 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 and 102–3.150. For meeting information please contact Mr. Steven Cruddas, Defense Business Board, 1155 Defense Pentagon, Room 5B1088A, Washington, DC 20301–1155, *steven.m.cruddas.civ@mail.mil,* (703) 697–2168. To submit written comments or questions to the Board, send via email to mailbox address: *osd.pentagon.odam.mbx.defense-business-board@mail.mil.* A copy of the public agenda and the terms of reference for the Task Group study may be obtained from the Board's Web site at *http://dbb.defense.gov/meetings.*

Purpose of the Meeting: The mission of the Board is to examine and advise the Secretary of Defense on overall DoD management and governance. The Board provides independent advice which reflects an outside private sector perspective on proven and effective best business practices that can be applied to DoD. The Board will hear an outbrief, findings, and recommendations from its Task Group on ''Implications of Technology on the Future Workforce.''

Agenda: 9:30 a.m.–9:35 a.m.—DFO Comments to Public Attendees; 9:35 a.m.–10:30 a.m.—DBB Study Outbrief on ''Implications of Technology on the Future Workforce''; 10:30 a.m.–10:45 a.m.—Public Comments (if time permits); 10:45 a.m.–11:00 a.m.—Board Deliberations and Vote.

Meeting Accessibility: 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 Mr. Steven Cruddas at the number listed in the **SUPPLEMENTARY INFORMATION** section no later than 12:00 p.m. on Thursday, July 27, 2017 to register and make arrangements for a Pentagon escort, if necessary. Individuals requiring special accommodations to access the public meeting should contact Mr. Steven Cruddas at least five (5) business days prior to the meeting so that appropriate arrangements can be made.

Written Statements: Written comments should be received by the Designated Federal Officer (DFO) at least five (5) business days prior to the meeting date so that the comments may be made available to the Board for their consideration prior to the meeting. Written comments should be submitted via email to the email address for public comments given in the **SUPPLEMENTARY INFORMATION** section in either Adobe Acrobat or Microsoft Word format. Please note that since the Board operates under the provisions of the Federal Advisory Committee Act, as amended, all submitted comments and public presentations will be treated as public documents and will be made available for public inspection, including, but not limited to, being posted on the Board's Web site.

Dated: July 14, 2017.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2017–15149 Filed 7–18–17; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2017–ICCD–0104]

Agency Information Collection Activities; Comment Request; an Impact Evaluation of Training in Multi-Tiered Systems of Support for Behavior (MTSS–B)

AGENCY: Institute of Education Sciences (IES), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, ED is proposing a revision of an existing information collection.

DATES: Interested persons are invited to submit comments on or before September 18, 2017.

ADDRESSES: To access and review all the documents related to the information collection listed in this notice, please use *http://www.regulations.gov* by searching the Docket ID number ED–2017–ICCD–0104. Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at *http://www.regulations.gov* by selecting the Docket ID number or via postal mail, commercial delivery, or hand delivery. *Please note that comments submitted by fax or email and those submitted after the comment period will not be accepted.* Written requests for information or comments submitted by postal mail or delivery should be addressed to the Director of the Information Collection Clearance Division, U.S. Department of Education, 400 Maryland Avenue SW., LBJ, Room 216–32, Washington, DC 20202–4537.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Lauren Angelo, 202–245–7276.

SUPPLEMENTARY INFORMATION: The Department of Education (ED), in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand the Department's information collection requirements and provide the requested data in the desired format. ED is soliciting comments on the proposed information collection request (ICR) that is described below. The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: An Impact Evaluation of Training in Multi-Tiered Systems of Support for Behavior (MTSS–B).

OMB Control Number: 1850–0921.

Type of Review: A revision of an existing information collection.

Respondents/Affected Public: Individuals or Households.

Total Estimated Number of Annual Responses: 2,568.

Total Estimated Number of Annual Burden Hours: 457.

Abstract: This submission requests approval of a third year of select data collection activities that will be used to support the Impact Evaluation of Training in Multi-Tiered Systems of Support for Behavior (MTSS–B). The evaluation will estimate the impact on school staff practices, school climate, and student outcomes of providing training and support in the MTSS–B framework plus universal (Tier I) positive behavior supports and targeted (Tier II) interventions across two years. The third year of data collection will provide information on sustainability, the capacity of schools to continue implementation after the study-supported training and support are complete, as well as district efforts to scale-up the intervention in other schools.

Dated: July 14, 2017.

Stephanie Valentine,

Acting Director, Information Collection Clearance Division, Office of the Chief Privacy Officer, Office of Management.

[FR Doc. 2017–15133 Filed 7–18–17; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Office of Energy Efficiency and Renewable Energy

[Case No. CR–007]

Notice of Petition for Waiver of ITW Food Equipment Group, LLC From the Department of Energy Commercial Refrigeration Equipment Test Procedures and Grant of Interim Waiver

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Notice of petition for waiver and grant of interim waiver, and request for public comment.

SUMMARY: This notice announces receipt of and publishes a petition for waiver from ITW Food Equipment Group, LLC (ITW) seeking an exemption from specified portions of the U.S. Department of Energy (DOE) test procedure for determining the energy consumption of commercial refrigeration equipment under the regulations for basic models of their Innopod temperature controlled grocery and general merchandise system (Innopod). ITW requests modifications, as specified in its petition for waiver, to the existing DOE test procedure, which references Air-Conditioning, and Refrigeration Institute (ARI) Standard 1200–2006 and Air-Conditioning, Heating, and Refrigeration Institute (AHRI) Standard 1200 (I–P)–2010 that further references American National Standards Institute/American Society of Heating, Refrigerating and Air-Conditioning Engineers (ANSI/ASHRAE) Standard 72. ITW submitted to DOE an alternate test procedure that allows for testing of specified Innopod basic models. This notice also announces that DOE has granted ITW an interim waiver from the DOE commercial refrigeration equipment test procedures for the specified commercial refrigeration equipment basic models, subject to use of the alternative test procedure as set forth in this notice. DOE solicits comments, data, and information concerning ITW's petition and its suggested alternate test procedure.

DATES: DOE will accept comments, data, and information with regard to the ITW petition until August 18, 2017.

ADDRESSES: You may submit comments, identified by Case No. CR–007, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Email: AS_Waiver_Requests@ee.doe.gov.* Include the case number [Case No. CR–007] in the subject line of the message. Submit electronic comments in WordPerfect, Microsoft Word, PDF, or ASCII file format, and avoid the use of special characters or any form of encryption.
- *Postal Mail:* Mr. Bryan Berringer, U.S. Department of Energy, Building Technologies Office, Mailstop EE–5B, Petition for Waiver Case No. CR–007, 1000 Independence Avenue SW., Washington, DC 20585–0121. Telephone: (202) 586–0371. If possible, please submit all items on a compact disc (CD), in which case it is not necessary to include printed copies.
- *Hand Delivery/Courier:* Appliance and Equipment Standards Program, U.S. Department of Energy, Building Technologies Office, 950 L'Enfant Plaza SW., 6th Floor, Washington, DC, 20024. Telephone: (202) 586–6636. If possible, please submit all items on a CD, in which case it is not necessary to include printed copies.

Docket: The docket, which includes **Federal Register** notices, comments, and other supporting documents/materials, is available for review at *http://www.regulations.gov.* All documents in the docket are listed in the *http://www.regulations.gov* index. However, some documents listed in the index, such as those containing information that is exempt from public disclosure, may not be publicly available.

FOR FURTHER INFORMATION CONTACT: Mr. Bryan Berringer, U.S. Department of Energy, Building Technologies Office, Mailstop EE–5B, 1000 Independence Avenue SW., Washington, DC 20585–0121. Telephone: (202) 586–0371. Email: *AS_Waiver_Requests@ee.doe.gov.*

SUPPLEMENTARY INFORMATION:

I. Background and Authority

Title III, Part C [1] of the Energy Policy and Conservation Act of 1975 (EPCA), Public Law 94–163 (42 U.S.C. 6311–6316, as codified) established the Energy Conservation Program for Certain Industrial Equipment, which includes commercial refrigeration equipment.[2] Part C includes definitions, test procedures, labeling provisions, energy conservation standards, and the authority to require information and reports from manufacturers. Further, Part C authorizes the Secretary of Energy to prescribe test procedures that are reasonably designed to produce results that measure energy efficiency, energy use, or estimated operating costs during a representative average-use cycle, and that are not unduly burdensome to conduct. (42 U.S.C. 6314(a)(2)) The test procedure for commercial refrigeration equipment is contained in Title 10 of the CFR part 431, subpart C, appendix B, "*Amended Uniform Test Method for the Measurement of Energy Consumption of Commercial Refrigerators, Freezers, and Refrigerator-Freezers.*"

DOE's regulations set forth at 10 CFR 431.401 contain provisions that allow a person to seek a waiver from the test procedure requirements for a particular basic model of a type of covered equipment when the petitioner's basic model for which the petition for waiver was submitted contains one or more design characteristics that either (1) prevent testing according to the prescribed test procedures; or (2) cause the prescribed test procedures to evaluate the basic model in a manner so unrepresentative of its true energy consumption as to provide materially inaccurate comparative data. 10 CFR 431.401(a)(1). A petitioner must include in its petition any alternate test procedures known to the petitioner to evaluate the basic model in a manner representative of its energy consumption. 10 CFR 431.401(b)(1)(iii).

DOE may grant a waiver subject to conditions, including adherence to alternate test procedures. 10 CFR 431.401(f)(2). As soon as practicable after the granting of any waiver, DOE will publish in the **Federal Register** a notice of proposed rulemaking to amend its regulations so as to eliminate any need for the continuation of such waiver. As soon thereafter as practicable, DOE will publish in the **Federal Register** a final rule. 10 CFR 431.401(l).

The waiver process also allows DOE to grant an interim waiver if it appears likely that the petition for waiver will be granted and/or if DOE determines that it would be desirable for public policy reasons to grant immediate relief pending a determination on the petition

[1] For editorial reasons, upon codification in the U.S. Code, Part C was redesignated as Part A–1.

[2] All references to EPCA in this document refer to the statute as amended through the Energy Efficiency Improvement Act of 2015 (EEIA), Public Law 114–11 (April 30, 2015).

for waiver. 10 CFR 431.401(e)(2). Within one year of issuance of an interim waiver, DOE will either: (i) Publish in the **Federal Register** a determination on the petition for waiver; or (ii) publish in the **Federal Register** a new or amended test procedure that addresses the issues presented in the waiver. 10 CFR 431.401(h)(1). When DOE amends the test procedure to address the issues presented in a waiver, the waiver will automatically terminate on the date on which use of that test procedure is required to demonstrate compliance. 10 CFR 431.401(h)(2).

II. ITW's Petition for Waiver of Test Procedure and Application for Interim Waiver

On December 20, 2016, ITW submitted a petition for waiver and interim waiver pursuant to 10 CFR 431.401 pertaining to DOE's test procedure at 10 CFR part 431, subpart C, appendix B, for their Innopod temperature controlled grocery and general merchandise system (Innopod) basic models of commercial refrigeration equipment. ITW's initial petition included twenty-two base model configurations. On May 3, 2017, ITW provided DOE with the complete list of 200 basic models covered by the twenty-two base model configurations. ITW petitioned for a waiver and interim waiver from various DOE test procedure requirements.

DOE's current test procedure references Air-Conditioning, and Refrigeration Institute (ARI) Standard 1200–2006 and Air-Conditioning, Heating, and Refrigeration Institute (AHRI) Standard 1200 (I–P)–2010, which further references American National Standards Institute/American Society of Heating, Refrigerating and Air-Conditioning Engineers (ANSI/ASHRAE) Standard 72 (incorporated by reference at 10 CFR 431.63 (c) and (d)). ITW asserts that these current test procedures do not account for the unique operating characteristics of the Innopod basic models. Because the specific design of this product line contains one or more design characteristics noted in the waiver request, including floating suction temperatures for individual compartments, different typical door-opening cycles, and a high-temperature ''ambient'' compartment, ITW believes that its petition and combined application meets both conditions of 10 CFR 431.401(a)(1) for granting waivers, on the grounds that: (1) The petitioner's basic model contains one or more design characteristics that prevent testing according to the prescribed test procedures; and (2) The prescribed test procedures may evaluate the basic model in a manner so unrepresentative of its true energy consumption as to provide materially inaccurate comparative data. ITW submitted to DOE an alternate test procedure that allows for testing of its Innopod basic models.

ITW's Innopod basic models include multiple thermally separated, temperature controlled compartments supplied with refrigerant from a single condensing unit. ITW's petition proposes an alternate test using an ''inverse refrigeration load'' test, various calculations to account for refrigeration system and component energy consumption, and adjustments to the door opening requirements based on typical use in the field. ITW's proposed refrigeration system calculations rely on the current calculations and assumptions used for testing remote condensing commercial refrigeration equipment in accordance with the DOE test procedure.

As previously noted, an interim waiver may be granted if it appears likely that the petition for waiver will be granted, and/or if DOE determines that it would be desirable for public policy reasons to grant immediate relief pending a determination of the petition for waiver. See 10 CFR 431.401(e)(2).

DOE understands that absent an interim waiver, the basic models identified by ITW in its petition cannot be tested and rated for energy consumption on a basis representative of their true energy consumption characteristics. DOE has reviewed the alternate procedure suggested by ITW and concludes that it will allow for the accurate measurement of the energy use of these equipment, while alleviating the testing problems associated with ITW's implementation of DOE's applicable commercial refrigeration equipment test procedure for the specified Innopod models. However, DOE has clarified how ITW should determine basic models, as discussed in section III of this notice, and adjusted certain aspects of the requested alternate test procedure regarding ambient test conditions, referenced industry standards, and calculations, as discussed in section IV of this notice. Thus, DOE has determined that ITW's petition for waiver will likely be granted and has decided that it is desirable for public policy reasons to grant ITW immediate relief pending a determination on the petition for waiver.

III. Petition for Waiver and Interim Waiver Basic Models

ITW's initial petition for waiver and interim waiver, submitted on December 20, 2016, included a list of twenty-two ''base model configurations'' of its Innopod equipment. However, based on the descriptions of the compartment configurations provided for each base model configuration, DOE expects that the list does not provide each basic model to which the waiver and interim waiver would apply.

Specifically, DOE noted that many of the base model configurations include compartments that are convertible between the freezer and refrigerator temperature operating ranges. With respect to multi-mode operation, DOE has taken the position in the most recent commercial refrigeration equipment test procedure final rule that self-contained equipment or remote condensing equipment with thermostats capable of operating at temperatures that span multiple equipment categories must be certified and comply with DOE's regulations for each applicable equipment category. 79 FR 22291 (April 21, 2014).

Additionally, DOE notes that its current regulations allow for the use of alternative efficiency determination methods (AEDMs), which allow manufacturers to simulate the energy use of untested basic models once a manufacturer has a validated AEDM and could be used to simulate results at other rating temperatures. 10 CFR 429.70.

Under DOE's definition of a basic model as ''equipment manufactured by one manufacturer within a single equipment class, having the same primary energy source, and that have essentially identical electrical, physical, and functional characteristics that affect energy consumption'' (10 CFR 431.62), the base model configurations in ITW's initial petition would represent multiple basic models depending on the set point of the convertible compartments. DOE requested that ITW provide an updated list of basic models, consistent with DOE's definition of basic model, that would be covered by the petition for waiver and request for interim waiver. ITW provided DOE with the updated list of basic model numbers on May 3, 2017.

ITW's petition also describes compartments that are convertible between refrigerator and ambient temperature ranges. These compartments would only be considered refrigerator compartments under DOE's definitions (compartments capable of operating at or above 32 °F

(±2°F)). Accordingly, these compartments would only be tested and rated at the refrigerator compartment standardized temperature (38 °F).

IV. Summary of Grant of Interim Waiver

For the reasons stated in section II of this notice, DOE has granted ITW's application for interim waiver from testing for its specified commercial refrigeration equipment basic models, with minor modifications to the proposed approach. The substance of the interim waiver is summarized below.

ITW is required to test and rate the specified ITW commercial refrigeration equipment Innopod basic models [3] according to the alternate test procedure as set forth in section V, ''Alternate Test Procedure.'' DOE has revised ITW's proposed test approach to reflect ambient test conditions that are consistent with those required in the DOE test procedure. DOE has determined that the ambient condition requirement would not prevent testing of the Innopod basic models. Additionally, DOE has revised ITW's proposed alternate approach to reference the current version of the AHRI 1200 standard referenced in DOE's existing test procedure. Further, DOE has clarified certain details of the necessary measurements and calculations in the granted interim waiver.

In addition, DOE is requiring that ITW test compartments in all relevant equipment configurations, as required by the current test procedure. Any compartments that are convertible between the refrigerator and freezer operating temperature ranges must be tested and rated under both test settings; however, the compartments in the ITW equipment that are convertible between ambient and refrigerator temperature ranges must be tested only at the refrigerator standardized compartment temperature of 38 °F, as described in section III of this notice.

ITW must make representations about the energy use of these basic models for compliance, marketing, or other purposes only to the extent that such equipment have been tested in accordance with the provisions set forth in the alternate test procedure and such representations fairly disclose the results of such testing in accordance with 10 CFR part 429, subpart B.

DOE makes decisions on waivers and interim waivers for only those basic models specifically set out in the petition, not future models that may be manufactured by the petitioner. ITW may request that DOE extend the scope of a waiver or an interim waiver to include additional basic models employing the same technology as the basic models set forth in the original petition consistent with 10 CFR 431.401(g). In addition, DOE notes that granting of an interim waiver or waiver does not release a petitioner from the certification requirements set forth at 10 CFR part 429. See also 10 CFR 431.401(a) and (i).

The interim waiver shall remain in effect consistent with 10 CFR 431.401(h). Furthermore, this interim waiver is conditioned upon the presumed validity of statements, representations, and documents provided by the petitioner. DOE may rescind or modify a waiver or interim waiver at any time upon a determination that the factual basis underlying the petition for waiver or interim waiver is incorrect, or upon a determination that the results from the alternate test procedure are unrepresentative of the basic model's true energy consumption characteristics. See 10 CFR 431.401(k).

V. Alternate Test Procedure

EPCA requires that manufacturers use DOE test procedures when making representations about the energy consumption and energy consumption costs of equipment covered by the statute. (42 U.S.C. 6293(c); 6314(d)) Consistent representations about the energy efficiency of covered equipment are important for consumers evaluating equipment when making purchasing decisions and for manufacturers to demonstrate compliance with applicable DOE energy conservation standards. Pursuant to its regulations applicable to waivers and interim waivers from applicable test procedures at 10 CFR 431.401, and after considering public comments on the petition, DOE will announce its decision as to an alternate test procedure for ITW in a subsequent Decision and Order.

During the period of the interim waiver granted in this notice, ITW shall test the basic models listed in section IV according to the test procedure for commercial refrigeration equipment prescribed by DOE at 10 CFR part 431, subpart C, appendix B, with some of the modifications to the existing DOE test requirements as specified in ITW's petition. However, DOE is requiring that ITW test its Innopod basic models according to the ambient test conditions as outlined in AHRI Standard 1200 (I–P)–2010 section 4.1.2, which requires a wet-bulb test room temperature of 64.4 °F ± 1.8 °F, rather than the conditions

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[3] 30–XX–X5–AAAAR, 30–XX–X5–AAARA, 30–XX–X5–AAARR, 30–XX–X5–AAAFA, 30–XX–X5–AAAFR, 30–XX–X5–AARAA, 30–XX–X5–AARAR, 30–XX–X5–AARRA, 30–XX–X5–AARRR, 30–XX–X5–AARFA, 30–XX–X5–AARFR, 30–XX–X5–AAFAA, 30–XX–X5–AAFAR, 30–XX–X5–AAFRA, 30–XX–X5–AAFRR, 30–XX–X5–AAFFA, 30–XX–X5–AAFFR, 30–XX–X5–ARAAA, 30–XX–X5–ARAAR, 30–XX–X5–ARARA, 30–XX–X5–ARARR, 30–XX–X5–ARAFA, 30–XX–X5–ARAFR, 30–XX–X5–ARRAA, 30–XX–X5–ARRAR, 30–XX–X5–ARRRA, 30–XX–X5–ARRRR, 30–XX–X5–ARRFA, 30–XX–X5–ARRFR, 30–XX–X5–ARFAA, 30–XX–X5–ARFAR, 30–XX–X5–ARFRA, 30–XX–X5–ARFRR, 30–XX–X5–ARFFA, 30–XX–X5–ARFFR, 30–XX–X5–AFAAA, 30–XX–X5–AFAAR, 30–XX–X5–AFARA, 30–XX–X5–AFARR, 30–XX–X5–AFAFA, 30–XX–X5–AFAFR, 30–XX–X5–AFRAA, 30–XX–X5–AFRAR, 30–XX–X5–AFRRA, 30–XX–X5–AFRRR, 30–XX–X5–AFRFA, 30–XX–X5–AFRFR, 30–XX–X5–AFFAA, 30–XX–X5–AFFAR, 30–XX–X5–AFFRA, 30–XX–X5–AFFRR, 30–XX–X5–RAAAA, 30–XX–X5–RAAAR, 30–XX–X5–RAARA, 30–XX–X5–RAARR, 30–XX–X5–RAAFA, 30–XX–X5–RAAFR, 30–XX–X5–RARAA, 30–XX–X5–RARAR, 30–XX–X5–RARRA, 30–XX–X5–RARRR, 30–XX–X5–RARFA, 30–XX–X5–RARFR, 30–XX–X5–RAFAA, 30–XX–X5–RAFAR, 30–XX–X5–RAFRA, 30–XX–X5–RAFRR, 30–XX–X5–RAFFA, 30–XX–X5–RAFFR, 30–XX–X5–RRAAA, 30–XX–X5–RRAAR, 30–XX–X5–RRARA, 30–XX–X5–RRARR, 30–XX–X5–RRAFA, 30–XX–X5–RRAFR, 30–XX–X5–RRRAA, 30–XX–X5–RRRAR, 30–XX–X5–RRRRA, 30–XX–X5–RRRFA, 30–XX–X5–RRFAA, 30–XX–X5–RRFAR, 30–XX–X5–RRFRA, 30–XX–X5–RRFFA, 30–XX–X5–RFAAA, 30–XX–X5–RFAAR, 30–XX–X5–RFARA, 30–XX–X5–RFARR, 30–XX–X5–RFAFA, 30–XX–X5–RFAFR, 30–XX–X5–RFRAA, 30–XX–X5–RFRAR, 30–XX–X5–RFRRA, 30–XX–X5–RFRFA, 30–XX–X5–RFFAA, 30–XX–X5–RFFAR, 30–XX–X5–RFFRA, 30–XX–X5–FAAAA, 30–XX–X5–FAAAR, 30–XX–X5–FAARA, 30–XX–X5–FAARR, 30–XX–X5–FAAFA, 30–XX–X5–FAAFR, 30–XX–X5–FARAA, 30–XX–X5–FARAR, 30–XX–X5–FARRA, 30–XX–X5–FARRR, 30–XX–X5–FARFA, 30–XX–X5–FARFR, 30–XX–X5–FAFAA, 30–XX–X5–FAFAR, 30–XX–X5–FAFRA, 30–XX–X5–FAFRR, 30–XX–X5–FRAAA, 30–XX–X5–FRAAR, 30–XX–X5–FRARA, 30–XX–X5–FRARR, 30–XX–X5–FRAFA, 30–XX–X5–FRAFR, 30–XX–X5–FRRAA, 30–XX–X5–FRRAR, 30–XX–X5–FRRRA, 30–XX–X5–FRRFA, 30–XX–X5–FRFAA, 30–XX–X5–FRFAR, 30–XX–X5–FRFRA, 30–XX–X5–FFAAA, 30–XX–X5–FFAAR, 30–XX–X5–FFARA, 30–XX–X5–FFARR, 30–XX–X5–FFRAA, 30–XX–X5–FFRAR, 30–XX–X5–FFRRA, 30–XX–X4A–AAAR, 30–XX–X4A–AARA, 30–XX–X4A–AARR, 30–XX–X4A–ARAA, 30–XX–X4A–ARAR, 30–XX–X4A–ARRA, 30–XX–X4A–ARRR, 30–XX–X4A–AFAA, 30–XX–X4A–AFAR, 30–XX–X4A–AFRA, 30–XX–X4A–AFRR, 30–XX–X4A–RAAA, 30–XX–X4A–RAAR, 30–XX–X4A–RARA, 30–XX–X4A–RARR, 30–XX–X4A–RRAA, 30–XX–X4A–RRAR, 30–XX–X4A–RRRA, 30–XX–X4A–RFAA, 30–XX–X4A–RFAR, 30–XX–X4A–RFRA, 30–XX–X4A–FAAA, 30–XX–X4A–FAAR, 30–XX–X4A–FARA, 30–XX–X4A–FARR, 30–XX–X4A–FRAA, 30–XX–X4A–FRAR, 30–XX–X4A–FRRA, 30–XX–X4A–FFAA, 30–XX–X4A–FFAR, 30–XX–X4A–FFRA, 30–XX–X4B–AAAR, 30–XX–X4B–AARA, 30–XX–X4B–AARR, 30–XX–X4B–AAFA, 30–XX–X4B–AAFR, 30–XX–X4B–ARAA, 30–XX–X4B–ARAR, 30–XX–X4B–ARRA, 30–XX–X4B–ARRR, 30–XX–X4B–ARFA, 30–XX–X4B–ARFR, 30–XX–X4B–AFAA, 30–XX–X4B–AFAR, 30–XX–X4B–AFRA, 30–XX–X4B–AFRR, 30–XX–X4B–AFFA, 30–XX–X4B–AFFR, 30–XX–X4B–RAAA, 30–XX–X4B–RAAR, 30–XX–X4B–RARA, 30–XX–X4B–RARR, 30–XX–X4B–RAFA, 30–XX–X4B–RAFR, 30–XX–X4B–RRAA, 30–XX–X4B–RRAR, 30–XX–X4B–RRRA, 30–XX–X4B–RRFA, 30–XX–X4B–RFAA, 30–XX–X4B–RFAR, 30–XX–X4B–RFRA, 30–XX–X4B–RFFA, 30–XX–XX–3–AAR, 30–XX–XX–3–30–XX–XX–3–ARA, 30–XX–XX–3–ARR, 30–XX–XX–3–RAA, 30–XX–XX–3–RAR, and 30–XX–XX–3–RRA.

requested in the petition for waiver, which instead specify a test room dew point. Additionally, DOE has revised ITW's proposed alternate approach to reference the current version of the AHRI 1200 standard referenced in DOE's existing test procedure, AHRI Standard 1200 (I–P)–2010. DOE has also clarified certain instructions, calculations, and measurements necessary to conduct the alternate test. Accordingly, DOE grants an interim waiver to ITW, but with modifications to ITW's requested approach. The applicable method of test for the specified ITW basic models is the test procedure for commercial refrigeration equipment prescribed by DOE at 10 CFR 431, subpart C, appendix B, with the following modifications:

For the purpose of testing and rating, the Ambient (75 °F) compartment is treated as a Medium (Refrigerator at 75 °F) compartment. All volume and energy consumption calculations will be included within the Medium (Refrigerator 38 °F) category and summed with other Medium (Refrigerator 38 °F) compartment calculation(s). Compartments that are convertible between ambient and refrigerator temperature ranges shall be tested at the refrigerator temperature (38 °F). Compartments that are convertible between refrigerator and freezer (0 °F) temperature ranges shall be tested at both temperatures.

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Test Condition/s or Calculation/s	Alternate Innopod Test Procedure
Test Method	"Inverse Refrigeration Load" test Allows energy (Heat) loss at a rate and delta-T equivalent to energy gains of a standard refrigerated cabinet.
Ambient	Dry Bulb: 75.2 °F ±1.8 °F Wet Bulb: 64.4 °F±1.8 °F
Integrated Average Temperature (IAT) Simulated Product vs. Test Ambient Delta-T	Refrigerator: (75.2 °F + 75.2 °F – 38 °F) = 112.4 °F ±2 °F Freezer: (75.2 °F + 75.2 °F – 0 °F) = 150.4 °F ±2 °F Ambient: (75.2 °F + 75.2 °F – 75 °F) = 75.4 °F ±2 °F *To ensure compartment temperature stability, the average of all temperature measurements at the end of the test period must be no lower than the average of all temperature measurements at the start of the test period. Inside Outside Delta-T Refrigerator: 112.4 °F 75.2 °F 37.2 °F Freezer: 150.4 °F 75.2 °F 75.2 °F Ambient: 75.04 °F 75.2 °F 0.4 °F Heat – LOSS = Heat – GAIN as prescribed in the test procedure
Door-Opening Requirement	Door openings shall start 3 hours after concluding stabilization period. Open each door for 8 seconds, every 2 hours, for 10 consecutive hours. (6 door cycles) (3 "load" and "unload" cycles) > Stock (load) + Retrieve (un-load) = Cycle (turn)
Calculation of Refrigeration Load	Total energy added divided by the total test time. "Inverse Refrigeration Load" $Q = \frac{Win\ (watt\text{-}hour) \times 3.412\ (BTU/watt\text{-}hour)}{t\ (Hr.)} = (BTU/Hr.)$ Where: Win = energy input measured over test period for all energized components (heaters, controls, and fans) located in the refrigerated compartments. Anti-sweat heaters shall be de-energized for the test. t = test duration (24 hours) Provides the "energy removed" by infiltration.
Adjusted Dew Point & EER AHRI 1200-2010 Table 1, EER	Dew Point (D.P.): Derived from standard industry design practices, "as the customary saturated vapor temperature of the refrigerant as it leaves the cabinet through the suction line." The Energy Efficiency Ratio is then taken from this value using Table 1. EER A.D.P.: Med. Temp. = (D.P.: +15 °F) – 2 °F = +13 °F EER = 11.22 Btu/Wh A.D.P.: Low Temp. = (D.P.: -20 °F) – 3 °F = -23 °F EER = 6.60 Btu/Wh
Calculated Daily Energy Consumption AHRI 1200-2010	Part 1: REVISED, Calculation of CEC CEC = [(Q × t) + ML + (FEC + AEC + DEC) × 3.412] / (1000 × EER) >"Q" does NOT include waste heat from auxiliary components and moisture infiltration (must be added separately). Where: ML: Moisture load impacts (see below) FEC: Evaporator Fan/s [measured fan power × runtime per day] (Wh/day) AEC: Anti-Condensate Heater/s [measured heater power × runtime per day] (Wh/day) DEC: Defrost Heater/s [measured heater power × runtime per day] (Wh/day) Moisture load impact calculations: Total impact: Number of door openings times (Enthalpy Adjustment + Moisture/frost Accumulation): $ML = N_d \times (A_e + A_m)$ Where N_d = number of door openings during test Enthalpy Adjustment: $A_e = [(H_a - H_c) - (H_t - H_a)] \times m_a$ Where: H_a = ambient air enthalpy H_c = compartment air enthalpy based on air conditions during cold operation: 0 °F dry bulb/-20 °F dew pt. for freezer compartment; 38 °F dry bulb/20 °F dew pt. for refrigerator compartment; 75 °F dry bulb/20 °F dew pt. for ambient compartment. H_t = compartment air enthalpy during heat leak test based on dew point being equal to ambient air dew point

	m_a = mass of compartment air exchanged (30% of total compartment volume) based density of air during cold operation. Moisture/frost Accumulation: $A_m = C_{p,liner} \times W_{liner} \times \Delta T_{liner}$ Where: $C_{p,liner}$ = specific heat of liner material W_{liner} = weight of all liner parts ΔT_{liner} = maximum temperature rise of all liner parts (4.5 °F, 2.5 °F, and 1 °F for freezer, refrigerator, and ambient compartments, respectively) Part 2: Current, Calculation of CDEC CDEC = CEC + FEC + AEC + DEC + (any additional component energy consumption)

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VI. Summary and Request for Comments

Through this notice, DOE announces receipt of ITW's petition for waiver from the DOE test procedure for certain basic models of ITW commercial refrigeration equipment, and announces DOE's decision to grant ITW an interim waiver from the test procedure for the specified basic models of commercial refrigeration equipment. DOE is publishing ITW's petition for waiver in redacted form, pursuant to 10 CFR 431.401(b)(1)(iv). The petition contains confidential information. The petition includes a suggested alternate test procedure to determine the energy consumption of specific basic models of commercial refrigeration equipment. DOE may consider including this alternate procedure in a subsequent Decision and Order based on comments from interested parties. However, DOE has tentatively determined that the alternate procedure proposed by ITW is not entirely acceptable and has provided a modified alternate test procedure as a part of its grant of an interim waiver. DOE will consider public comments on the petition in issuing its Decision and Order.

DOE solicits comments from interested parties on all aspects of the petition, including the suggested alternate test procedure and calculation methodology. Pursuant to 10 CFR 431.401(d), any person submitting written comments to DOE must also send a copy of such comments to the petitioner. The contact information for the petitioner's representative is Ms. Mary Dane, Agency Approval Engineer, ITW Food Equipment Group, LLC, North American Refrigeration, 4401 Blue Mound Rd., Fort Worth, TX 76106. All comment submissions must include the agency name and Case No. CR–007 for this proceeding. Submit electronic comments in WordPerfect, Microsoft Word, Portable Document Format (PDF), or text (American Standard Code for Information Interchange (ASCII)) file format and avoid the use of special characters or any form of encryption. Wherever possible, include the electronic signature of the author. DOE does not accept telefacsimiles (faxes).

Pursuant to 10 CFR 1004.11, any person submitting information that he or she believes to be confidential and exempt by law from public disclosure should submit two copies to DOE: One copy of the document marked ''confidential'' with all of the information believed to be confidential included, and one copy of the document marked ''non-confidential'' with all of the information believed to be confidential deleted. DOE will make its own determination about the confidential status of the information and treat it according to its determination.

Issued in Washington, DC, on July 11, 2017.

Kathleen B. Hogan,

Deputy Assistant Secretary for Energy Efficiency, Energy Efficiency and Renewable Energy.

BILLING CODE 6450–01–P

INNOPOD TEMPERATURE CONTROLLED GROCERY AND GENERAL MERCHANDISE [redacted] SYSTEM

DEPARTMENT OF ENERGY PETITION FOR WAIVER AND APPLICATION FOR INTERIM WAIVER

December 20, 2016
Supplemented-May 3, 2017

May contain trade secrets or commercial or financial information that is privileged or confidential and exempt from public disclosure pursuant to 5 U.S.C. § 552(b) (4).

ITW FOOD EQUIPMENT GROUP, LLC-NORTH AMERICAN REFRIGERATION
4401 Blue Mound Road
Fort Worth, TX 76106

INNOPOD TEMPERATURE CONTROLLED GROCERY AND GENERAL MERCHANDISE [redacted] SYSTEM

DEPARTMENT OF ENERGY PETITION FOR WAIVER AND APPLICATION FOR INTERIM WAIVER

December 20, 2016
Supplemented-May 3, 2017

EXECUTIVE SUMMARY

ITW, Food Equipment Group, LLC-North American Refrigeration, henceforth referred to as "Traulsen" is located in Fort Worth, TX and has been manufacturing a diverse line of commercial refrigeration equipment (CRE) and hot food holding products for over 75 years.

Traulsen has been a proud Energy Star Partner for many years, as well as a supporter of other endeavors focusing on products that use energy responsibly. We actively engage with several organizations providing solutions for various specifications and product test standards, including Southern California (SoCal) Edison, UL, LLC[1], NSF, International, ASHRAE and the American National Standards Institute or "ANSI". Our strong reputation providing highly-customized, niche applications, or "Engineer to Order" (ETO) solutions, has led customers such as independent consultants and facility designers to bring us innovative concepts for new ways to do business.

In recent years, retail grocers have seen a significant uptick in the home delivery service arena. Using lessons learned in the international market, Traulsen – in response to specific customer requests - has worked to anticipate the needs of the emerging U.S. grocery market. We have engineered an innovated solution that allows customers' outdoor and remote pick-up point access to groceries (even beyond grocery store property) while maintaining the safety and integrity of their food purchases.

Traulsen is filing this combined petition for waiver and application of interim waiver specific to the introduction of the Innopod Temperature Controlled Grocery and General Merchandise [redacted] System, referred to herein as "Innopod."

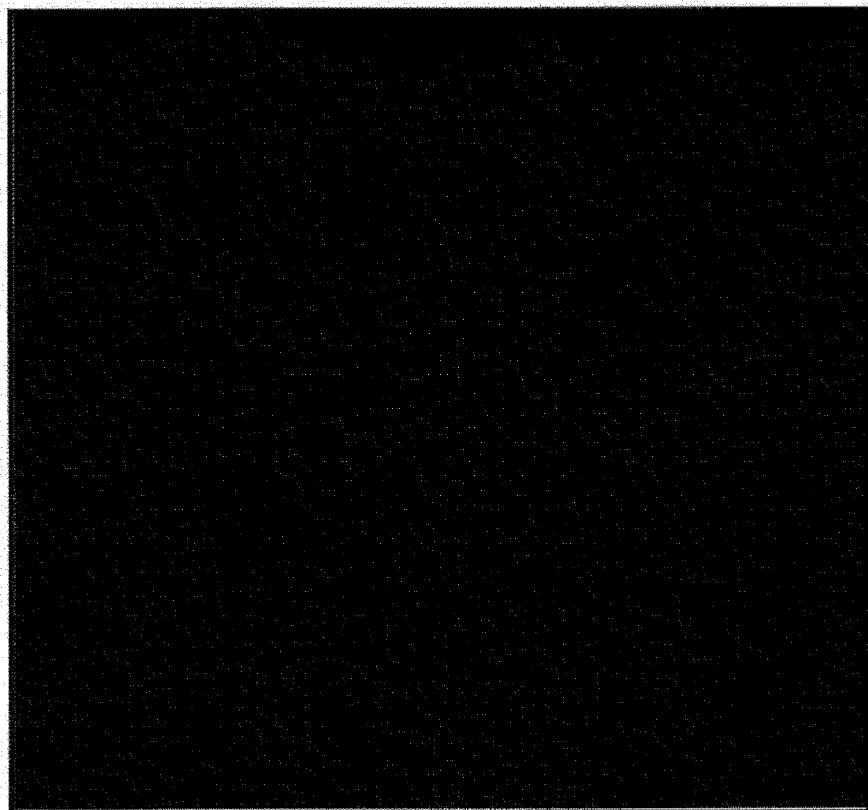
[1] Formerly known as Underwriter's Laboratories.

The Innopod [redacted] have been designed to meet the DOE 2017 energy requirement limits for [redacted]

Traulsen believes that this petition and its combined application substantiates and meets both conditions of 10 CFR 431.401(a) (1) for granting waivers, on the grounds that:

1. The petitioner's basic model contains one or more design characteristics that prevent testing according to the prescribed test procedures; and
2. The prescribed test procedures may evaluate the basic model in a manner so unrepresentative of its true energy consumption as to provide materially inaccurate comparative data.[2]

The application will describe the evaluation methodology in our test procedure waiver request as well as explain how the variation in volume and maximum daily energy consumption "MDEC" values are calculated caused by the unique design classification of a product uniquely designed in the [redacted] category.



[2] 10 CFR 431.401(a) (1)

DESCRIPTION OF UNIT SPECIFICATION AND DESIGN CHARACTERISTICS THAT PREVENT TESTING ACCORDING TO TEST PROCEDURES

Innopod are an "E ed to Order" (ETO) The is thermally separated, temperature controlle temperature controls packaged and potentially hazardous foodstuff[3] temperature for short term holding periods. The customer has a timeframe in which to retrieve a grocery order or the grocer recovering the unclaimed foodstuff in the next deliver or "LOAD" cycle.

[3] Note: NSF/ANSI 170-2014 defines "potentially hazardous food" as: A food that is natural or synthetic and requires temperature control because it is in a form capable of supporting the following: rapid and progressive growth of infectious or toxigenic microorganisms; growth and toxin production of *Clostridium botulinum*; or, as in raw shell eggs, the growth of *Salmonella enteritidis*.

Potentially hazardous food includes animal food (a food of animal origin) that is raw or heat-treated; food of plant origin that is heat-treated or consists of raw seed sprouts; cut melons; and garlic and oil mixtures that are not acidified or otherwise modified a food processing plant in a way that results in mixtures that do not support growth as specified above."

each is installed under special permit by skilled installers in

The s designed to support the cold food chain and maintain temperatures according to the applicable NSF 7 standard. If the temperature within the exceeds the designated safe temperature threshold for a specific time period, the customer is prevented from collecting their order

When in use, will be operated at

[4] See Annex B for state by state temperature range information.

A condensing unit is controlled (cycled ON and OFF) by This control functionality is similar to that found on a parallel rack in a supermarket environment in that refrigeration capacity is managed with a floating or moving saturated suction temperature.

The desired saturated suction temperature is based on or relative to the desired compartment temperature currently being cooled

The condensing unit is composed of

[5] Depending on the size of the vehicle used, there is a defined maximum number of deliveries that can be met during a single delivery route cycle. This tends to be around 18-20 deliveries assuming that each customer has placed a 'standard order' of mixed temperature items. This means the average delivery vehicle will travel between 20 individual addresses during a 4 hour route, and not necessarily in the most efficient fashion as the vehicle may have to return to areas previously visited in order to meet a 2 hour delivery window allowance. The vehicle also tends to be left curbside idling in order to enable maintenance of temperature within the storage areas while it is stopped at each of the drop off addresses adding additional environmental concerns related to air quality.

SPECIFIC REQUIREMENTS SOUGHT TO BE WAIVED IN ORDER TO PROPERLY EVALUATE THE INNOPOD TO ASHRAE 72 -2014, SECTION 7

Summary:

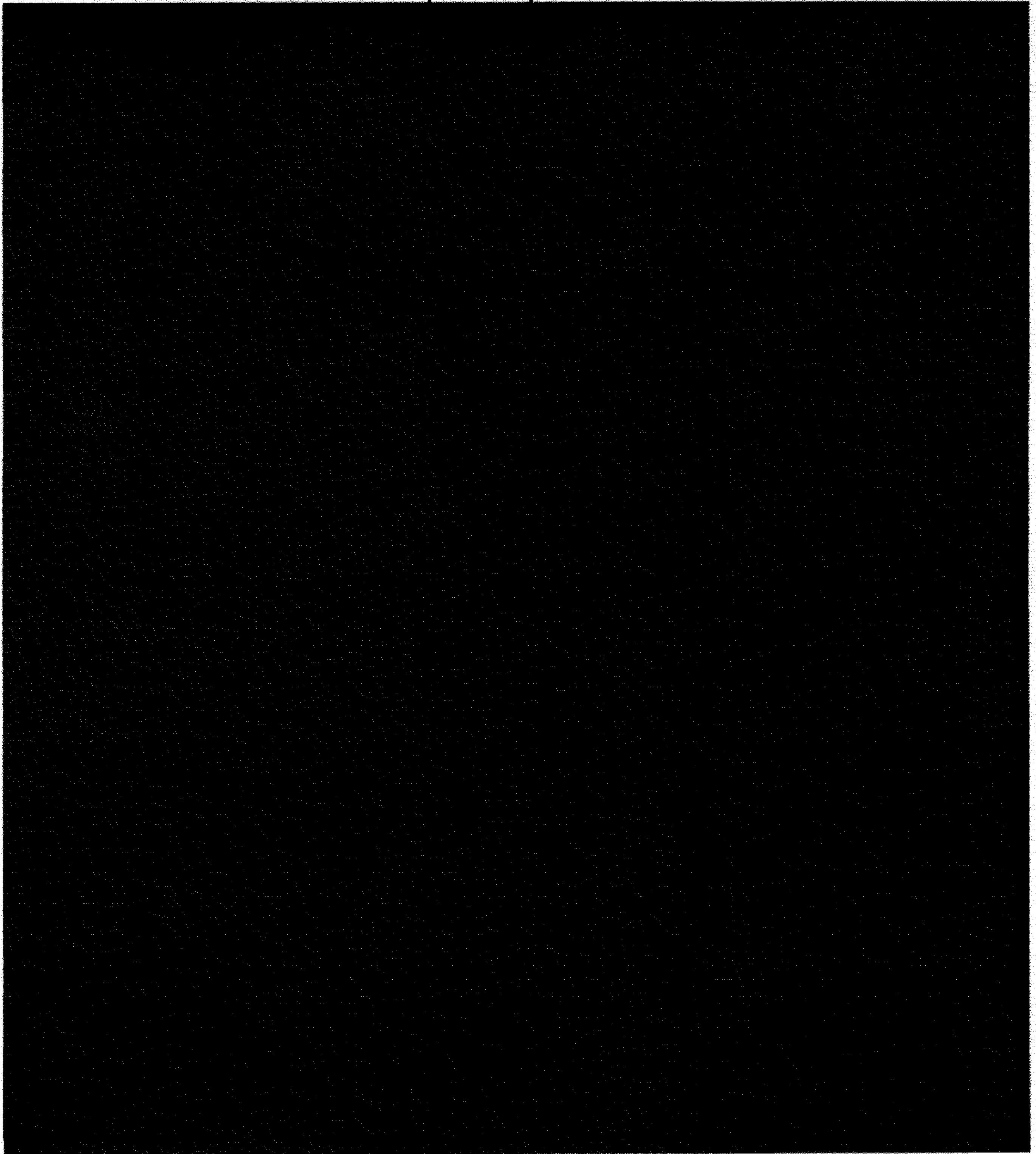
For the purpose of testing and rating, the Ambient (75°F) compartment is treated as a Medium (Refrigerator at 75°F) compartment. All volume and energy consumption calculations will be included within the Medium (Refrigerator 38°F) category and summed with other Medium (Refrigerator 38°F) compartment/s.

Below is a list of testing requested variations, with justification, to the current DOE test procedure for remote, solid door cabinet models. These variations allow evaluation of the basic models in a process more representative of the "true" energy consumption.

Test Condition/s or Calculation/s	DOE Remote Solid Door Cabinet Test Procedure	Traulsen Proposed Innopod Test Procedure[6]	Justification for Change
Test Method	ASHRAE 72-2014, Section 7 Test Procedure	**"Inverse Refrigeration Load" test, See Appendix - F** Allows energy (Heat) loss at a rate and delta-T equivalent to energy gains of a standard refrigerated cabinet.	Eliminates the implications associated with capillary tube refrigeration system testing. Capillary tubes cannot be used with a "typical" remote refrigeration system and the fixture described in the test procedure.
Ambient	Dry Bulb: 75.2°F ±1.8°F Wet Bulb: 64.4°F±1.8°F	Dry Bulb: 75.2°F ±1.8°F **Dew Point: 58.3°F ±1.8°F**	Reflects a test condition where the moisture content of the ambient air is held constant. Both are primary measurements.
Integrated Average Temperature (IAT)Simulated Product vs. Test Ambient Delta-T	Refrigerator: 38°F ± 2°F Freezer 0°F ±2°F Inside / Outside / Delta-T 38°F 75.2°F 37.2°F 0°F 75.2°F 75.2°F *Heat - GAIN*	Refrigerator: (*75.2°F + 75.2°F – 38°F*) = **112.4°F ±2°F** Freezer: (*75.2°F + 75.2°F – 0°F*) = **150.4°F ±2°F** **Ambient: (75.2°F + 75.2°F - 75°F) = 75.4 °F ±2°F** Inside / Outside / Delta-T Refrigerator: 112.4°F 75.2°F 37.2°F Freezer: 150.4°F 75.2°F 75.2°F Ambient: 75.04°F 75.2°F 0.4°F *Heat – LOSS = Heat – GAIN as proscribed in the test procedure*	Reflects a test condition where the (Delta "T"! between the IAT and ambient air is held constant. Introduces a new "Lowest Applicable Product Temperature" of 0°F75°F for cavity operating temperature range of "Ambient". This range shall be treated as a refrigerator for energy calculation purposes. VCS.RC.M
Door-Opening Requirement	Starts 3 hours after defrost for 6 seconds, every 10 minutes, for 8 consecutive hours, per door. (48 cycles)	**Door openings shall start 3 hours after concluding stabilization period. Open each door for 8 seconds, every 2 hours, for 12 consecutive hours. (6 door cycles) (3 "load" and "unload" cycles)** > Stock (load) + Retrieve (un-load) = Cycle (turn)	Timing reflects actual usage as a general grocery [redacted] >3 turns per day (load & un-load) >Each turn equals 4 hours
Calculation of Refrigeration Load ASHRAE 72-2014	Total energy removed divided by the running time. $Q = \frac{(hi - ho) \times {}^{\circ}F}{t(Hr.)} = (BTU/Hr.)$ "energy removed" all sources	Total energy added divided by the total test time. **"Inverse Refrigeration Load"** $\mathbf{Q = \frac{Win\ (watt) * 3.412\ (BTU/Watt)}{t\ (Hr.)} = (BTU/Hr.)}$ Provides the "energy removed" by infiltration.	Measuring the amount of heat required by the compartment to maintain its desired temperature across an insulation barrier at a constant delta-T yields the "Refrigeration Load" by infiltration.
Adjusted Dew Point & EER AHRI 1200-2013 Table 1, EER	D.P.: The average measured "Saturated Vapor Temp." of the refrigerant during the "Last ¾ of the Running Cycle" as it leaves the cabinet. A.D.P.: Med. Temp. = D.P. – 2°F A.D.P.: Low Temp. = D.P. – 3°F	**Dew Point (D.P.): Derived from standard industry design practices**, "as the customary saturated vapor temperature of the refrigerant as it leaves the cabinet through the suction line." The Energy Efficiency Ratio is then taken from this value using Table 1. **EER** **A.D.P.: Med. Temp. = (D.P.: +15°F) – 2°F = +13°F 11.22** **A.D.P.: Low Temp. = (D.P.: -20°F) – 3°F = -23°F 6.60**	The "Inverse Refrigeration Load" test does not allow for the direct measurement of the saturated suction pressure (Saturated Vapor Temp.), therefore the Dew Point value must be taken from standard industry practices at the applicable compartment operating temp.
Calculated Daily Energy Consumption AHRI 1201-2013	Part 1: Calculation of CEC CEC = [(Q x t) / 1000] / EER >"Q" includes waste heat from: * Evaporator Fan/s * Anti-Condensate Heater/s * Defrost Heater/s Part 2: Calculation of CDEC CDEC = CEC + FEC + AEC + DEC	**Part 1: REVISED, Calculation of CEC** **CEC = [(Q x t) / 1000 + (FEC + AEC + DEC) *3.412] / EER** **>"Q" does NOT include waste heat from auxiliary components and moisture infiltration (must be added separately).** * FEC: Evaporator Fan/s * AEC: Anti-Condensate Heater/s * DEC: Defrost Heater/s Part 2: *Current*, Calculation of CDEC CDEC = CEC + FEC + AEC + DEC	The "Inverse Refrigeration Load" test does not include waste heat from auxiliary components located within the refrigerated storage compartment and the calculated moisture infiltration from the "Door – Opening Requirement". This "Heat Load" must be added separately before the EER is applied to the Total Refrigeration Load when calculating the CEC.

[6] See Annex E for additional information

Calculation of Moisture Load per Compartment



Calculation Methodology

1	Calculate volume of each compartment			
	Unit # -	Width (in)	Depth (in)	Height (in)	Volume (cu-ft)
2	Calculate free air space in each compartment at a 70% product load factor.	(cu-ft)		
3	compartment per door opening when cabinet is operating at actual conditions. Assume 100% Of 30%	(lbs)	=	
4	Calculate final **Enthalpy** "Energy" of compartment air when operating at actual (Dry Bulb/Dew Point) conditions. Assume 100% of 30% for volume	(BTU)	=	
5	Calculate entering **Enthalpy** "Energy" of room air entering compartment. Assume weight of air is equal to 100% of the 30% excess volume.	(BTU)		
6	Calculate final **Enthalpy** "Energy" of compartment air when operating at test (Dry Bulb/Dew Point) conditions. Assume 100% of 30% for volume	(BTU)		
7				
8	Calculate moisture Load on Interior surfaces not accounted for during testing.			
9	door opening (freezer compartment) from the ambient air not accounted for during testing. Moisture Loading.	(BTU)		

BASIC MODEL NUMBERS WHICH THE WAIVERS ARE BEING REQUESTED FOR:

The test procedure described in this waiver shall be used on the following possible basic model configurations.

See Annex A for model configuration information.

MODEL	[redacted]	[redacted]	[redacted]	[redacted]
30-	XX-	X(x)-	3 (x)-	XXX
			4 (x)-	XXXX
			5 (x)-	XXXXX
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]

LIST OF MANUFACTURERS OF ALL OTHER BASIC MODELS MARKETED IN THE UNITED STATES AND KNOWN TO THE PETITIONER TO INCORPORATE SIMILAR DESIGN CHARACTERISTIC(S)

Traulsen has reviewed the CCMS database as of 12/20/2016 to review all known listed products and found that there are no listed models covered by the DOE requirements that have design characteristics similar to that on which our relief petition is based.

Traulsen has also done a number of web searches which has not shown any covered products with similar design characteristics to be available in the U.S. However, there are several "refrigerated" that we found available and installed in markets outside of the United States. This type of product is not currently energy regulated in those countries, nor is it subject to the strenuous NSF standards for food safety, allowing them to be designed without energy usage constraints.

Therefore, Traulsen does not believe that there are other known manufacturers in which to provide concurrent notice of this Petition for Waiver and Application for Interim Wavier.

SUCCESS OF THE PETITION/ APPLICATION FOR THE WAIVER WILL:

this product represents an innovative way to provide short-term holding of the customer grocery orders in locations that are convenient and assure greater product safety due to the ability of the store to control and monitor the cold food chain of the customer's grocery order.

Allowing Traulsen to perform testing using the proposed alternate method will allow us to report valid energy usages more representative of the product's design and prove compliance with applicable DOE 2017 Energy Conservation standards. In addition, the waiver will provide the opportunity for the company to review the performance of the product in real time uses and assess it for future innovations

WHAT ECONOMIC HARDSHIPS AND/ OR COMPETITIVE DISADVATAGE IS LIKELY TO RESULT ABSENT A FAVORABLE DETERMINATION OF THE PETITION/ APPLICATION OF WAIVER

A denial of this petition will not only affect Traulsen but an entire chain of suppliers, customers and end-users with an economic stake in the research attached to Innopod's introduction.

Because the innovative, custom design nature of this product Traulsen has had long lead times and has made a significant investment associated with designing these products for the U.S. market, including the necessary compliance obligations related to safety, sanitation, and energy usage. Absence of the waivers will mean that exposing the company to substantial economic hardship and potential legal liability.

CONCLUSION

It is clear that the law requires covered commercial refrigeration products to be tested and certified using the test procedure set forth at 10 C.F.R. Pt 431, Subpt. C, Sec. 431.64 – or **be subject to a waiver** – before they are sold into commerce. DOE's current test procedure references ARI Standard 1200-2006 and AHRI Standard 1200 (I-P)-2010 which further references ANSI/ASHRAE Standard 72. However, these current test procedures simply do not contemplate the unique operating characteristics of the Innopod [redacted] as described herein.

Because the specific design of this product contains one or more design characteristics noted in the waiver, Traulsen believes that this petition and its combined application meets both conditions of 10 CFR 431.401(a) (1) for granting waivers, on the grounds that:

1. The petitioner's basic model contains one or more design characteristics that prevent testing according to the prescribed test procedures; and
2. The prescribed test procedures may evaluate the basic model in a manner so unrepresentative of its true energy consumption as to provide materially inaccurate comparative data;

Therefore, Traulsen respectfully requests that the Department grant both the above Petition for Waiver and the Application of Interim Waiver, allowing Traulsen to move forward with the limited introduction into the U.S. market.

If we can provide further information, or if it would be helpful to discuss any of these matters further, please contact us at your earliest convenience.

Thank you in advance for your consideration and prompt response.

Sincerely,

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Government Affairs
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PAGES 13-52 HAVE BEEN REMOVED AS THEY CONTAIN INFORMATION THAT IS A TRADE SECRET OR COMMERICAL OR FINANCIAL INFORMATION THAT IS PRIVILIGED OR CONFIDENTIAL AND EXEMPT FROM PUBLIC DISCLOSURE (PER 10 CFR SEC. 600.15)

[FR Doc. 2017–15130 Filed 7–18–17; 8:45 am]

BILLING CODE 6450–01–C

DEPARTMENT OF ENERGY

Office of Energy Efficiency and Renewable Energy

[Case No. RF–044]

Notice of Petition for Waiver of New Shunxiang Electrical Appliance Co., Ltd., From the Department of Energy Refrigerator, Refrigerator-Freezer, Freezer Test Procedures

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Notice of petition for waiver and request for public comments.

SUMMARY: This notice announces receipt of and publishes a petition for waiver from New Shunxiang Electrical Appliance Co., Ltd. (''New Shunxiang''), seeking an exemption from specified portions of the U.S. Department of Energy (''DOE'') test procedure for determining the energy consumption of refrigerators and refrigerator-freezers under the regulations. New Shunxiang contends that the DOE test procedure does not clearly address its basic model JG50–2D1, which combines a compartment intended for storing wine (a cooler compartment) with a beverage cooler (a refrigerator compartment), and has petitioned for a waiver from appendix A. Although New Shunxiang did not propose an alternate test approach for its basic model, DOE has granted waivers for similar products. Therefore, DOE is considering whether to permit New Shunxiang to test and rate its basic model of combination cooler-refrigerator in a manner similar to that which DOE has permitted for other manufacturers with similar products. DOE also solicits comments, data, and information concerning New Shunxiang's petition and on the alternate test procedure detailed in this document.

DATES: DOE will accept comments, data, and information with regard to the New Shunxiang petition until August 18, 2017.

ADDRESSES: You may submit comments, identified by Case Number RF–044, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Email: AS_Waiver_Requests@ee.doe.gov* Include the case number [Case No. RF–044] in the subject line of the message. Submit electronic comments in WordPerfect, Microsoft Word, PDF, or ASCII file format, and avoid the use of special characters or any form of encryption.
- *Postal Mail:* Mr. Bryan Berringer, U.S. Department of Energy, Building Technologies Office, Mailstop EE–5B, Petition for Waiver Case No. RF–044, 1000 Independence Avenue SW., Washington, DC 20585–0121. Telephone: (202) 586–0371. If possible, please submit all items on a compact disc (CD), in which case it is not necessary to include printed copies.
- *Hand Delivery/Courier:* Appliance and Equipment Standards Program, U.S. Department of Energy, Building Technologies Office, 950 L'Enfant Plaza SW., Room 6055, Washington, DC, 20024. Telephone: (202) 586–6636. Please submit one signed original paper copy.

Docket: The docket, which includes **Federal Register** notices, comments, and other supporting documents/materials, is available for review at *www.regulations.gov.* All documents in the docket are listed in the *www.regulations.gov* index. However, some documents listed in the index, such as those containing information that is exempt from public disclosure, may not be publicly available.

FOR FURTHER INFORMATION CONTACT: Mr. Bryan Berringer, U.S. Department of Energy, Building Technologies Office, Mailstop EE–5B, 1000 Independence Avenue SW., Washington, DC 20585–0121. Telephone: (202) 586–0371. Email: *AS_Waiver_Request@ee.doe.gov.*

Mr. Michael Kido, U.S. Department of Energy, Office of the General Counsel, Mail Stop GC–33, Forrestal Building, 1000 Independence Avenue SW., Washington, DC 20585–0103. Telephone: (202) 586–8145. Email: *Michael.Kido@hq.doe.gov.*

SUPPLEMENTARY INFORMATION:

I. Background and Authority

Title III, Part B of the Energy Policy and Conservation Act of 1975 (''EPCA'') (42 U.S.C. 6291–6309) established the Energy Conservation Program for Consumer Products Other Than Automobiles, a program that includes consumer refrigerators and refrigerator-freezers.[1] Part B includes definitions, test procedures, labeling provisions, energy conservation standards, and the authority to require information and reports from manufacturers. Further, Part B authorizes the Secretary of Energy to prescribe test procedures that are reasonably designed to produce results measuring energy efficiency, energy use, or estimated operating costs, and that are not unduly burdensome to conduct. (42 U.S.C. 6293(b)(3)) The test procedure for consumer refrigerators and refrigerator-freezers is contained in 10 CFR part 430, subpart B, appendix A.

The regulations set forth in 10 CFR 430.27 contain provisions that allow a person to seek a waiver from the test procedure requirements for a particular basic model of a type of covered product when the petitioner's basic model for which the petition for waiver was submitted contains one or more design characteristics that: (1) Prevent testing according to the prescribed test procedure, or (2) cause the prescribed test procedures to evaluate the basic model in a manner so unrepresentative of its true energy consumption characteristics as to provide materially inaccurate comparative data. 10 CFR 430.27(a)(1). A petitioner must include

[1] For editorial reasons, upon codification in the U.S. Code, Part B was re-designated Part A.

in its petition any alternate test procedures known to the petitioner to evaluate the basic model in a manner representative of its energy consumption characteristics. 10 CFR 430.27(b)(1)(iii). DOE may grant the waiver subject to conditions, including adherence to alternate test procedures. 10 CFR 430.27(f)(2). As soon as practicable after the granting of any waiver, DOE will publish in the **Federal Register** a notice of proposed rulemaking to amend its regulations so as to eliminate any need for the continuation of such waiver. As soon thereafter as practicable, DOE will publish in the **Federal Register** a final rule. 10 CFR 430.27(l).

DOE recently published standards for miscellaneous refrigeration products (''MREFs''). See 81 FR 75194 (Oct. 28, 2016). Testing to demonstrate compliance with those standards will require manufacturers to use the MREF test procedure established in a final rule published in July 2016. See 81 FR 46768 (July 18, 2016) (MREF coverage determination and test procedure final rule) and 81 FR 49868 (July 29, 2016) (MREF test procedure final rule correction notice). Under these rules, DOE has determined that products such as those that are at issue here fall into the MREF category. Accordingly, consistent with these MREF-specific provisions, these products will be evaluated under prescribed procedures and against specified standards that are tailored to account for their particular characteristics.

II. Petition for Waiver

By email with attachment sent to DOE on October 14, 2015, New Shunxiang submitted a petition for waiver for its combination cooler-refrigerator basic model JG50–2D1. In its petition, New Shunxiang stated that it was unclear how this product would be classified under DOE regulations. As indicated in New Shunxiang's submitted data, the product includes both a cooler (with temperatures down to 40.2 °F) and a refrigerator (with temperatures down to 35 °F). Such a basic model is subject to the existing refrigerator energy conservation standards for the product class that would apply if the model did not include a cooler compartment.[2] Under DOE's regulations prior to the MREF rulemakings, both compartments of the basic model would be tested using a standardized compartment temperature of 39 degrees Fahrenheit (°F). However, because the cooler compartment cannot reach this temperature, the basic model would have received no energy use rating under appendix A prior to the MREF rulemakings. Thus, New Shunxiang requested a waiver to test this basic model.

Although New Shunxiang did not include an alternate test procedure for its basic model, DOE is considering whether to allow New Shunxiang to test and rate its combination cooler-refrigerator basic model as detailed in section III of this document.

DOE granted a similar waiver to Panasonic Appliances Refrigeration Systems Corporation of America (''PAPRSA'') in 2012 (under PAPRSA's previous corporate name, Sanyo E&E Corporation) (Case No. RF–022, 77 FR 49443 (August 16, 2012)), in 2013 (Case No. RF–031, 78 FR 57139 (Sept. 17, 2013)), and 2014 (Case No. RF–041, 79 FR 55769 (September 17, 2014)). On October 4, 2012, DOE issued a notice of correction to its Decision and Order in Case No. RF–022 by incorporating a K-factor (correction factor) value of 0.85 when calculating the energy consumption of the affected models. 77 FR 60688. On January 26, 2016, due to issues with the equations detailed in the prior waiver decisions, DOE issued a proposed modification of its prior waivers and granted PAPRSA with an interim waiver (81 FR 4270) under Case No. RF–043 to correct these known issues. DOE also previously granted a similar waiver to Sub-Zero Group Inc. through an interim waiver (79 FR 55772 (September 17, 2014)) and a subsequent Decision and Order (80 FR 7854 (February 12, 2015)) under Case No. RF–040. More recently, DOE granted a similar waiver to AGA Marvel through an interim waiver (81 FR 41531 (Jun 27, 2016)) and a subsequent Decision and Order (82 FR 21211 (May 5, 2017)) under Case No. RF–045. DOE also granted the PAPRSA waiver through a Decision and Order on May 5, 2017 (82 FR 21209).

DOE's recently granted waivers to PAPRSA and AGA Marvel address refrigeration products similar to those identified in New Shunxiang's petition for wavier—products combining a high-temperature compartment (a cooler) with a refrigerator. The waivers granted to PAPRSA and AGA Marvel require that the manufacturers test the cooler compartment of these products at a standardized compartment temperature of 55 °F instead of the prescribed 39 °F. This temperature is consistent with the standardized compartment temperature for coolers established in the MREF test procedure final rule. See 81 FR 75194. The PAPRSA and AGA Marvel waivers also require that the manufacturers apply a correction factor of 0.85 rather than the 0.55 established in the MREF test procedure for determining compliance with refrigerator standards.

DOE, therefore, is considering permitting New Shunxiang to test its product using the alternate test approach detailed in section III of this document. This approach is consistent with that detailed in the recent waiver decisions cited earlier and would require the basic model JG50–2D1 to be tested under the alternate approach.

III. Alternate Test Procedure

Although New Shunxiang did not provide an alternate test procedure for its basic model for DOE to consider (or request an interim waiver), DOE is considering whether to allow New Shunxiang to test and rate its combination cooler-refrigerator basic model JG50–2D1 on the basis of the current test procedure contained in 10 CFR part 430, subpart B, appendix A, with the exception that it must calculate energy consumption using a correction factor (''K-factor'') of 0.85.

Therefore, under this approach, the energy consumption would be defined in the following manner:

If compartment temperatures are below their respective standardized temperatures for both test settings (according to 10 CFR part 430, subpart B, appendix A, section 6.2.4.1):

$E = (ET1 \times 0.85) + IET$.

If compartment temperatures are not below their respective standardized temperatures for both test settings, the higher of the two values calculated by the following two formulas (according to 10 CFR part 430, subpart B, appendix A, section 6.2.4.2):

Energy consumption of the ''cooler compartment'':

$E_{Cooler\ Compartment} = (ET1 + [(ET2-ET1) \times (55\ °F-TC1)/(TC2-TC1)]) \times 0.85 + IET$

Energy consumption of the ''fresh food compartment'':

$E_{FreshFood\ Compartment} = (ET1 + [(ET2-ET1) \times (39\ °F-TR1)/(TR2-TR1)]) \times 0.85 + IET$

The following basic model is included in New Shunxiang's petition: JG50–2D1.

IV. Summary and Request for Comments

This document announces New Shunxiang's petition for waiver from appendix A for its basic model of a combination cooler-refrigerator and seeks comment on whether the

[2] See the relevant 2011 guidance documents for consumer refrigerators and freezers available at *https://www1.eere.energy.gov/buildings/appliance_standards/pdfs/hybridwinechiller_faq3_2011-02-10.pdf* and *https://www1.eere.energy.gov/buildings/appliance_standards/pdfs/hybridwinechiller_faq_2011-02-10.pdf.*

company should be permitted to use the alternate test procedure described in this document for the identified basic model. DOE will consider the use of the alternate procedure in its subsequent Decision and Order. DOE is publishing New Shunxiang's request for a petition of waiver in its entirety pursuant to 10 CFR 430.27(b)(1)(iv). The petition contains no confidential information.

DOE solicits comments from interested parties on all aspects of the petition, including the alternate calculation methodology under consideration. New Shunxiang's cover email and attachment's text are both reproduced verbatim and are available in the docket identified in the **ADDRESSES** section in this document. See *https://www.regulations.gov/document?D=EERE-2017-BT-WAV-0002-0001* (containing product photographs and related information). Pursuant to 10 CFR 430.27(d), any person submitting written comments to DOE must also send a copy of such comments to the petitioner. The contact information for the petitioner is Dolly *shunxiang187@163.com*, New Shunxiang Electrical Appliance Co., Ltd., Zhengxing Road, Nantou, Zhongshan, Guandong, China. All comment submissions to DOE must include the Case No. RF–044 for this proceeding. Submit electronic comments in Microsoft Word, Portable Document Format (PDF), or text (American Standard Code for Information Interchange (ASCII)) file format and avoid the use of special characters or any form of encryption. Wherever possible, include the electronic signature of the author. DOE does not accept telefacsimiles (faxes).

According to 10 CFR 1004.11, any person submitting information that he or she believes to be confidential and exempt by law from public disclosure should submit two copies: one copy of the document including all the information believed to be confidential, and one copy of the document with the information believed to be confidential deleted. DOE will make its own determination about the confidential status of the information and treat it according to its determination.

Issued in Washington, DC, on July 11, 2017.

Kathleen B. Hogan,

Deputy Assistant Secretary for Energy Efficiency, Energy Efficiency and Renewable Energy.

[FR Doc. 2017–15131 Filed 7–18–17; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER17–742–001; ER10–1342–004; ER10–1886–007.
Applicants: CP Bloom Wind LLC, CP Energy Marketing (US) Inc., Decatur Energy Center, LLC.
Description: Notice of Change in Status and Limited Request for Privileged Treatment of CP Bloom Wind LLC, et al.
Filed Date: 7/12/17.
Accession Number: 20170712–5200.
Comments Due: 5 p.m. ET 8/2/17.

Docket Numbers: ER17–1780–001.
Applicants: Midcontinent Independent System Operator, Inc.
Description: Tariff Amendment: 2017–07–12 SA 1677 Illinois Power-Ameren Substitute Amended GIA to be effective 5/25/2017.
Filed Date: 7/12/17.
Accession Number: 20170712–5178.
Comments Due: 5 p.m. ET 8/2/17.

Docket Numbers: ER17–2084–000.
Applicants: Great Bay Solar 1, LLC.
Description: Baseline eTariff Filing: Application for Market-Based Tariff and Waivers to be effective 8/29/2017.
Filed Date: 7/12/17.
Accession Number: 20170712–5195.
Comments Due: 5 p.m. ET 8/2/17.

Docket Numbers: ER17–2085–000.
Applicants: Alliant Energy Corporate Services, Inc.
Description: § 205(d) Rate Filing: AECS Updated Schedule 2 (Reactive Power) to be effective 9/1/2017.
Filed Date: 7/12/17.
Accession Number: 20170712–5198.
Comments Due: 5 p.m. ET 8/2/17.

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: July 13, 2017.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2017–15094 Filed 7–18–17; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2197–117]

Cube Yadkin Generation, LLC; Notice of Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Protests

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Application Type:* Shoreline Management Plan—Updated Guidelines.
b. *Project No:* 2197–117.
c. *Date Filed:* May 12, 2017.
d. *Applicant:* Cube Yadkin Generation, LLC.
e. *Name of Project:* Yadkin Hydroelectric Project.
f. *Location:* The Yadkin and Pee Dee rivers in Stanly, Davidson, Montgomery, Rowan, and Davie counties, North Carolina.
g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791a–825r.
h. *Applicant Contact:* Mark Gross, Cube Hydro Carolinas, LLC, 293 Highway 740, Badin, NC 28009–0575, (704) 422–5774.
i. *FERC Contact:* Mark Carter, (678) 245–3083, *mark.carter@ferc.gov.*
j. Deadline for filing comments, motions to intervene, and protests: August 11, 2017.

The Commission strongly encourages electronic filing. Please file comments, motions to intervene, and protests using the Commission's eFiling system at *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov,* (866) 208–3676 (toll free), or (202) 502–8659 (TTY). In lieu of electronic filing, please send a paper copy to: Secretary, Federal Energy Regulatory Commission, 888

First Street NE., Washington, DC 20426. The first page of any filing should include docket number P–2197–117. Comments emailed to Commission staff are not considered part of the Commission record.

The Commission's Rules of Practice and Procedure require all intervenors filing documents with the Commission to serve a copy of that document on each person whose name appears on the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

k. *Description of Request:* The licensee filed for Commission approval revised appendices to its approved shoreline management plan pursuant to Article 407 of the license. The revised appendices (*i.e.,* Appendix E—Specifications for Private Recreation Facilities, Appendix F—Subdivision Access Approval Procedures, and Appendix G—Shoreline Stewardship Policy) were filed during the re-licensing process, discussed in Commission staff's Final Environmental Impact Statement for the project, but not approved under the new license. The revised appendices would increase flexibility in dock design, allow additional lands adjacent to the project to pursue dock permits, make changes to vegetation removal procedures, etc.

l. *Locations of the Application:* A copy of the application is available for inspection and reproduction at the Commission's Public Reference Room, located at 888 First Street NE., Room 2A, Washington, DC 20426, or by calling (202) 502–8371. This filing may also be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, call 1–866–208–3676 or email *FERCOnlineSupport@ferc.gov,* for TTY, call (202) 502–8659. A copy is also available for inspection and reproduction at the address in item (h) above. Agencies may obtain copies of the application directly from the applicant.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

n. *Comments, Protests, or Motions to Intervene:* Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214, respectively. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

o. *Filing and Service of Documents:* Any filing must (1) bear in all capital letters the title COMMENTS, PROTEST, or MOTION TO INTERVENE as applicable; (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person commenting, protesting or intervening; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. All comments, motions to intervene, or protests must set forth their evidentiary basis. Any filing made by an intervenor must be accompanied by proof of service on all persons listed in the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 385.2010.

Dated: July 12, 2017.

Kimberly D. Bose,

Secretary.

[FR Doc. 2017–15090 Filed 7–18–17; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. IC17–9–000]

Commission Information Collection Activities (FERC–510, FERC–520, FERC–561, and FERC–583); Comment Request

AGENCY: Federal Energy Regulatory Commission.

ACTION: Comment request.

SUMMARY: In compliance with the requirements of the Paperwork Reduction Act of 1995, the Federal Energy Regulatory Commission (Commission or FERC) is submitting its information collection [FERC–510 (Application for Surrender of a Hydropower License), FERC–520 (Application for Authority to Hold Interlocking Directorate Positions), FERC–561 (Annual Report of Interlocking Positions), and FERC–583 (Annual Kilowatt Generating Report (Annual Charges))] to the Office of Management and Budget (OMB) for review of the information collection requirements. Any interested person may file comments directly with OMB and should address a copy of those comments to the Commission as explained below. The Commission previously issued a Notice in the **Federal Register** (82 FR 16191, 4/3/2017) requesting public comments. The Commission received no comments on the FERC–510, the FERC–520, the FERC–561, or the FERC–583 and is making this notation in its submittal to OMB.

DATES: Comments on the collection of information are due by August 18, 2017.

ADDRESSES: Comments filed with OMB, identified by the OMB Control No. 1902–0068 (FERC–510), 1902–0083 (FERC–520), 1902–0099 (FERC–561), or 1902–0136 (FERC–583) should be sent via email to the Office of Information and Regulatory Affairs: *oira_submission@omb.gov.* Attention: Federal Energy Regulatory Commission Desk Officer. The Desk Officer may also be reached via telephone at 202–395–4718.

A copy of the comments should also be sent to the Commission, in Docket No. IC17–9–000, by either of the following methods:

- *eFiling at Commission's Web site: http://www.ferc.gov/docs-filing/efiling.asp.*
- *Mail/Hand Delivery/Courier:* Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street NE., Washington, DC 20426.

Instructions: All submissions must be formatted and filed in accordance with submission guidelines at: *http://www.ferc.gov/help/submission-guide.asp.* For user assistance contact FERC Online Support by email at *ferconlinesupport@ferc.gov,* or by phone at: (866) 208–3676 (toll-free), or (202) 502–8659 for TTY.

Docket: Users interested in receiving automatic notification of activity in this docket or in viewing/downloading comments and issuances in this docket may do so at *http://www.ferc.gov/docs-filing/docs-filing.asp.*

FOR FURTHER INFORMATION CONTACT: Ellen Brown may be reached by email at *DataClearance@FERC.gov,* by telephone at (202) 502–8663, and by fax at (202) 273–0873.

SUPPLEMENTARY INFORMATION:

Type of Request: Three-year extension of the information collection requirements for all collections described below with no changes to the current reporting requirements. Please note that each collection is distinct from the next.

Comments: Comments are invited on: (1) Whether the collections of information are necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility; (2) the accuracy of the agency's estimates of the burden and cost of the collections of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility and clarity of the information collections; and (4) ways to minimize the burden of the collections of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

FERC–510 [Application for Surrender of a Hydropower License]

OMB Control No.: 1902–0068.

Abstract: The information collected under the requirements of FERC–510 is used by the Commission to implement the statutory provisions of sections 4(e), 6 and 13 of the Federal Power Act (FPA) (16 U.S.C. 797(e), 799 and 806). Section 4(e) gives the Commission authority to issue licenses for the purposes of constructing, operating and maintaining dams, water conduits, reservoirs, powerhouses, transmission lines or other power project works necessary or convenient for developing and improving navigation, transmission and utilization of power using bodies of water over which Congress has jurisdiction. Section 6 gives the Commission the authority to prescribe the conditions of licenses including the revocation or surrender of the license. Section 13 defines the Commission's authority to delegate time periods for when a license must be terminated if project construction has not begun. Surrender of a license may be desired by a licensee when a licensed project is retired or not constructed or natural catastrophes have damaged or destroyed the project facilities.

FERC–510 is the application for the surrender of a hydropower license. The information is used by Commission staff to determine the broad impact of such surrender. The Commission will issue a notice soliciting comments from the public and other agencies and conduct a careful review of the application before issuing an order for Surrender of a License. The order is the result of an analysis of the information produced (*i.e.,* dam safety, public safety, and environmental concerns, etc.), which is examined to determine whether any conditions must be satisfied before granting the surrender. The order implements the existing regulations and is inclusive for surrender of all types of hydropower licenses issued by FERC and its predecessor, the Federal Power Commission. The Commission implements these mandatory filing requirements in the Code of Federal Regulations (CFR) under 18 CFR 6.1–6.4.

Type of Respondent: Private or Municipal Hydropower Licensees.

Estimate of Annual Burden [1]*:* The Commission estimates the total annual burden and cost [2] for this information collection as follows:

FERC–510

[Application for surrender of a hydropower license]

Number of respondents (1)	Annual number of responses per respondent (2)	Total number of responses (1) * (2) = (3)	Average burden and cost per response (4)	Total annual burden hours and total annual cost (3) * (4) = (5)	Cost per respondent ($) (5) ÷ (1)
14	1	14	80 hrs.; [3] $6,120	1,120 hrs.; $85,680	$6,120

FERC–520 [Application for Authority To Hold Interlocking Directorate Positions]

OMB Control No.: 1902–0083.

Abstract: The Federal Power Act (FPA), as amended by the Public Utility Regulatory Policies Act of 1978 (PURPA), mandates federal oversight and approval of certain electric corporate activities to ensure that neither public nor private interests are adversely affected. Accordingly, the FPA proscribes related information filing requirements to achieve this goal. Such filing requirements are found in the Code of Federal Regulations (CFR), specifically in 18 CFR part 45, and serve as the basis for FERC–520.

FERC–520 is divided into two types of applications: Full and informational. The full application, as specified in 18 CFR 45.8, implements the FPA requirement under section 305(b) that it is unlawful for any person to concurrently hold the positions of officer or director of more than one public utility; or a public utility and a financial institution that is authorized to underwrite or participate in the marketing of public utility securities; or a public utility and an electrical equipment supplier to that public utility, unless authorized by order of the Commission. In order to obtain authorization, an applicant must demonstrate that neither public nor private interests will be adversely affected by the holding of the position. The full application provides the Commission with information about any interlocking position for which the applicant seeks authorization including, but not limited to, a description of duties and the estimated time devoted to the position.

An informational application, specified in 18 CFR 45.9, allows an applicant to receive automatic authorization for an interlocked position upon receipt of the filing by the Commission. The informational application applies only to those individuals who seek authorization as: (1) An officer or director of two or more

[1] Burden is the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. For additional information, refer to Title 5 Code of Federal Regulations 1320.3.

[2] The Commission staff thinks that the average respondent for this collection is similarly situated to the Commission, in terms of salary plus benefits. Based upon FERC's 2017 annual average of $158,754 (for salary plus benefits), the average hourly cost is $76.50/hour.

[3] Based on additional information, we are revising the estimated average burden per response to 80 hours (rather than 10 hours). The reporting requirements have not changed.

public utilities where the same holding company owns, directly or indirectly, that percentage of each utility's stock (of whatever class or classes) which is required by each utility's by-laws to elect directors; (2) an officer or director of two public utilities, if one utility is owned, wholly or in part, by the other and, as its primary business, owns or operates transmission or generation facilities to provide transmission service or electric power for sale to its owners; or (3) an officer or director of more than one public utility, if such person is already authorized under part 45 to hold different positions as officer or director of those utilities where the interlock involves affiliated public utilities.

Pursuant to 18 CFR 45.5, in the event that an applicant resigns or withdraws from Commission-authorized interlocked positions or is not re-elected or re-appointed to such interlocked positions, the Commission requires that the applicant submit a notice of change within 30 days from the date of the change.

Type of Respondents: Individuals who plan to concurrently become officers or directors of public utilities and of certain other covered entities must request authorization to hold such interlocking positions by submitting a FERC–520.

Estimate of Annual Burden [1]: The Commission estimates the total annual burden and cost [2] for this information collection as follows:

FERC–520

[Application for authority to hold interlocking directorate positions]

	Number of respondents (1)	Annual number of responses per respondent (2)	Total number of responses (1) * (2) = (3)	Average burden and cost per response (4)	Total annual burden hours (Total Annual Cost) (3) * (4) = (5)	Cost per respondent ($) (5) ÷ (1)
Full	16	1	16	50 hrs.; $3,825	800 hrs.; $61,200	$3,825
Informational	500	1	500	8 hrs.; $612	4,000 hrs.; $306,000	$612
Notice of Change	200	1	200	0.25 hrs.; $19.13	50 hrs.; $3,825	$19.13
Total					4,850 hrs.; $371,025	

FERC–561 [Annual Report of Interlocking Positions]

OMB Control No.: 1902–0099

Abstract: The FERC Form 561 responds to the FPA requirements for annual reporting of similar types of positions which public utility officers and directors hold with financial institutions, insurance companies, utility equipment and fuel providers, and with any of an electric utility's 20 largest purchasers of electric energy (*i.e.,* the 20 entities with high expenditures of electricity). The FPA specifically defines most of the information elements in the Form 561 including the information that must be filed, the required filers, the directive to make the information available to the public, and the filing deadline.

The Commission uses the information required by 18 CFR 131.31 and collected by the Form 561 to implement the FPA requirement that those who are authorized to hold interlocked directorates annually disclose all the interlocked positions held within the prior year. The Form 561 data identifies persons holding interlocking positions between public utilities and other entities, allows the Commission to review these interlocking positions, and allows identification of possible conflicts of interest.

Type of Respondents: Public utility officers and directors holding financial positions, insurance companies, security underwriters, electrical equipment suppliers, fuel provider, and any entity which is controlled by these.

Estimate of Annual Burden [1]*:* The Commission estimates the total annual burden and cost [2] for this information collection as follows:

FERC FORM 561

[Annual report of interlocking positions]

Number of respondents (1)	Annual number of responses per respondent (2)	Total number of responses (1) * (2) = (3)	Average burden and cost per response (4)	Total annual burden hours and total annual cost (3) * (4) = (5)	Cost per respondent ($) (5) ÷ (1)
2,700	1	2,700	0.25 hrs.; $19.13	675.00 hrs.; $51,637.50	$19.13

FERC–583 [Annual Kilowatt Generating Report (Annual Charges)]

OMB Control No.: 1902–0136.

Abstract: The FERC–583 is used by the Commission to implement the statutory provisions of section 10(e) of the Federal Power Act (FPA) (16 U.S.C. 803(e)), which requires the Commission to collect annual charges from hydropower licensees for, among other things, the cost of administering part I of the FPA and for the use of United States dams. In addition, section 3401 of the Omnibus Budget Reconciliation Act of 1986 (OBRA) authorizes the Commission to ''assess and collect fees and annual charges in any fiscal year in amounts equal to all of the costs incurred by the Commission in that fiscal year.'' The information is collected annually and used to determine the amounts of the annual charges to be assessed licensees for reimbursable government administrative costs and for the use of government dams. The Commission implements these filing requirements in the Code of

Federal Regulations (CFR) under 18 CFR part 11.1 through 11.8.[4]

Type of Respondent: FERC-regulated private and public hydropower licensees.

Estimate of Annual Burden[1]: The Commission estimates the total annual burden and cost [2] for this information collection as follows:

FERC–583, ANNUAL KILOWATT GENERATING REPORT

[Annual charges]

Number of respondents[5]	Annual number of responses per respondent	Total number of responses	Average burden and cost per response	Total annual burden hours and total annual cost	Cost per respondent ($)
(1)	(2)	(1) * (2) = (3)	(4)	(3) * (4) = (5)	(5) ÷ (1)
520	1	520	2 hrs.; $153	1,040 hrs.; $79,560	$153

Dated: July 12, 2017.

Kimberly D. Bose,

Secretary.

[FR Doc. 2017–15089 Filed 7–18–17; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER17–2084–000]

Great Bay Solar 1, LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of Great Bay Solar 1, LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is August 2, 2017.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 5 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

The filings in the above-referenced proceeding are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also 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.

Dated: July 13, 2017.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2017–15095 Filed 7–18–17; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9964–90–OA]

Environmental Laboratory Advisory Board; Notice of Charter Renewal

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of charter renewal.

Notice is hereby given that the Environmental Protection Agency (EPA) has determined that, in accordance with the provisions of the Federal Advisory Committee Act (FACA), 5 U.S.C. App. 2, the Environmental Laboratory Advisory Board (ELAB) is in the public interest and is necessary in connection with the performance of EPA's duties. Accordingly, ELAB will be renewed for an additional two-year period. The purpose of the ELAB is to provide advice and recommendations to the Administrator of EPA on issues associated with enhancing EPA's measurement programs and the systems and standards of environmental accreditation. Inquiries may be directed to Lara P. Phelps, Senior Advisor, U.S. Environmental Protection Agency, Office of the Science Advisor, 109 T W Alexander Drive (E243–05), Research Triangle Park, NC 27709 or by email: *phelps.lara@epa.gov.*

Dated: July 12, 2017.

Robert J. Kavlock,

EPA Science Advisor.

[FR Doc. 2017–14825 Filed 7–18–17; 8:45 am]

BILLING CODE 6560–50–P

[4] As discussed in 18 CFR part 11, selected federal agencies (such as the United States Fish and Wildlife Service and the National Marine Fisheries Service) submit annual reports to the Commission on their federal costs in administering part I of the Federal Power Act. The filing requirements imposed on those federal agencies are not collected for general statistical purposes and are not a collection of information as defined by 5 CFR 1320.3(c)(3). (The form and additional information on the information provided by those agencies is posted at *https://www.ferc.gov/docs-filing/forms.asp#ofa.*)

[5] Based on data from Fiscal Year 2016, there were 520 project, owned by 242 FERC-regulted private and public licensees. Many of the licensees owned multiple projects.

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OAR–2014–0609; FRL–9965–08–OAR]

Criteria for the Certification and Recertification of the Waste Isolation Pilot Plant's Compliance With the Disposal Regulations; Recertification Decision

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice; recertification decision.

SUMMARY: With this notice, the Environmental Protection Agency (EPA or the Agency) recertifies that the U.S. Department of Energy's (DOE) Waste Isolation Pilot Plant (WIPP) continues to comply with the ''Environmental Standards for the Management and Disposal of Spent Nuclear Fuel, High-Level and Transuranic (TRU) Radioactive Waste.''

This action represents the Agency's third periodic evaluation of the WIPP's continued compliance with the disposal regulations and WIPP Compliance Criteria. The WIPP Compliance Criteria implement and interpret the disposal regulations specifically for the WIPP. As directed by Congress in the WIPP Land Withdrawal Act (WIPP LWA), this ''recertification'' process is required every five years following the WIPP's initial receipt of TRU waste on March 26, 1999 (*e.g.,* March 2004, March 2009), until the end of the decommissioning phase. For each recertification—including the one being announced with this action—the DOE must submit documentation of the site's continuing compliance with the disposal regulations to the EPA for review.

This recertification decision is based on a thorough review of information submitted by the DOE, independent technical analyses, and public comments. The Agency has determined that the DOE continues to meet all applicable requirements of the WIPP Compliance Criteria, and with this action, recertifies the WIPP facility. This recertification decision does not otherwise amend or affect the EPA's radioactive waste disposal regulations or the WIPP Compliance Criteria. In addition, recertification is not subject to rulemaking or judicial review, nor is it linked to the resumption of disposal activities at the WIPP facility. The EPA has also identified areas in which the DOE's technical analyses and justifications could be improved for the next recertification application.

FOR FURTHER INFORMATION CONTACT: Ray Lee, Radiation Protection Division, Mail Code 6608T, U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue Washington, DC 20460; telephone number: (202) 343–9463; fax number: (202) 343–2305; email address: *lee.raymond@epa.gov.* Copies of the Compliance Application Review Documents (CARDs) supporting this action and all other recertification-related documentation can be found in the Agency's electronic docket found at *www.regulations.gov* (Docket ID No. EPA–HQ–OAR–2014–0609).

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Abbreviations

CARD Compliance Application Review Document
CFR Code of Federal Regulations
DOE U.S. Department of Energy
EPA U.S. Environmental Protection Agency
FR Federal Register
NMED New Mexico Environment Department
OAR Office of Air and Radiation
Pa Pascal
PBRINE Parameter: Probability Distribution of Encountering Brine
RCRA Resource Conservation and Recovery Act
SEN Sensitivity Study
TRU Transuranic
TSD Technical Support Document
WIPP Waste Isolation Pilot Plant
WIPP LWA WIPP Land Withdrawal Act

I. General Information

A. How can I get copies of this document and other related information?

1. *Docket.* The EPA has established a docket for this action under Docket ID No. EPA–HQ–OAR–2014–0609. Publicly available docket materials are available either electronically at *http://www.regulations.gov* or in hard copy at the Air and Radiation Docket in the EPA

Docket Center, (EPA/DC) EPA West, Room B102, 1301 Constitution Ave. NW., Washington, DC. The EPA Docket Center 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 Air and Radiation Docket is (202) 566–1742. As provided in the EPA's regulations at 40 CFR part 2, and in accordance with normal EPA docket procedures, if copies of any docket materials are requested, a reasonable fee may be charged for photocopying.

2. *Electronic Access.* You may access this **Federal Register** document electronically through the U.S. Government Publishing Office Web site at *https://www.gpo.gov/fdsys/browse/collection.action?collectionCode=FR.*

II. What is the WIPP?

A. Background

The Waste Isolation Pilot Plant (WIPP) is a disposal system for defense-related transuranic (TRU) radioactive waste. The WIPP Land Withdrawal Act (WIPP LWA) of 1992 defines TRU waste as materials containing alpha-emitting radioisotopes, with half-lives greater than twenty years, in concentrations greater than 100 nanocuries per gram (nCi/g), except for (A) high-level radioactive waste; (B) waste that the Secretary has determined, with the concurrence of the Administrator, does not need the degree of isolation required by the disposal regulations; or (C) waste that the Nuclear Regulatory Commission has approved for disposal on a case-by-case basis in accordance with part 61 of title 10, Code of Federal Regulations (CFR). Developed by the U.S. Department of Energy (DOE), the WIPP is located near Carlsbad in southeastern New Mexico. At the WIPP, the DOE disposes of radioactive waste 655 meters (2,150 feet) underground in an ancient salt layer which will eventually creep and encapsulate the waste. The WIPP has a total capacity to dispose of 6.2 million cubic feet of waste.

Congress initially authorized the development and construction of the WIPP in 1980 ''for the express purpose of providing a research and development facility to demonstrate the safe disposal of radioactive wastes resulting from the defense activities and programs of the United States.'' [1] To further facilitate the development and operation of the WIPP, Congress passed the WIPP LWA in 1992 and amended it in 1996. The WIPP LWA only allows TRU radioactive waste generated by defense activities associated with nuclear weapons to be emplaced in the WIPP and explicitly prohibits high-level waste or spent nuclear fuel from being disposed of at the WIPP.

Most TRU waste proposed for disposal at the WIPP consists of items that have become contaminated as a result of activities associated with the production of nuclear weapons or with the clean-up of weapons production facilities, *e.g.,* rags, equipment, tools, protective gear and organic or inorganic sludges. Some TRU waste contains hazardous chemicals used during weapons production, research and development and cleaning/maintenance/deactivation activities. Some of the waste proposed for disposal at the WIPP is known as legacy waste and has been stored for decades at various federal facilities across the United States, including major generator sites such as the Idaho National Laboratory, Los Alamos National Laboratory and Oak Ridge National Laboratory, and smaller generators such as Argonne National Laboratory and Lawrence Livermore National Laboratory. These facilities continue to generate small quantities of TRU waste. All TRU waste which the DOE plans to ship to the WIPP is subjected to the EPA's WIPP waste characterization requirements at 40 CFR 194.24.

The WIPP LWA provides the EPA the authority to oversee and regulate the WIPP. The WIPP LWA requires the EPA to conduct three main tasks, to be completed sequentially, to reach an initial compliance certification decision. First, the WIPP LWA requires the EPA to finalize general regulations for the disposal of highly-radioactive waste.[2] The EPA published these disposal regulations, located at subparts B and C of 40 CFR part 191, in the **Federal Register** in 1985 and 1993.[3]

Second, the WIPP LWA requires the EPA to develop criteria, via rulemaking, to interpret and implement the general radioactive waste disposal regulations specifically as they apply to the WIPP. In 1996, the Agency issued the WIPP Compliance Criteria (40 CFR part 194).[4]

Third, the WIPP LWA requires the EPA to review the information submitted by the DOE every five years to demonstrate continued compliance with the disposal regulations and determine whether or not the WIPP continues to be in compliance.[5] The Agency issued the initial certification decision on May 18, 1998 (63 FR 27354–27406).

B. Impacts of February 2014 Incidents on the Repository

Since the EPA's initial certification, operation of the WIPP proceeded without substantial interruption until 2014. However, two events took place at the WIPP in February 2014 that led the DOE to suspend emplacement of additional waste in the facility for nearly three years. On February 5, a salt haul truck caught fire. Workers were evacuated, and the underground portion of the WIPP was shut down. On February 14, a second event occurred when a continuous air monitor alarmed during the night shift, signaling a detection of radiation. The continuous air monitor was measuring exhaust from waste panel 7, where waste emplacement had recently begun. Radiological contamination of the underground caused an indefinite suspension of waste handling activities.

After implementing numerous corrective actions, the DOE resumed limited waste emplacement on January 4, 2017, and also resumed limited shipments from waste generator sites. Resumption of waste emplacement at the WIPP is unrelated to the EPA's recertification decision, which is primarily concerned with compliance with the EPA's long-term disposal requirements. However, the DOE has acknowledged that recovery from the radiological release will result in design changes to the repository, which will need to be considered from that longer-term perspective. These changes include installation of a new ventilation shaft and modification of the waste panel layout to accommodate the premature closure of planned waste emplacement capacity in panel 9. The DOE is still reviewing options and has not provided any specific plans to the EPA. The EPA will review these changes as more information becomes available and they are incorporated into future recertification applications. The EPA recognizes that the current recertification decision is based on a repository design that is likely to change, but the current application contains the information necessary to reach a decision without knowing the details of the future changes. It is not unprecedented for the EPA to conduct a recertification review with the knowledge that the DOE will submit a request to change an aspect of the disposal system design.

[1] Department of Energy National Security and Military Applications of Nuclear Energy Authorization Act of 1980, Pub. L. 96–164, section 213.

[2] WIPP LWA, section 8(b).

[3] 50 FR 38066–38089 (September 19, 1985) and 58 FR 66398–66416 (December 20, 1993).

[4] 61 FR 5224–5245 (February 9, 1996).

[5] WIPP LWA, section 8(d).

The EPA expects that any issues associated with repository design changes will be appropriately addressed in responding to change requests from the DOE and in subsequent recertification applications. However, because these design changes are likely to be substantial, the EPA believes it is necessary for the DOE to ensure that future compliance recertification applications are as robust and technically defensible as possible. To that end, the EPA discusses in Section VI.D specific aspects of future compliance recertification applications that the Agency believes would benefit from independent technical review, or otherwise from thorough consideration of more recent scientific information and understanding of chemical processes anticipated to take place within the repository. The EPA strongly believes that incorporating such reviews and information into future applications will increase public confidence in the DOE's compliance demonstrations and facilitate the Agency's review.

III. Compliance Certification History

A. 1998 Certification Decision

The WIPP LWA, as amended, required the EPA to evaluate whether the WIPP complied with the EPA's standards for the disposal of radioactive waste. On May 18, 1998 (63 FR 27354–27406), the EPA determined that the WIPP met the standards for radioactive waste disposal. This decision allowed the DOE to begin placing radioactive waste in the WIPP, provided that all other applicable health and safety standards, and other legal requirements, were met. The WIPP received the first shipment of TRU waste on March 26, 1999. The complete record and basis for the EPA's 1998 certification decision can be found in Air Docket A–93–02.

Although the EPA determined that the DOE met all of the applicable requirements of the WIPP Compliance Criteria in the original certification decision, the EPA also found that it was necessary for the DOE to take additional steps to ensure that the measures actually implemented at the WIPP (and thus the circumstances expected to exist there) were consistent with the DOE's compliance certification application and with the basis for the EPA's compliance certification. As a result, the EPA included four explicit conditions in the WIPP certification of compliance (see 40 CFR part 194, Appendix A; WIPP Recertification Background Document in Docket No. EPA–HQ–OAR–2014–0609). These conditions are discussed in Section V.C of this document.

B. 2006 Recertification Decision

The first recertification process, which occurred in 2004–2006, included an EPA review of all changes made at the WIPP facility since the original 1998 certification decision. The Agency received the DOE's first compliance recertification application on March 26, 2004. The EPA issued the completeness determination [6] for the 2004 Compliance Recertification Application by letter to the DOE on September 29, 2005 (see 70 FR 61107–61111, October 20, 2005). On March 29, 2006, the EPA officially recertified the WIPP facility for the first time (71 FR 18010–18021, April 10, 2006).

C. 2010 Recertification Decision

Following receipt of the DOE's second compliance recertification application on March 24, 2009, the EPA requested additional information from the DOE and the DOE responded with the requested supplemental information. All pertinent 2009 Compliance Recertification Application correspondence was placed in the docket (Docket ID No. OAR–2009–0330 on *www.regulations.gov*) and linked to on the WIPP Web site (*https://www.epa.gov/radiation/certification-and-recertification-wipp#tab2*). On June 29, 2010, the EPA sent a letter to the DOE announcing that the DOE's recertification application was complete (75 FR 41421–41424, July 16, 2010). The EPA's second recertification of the WIPP compliance was published on November 18, 2010 (75 FR 70584).

IV. With which regulations must the WIPP comply?

A. Compliance With Radioactive Waste Disposal Regulations & the WIPP Compliance Criteria

The WIPP must comply with the EPA's radioactive waste disposal regulations, located at subparts B and C of 40 CFR part 191. These regulations limit the amount of radioactive material which may escape from a disposal facility, and protect individuals and ground water resources from dangerous levels of radioactive contamination. In addition, the compliance recertification application and other information submitted by the DOE must meet the requirements of the WIPP Compliance Criteria at 40 CFR part 194. The WIPP Compliance Criteria implement and interpret the general disposal regulations specifically for the WIPP, and clarify the basis on which the EPA makes the certification decision.

B. Compliance With Other Environmental Laws and Regulations

In addition to the EPA's radioactive waste disposal regulations, the WIPP must also comply with a number of other federal laws and regulations pertaining to public health and safety or the environment, including, for example, the Solid Waste Disposal Act (also known as the Resource Conservation and Recovery Act (RCRA)) (42 U.S.C. 6901 *et seq.*) and the EPA's environmental standards for the management and storage of radioactive waste (subpart A of 40 CFR part 191). Various regulatory agencies are responsible for overseeing the enforcement of these federal laws and regulations. For example, enforcement of some parts of the hazardous waste management regulations has been delegated to the State of New Mexico. The State is authorized by the EPA to carry out the State's RCRA programs in lieu of the equivalent federal programs, and New Mexico's Environment Department (NMED) reviews the DOE's permit applications for treatment, storage, and disposal facilities for hazardous waste, under Subtitle C of RCRA. NMED's RCRA authority, such as issuing a hazardous waste operating permit for the WIPP, is not affected by the EPA's recertification decision. The DOE is responsible for biennially reporting to the EPA and the State of New Mexico on the WIPP's compliance with all applicable federal laws pertaining to public health and safety (WIPP LWA § 9).[7] This action does not address the WIPP's compliance with environmental or public health and safety laws and regulations other than the EPA's radioactive waste disposal regulations (40 CFR part 191) and the WIPP Compliance Criteria (40 CFR part 194).

V. Continuing Compliance With the WIPP Compliance Criteria

The EPA monitors and ensures continuing compliance with the EPA regulations through a variety of activities, including the following: review and evaluation of the DOE's annual change reports, monitoring of

[6] A ''completeness determination'' is an administrative step by the Agency to notify the DOE and the public that the Agency has enough information to conduct a final technical review of the DOE's application. It does not reflect any conclusion regarding the WIPP's continued compliance with the radioactive waste disposal regulations at 40 CFR part 191 and the compliance criteria at 40 CFR part 194. The completeness determination represents the start of the six-month period specified in the WIPP LWA for issuance of the recertification decision.

[7] Compliance with these laws and regulations is addressed in the site's Biennial Environmental Compliance Report (BECR).

the conditions of compliance, addressing planned change requests, inspections of the WIPP site and inspections of waste characterization operations. Because of the 2014 incident, the EPA also reviewed health and monitoring data to ensure the radiological releases remained below the limits of subpart A of 40 CFR part 191 and the Clean Air Act National Emissions Standards for Hazardous Air Pollutants at 40 CFR part 61, subpart H.

The DOE must timely report any planned or unplanned changes in activities or conditions pertaining to the disposal system that differ significantly from the most recent compliance application and, at least annually, report any other changes in disposal system conditions or activities (40 CFR 194.4(b)(3), (4)). The Department must also report any releases of radioactive material from the disposal system (40 CFR 194.4(b)(3)(iii)). In addition, the EPA may request additional information from the DOE at any time (§ 194.4(b)(2)). These requirements assist the EPA with monitoring the performance of the disposal system and evaluating whether the certification should be modified, suspended or revoked.

A. Annual Change Reports

In addition to reporting significant changes to the WIPP disposal system, the DOE is required to report at least annually other changes to the conditions or activities concerning the WIPP disposal system (40 CFR 194.4(b)(4)). The DOE submitted the first annual change report in November 1998.

The DOE's annual change reports reflect the progress of quality assurance and waste characterization inspections, minor changes to the DOE documents, information on monitoring activities and any additional EPA approvals for changes in activities. All correspondence and approvals regarding the annual change reports can be found in hard copy in the Air Docket A–98–49, Categories II–B2 and II–B3.

B. Monitoring the Conditions of Compliance

1. Panel Closure Rulemaking. Waste panel closure systems are required by the State of New Mexico during the WIPP's operational phase. Since they are a feature of the disposal system design, the EPA requires panel closures to be included in the long-term modeling of the repository. The panel closures impact long-term disposal system performance because they can impede brine and gas flow between waste panels. As originally promulgated, the WIPP Certification Condition 1 required the DOE to implement the Option D panel closure system at the WIPP, using Salado mass concrete.[8] By final action published October 8, 2014, the EPA modified Condition 1 to remove the specific reference to Option D and generally require that the DOE close filled waste panels as specifically approved by the EPA (40 CFR part 194, Appendix A, as amended; 79 FR 60750–60756). With the same action, the EPA approved a design which primarily consists of 100 feet of run-of-mine salt. The DOE submitted a performance assessment [9] to support its request to change the panel closure system design. The DOE asserted that the performance assessment demonstrated that a panel closure design using run-of-mine salt would be compliant with the EPA's disposal regulations (40 CFR part 191). The modification to the WIPP Certification Condition 1 also removed the requirement for the Agency to make future panel closure design changes by formal rulemaking.

2. Quality Assurance. Certification Condition 2 requires each TRU generator site to establish and execute a quality assurance program for waste characterization activities. Section 194.22 establishes quality assurance requirements for the WIPP. The DOE must adhere to a quality assurance program that implements the requirements of ASME NQA–1–1989 edition, ASME NQA–2a–1990 addenda, part 2.7, to ASME NQA–2–1989 edition, and ASME NQA–3–1989 edition (excluding Section 2.1 (b) and (c), and Section 17.1).The EPA determined that the 2014 Compliance Recertification Application provides adequate information to verify the establishment and implementation of each of the applicable elements of the ASME NQA–1–1989.The EPA has also verified the continued proper implementation of the Nuclear Quality Assurance Program through periodic audits conducted in accordance with § 194.22(e).

[8] ''Salado'' mass concrete refers to concrete made using Salado brines instead of fresh water.

[9] Performance assessment is an important tool used in various contexts or evaluations relating to the WIPP and such assessments are mentioned in different circumstances throughout this notice, especially in Section VI.E. In general, performance assessment means: ''an analysis that: (1) Identifies the processes and events that might affect the disposal system; (2) examines the effects of those processes and events on the performance of the disposal system; and (3) estimates the cumulative release of radionuclides, considering the associated uncertainties, caused by all significant processes and events'' (40 CFR 191.12). Performance assessment, for example, is required to show compliance with containment requirements (40 CFR 191.13).

The EPA's determination of compliance with 40 CFR 194.22 can be found in Table 1 of the 2014 Compliance Recertification Application CARD 22. Between March 2008 and April 2012, the EPA conducted several quality assurance audits and found the site-specific quality assurance programs to be adequate. The EPA conducted quality assurance audits at several waste generator sites and entities supporting the WIPP Performance Assessment activities at Los Alamos and Sandia Laboratories. The EPA also audited the quality assurance program of the Carlsbad Field Office.

3. Waste Characterization. Certification Condition 3 requires TRU waste generator sites to have waste characterization systems approved by the EPA. The Agency has conducted numerous audits and inspections at waste generator sites in order to implement Condition 3 and the relevant provisions of 40 CFR part 194, including § 194.8. The EPA inspected site-specific TRU waste characterization programs implemented to (a) characterize physical and radiological components in individual waste containers and (b) demonstrate compliance with the WIPP waste disposal requirements at 40 CFR 194.24.

To support the 2014 Compliance Recertification Application, the DOE reported the EPA's waste characterization inspections and approvals between January 2007 and December 2012 (see Table 1 in CARD 8). The EPA evaluated previously approved site-specific waste characterization program for continued compliance in accordance with 40 CFR 194.24, as well as changes to the systems of controls approved as part of the baseline (initial) approvals, and concluded them to be technically adequate. The TRU waste sites approved by the EPA to ship contact-handled TRU waste to the WIPP facility in accordance with the requirements of § 194.8 since the 2009 Compliance Recertification Application are as follows: Advanced Mixed Waste Treatment Project, Hanford's Richland Laboratory, Idaho National Laboratory, Los Alamos National Laboratory, Oak Ridge National Laboratory and Savannah River Site. Since the 2009 Compliance Recertification Application, the TRU waste sites approved by the EPA to ship remote-handled TRU waste to the WIPP facility in accordance with the requirements of § 194.8 are Argonne National Laboratory, Bettis Atomic Power Laboratory, General Electric Vallecitos Nuclear Center, Idaho National Laboratory, Oak Ridge National Laboratory and Savannah River Site. Since the 2009 Compliance

Recertification Application, no waste characterization occurred at Bettis Atomic Power Laboratory, General Electric Vallecitos Nuclear Center, Hanford's Richland Laboratory and Oak Ridge National Laboratory.

During the period covered by the 2014 Compliance Recertification Application, all site-specific waste characterization systems of controls at active TRU waste generator sites had necessary baseline approvals. Over the years, when warranted, the EPA approved modification to waste characterization program components. Notices announcing the EPA inspections or audits are routinely published in the **Federal Register** and also announced on the Agency's WIPP Web site (*https://www.epa.gov/radiation/epas-role-waste-isolation-pilot-plant-wipp*) and WIPP-NEWS email listserv.[10]

Records of the EPA's quality assurance correspondences and waste characterization approvals can be found in Air Docket A–98–49, Categories II–A1 and II–A4, respectively, as well as online in Docket ID No. EPA–HQ–OAR–2001–0012 on *www.regulations.gov.*

4. Passive Institutional Controls. Certification Condition 4 requires the DOE to submit a schedule and plan for implementing passive institutional controls, including markers and other measures indicating the presence of the repository. The standards under the WIPP Certification Condition 4 do not require the submission of any reports until the final compliance recertification application prior to closure of the WIPP. The EPA has not received any submissions from the DOE during the period addressed by the 2014 Compliance Recertification Application and has not taken any actions relating to Condition 4. The EPA anticipates that it will evaluate the DOE's compliance with Condition 4 of the certification when the DOE submits a revised schedule and additional documentation regarding the implementation of passive institutional controls. Once received, the information will be placed in the EPA's public dockets, and the Agency will evaluate the adequacy of the documentation. After receiving Condition 4 submissions from the DOE, and during the operational period when waste is being emplaced in the WIPP (and before the site has been sealed and decommissioned), the EPA will verify that specific actions identified by the DOE in the compliance certification application, and supplementary information (and in any additional documentation submitted in accordance with Condition 4) are being taken to test and implement passive institutional controls.

C. Inspections

The WIPP Compliance Criteria provide the EPA the authority to conduct inspections of activities at the WIPP and at off-site facilities which provide information relevant to compliance applications (40 CFR 194.21). The Agency has conducted periodic inspections to verify the adequacy of information relevant to certification applications. The EPA has conducted annual inspections at the WIPP site to review and ensure that the monitoring program meets the requirements of § 194.42. The EPA has also inspected the emplacement and tracking of waste in the repository. The Agency's inspection reports can be found in Air Docket A–98–49, Categories II–A1 and II–A4, as well as online at *www.regulations.gov,* Docket ID No. EPA–HQ–OAR–2001–0012.

VI. What is the EPA's 2017 Recertification Decision?

The EPA determines, in accordance with WIPP LWA § 8(f)(2), that the WIPP facility is in compliance with the final disposal regulations, subparts B and C of 40 CFR part 191. Compliance recertification ensures that accurate and up-to-date information is considered in the determination that WIPP remains in compliance with these radioactive waste disposal regulations. The EPA makes this recertification and determination of continued compliance following the ''Criteria for the Certification and Recertification of the WIPP's Compliance with the 40 CFR part 191 Disposal Regulations'' (WIPP Compliance Criteria, 40 CFR part 194), including the WIPP certification conditions (40 CFR part 194, Appendix A).

A. Performance Assessment and the EPA's Standards

The disposal regulations at 40 CFR part 191 include requirements for containment of radionuclides. The containment requirements at 40 CFR 191.13 specify that releases of radionuclides to the accessible environment[11] must be unlikely to exceed specific limits for 10,000 years after disposal. The DOE assesses the likelihood that the WIPP will meet these release limits through a process known as performance assessment.

The disposal regulations provide that there must be a reasonable expectation that cumulative releases of radionuclides from the WIPP and into the environment over 10,000 years will not exceed specified quantities of these radionuclides (40 CFR 191.13 and Appendix A). A reasonable expectation standard is used because of the long time period involved and the nature of the events and processes at radioactive waste disposal facilities leads to uncertainties about future performance. The DOE's probabilistic performance assessments assess the likelihood of environmental radionuclide release so that future uncertainties are accounted for in the calculations through the use of alternative scenarios and variations in values of uncertain parameters via probability distributions.

The containment requirements in 40 CFR 191.13 are expressed in terms of ''normalized releases.'' At the WIPP, the specific release limits are based on the estimated amount of waste in the repository at the time of closure, and the projected releases are ''normalized'' against these limits (§ 194.31). Normalized releases are expressed as ''EPA units''. The EPA units are calculated by dividing all the combined projected releases by the total combined radioactivity of all the waste in the repository.

The DOE must demonstrate, in each 5-year compliance recertification application, that the total average of combined releases are below two compliance criteria at a higher probability of occurrence and a lower probability of occurrence. These compliance points are as follows:

1. For a probability of 0.1 (a 1 in 10 chance) in 10,000 years, releases to the accessible environment will not exceed 1 EPA unit, and

2. For a probability of 0.001 (a 1 in 1,000 chance) in 10,000 years, releases to the accessible environment will not exceed 10 EPA units.

DOE evaluates four release mechanisms in the WIPP performance assessment modeling:

Cuttings and cavings. This consists of material that gets brought to the surface when a borehole intersects waste in a WIPP waste panel. The cuttings are the material intersected by the borehole itself and the cavings material is waste that fails around the borehole, collapses into it and is brought to the surface.

Spallings. This is solid material that fails and gets brought to the surface under high pressure conditions in the

[10] For more information on the WIPP–NEWS email listserv, see Section VIII.B below.

[11] The accessible environment is defined in 40 CFR 191.12 as (1) The atmosphere: (2) land surfaces; (3) surface waters; (4) oceans; and (5) all of the lithosphere that is beyond the controlled area.

repository. This only occurs when the pressure is above 8 megapascal[12] (MPa).

Direct Brine Releases. This is a release of dissolved actinides in brine when there is sufficient brine and high pressure in the repository (*i.e.,* above 8 MPa) and brine saturations are above residual saturation (*i.e.,* brine is not ''trapped'' between pore spaces) as a borehole intersects a waste panel. The contaminated fluid is brought to the surface over a period of hours to days.

Releases to the Culebra. This occurs when contaminated brine from repository is introduced via a borehole to the Culebra Dolomite and then moves to the edge of the accessible environment (*i.e.,* the boundary established by the WIPP LWA).

The DOE estimates the potential releases from these release mechanisms, *i.e.,* the cumulative releases, for comparison with the specified limits provided in 40 CFR part 191, Appendix A. The DOE is to provide in the application overall mean calculated releases and the upper 95th confidence limit of that mean.

B. Summary of the EPA's Review

After reviewing the DOE's documentation and additional studies that the DOE conducted at EPA's request, the aspects of the performance assessment of most interest to EPA are those that affect the direct brine release mechanism, by which actinides[13] dissolved in brine are transported to the surface during a drilling intrusion. Direct brine release is the overall dominant release mechanism at the low probability compliance point, and is influenced primarily by the availability of liquid (*i.e.,* brine) in the repository, the availability of radionuclides to dissolve in that liquid (*i.e.,* inventory and solubility) and the pressure in the repository (providing a motivating force for dissolved radionuclides to move out of the repository).

The key issues involving these aspects of the repository are: (1) The actinide solubility, which is addressed through changes to the geochemical database, colloid contribution updates and the determination of the actinide solubility uncertainty; (2) the probability of hitting a brine pocket under the repository; (3) the steel corrosion rate and steel's interactions with hydrogen sulfide and magnesium oxide (affecting the gas pressure); and (4) the overall modeling of direct brine releases that involve the interactions of items 1–3 plus the conditions of the repository (*e.g.,* panel and drift permeability and porosity) that can influence the pressure characteristics of the waste areas. These issues are discussed in more detail in Section VI.D, along with other issues that are noteworthy but have more limited impact on performance assessment results.

The following information describes the EPA's compliance evaluation related to the disposal regulations and Compliance Criteria.

C. What information did the Agency use to make the decision?

In general, compliance applications must include information relevant to demonstrating compliance with each of the individual sections of 40 CFR part 194 to determine if the WIPP will comply with the Agency's radioactive waste disposal regulations at 40 CFR part 191, subparts B and C. The EPA begins the compliance recertification evaluation once the EPA receives a complete compliance recertification application (40 CFR 194.11).

To make this decision, the EPA evaluated basic information about the WIPP site and disposal system design, as well as information which addressed the various compliance criteria. As required by 40 CFR 194.15(a), the DOE's 2014 Compliance Recertification Application updated the previous submission in 2009.

On March 26, 2014, the DOE submitted the compliance recertification application. The EPA began to identify areas of the application where additional information was needed. On October 10, 2014, the EPA gave public notice of the compliance recertification application and opened the official public comment period (79 FR 61268). On January 13, 2017, the EPA sent a letter to the DOE stating that the DOE's recertification application was complete. On March 10, 2017, the EPA issued a **Federal Register** notice announcing the completeness determination and stating that the public comment period would close one month later, on April 10, 2017 (82 FR 13282). The compliance recertification application completeness-related correspondence can be found in Docket ID No. EPA–HQ–OAR–2014–0609 on *www.regulations.gov.*

The EPA relied on materials prepared by the Agency or submitted by the DOE in response to the EPA requests. For example, the EPA requested that the DOE conduct specific, additional modeling calculations for the performance assessment, known as sensitivity studies. The purpose of these studies was to evaluate the impact on performance assessment results of changing specific parameter values. The studies aided the EPA in determining how significant the differences in some parameter values were to a demonstration of compliance. The four sensitivity studies and the EPA's evaluation of them are discussed in more detail in Section VI.E.

To determine whether the WIPP facility continues to be in compliance with the final disposal regulations, the EPA engaged in a technical review of the compliance recertification application against the WIPP Compliance Criteria. The Agency focused the review on areas of change identified by the DOE since the 2010 recertification decision.

The Agency produced many documents during the technical review and evaluation of the compliance recertification application. The EPA's Compliance Application Review Documents (CARDs) correspond in number to the sections of 40 CFR part 194 to which the documents primarily relate. Each CARD enumerates all changes made by the DOE relating to a particular section of the rule or certification criterion, and describes the EPA's process and conclusions. The EPA also prepared technical support documents (TSDs) to address specific topics in greater detail. Both the CARDs and the TSDs for this recertification decision can be found in Docket ID No. EPA–HQ–OAR–2014–0609 on *www.regulations.gov.* Together, the CARDs and TSDs thoroughly document the EPA's review of the DOE's compliance recertification application and the technical rationale for the Agency's decisions.

In summary, the EPA's recertification decision is based on the entire record available to the Agency, which is located in the public docket dedicated to this recertification (Docket ID No. EPA–HQ–OAR–2014–0609 on *www.regulations.gov*). The record consists of the 2014 Compliance Recertification Application, supplementary information submitted by the DOE in response to the EPA requests for additional information, technical reports generated by the EPA, the EPA audit and inspection reports, and comments submitted on the DOE's application and the EPA's completeness review during the public comment period. All pertinent 2014 Compliance Recertification Application correspondence was placed in the docket and linked to via the EPA's WIPP Web site (*https://www.epa.gov/*

[12] ''Pascal'' is a unit of pressure, defined as 1 kg/m-sec^2.

[13] Actinide means any of the series of fifteen metallic elements from actinium (atomic number 89) to lawrencium (atomic number 103) in the periodic table. They are all radioactive, the heavier members being extremely unstable and not of natural occurrence.

radiation/certification-and-recertification-wipp).

D. Content of the Compliance Recertification Application (§§ 194.14 and 194.15)

The DOE's WIPP compliance applications must include, at a minimum, basic information about the WIPP site and disposal system design, including information about the following topics: the geology, hydrology, hydrogeology and geochemistry of the WIPP disposal system and the WIPP vicinity; the WIPP materials of construction; standards applied to design and construction; background radiation in air, soil and water; and past and current climatological and meteorological conditions (40 CFR 194.14). Section 194.15 states that the DOE's recertification applications shall update this information to provide sufficient information for the EPA to determine whether or not the WIPP facility continues to be in compliance with the disposal regulations.

1. Changes to the Disposal System Identified by the DOE. In Section 15 of the 2014 Compliance Recertification Application, the DOE identified changes to the disposal system between the 2009 Compliance Recertification Application and 2014 Compliance Recertification Application and changes to technical information relevant to §§ 194.14 and 194.15. Noteworthy changes identified by the DOE in the 2014 Compliance Recertification Application include the following: an update to the parameters defining drilling rate and plugging pattern, revisions to the calculations of the probability of encountering a pressurized brine reservoir, replacing the Option D panel closure design with run-of-mine salt, modeling open areas in the repository, revision of the steel corrosion rate, revision of the effective shear strength of waste, revisions of the repository water balance including variable brine volumes for radionuclides to dissolve and revisions of the colloid parameters.

Before determining that the compliance recertification application was complete, the EPA raised numerous technical questions with the DOE, as described below. For each topic, a brief summary is provided of how the DOE addressed the issue in the 2014 application, followed by the EPA's perspective on the change, including any follow-up analyses requested. The DOE also updated the waste inventory. This topic is discussed in Section VI.F.1.

Since the initial Compliance Certification performance assessment, the DOE's calculated releases in performance assessments have increased with every performance assessment until the 2014 Compliance Recertification Application performance assessment. The changes the DOE made to the performance assessment in the current application reduce the calculated releases. For example, the calculated release of radionuclides at the low probability compliance point (a likelihood of less than a one in 1,000 chance), was assessed by the DOE in the 2009 Compliance Recertification Application as 0.72 EPA Units, but in the 2014 Compliance Recertification Application, the similar calculated release initially was assessed as 0.261 EPA Units.

Changes that reduce the calculated releases involve the shear strength of the waste, revised steel corrosion rate, incorporating water balance as part of the chemical model implementation as it relates to steel corrosion and interactions with the magnesium oxide engineered barrier, correcting errors associated with brine volume mass balance and calculation of actinide solubility and the change to how the DOE calculates the probability of hitting a brine pocket under the repository. In general, the result of the DOE's methodology changes is to reduce calculated releases by about a factor of two between the 2009 and 2014 Compliance Recertification Applications at both the 0.1 and 0.001 probability compliance points.

The EPA has identified issues with some of these changes, but even with changes the EPA asked the DOE to investigate, projected releases stay well under the numerical release limits. For example, at the 0.001 probability compliance point where the EPA normalized release limit is 10 EPA units, the changes the EPA requested resulted in increased releases from 0.261 EPA units in the DOE's 2014 performance assessment to 0.299 EPA units in sensitivity study SEN3 and 0.541 EPA units in sensitivity study SEN4. The sensitivity studies are discussed in depth in Section VI.E.

a. Update to the Drilling Rate and Borehole Plugging Patterns. As with previous recertification applications, the DOE updated the Delaware basin drilling rates based on the methodology previously approved. For the 2014 Compliance Recertification Application, the drilling rate increased to 0.00673 boreholes per km^2 per year (equivalent to 67.3 boreholes/km^2 over the 10,000-year regulatory period) compared to that used in the 2009 performance assessment baseline calculation, which was .00598 boreholes per km^2 per year (or 59.8 boreholes/km^2 over 10,000 years). The Agency accepted the DOE's drilling rate increase.

The DOE also updated information on the type of plugs installed in exploratory, disposal and resource extraction boreholes. There are three types of borehole plugs used in the Delaware basin. There are boreholes that are continuously plugged through the entire salt section, and the DOE reports a slight increase in the use of this design. There are boreholes plugged with a two-plug configuration (at the Salado/Rustler and the Bell Canyon/Castile Formation interfaces). This two-plug design also slightly increased from that used in the 2009 application. There is also a three-plug configuration (*i.e.,* borehole plugs at the Rustler/Salado, Salado/Castile and Castile/Bell Canyon interfaces); the DOE reports a slight decrease in this configuration. The Agency accepted the DOE's update to the change in the plugging patterns.

b. Replacement of Option D Panel Closure System with the Run-of-Mine Salt Panel Closure Design. Part of the design for the WIPP includes the use of a closure system to separate the waste rooms in a panel from active areas in the mine, which can affect long-term brine and gas flows within the repository. As part of the design, the panel closure system that is installed needs to be represented in the modeling of long-term performance.

On September 28, 2011, the DOE provided a change request to the EPA (Docket EPA–HQ–OAR–2013–0684) to modify the panel closure system design specified in Appendix A of 40 CFR part 194 from that of a concrete monolith plug, noted as Option D, to a 100-foot long barrier consisting of run-of-mine salt (EPA 2013; 2014). The panel closure system performance assessment release calculations were well within the numerical limits established in 40 CFR 191.13. The EPA approved the DOE's use of the proposed run-of-mine salt closure design (79 FR 60750, Oct. 8, 2014) (Docket EPA–HQ–OAR–2013–0684–0004 on *www.regulations.gov*).

The DOE incorporated the run-of-mine salt design for panel closures into the 2014 Compliance Recertification Application. To evaluate this change, the Agency reviewed a broad set of information related to the evolution of salt repository properties, including run-of-mine salt and adjacent disturbed rock zone in the WIPP repository setting (Salt Characteristics TSD [14]). From this

[14] "Technical Support Document for Section 194.23: Technical Review of Salt Aggregate, Disturbed Rock Zone, and Open Drift Healing Characteristics" in Docket ID No. EPA–HQ–OAR–2014–0609.

review, the Agency's interpretation of the data is that healing of the run-of-mine salt in the panel closures, the surrounding disturbed rock zone and open areas should occur within about the first 200 years of post-closure instead of the relatively asymptotic closure for the 200–10,000 years used by the DOE. The DOE's use of the longer period of time assumes permeability and porosity for the salt will be low within 200 years, but not at the very low end state properties of intact halite.

To identify the potential effect of the difference in the repository properties between what the EPA has identified may be applicable and what the DOE modeled, the Agency requested that the DOE analyze the repository performance using parameter values for the run-of-mine salt panel closure system and adjacent disturbed rock zone that simulate complete healing. The DOE did this in the sensitivity study SEN3 discussed in Section VI.E. The calculated releases increased for direct brine releases and spallings releases in SEN3, but overall releases remained well within the numerical limits of 40 CFR 191.13 and the EPA concludes that there is a reasonable expectation that the repository remains in compliance with the numerical limits at 40 CFR 191.13, and 40 CFR part 191, Appendix A.

If the DOE determines, in light of the announced decision to abandon the area previously designated for panel 9, that worker safety considerations preclude installing panel closures in affected areas of the repository, the DOE's treatment of panel closures in performance assessment may be more appropriately addressed in the context of modeling open areas representative of no panel closures. The Agency will review future panel closure modeling in the context of future facility design changes.

c. Modeling of Open Areas in the Repository. In the 2014 Compliance Recertification Application, the DOE increased the modeled volume of the open rooms and drifts by approximately forty percent to accommodate future planned experiments. These new areas are located north of the waste area drifts and are to be separated from the waste area by two sets of run-of-mine salt panel closures. For the 2014 Compliance Recertification Application performance assessment, the DOE modeled these areas as open for the entire 10,000-year regulatory period even though it is expected that the creep closure process will close the open areas within a few hundred years (Overview TSD [15]). The Agency evaluated the impact of the DOE's assumption to model these areas as open (relatively large porosity and high permeability) by requesting the DOE perform sensitivity study SEN2, where the non-waste rooms and open drifts are assumed to have creep closed during the entire 10,000-year regulatory period.

The results from the SEN2 studies indicate modeling creep closure and healing of the operations and experimental areas (*i.e.,* non-waste areas) of the repository was shown to have little effect on the prediction of total releases from the repository although, relative to the 2014 Compliance Recertification Application performance assessment, a slight increase in spallings releases does occur if these areas are assumed to creep closed. This is a result of higher pressures occurring in panels. See Section VI.E for discussion of the SEN2 study.

If, in the future, there are repository design changes that result in more non-waste drifts mined or left open in the facility, the issue of open areas will need to be re-evaluated in the context of those design changes, as releases could be expected to increase in that circumstance. The DOE's plan to abandon panel 9 would leave large areas of open space in the repository in the panel 9 drifts and possibly no panel closures for multiple panels. Performance assessment modeling should address these expected future repository conditions. The EPA believes that an independent technical review of issues related to salt behavior and modeling of open areas would be of benefit to the DOE as it further develops its plans.

d. The DOE's Revised Estimate of the Probability of Encountering Pressurized Brine. Highly pressurized zones of brine (*i.e.,* pressurized brine reservoirs) occur in the Castile Formation below the Salado Formation, which is the formation that hosts the WIPP. If a future driller encounters a Castile pressurized brine reservoir and brine enters the waste panels, it can dissolve radionuclides that then could be transported up a borehole to the surface. In the modeling of the repository, the probability of a future borehole intersecting a waste panel and a Castile brine reservoir below the repository is denoted by the parameter name PBRINE. Because the probability of hitting a brine pocket is uncertain, it is represented by a probability distribution, and the actual value of the PBRINE parameter for an individual model run is sampled from the PBRINE probability distribution.

In the 2014 Compliance Recertification Application, the DOE changed the basis it used to develop the probability distribution for parameter PBRINE. The DOE's revision to the estimated probability of a future driller encountering pressurized brine relies heavily on voluntarily reported drilling logs [16] combined with an updated probability distribution. The DOE eliminated from consideration site-specific data collected through geophysical detection methods, which had previously been incorporated into the PBRINE parameter.

The EPA has several concerns regarding the DOE's update to the PBRINE parameter,[17] including the DOE's elimination of the site geophysical data leading to estimates of the potential for brine encounters based only on the voluntary data reported by the driller, and that more recent site data supports the potential for more brine under the repository than the DOE or the EPA had previously considered. For a more in-depth discussion of these issues, see the PBRINE TSD.[18] The EPA's concerns were significant enough that the EPA developed a modified methodology for determining the probability distribution for parameter PBRINE in the WIPP performance assessment calculations.

The Agency's revision to the PBRINE parameter was incorporated into Sensitivity Study SEN4. The study results indicate the modified PBRINE probability distribution contributed to an increase in estimated direct brine releases and increased the total releases at the 0.001 low probability compliance point to roughly double those in the 2014 Compliance Recertification Application performance assessment.[19] Because the Agency is unable to accept the DOE approach used to define the PBRINE parameter, the EPA views the updated probability distribution used in

[15] ''Overview of Changes Between PABC–2009 and CRA–2014 WIPP Performance Assessments'' in Docket ID No. EPA–HQ–OAR–2014–0609.

[16] Kirchner, T., T. Zeitler, and R. Kirkes. 2012. Evaluating the Data in Order to Derive a Value for GLOBAL:PBRINE. Memorandum to Sean Dunagan dated December 11, 2012. ERMS 558724. Carlsbad, NM: Sandia National Laboratories.; EPA Completeness Comment 1–23–6; Docket EPA–HQ–OAR–2014–0609–0004.

[17] See Completeness Question 1–23–6, Probability of Encountering a Castile Brine Pocket and subsequent clarifying questions, as well as the PBRINE TSD, for more detail in Docket ID No. EPA–HQ–OAR–2014–0609.

[18] ''Probability of Encountering Castile Brine Beneath the WIPP Waste Panels Using the TDEM Block Method.''

[19] DOE 2014 Appendix PA, Sections PA–9.3 and PA–9.5 Kirchner 2013 and the EPA, 2017 Technical Support Document.

the SEN4 study as the baseline for PBRINE in future performance assessments. The EPA will evaluate alternative approaches proposed by the DOE. See Section VI.E for more discussion of the SEN4 study.

e. Revised Corrosion Rate of Steel. The WIPP corrosion rate model includes anoxic corrosion (*i.e.,* corrosion in the absence of oxygen) of iron in the waste containers. This corrosion is caused by hydrogen sulfide gas produced from the microbial degradation of cellulosic, plastics and rubber materials from the contaminated rubber gloves and Kimwipes™ included in the waste.

The EPA reviewed the 2014 Compliance Recertification Application model and had concerns with the way the model addressed expected repository carbon dioxide concentrations in the experimental derivation of corrosion rates. The EPA also found that the model did not incorporate hydrogen sulfide induced steel passivation,[20] which could result in an overestimation of corrosion in the longer-term. Once steel is passivated, hydrogen sulfide consumption will decrease significantly as corrosion will be limited by the ability for the gas to diffuse through the iron sulfide coating the outer surface of the container.

In addition, other components of this model, which the DOE considered to be minor, may have more impact. Calculations of the potential lead inventories at the WIPP only include current waste containers without accounting for the maximum potential of future containers.

To address the EPA's concerns about corrosion, part of the DOE's SEN4 sensitivity study involved turning off the hydrogen sulfide corrosion parameter to simulate steel passivation. These changes resulted in a slight increase in gas pressures as well as a decrease in the saturation of the waste area because both hydrogen gas and water were eliminated from the end products. Results from this study indicated that projected releases would remain within the limits of 40 CFR 191.13. Therefore, the EPA accepts the corrosion approach incorporated in the 2014 Compliance Recertification Application. See Section VI.E for more discussion of the SEN4 study.

To ensure that future performance assessments adequately address the mechanisms that affect gas generation in the repository, it would be appropriate for the DOE to update the corrosion model to better address steel passivation and account for radiolysis and address lead corrosion to be consistent with the expected inventory of the repository.

f. Revised Effective Shear Strength of the WIPP Waste. The parameter TAUFAIL represents waste shear strength and is used in calculating potential releases of waste materials from the WIPP repository when a drilling operator drills a borehole through the waste. The drilling mud will apply a hydrodynamic shear stress to the punctured waste and cause it to erode and be transported up the borehole to the surface. The sheared waste transmitted to the surface is called "cavings". A higher shear strength means the material is less likely to break into pieces and be transported up a borehole. The parameter TAUFAIL has an uncertain value which is sampled from a range of experimental values for individual model runs. In the 2014 Compliance Recertification Application, the DOE updated the mean and lower bound for the TAUFAIL parameter value distribution based on a suite of laboratory flume tests specifically designed to represent the range of values for the WIPP waste.

In the 2009 Compliance Recertification Application the lower bound value was 0.05 Pa, while for the 2014 Compliance Recertification Application the lower bound of the distribution was increased to 2.22 Pa (the mean value from the laboratory flume tests). The upper bound of the distribution, 77 Pa, remained the same. The EPA believes the DOE's overall approach of using experimental data to revise the TAUFAIL parameter is reasonable; however, the EPA had concerns with the DOE's lower "bounding" range value derived from the experiments. The Agency was concerned that three of the five low shear-strength tests had highly scattered results. The DOE attributed the scatter to pre-test sample damage and/or a high degree of variability in sample preparation, rather than testing an equivalent suite of samples. As a result, the mean of the low shear strength test results may not be truly representative of low shear strength samples.

In the SEN4 study, the EPA requested the DOE include the lowest shear-strength flume test results (1.6 Pa) as the bounding value, rather than the average (2.22 Pa). The SEN4 results indicate modifying the lower range to include the lowest value as the bounding value insignificantly impacted releases. This is due to the fact that the change from 2.22 Pa to 1.6 Pa (*i.e.,* from the mean of experimental values to the lowest experimental value) is much less than would be the change from the 0.05 Pa used in previous performance assessments to either the 1.6 Pa or the 2.22 Pa values. Based on these results, the EPA accepts the DOE's range of values used in the 2014 Compliance Recertification Application, though for future performance assessments the EPA believes it is more appropriate for the DOE to use the lower-bound result instead of the mean. See Section VI.E for more discussion of the SEN4 study. See also the TAUFAIL TSD.[21]

g. Revised Repository Water Balance. Repository water balance is the culmination of multiple chemical reactions that produce or consume water and affect actinide concentrations in the brine. These reactions include microbial degradation of the cellulosic, plastic and rubber materials, the anoxic corrosion of iron in the steel waste canisters, and reactions of the magnesium oxide (MgO) used to control carbon dioxide (CO_2) buildup in the repository. Magnesium oxide, in particular, reacts with brine and results in hydromagnesite ($Mg_5(CO_3)_4(OH)_2 \bullet 4H_2O$), which consumes water in the process.

Previous compliance recertification applications only included anoxic corrosion in water balance calculations. The 2014 Compliance Recertification Application includes an assessment of the microbial degradation of the cellulosic, plastic and rubber material, the anoxic corrosion of iron in the steel waste canisters and reactions of the engineered barrier. The DOE did not change the rates for microbial cellulosic, plastic and rubber material degradation and water production from the 2009 Compliance Recertification Application. As discussed previously, the DOE revised steel corrosion rates. The DOE developed magnesium reaction rates for the compliance recertification application based on previous studies (Chemistry TSD[22]).

Although changes to each of these parameters is minor, the reactions will have a cumulative effect. Based on previous exchanges with the DOE (see comment 2–C–5 in Docket ID No. EPA–HQ–OAR–2014–0609) as well as the SEN4 sensitivity study, the water balance updates do not appear to significantly affect the WIPP performance. However, the EPA

[20] Passivation refers to the creation of an outer coating layer on the steel canisters due to the interaction of iron and sulfide.

[21] "Technical Support Document for Section 194.23: EPA Review of Proposed Modification to the Waste Shear Strength Parameter TAUFAIL" in Docket ID No. EPA–HQ–OAR–2014–0609.

[22] "Technical Support Document for Section 194.24: Evaluation of the Compliance Recertification Actinide Source Term, Gas Generation, Backfill Efficacy, Water Balance and Culebra Dolomite Distribution Coefficient Values" in Docket ID No. EPA–HQ–OAR–2014–0609.

recommends that the DOE re-evaluate the water balance issue for future performance assessments to address questions associated with interactions involving magnesium oxide (*e.g.,* hydration rates in the water balance calculations), and as previously discussed in Section VI.D.1.e, the associated steel corrosion model and passivation processes.

h. Variable Brine Volume. Brine volume plays an important role in calculating actinide and organic ligand concentrations. In previous performance assessments, the DOE calculated concentrations of these species using the minimum brine volume needed for a direct brine release, regardless of how much brine is projected to be released. This failed to account for dilution and thus resulted in an overestimation of organic ligand concentrations as well as actinide releases. To correct for this in the 2014 Compliance Recertification Application, the DOE adjusted actinide and organic ligand concentration calculations to incorporate multiple brine volumes. The DOE continues to calculate actinides and organic ligand concentrations at the minimum brine volume required for a release. However, the DOE now also calculates concentrations by dissolving these species at volumes 2, 3, 4 and 5 times the minimum volume to simulate larger volume releases. Thus, concentrations at 5 times the volume will be lower than those calculated at the minimum volume because more brine will be present to dilute these aqueous species. The EPA finds that this approach realistically addresses the issue of variable brine volumes involved in a direct brine release and accepts this model for the compliance recertification application.

i. Revised Colloid Parameters. Colloids are particles larger than molecules that can be suspended in the WIPP brine. Because colloids migrate more rapidly through the subsurface than actinides dissolved in solution, colloids are an important contribution to actinide mobility during a direct brine release. Intrinsic colloids are actinide macromolecules that eventually increase in size. Microorganisms are considered large colloids capable of mobilizing actinides because of actinide sorption to their charged cell walls or because of actinide bio-uptake.

In the original Compliance Certification Application, the colloid parameters were based on experimentally derived values examining actinide macromolecules or actinides sorbed onto biomass (*e.g.,* Completeness Comment 3–C–9 in EPA–HQ–OAR–2014–0609–0010). Since then, the DOE has performed multiple new investigations to update the intrinsic and microbial colloid parameters. These investigations prompted the DOE to reduce the contribution of colloids in the 2014 performance assessment.

Because of issues with experimental data used to develop the 2014 colloid contributions to actinide solubility, the 2014 performance assessment calculations using those experimental results may underestimate colloidal concentrations, and therefore, actinide solubility. However, the EPA finds that the use of an updated uncertainty distribution for actinide solubility in the SEN4 sensitivity study provides adequate information to determine that an increase in colloid concentrations would not cause releases to exceed the disposal standards. The EPA recommends that additional review of the experimental results would benefit the DOE's treatment of colloid formation mechanisms in future performance assessments. The EPA's review of this topic is provided in the Chemistry TSD. See Section VI.E of this document for discussion of the SEN4 study.

j. New Actinide Solubility Code (EQ3/6). Prior to the 2014 Compliance Recertification Application, the DOE used the Fracture Matrix Transport (FMT) geochemical modeling code for actinide solubility calculations. The DOE has since moved actinide solubility calculations to the EQ3/6 code using the database DATA0.FM1, which contains the values needed to calculate chemical speciation of the ions, actinides and minerals present in the WIPP. The move to EQ3/6 is logical as the program is widespread and has been used in other the DOE projects. EQ3/6 can provide more robust calculations than FMT, particularly in dynamic reaction-path calculations. The EPA accepts the move to the EQ3/6 code. For additional discussion on this topic see the EQ3/6 TSD.[23]

2. Other Key Issues Identified by the EPA During Review. The EPA identified three key topics where the Agency believes new information can be incorporated into future compliance recertification applications. These topics relate to the chemical conditions within the repository and are of fundamental importance in determining the potential for releases of radionuclides from the disposal system. These topics are discussed in more detail in the Chemistry TSD.

a. Chemical Database. Actinide solubility, or the ability for actinide solids to dissolve in brine, is important in calculating releases. In performance assessment calculations, these radionuclides include americium, curium, neptunium, plutonium, thorium, and uranium. Americium(III) solubility is used to predict plutonium(III) and curium(III) concentrations while thorium(IV) is used to predict plutonium(IV), neptunium(IV) and uranium(IV).

The EPA's review identified that the DOE's update of the chemical assumptions used in the actinide solubility database (DATA0.FM1) did not reflect all data available prior to the DOE's data cut-off date of December 31, 2012.The EPA raised several issues (in Docket ID No. EPA–HQ–OAR–2014–0609–0010) about americium and thorium solubility and speciation and in response, the DOE modified the database to produce DATA0.FM2. However, the EPA identified flaws in the modified database that need to be corrected before it can be considered to be of sufficient quality for use in recertification. The EPA concluded that, even with identified data gaps, the original DATA0.FM1 database was of higher quality and provided sufficient information to support a determination of continued compliance. The DOE's updates of the chemical database for future performance assessments should more comprehensively incorporate recent data.

b. Revised Radionuclide Uncertainty Distribution. The DOE also examined the uncertainty distribution used to model the +III and +IV actinide concentrations in the performance assessment by comparing modeled solubility calculations to experimental data from multiple reports and peer-reviewed studies. These studies include solubility measurements from americium, thorium and their analogues using a specific set of criteria (Chemistry TSD; 2014 Compliance Recertification Application, Appendix SOTERM–2014 Section 5.1.3). During the performance assessment solubility calculations, this uncertainty distribution is sampled and used in calculating dissolved actinides in a release.

After reviewing the actinide solubility uncertainty distribution for the 2014 Compliance Recertification Application, the EPA identified relevant studies that were not considered in developing this distribution, as well as identifying studies that should have been excluded from consideration, based on the DOE's evaluation criteria. Using relevant studies would result in a revised actinide solubility uncertainty distribution with overall higher +III

[23] ''EQ3/6 Computer Code Evaluation'' in Docket ID No. EPA–HQ–OAR–2014–0609.

actinide solubility. The DOE included a revised solubility uncertainty distribution based on the EPA's input in the sensitivity study SEN4. The higher actinide solubility used in the SEN4 study contributed to higher releases compared to the 2014 performance assessment, although releases in the SEN4 study still remain below the regulatory limits. See Section VI.E for more discussion of the SEN4 study.

The EPA recommends that updating the actinide solubility uncertainty distribution should be part of the update to the geochemical database. This would include incorporating new solubility data for thorium and americium under the WIPP repository conditions, and re-evaluating how studies are included in or excluded from the DOE's analyses.

c. Plutonium Oxidation State. Oxidation states refer to an actinide ion's charge. Actinides with a higher charge likely exist in environments with greater oxygen content while actinides with lower charges likely exist where there is less oxygen. Although plutonium has multiple oxidation states including +VI, +V, +IV, and +III, the WIPP model assumes plutonium oxidation state is dominated by the +III or +IV charge in the aqueous phase due to the rapid removal of oxygen in the repository. Identifying the dominant oxidation state is particularly important as plutonium(III) is much more soluble than plutonium(IV). To address this uncertainty, the plutonium oxidation state model does not calculate oxidation state but instead considers plutonium(III) in 50% of the realizations and plutonium(IV) in the other 50%. Since the 2009 Compliance Recertification Application, experiments have verified that the iron metal corrosion of the WIPP waste containers largely mediate the conditions conducive to plutonium(IV) and plutonium(III) oxidation states. While experiments have confirmed the WIPP conditions post-closure, the debate has shifted towards whether plutonium(IV) or plutonium(III) is dominant in the WIPP conditions, or whether they will be present in equal proportions. More recent experimental information leads the EPA to believe that, under the WIPP conditions, aqueous plutonium(III) will be the dominant state of plutonium and will exist in equilibrium with the different solid plutonium phases present. In addition, organic ligands, iron and microbial processes will also increase the likelihood that plutonium(III) will dominate in solutions.

While the sensitivity studies did not directly test the presumption that +III and +IV species would be equally present, the SEN4 study indirectly examined this proposition by including a modified solubility uncertainty distribution that was more heavily weighted toward higher +III solubility (see Section VI.E.2.d). Both the compliance recertification application and the SEN4 study indicate plutonium release levels will be below the compliance points. Combined with the related analysis of the actinide solubility uncertainty distributions, the Agency can accept the DOE's assumption that the plutonium(III) and plutonium(IV) oxidation states will each occur 50% of the time in performance assessment calculations for the current recertification. However, because of the available data that the EPA has identified supporting the presence of plutonium(III) over plutonium(IV), the EPA believes this issue is of sufficient significance to benefit from independent technical review of the available data and the assumption that both plutonium oxidation states will occur equally under the WIPP conditions. The EPA's review of the plutonium oxidation state issue is addressed more thoroughly in the Chemistry TSD.

E. Performance Assessment: Modeling and Containment Requirements (§§ 194.14, 194.15, 194.23, 194.31 through 194.34)

1. Overview. Section VI.A provided a basic description of the requirements in 40 CFR 191.13 and the performance assessment process required to show compliance with those standards. This section provides additional information on performance assessment and how it is evaluated by the EPA in the compliance recertification application. As described earlier, the DOE must use the performance assessment to demonstrate compliance with the containment requirements in 40 CFR 191.13. The containment requirements are expressed in terms of ''normalized releases.'' The DOE assembles the results of the performance assessment into complementary cumulative distribution functions, which indicate the probability of exceeding various levels of normalized releases (§ 194.34).

For both of the DOE's 2004 and 2009 Compliance Recertification Applications, the EPA requested that the DOE modify those respective performance assessments to (1) address completeness and technical issues raised during the EPA review process and with these modifications, and (2) assure the disposal regulations were met.

These additional sets of calculations have been termed by the DOE to be performance assessment ''baseline calculations'' and the EPA has considered these calculations as updated ''baselines'' for each respective compliance recertification application. The EPA then used these baseline calculations for the comparison performance assessment in each of the DOE's subsequent five-year compliance recertification applications.

In this recertification review process, the Agency proceeded differently than in the past. During the completeness review, the EPA identified issues with parameters or approaches used by the DOE in the calculations. These have been discussed in Section VI.D. The Agency requested that the DOE conduct additional calculations so the EPA could better understand how alternative parameter values would affect repository performance. These calculations, or sensitivity studies as they have been referred to, are summarized below and are the subject of a TSD.[24] With the completion of these sensitivity studies, the Agency has decided not to request another set of performance assessment baseline calculations as was done for previous recertifications. The Agency believes that the sensitivity studies, coupled with the DOE's documentation, provide a reasonable expectation that the WIPP complies with the radioactive waste disposal regulations at 40 CFR part 191 and the compliance criteria at 40 CFR part 194. Further, with the February 2014 incidents and the DOE's resulting need to change the facility design,[25] the Agency felt it was not necessary or appropriate at this time to conduct additional calculations using a facility design that will be changed in the near future.

The Agency requested that the DOE conduct four sensitivity studies (labeled as SEN1, SEN2, SEN3 and SEN4) to address technical concerns raised during the EPA's 2014 Compliance Recertification Application review. The EPA has compared these sensitivity results to the DOE's 2014 performance assessment calculations. The purpose of these sensitivity studies is to provide an understanding of how repository

[24] ''Review of EPA Sensitivity Studies of the DOE CRA–2014 WIPP Compliance Recertification Performance Assessment'' in Docket ID No. EPA–HQ–OAR–2014–0609.

[25] The DOE has stated that it intends to abandon plans to use the area previously designated as waste panel 9 for waste emplacement because of worker safety issues (''Installation of Ventilation Barriers and Prohibiting Personnel Access to Equivalent Panel 9 Areas,'' Letter from Todd Shrader, DOE, to Alan Perrin, EPA dated April 18, 2017, Docket ID No. EPA–HQ–OAR–2014–0609). The DOE also plans to develop a new ventilation shaft to increase airflow in the mine, which is limited after the February 2014 incidents.

compliance would be affected when modifying specific inputs in the 2014 performance assessment calculations. A brief explanation of those selected parameters is provided below.

The ability of salt openings and aggregates to quickly compress, consolidate and ''heal'' within a few hundred years, mostly due to the creep-closure process, is one of the unique properties of bedded salt geologic units that make them potentially suitable to use as nuclear waste repositories. The DOE's 2014 performance assessment parameter values assigned to the non-waste rooms, the panel closure system and the adjacent disturbed rock zone did not reflect the creep-closure and rapid healing of these areas that the EPA expects to occur. That is, the DOE did not use permeability, porosity, residual gas and brine saturations and capillary pressures reflective of in-situ (*i.e.,* undisturbed) conditions.

Three of the EPA requested sensitivity studies, SEN1, SEN2 and SEN3, focused on modifying parameters to test how assuming complete creep-closure and healing of these areas would impact long-term performance through modifying values related to the permeability, porosity and two-phase flow parameter values for the run-of-mine salt panel closure system, the disturbed rock zone and non-waste areas for the 10,000-year modeled period. The fourth sensitivity study, SEN4, investigated the cumulative effects and impact on repository performance by making changes to five important parameter values as well as using an updated numerical code.

As with the 2014 performance assessment, all of the sensitivity studies had three replicate calculation sets and included the same future scenarios. The four scenarios are briefly described below:

(1) The undisturbed scenario—where the repository is not impacted by human activities,

(2) The E1 Scenario—where one or more boreholes penetrate a Castile brine reservoir and also intersect a repository waste panel,

(3) The E2 Scenario—where one or more boreholes intersect a repository waste panel but not a brine reservoir, and

(4) The E1/E2 Scenario—where there are multiple penetrations of waste panels by boreholes of either the E1 or E2 type, at many possible combinations of intrusion times and locations for either E1 or E2 drilling type of event.

2. Sensitivity Studies

a. The SEN1 Study. The intention of the SEN1 study was to determine the impact on repository performance by modeling the stepped (*i.e.,* gradual) reduction in porosity, permeability, residual gas and brine saturation, and capillary pressures that reflect creep-closure and healing of the open rooms and disturbed rock zone during the first 200 years after repository closure. The DOE was then to model these areas, from 200 years to 10,000 years, as fully healed.

This study had to be terminated because the numerical flow code used in these calculations produced non-physical and unrealistic results when these parameters were modified in time-intervals to reflect healing. The Agency accepted termination of this study, in part, because modeling changes in these values for the first 200 years, a relatively short time compared to the 10,000-year regulatory time period, would not be as important to long-term repository performance. The Agency considered that the SEN2 and SEN3 studies described below adequately addressed the issues targeted by the SEN1 study because the latter two studies both modeled the open and disturbed areas as fully healed for the entire 10,000-year regulatory time period, essentially bounding the conditions specified for the SEN1 study.

b. The SEN2 Study. This study tested the impacts on repository performance by modeling the non-waste areas and open drifts as completely creep-closed during the entire 10,000-year regulatory period. In this study, parameter values for all the non-waste areas (*i.e.,* the operations and experimental room open drifts) and adjacent disturbed rock zones were modified. The permeability and porosity were reduced to that of intact halite. The residual brine and gas saturations were also increased to better reflect healed conditions and capillary pressures (the pressure needed for fluid to flow between pores) were increased.

Compared to the 2014 Compliance Recertification Application performance assessment, the SEN2 study waste room pressures generally increased and brine saturations decreased. The most affected primary release mechanism saw an increase in solid waste moving up a borehole (spallings) because this release mechanism increases when waste panel pressure increase. All other release mechanisms remained essentially unchanged from the 2014 performance assessment calculations. Total spallings releases remained small compared with cuttings, cavings and direct brine releases. Spallings releases therefore did not materially contribute to total repository releases in either SEN2 or the 2014 Compliance Recertification Application.

c. The SEN3 Study. For the SEN3 study, the DOE assumed that the panel closure system, the adjacent disturbed rock zone and the non-waste areas and open drifts are healed for the 10,000-year regulatory period. The DOE reduced porosity and permeability in the repository, increasing initial residual brine and gas saturations, and invoking two-phase flow parameters for intact halite. Using these modifications effectively isolated the individual waste panels and the non-waste areas from one another for the entire modeled period due to limited brine and gas flows between areas of the repository.

The modifications made in the SEN3 study caused increases in waste-panel pressures and decreases in waste panel saturations. The dominant releases were from spallings, which are only dependent on a waste panel pressure high enough to force solids to the surface, and direct brine releases, which are dependent on having sufficient brine in the waste panels coupled with high enough pressure to force brine to the surface. The release mechanism that increased the most was for spallings, and the increase was seen at both the low and high probability compliance points. The impact on direct brine release was primarily at low probabilities because this release depends on both high waste panel pressure and high saturation conditions, the combination of which were less likely to occur in this study.

Factoring in all combined releases, the total mean and low-probability (0.001 probability) releases increased by approximately 15% from the initial 2014 Compliance Recertification Application results, although the upper bound of the 95% confidence interval was essentially the same as in the 2014 Compliance Recertification Application (0.384 EPA Units in the 2014 Compliance Recertification Application and 0.387 EPA Units in SEN3). Total releases did not exceed the EPA's WIPP release limits.

The parameter values used in the SEN3 study created a ''tight'' repository (panel closure system, disturbed rock zone and non-waste rooms) in which brine and gas flow is limited. The study results indicate that such conditions may produce calculated releases higher than the more open and brine- and gas-conducive set of conditions presented by the DOE in the 2014 Compliance Recertification Application.

d. The SEN4 Study

i. Overview. The fourth sensitivity study was intended to understand the cumulative effects on repository performance by making changes to

several parameters that the Agency questioned in the completeness review. This study also incorporated a DOE-corrected version of the DRSPALL code, which calculates waste that is released up a borehole to the surface. This study does not address all of the EPA's completeness questions, but provides significant insights as to the degree in which some parameter values of interest to the EPA impact releases. Note, the parameter changes in SEN2 and SEN3 representing creep closure were not made in the SEN4 study, so the results reflect the 2014 Compliance Recertification Application creep closure assumptions. The modifications requested for this study are provided below:

- Use the EPA's updated distribution for the probability of intersecting a waste panel and a Castile brine reservoir, denoted as the PBRINE parameter and discussed in Section VI.D.1.d previously.
- Use the revised data set for the plutonium oxidation state uncertainty distribution discussed in Section VI.D.2.c.
- Modify the lower limit for the parameter that predicts waste strength, denoted as the parameter TAUFAIL discussed in Section VI.D.1.f.
- Use the updated version of the computer code DRSPALL that models waste carried up a borehole. After the 2014 performance assessment calculations had been completed and submitted to the EPA, the DOE discovered an error in the computer code, DRSPALL. The DOE corrected this error and reported it to the EPA. For the SEN4 study, the EPA requested that the DOE use the corrected version.
- Eliminate the hydrogen sulfide reaction with iron as discussion in Section VI.D.1.e.
- Use the correct modeled length for north panel closure. The WIPP repository design includes two sets of panel closures emplaced at the north end of the repository. For the 2014 performance assessment calculations, the DOE modeled the ''effective'' length of only one panel closure rather than two. The EPA requested that the DOE increase the effective length of the modeled north waste panel to be consistent with the facility design.

ii. Cumulative effects of the changes evaluated by release pathway.

aa. Direct Brine Releases. Direct brine releases are a function of actinide solubility, repository pressure and brine saturation. Of these changes, the most significant are the revised solubility uncertainty distributions that increase the concentration of the more soluble plutonium(III) in repository brine, the increased likelihood of a higher probability of hitting a brine pocket and the iron sulfidation reaction stoichiometric coefficient changes. The combined effects of these changes increased direct brine calculated releases and total mean low probability (0.001) repository releases to about twice those of the 2014 Compliance Recertification Application performance assessment (0.541 EPA Units for SEN4 versus 0.261 EPA Units for 2014 performance assessment).

bb. Spallings Releases. Spallings releases are affected in SEN4 by a combination of corrections using the updated version of the DRSPALL code as well as increases in repository pressure. Repository pressure was generally increased in SEN4 as a result of the updated distribution of the PBRINE parameter, the increased length of the northernmost panel closure and the updated iron sulfidation reaction stoichiometric coefficients. The combined effect of these changes was to increase spallings releases by about half an order of magnitude. However, spallings releases remained low compared to direct brine releases and the effect of this increase in spallings on total mean releases was minimal.

cc. Cuttings and Cavings Releases. Cavings releases were affected by the Agency's requested reduction of the lower bound of the distribution for the TAUFAIL parameter. The small reduction in the lower bound did not have a meaningful effect on total mean releases.

dd. Releases from the Culebra. Releases from lateral flow through the Culebra Dolomite are a function of actinide solubility, repository pressure, and brine saturation. These are affected by the revised solubility uncertainty distributions, the increased likelihood of sampling higher values for the PBRINE parameter, the increased length of the northernmost panel closure and removal of the iron sulfidation reactions. The combined effect of these changes on Culebra releases was too small to have a meaningful effect on total mean repository releases.

ee. Insights from the SEN4 Study. In the SEN4 study, the most significant effects on repository performance were an increase in direct brine releases and, by extension, an increase in total low probability repository releases. The Agency concludes that these increases were primarily the result of updating the solubility uncertainty distributions, updating the distribution of PBRINE and incorporating hydrogen sulfide steel passivation. The remaining changes, updating the TAUFAIL lower bound, using the corrections in the code DRSPALL and correcting the panel closure length, provided important updates and corrections to the performance calculation but had only a negligible effect on total mean releases. As in the previous sensitivity studies, the total mean releases, the upper 95% confidence limit on those means and all individual vectors in the three replicates remained below regulatory limits in SEN4.

3. How the Four Sensitivity Studies Affect the WIPP's Compliance. The results indicate that modifications to the selected parameters reported in these evaluations increased calculated releases. However, the total mean releases, the upper 95% confidence limit on those means, and all individual vectors in the three replicates remained below the EPA's WIPP release limits.

These sensitivity studies were intended to address a subset of the EPA technical issues. These studies do not address all the technical issues identified in the EPA's 2014 Compliance Recertification Application review. The major issues identified in the EPA's review primarily influence the direct brine releases and how the performance assessment addresses those releases. The EPA recommends that, especially with respect to calculating direct brine releases, the DOE re-evaluate the implementation of features, events and processes, along with model assumptions, to ensure their appropriate integration in the 2019 Compliance Recertification Application. The EPA has identified two areas in particular (modeling of open areas and plutonium oxidation states) that the Agency believes would greatly benefit from independent technical review for consideration in the DOE's 2019 Compliance Recertification Application.

F. Additional Requirements

This section summarizes the EPA's review as it relates to specific sections of the WIPP Compliance Criteria in 40 CFR part 194 that do not directly involve performance assessment.

Information on continuing compliance activities related to waste characterization (40 CFR 194.8 and 194.24), inspections (§ 194.21) and quality assurance (§ 194.22) may be found in Section V of this document.

The DOE did not conduct any activities during the period covered by the 2014 Compliance Recertification Application related to future state assumptions (§ 194.25), expert judgment (§ 194.26) or assurance requirements (§ 194.41–46). See the corresponding CARDs for more discussion. Information on passive institutional controls, which is an element of the assurance

requirements, may also be found in Section V.B.4.

1. Waste Characterization (Waste Inventory) (§ 194.24). Section 194.24 generally requires the DOE to identify, quantify and track the important chemical, radiological and physical components of the waste destined for disposal at the WIPP. The DOE collects data from generator sites and compiles the waste inventory on an annual basis. The DOE's 2012 Annual Transuranic Waste Inventory Report (ATWIR 2012), which was used for the 2014 Compliance Recertification Application, reflects the disposal intentions of the waste generator sites as of December 31, 2010. The DOE classified the wastes as emplaced, stored or projected (to-be-generated). The DOE used data from the WIPP database to identify the characteristics of the waste that has been emplaced at the WIPP. The projected wastes were categorized similarly to existing waste (*e.g.,* heterogeneous debris, filter material, soil).

The EPA reviewed the compliance recertification application and supplemental information to determine whether these documents provided a sufficiently complete estimate and description of the chemical, radiological and physical composition of the emplaced, stored and projected wastes proposed for disposal in the WIPP. The Agency also reviewed the DOE's description of the approximate quantities of waste components (for both existing and projected wastes). The EPA found that the radionuclides, cellulosic, plastic and rubber materials, organic ligands, oxyanions and cements in the waste are being appropriately tracked and characterized. In the 2014 Compliance Recertification Application, there is an update on the inventory of curium and neptunium, which remain in concentrations well below their solubility limits even after accounting for decay. The EPA accepts this updated inventory, which is relatively similar to the one used in the 2009 Compliance Recertification Application. See the Baseline Inventory TSD [26] for more information.

2. Peer Review (§ 194.27). Section 194.27 of the WIPP Compliance Criteria requires the DOE to conduct peer review evaluations, when warranted, of conceptual models, waste characterization analyses, and a comparative study of engineered barriers. The required peer reviews must be performed in accordance with the Nuclear Regulatory Commission's NUREG–1297, ''Peer Review for High-Level Nuclear Waste Repositories,'' which establishes guidelines for the conduct of a peer review exercise. The DOE has conducted one peer review since the 2009 Compliance Recertification Application to establish radiological properties for two waste streams, titled the ''Savannah River Site Historical Radiochemistry Data Peer Review,'' demonstrating its compliance with the requirements of § 194.27.

Based on a review and evaluation of the 2014 Compliance Recertification Application and supplemental information provided by the DOE (Docket ID No. EPA–HQ–OAR–2014–0609–0330), the EPA determines that the DOE continues to comply with the requirements of 40 CFR 194.27.

G. Individual and Groundwater Protection Requirements (§§ 194.51 Through 194.55)

Sections 194.51 through 194.55 of the WIPP Compliance Criteria implement the individual protection requirements of 40 CFR 191.15 and the groundwater protection requirements of subpart C of 40 CFR part 191. Assessment of the likelihood that the WIPP will meet the individual dose limits and radionuclide concentration limits for ground water is conducted through a process known as compliance assessment. Compliance assessment uses methods similar to those of performance assessment (for the containment requirements in 40 CFR 191.13 and Appendix A) but is required to address only undisturbed performance of the disposal system. That is, compliance assessment does not include human intrusion scenarios (*i.e.,* drilling or mining for resources). Compliance assessment can be considered a ''subset'' of performance assessment, since it considers only natural (undisturbed) conditions and past or near-future human activities (such as existing boreholes), but does not include the long-term future human activities that are addressed in the performance assessment.

In the 2014 Compliance Recertification Application, the DOE re-evaluated each of the individual and groundwater requirements. The DOE updated the data for ground water quantity determination to define an underground source of drinking water for purposes of calculating groundwater concentrations and doses. In the 2014 Compliance Recertification Application, the DOE used 2011 (U.S. Bureau of Census 2013) census data to update the number of persons per household.[27] The DOE continued to use the 2009 compliance recertification application data for the average household water consumption values. The water consumption data show that the average per capita consumption is 273 gallons per day.[28] The DOE concludes that the sub-criterion of 5 gallons per minute rate of production from a well continues to accurately define an underground source of drinking water [29] and any change in this sub-criterion is not warranted as a result of applying more current water-consumption data to the calculation.

The updates made by the DOE in the 2014 Compliance Recertification Application did not significantly impact the conclusions regarding the groundwater standard in the Compliance Certification Application. The DOE did not change the criteria for making underground source of drinking water determinations, and for the 2014 Compliance Recertification Application evaluation, the maximum potential dose remains below the Compliance Certification Application value calculated and continued compliance with the individual protection standard is maintained. The DOE states that the conservative bounding analysis used for the 1998 certification decision compliance assessment is still applicable for 2014 Compliance Recertification Application.[30]

The EPA finds the DOE in continued compliance with 40 CFR 194.51–194.55 requirements.

VII. How has the public been involved in the EPA's WIPP recertification activities?

A. Public Information

The EPA interacts with the public through various means. The EPA's main mechanism for distributing information is the EPA Web site and email messages via the WIPP–NEWS listserv. The EPA will also occasionally have meetings, in person or via teleconferences or webinars.

Throughout the recertification process, the Agency posted pertinent new information and updates on the EPA WIPP Web site (*https://www.epa.gov/radiation/epas-role-waste-isolation-pilot-plant-wipp*). All pertinent recertification documents

[26] ''Technical Support Document for Section 194.24: Review of the Baseline Inventory Used in the Compliance Recertification Application (CRA–2014)'' in Docket ID No. EPA–HQ–OAR–2014–0609.

[27] 2014 Compliance Recertification Application Appendix IGP–2014, Table IGP–3

[28] 2014 Compliance Recertification Application Appendix IGP–2014, Table IGP–3

[29] 2014 Compliance Recertification Application Appendix IGP–2014, Section IGP–3.1.1)

[30] 2014 Compliance Recertification Application Appendix IGP–2014, Section IGP–4.0

(including the DOE-submitted recertification materials, correspondence, **Federal Register** notices, outreach materials, hearing transcripts as well as TSDs) are available for review or download (in Adobe PDF format) via the electronic docket dedicated to the 2014–2017 recertification process (*http://www.regulations.gov,* Docket ID No. EPA–HQ–OAR–2014–0609).

Since October 2014, the EPA has sent out numerous announcements regarding the recertification schedule and availability of any WIPP-related documents on the EPA WIPP Web site and the dockets, as well as details for the Agency's June 2015 stakeholder meetings in New Mexico and January 2017 stakeholder webinar (via Adobe Connect).

B. Stakeholder Meetings

As discussed in the WIPP LWA, the recertification process is not a rulemaking and public hearings are not required. However, the EPA held a series of stakeholder meetings in June 2015 (Carlsbad and Albuquerque, NM) as well as a stakeholder webinar in January 2017 (via Adobe Connect software, with public hosting locations in Carlsbad and Albuquerque, NM) to provide information and updates about the recertification process. In an effort to make these meetings as informative as possible to all attending parties, the EPA listened to stakeholder input and concerns and tailored the meetings around the public as much as possible. The first meeting was held on June 16, 2015, in Carlsbad, New Mexico and consisted of one three-hour afternoon session. The second public meeting was held on June 17, 2015, in Albuquerque, New Mexico, with afternoon and evening sessions.

The main purpose of these meetings was to discuss the EPA's recertification process and timeline, as well as the DOE's application and important changes at the WIPP since the last recertification in 2010. The meetings featured brief presentations on the aforementioned topics, as well as a facilitated discussion. In response to stakeholder suggestions, the DOE staff members were also on hand to provide information and answer any stakeholder questions. Staff from the New Mexico Environment Department (NMED) were present as observers. Public participants were encouraged to provide comments to the EPA for consideration during review of the DOE's 2014 Compliance Recertification Application.

The EPA also held a stakeholder webinar using the Adobe Connect software on January 12, 2017. The Agency hosted the webinar from Washington, DC, with physical hosting locations set up in both Carlsbad and Albuquerque, NM, to accommodate members of the public as well as the DOE and NMED staff. The main purpose of this webinar was to inform the public of the current recertification schedule and provide updated technical information related to stakeholder questions and comments received at the June 2015 meetings.

All of the issues raised at these meetings have been addressed by the EPA in Section VII.C of this document or in the CARDs under the relevant section and are available in the public docket (*www.regulations.gov,* Docket ID No. EPA–HQ–OAR–2014–0609).

C. Public Comments on Recertification

The EPA posted the recertification application on the Web site immediately following receipt. The EPA formally announced receipt of the recertification application in the **Federal Register** on October 10, 2014. The notice also officially opened the public comment period on the recertification application.

For recertification, the EPA sought public comments and input related to changes in the DOE's application that may have a potential impact on the WIPP's ability to remain in compliance with the EPA's disposal regulations.

The comment period for the recertification application closed on April 10, 2017, approximately two years and six months after it initially opened. This closing date was 30 days after the EPA's announcement in the **Federal Register** that the recertification application was complete.

The EPA received 17 sets of written public comments during the public comment period. The EPA considered significant comments from the written submissions and the stakeholder meetings in the evaluation of continuing compliance. The EPA addresses these comments in CARDs that are relevant to each topic. In addition, a listing of all comments received and responses to each is included in Appendix 15–C of CARD 15. Two specific comments are addressed here.

Comment: One comment addressed shipment of waste from Argonne National Lab. Citing the EPA's inspection reports, the commenter stated that he believed that the DOE had shipped and emplaced at the WIPP waste from the Lab that contained spent nuclear fuel and high level waste. He correctly stated that the WIPP LWA bans the transport to and disposal at the WIPP of high level radioactive waste and spent nuclear fuel. He wanted to know (a) how the EPA failed to uncover that the Argonne Lab was to ship spent nuclear fuel to the WIPP and approved this disposal, (b) how the EPA assures that this waste will not be sent to the WIPP, (c) how much of this waste has been sent to the WIPP, and the identity of all waste of these types, (d) what authority allowed the shipment and disposal of these prohibited wastes, and (e) how the EPA did not bar the DOE's shipment and disposal of these wastes.

In a related comment, on February 3, 2017, the DOE, responded to this commenter and stated that the Argonne Lab waste is derived from atomic energy defense activities and did not contain any spent nuclear fuel (see EPA–HQ–OAR–2014–0609–0042). The DOE acknowledged that the WIPP LWA prohibits the disposal at WIPP of spent nuclear fuel and also acknowledged that some of the waste from the Argonne Lab was debris from specimens taken from fuel pins that were originally irradiated in commercial nuclear reactors. However, the DOE commented that the statutory definition of spent nuclear fuel does not speak directly to the issue of whether debris from specimens of commercial fuel rods is spent nuclear fuel. The DOE explained that, here, the debris—although including material that originated from fuel pins that had been irradiated in nuclear reactors—resulted from research and development activities at Argonne. The DOE stated that to try to segregate debris originating from irradiated fuel pins from other waste would be technically infeasible and cost prohibitive and would increase worker exposure. The DOE asserted that resolution of whether the material should be considered spent nuclear fuel was within its discretion and that it was its longstanding practice to classify such debris as waste and not spent nuclear fuel. In response to the DOE's February 3, 2017 comment, the original commenter resubmitted his original comment.

EPA Response: Under the WIPP LWA, the focus of the EPA's present recertification determination is whether the WIPP continues to comply with the final disposal regulations. Although—as the commenter notes and the DOE acknowledges—the WIPP LWA bans disposal at the WIPP of spent nuclear fuel, the disposal regulations, themselves, currently do not expressly address disposal of spent nuclear fuel. The WIPP LWA incorporates the definition of spent nuclear fuel found in the Nuclear Waste Policy Act of 1982: ''fuel that has been withdrawn from a nuclear reactor following irradiation, the constituent elements of which have not been separated by reprocessing.'' 42 U.S.C. 10101(23) (as incorporated by

WIPP LWA §2(15)). There seems to be no dispute that waste from the Argonne Lab includes some quantity of material that is not presently in the intact physical form of fuel withdrawn from a reactor following irradiation,[31] but is fragments of or particulates from fuel pins withdrawn from a reactor following irradiation. The DOE states that the fragments or particulates resulted from research and development activities on test specimens from fuel pins withdrawn from a reactor following irradiation and claims that treatment of such material as other than spent nuclear fuel is consistent with the intent of the WIPP LWA. The DOE also asserts that attempting to segregate the fuel pin fragments and particulates from other debris shipped to the WIPP is infeasible and cost prohibitive and would increase worker exposure.

Reasonable contentions may be made that fragments and particulates resulting from research and development activities on specimens from fuel withdrawn from a nuclear reactor following irradiation (''pieces of pieces'' of fuel pins) do not meet the statutory definition of spent nuclear fuel. The practical considerations of feasibility, cost, and worker safety associated with attempting to segregate such particulates from other waste shipped to the WIPP bear consideration. It is not essential, however, to the EPA's present recertification decision to attempt to definitively resolve this issue, because the current disposal regulations do not expressly address disposal of spent nuclear fuel.

On an on-going basis, aside from the periodic recertification of the WIPP, the EPA communicates with the DOE concerning the characterization of WIPP waste. The DOE provides the EPA with documentation relating to WIPP waste streams, including but not limited to, waste from the Argonne National Laboratory, and including documentation for both contact handled and remote handled TRU waste streams. The relevant information is confirmed by analyzing individual waste containers using the EPA approved processes, procedures and equipment. These steps allow the DOE to demonstrate that waste containers for WIPP disposal meet the EPA's WIPP waste limits for physical and radiological contents of the waste. So, concerning the waste shipped from Argonne National Laboratory, the EPA evaluated the waste characteristic information prepared for remote handled waste. The DOE provided historical information to document that waste generated from laboratory experiments at Argonne was defense related, and through radiological assay concluded that the waste in question met the definition of TRU waste and was appropriate for disposal at the WIPP. Following this determination, Argonne provided this waste for characterization. Radiological and physical characterization confirmed that the TRU waste in question (a) is remote handled waste; (b) exhibits the characteristics of debris waste; and (c) meets the regulatory limits of the EPA's WIPP waste acceptance requirements at 40 CFR 194.24.

The EPA thoroughly inspects and approves the waste characterization processes in place at all waste characterization sites including Argonne National Laboratory. As part of the waste characterization inspections and approvals, the EPA is responsible for evaluating the adequacy of characterization methods used to identify and measure radiological and physical contents of the TRU waste that affect the long term containment and isolation of waste at the WIPP and for ensuring that the WIPP-bound waste meets the disposal requirements under 40 CFR 194.24.

Comment: Another commenter disagreed with the DOE's proposed revision of the PBRINE parameter. The commenter noted that the DOE's 2014 approach resulted in a lower probability of intersecting a brine pocket than was used in the original certification and previous recertifications, and finds this to be ''invalid.'' The commenter recommends using a fixed value of 60% probability, based on historical well testing and geophysical data. The commenter also disputes a number of the DOE's underlying assumptions for revising the approach, including the DOE's view of the geophysical data as unreliable and what the commenter sees as the DOE's misinterpretation of more recent drilling data.

EPA Response: The EPA agrees with the commenter that the DOE's revised approach raises concerns. In particular, the EPA does not agree with the DOE's conclusions regarding the geophysical data. However, after reviewing the data again, the EPA disagrees with the commenter that a fixed probability of 60% is necessary. The EPA notes that 60% was the high end of the probability distribution used in performance assessments prior to 2014, with a mean probability of 30.5%, as recognized by the commenter. The updated approach developed by the EPA uses the geophysical data, but also incorporates newer drilling information into the probability distribution. The EPA believes this approach is sound and is acceptable for use in future performance assessments. The EPA will evaluate future proposals by the DOE to update the method for determining PBRINE. The EPA's review is discussed further in Section VI.D.1.d of this document and in the PBRINE TSD.

VIII. Where can I get more information about the EPA's WIPP-related activities?

A. Supporting Documents for Recertification

The CARDs discuss DOE's compliance with each of the individual requirements of the WIPP Compliance Criteria. The CARDs also list the EPA TSDs and any other references used by the EPA in rendering the decision on compliance. All TSDs and references are available in the Agency's dockets, via *www.regulations.gov* (Docket ID No. EPA–HQ–OAR–2014–0609), with the exception of generally available references and those documents already maintained by the DOE or its contractors in locations accessible to the public. For more detailed information on the technical issues considered in the EPA's recertification decision, see the TSDs.

B. The WIPP Web site & WIPP–NEWS Email Listserv

For more general information and updates on the EPA's WIPP activities, please visit the WIPP internet homepage at <*https://www.epa.gov/radiation/epas-role-waste-isolation-pilot-plant-wipp*>. All pertinent recertification-related documents (including the DOE-submitted recertification materials, letters, **Federal Register** notices, outreach materials, etc.) are available for review or download in Adobe PDF format. The Agency's WIPP–NEWS email listserv, which automatically sends messages to subscribers with up-to-date WIPP announcements and information, is also available online. Any individuals wishing to subscribe to the listserv can join by visiting <*https://lists.epa.gov/read/all_forums/subscribe?name=wipp-news*> and providing all requested information to register.

C. Dockets

In accordance with 40 CFR 194.67, the EPA maintains public dockets via *www.regulations.gov* (Docket ID No. EPA–HQ–OAR–2014–0609) that contain all the information used to support the Agency's decision on recertification. The Agency maintains the formal hard

[31] There also seems to be no doubt that, as to the material in question, the ''constituent elements'' have not been ''separated by reprocessing.''

copy/paper docket in Washington, DC, as well as informational dockets in three locations in the State of New Mexico (Carlsbad, Albuquerque, and Santa Fe). The docket consists of all relevant, significant information received to date from outside parties and all significant information considered by the EPA in reaching a recertification decision regarding whether the WIPP facility continues to comply with the disposal regulations.

IX. What is the EPA's role in future WIPP activities?

The EPA's regulatory role at the WIPP does not end with this recertification decision. The Agency's future WIPP activities include additional recertifications every five years (the next being scheduled to be submitted by the DOE in March 2019), review of the DOE reports on conditions and activities at the WIPP, assessment of waste characterization and quality assurance programs at waste generator sites, announced and unannounced inspections of the WIPP and other facilities and, if necessary, modification, revocation or suspension of the certification.

As a result of the February 2014 incidents at the WIPP, the DOE will be making changes to the repository design. The DOE has indicated that it no longer plans to use panel 9 for waste operations due to the worker safety hazards in that location, so an alternative panel will be needed. This decision may also have implications for panel closures in the panels accessed through the panel 9 drifts (*i.e.,* panels 3–6). In addition, the DOE is planning a new ventilation shaft that will allow for increased airflow through the underground operations area. The EPA will be keeping abreast of the DOE's requested changes and will make that information available as it is received.

As described in Section VI of this notice, the EPA's review of the 2014 Compliance Recertification Application identified where the DOE's technical basis for the modeling has limitations with assumptions used or with the basis for some parameter values. The EPA concerns with these limitations were generally addressed by the results of the SEN studies. While this approach of using a series of sensitivity studies to examine identified limitations was sufficient in the context of this compliance recertification application, it was to some extent driven by the known upcoming physical changes in the repository. The EPA would prefer to be able to evaluate a complete revised performance assessment in future compliance recertification application reviews. The EPA recommends that the performance assessment technical basis be evaluated for improvement in these areas: (1) Calculations of actinide solubility, (2) modeling the chemical conditions in the repository, and (3) modeling direct brine releases.

Although not required by the Administrative Procedure Act (APA), the WIPP LWA or the WIPP Compliance Criteria, the EPA intends to continue docketing all inspection or audit reports and annual reports and other significant documents on conditions and activities at the WIPP, as well as formal communications between the two agencies.

The EPA plans to conduct future recertification processes using an administrative process generally similar to that described in today's action.

Dated: July 10, 2017.

Sarah Dunham,

Acting Assistant Administrator, Office of Air and Radiation.

[FR Doc. 2017–15182 Filed 7–18–17; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[9965–03–OEI]

Cross-Media Electronic Reporting: Authorized Program Revision Approval, Territory of U.S. Virgin Islands

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces EPA's approval of the Territory of U.S. Virgin Islands' request to revise its EPA Administered Permit Programs: The National Pollutant Discharge Elimination System EPA-authorized program to allow electronic reporting.

DATES: EPA's approval is effective July 19, 2017.

FOR FURTHER INFORMATION CONTACT: Karen Seeh, U.S. Environmental Protection Agency, Office of Environmental Information, Mail Stop 2823T, 1200 Pennsylvania Avenue NW., Washington, DC 20460, (202) 566–1175, *seeh.karen@epa.gov.*

SUPPLEMENTARY INFORMATION: On October 13, 2005, the final Cross-Media Electronic Reporting Rule (CROMERR) was published in the **Federal Register** (70 FR 59848) and codified as part 3 of title 40 of the CFR. CROMERR establishes electronic reporting as an acceptable regulatory alternative to paper reporting and establishes requirements to assure that electronic documents are as legally dependable as their paper counterparts. Subpart D of CROMERR requires that state, tribal or local government agencies that receive, or wish to begin receiving, electronic reports under their EPA-authorized programs must apply to EPA for a revision or modification of those programs and obtain EPA approval. Subpart D provides standards for such approvals based on consideration of the electronic document receiving systems that the state, tribe, or local government will use to implement the electronic reporting. Additionally, § 3.1000(b) through (e) of 40 CFR part 3, subpart D provides special procedures for program revisions and modifications to allow electronic reporting, to be used at the option of the state, tribe or local government in place of procedures available under existing program-specific authorization regulations. An application submitted under the subpart D procedures must show that the state, tribe or local government has sufficient legal authority to implement the electronic reporting components of the programs covered by the application and will use electronic document receiving systems that meet the applicable subpart D requirements.

On July 7, 2017, the U.S. Virgin Islands Department of Planning & Natural Resources (VI DPNR) submitted an application titled ''NPDES e-Reporting Tool'' for revision to its EPA-approved program under title 40 CFR to allow new electronic reporting. EPA reviewed VI DPNR's request to revise its EPA-authorized Part 123—EPA Administered Permit Programs: The National Pollutant Discharge Elimination System program and, based on this review, EPA determined that the application met the standards for approval of authorized program revision/modification set out in 40 CFR part 3, subpart D. In accordance with 40 CFR 3.1000(d), this notice of EPA's decision to approve U.S. Virgin Islands' request to revise its Part 123—EPA Administered Permit Programs: The National Pollutant Discharge Elimination System program to allow electronic reporting under 40 CFR parts 122 and 125 is being published in the **Federal Register**.

VI DPNR was notified of EPA's determination to approve its application with respect to the authorized program listed above.

Matthew Leopard,

Director, Office of Information Management.

[FR Doc. 2017–15164 Filed 7–18–17; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–R10–OW–2017–0369; FRL–9965–20-Region 10]

Proposal To Withdraw Proposed Determination To Restrict the Use of an Area as a Disposal Site; Pebble Deposit Area, Southwest Alaska

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice; request for comment.

SUMMARY: The Environmental Protection Agency (EPA) Administrator and Region 10 Regional Administrator are requesting public comment on this proposal to withdraw the EPA Region 10 July 2014 Proposed Determination that was issued pursuant of the Clean Water Act, to restrict the use of certain waters in the South Fork Koktuli River, North Fork Koktuli River, and Upper Talarik Creek watersheds in southwest Alaska as disposal sites for dredged or fill material associated with mining the Pebble deposit, a copper-, gold-, and molybdenum-bearing ore body. EPA agreed to initiate this proposed withdrawal process as part of a May 11, 2017 settlement agreement with the Pebble Limited Partnership (PLP), whose subsidiaries own the mineral claims to the Pebble deposit. The Agency is taking today's action to afford the public an opportunity to comment on the rationale for the proposed withdrawal.

DATES: Comments must be received on or before October 17, 2017.

ADDRESSES: To submit your comments, identified by Docket ID No. EPA–R10–OW–2017–0369, refer to section I.C. of the **SUPPLEMENTARY INFORMATION**.

FOR FURTHER INFORMATION CONTACT: Visit *www.epa.gov/bristolbay* or contact a Bristol Bay-specific phone line, (206) 553–0040, or email address, *r10bristolbay@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. How to Obtain a Copy of the Proposed Determination: The July 2014 Proposed Determination is available via the Internet on the EPA Region 10 Bristol Bay site at *www.epa.gov/bristolbay.*

B. How to Obtain a Copy of the Settlement Agreement: The May 11, 2017 settlement agreement is available via the Internet on the EPA Region 10 Bristol Bay site at *www.epa.gov/bristolbay.*

C. How to Submit Comments to the Docket at www.regulations.gov: Submit your comments, identified by Docket ID No. EPA–R10–OW–2017–0369, by one of the following methods:

- *Federal eRulemaking Portal (recommended method of comment submission):* Go to *http://www.regulations.gov* and follow the online instructions for submitting comments.
- *Email:* Send email to *ow-docket@epa.gov.* Include the docket number EPA–R10–OW–2017–0369 in the subject line of the message.
- *Mail:* Send your comments to: Water Docket, Environmental Protection Agency, Mail Code 28221T, 1200 Pennsylvania Avenue NW., Washington, DC 20460, Attention: Docket ID No. EPA–R10–OW–2017–0369.
- *Hand Delivery/Courier:* Deliver your comments to EPA Docket Center, EPA West, Room 3334, 1301 Constitution Avenue NW., Washington, DC 20460, Attention: Docket ID No. EPA–R10–OW–2017–0369. Such deliveries are accepted only during the Docket's normal hours of operation, 8:30 a.m. to 4:30 p.m. ET, Monday through Friday (excluding legal holidays). Special arrangements should be made for deliveries of boxed information. The telephone number for the Water Docket is (202) 566–2426.

Instructions: Once submitted, comments cannot be edited or withdrawn. The EPA may publish any comment received to its public docket. Do not submit 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 (*e.g.,* on the web, cloud, or other file sharing system). For additional submission methods, 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.*

On July 21, 2014, EPA Region 10 published in the **Federal Register** (79 FR 42314) a Notice of Proposed Determination under section 404(c) of the Clean Water Act (CWA) to restrict the use of certain waters in the South Fork Koktuli River, North Fork Koktuli River, and Upper Talarik Creek watersheds (located within the larger Bristol Bay watershed) as disposal sites for dredged or fill material associated with mining the Pebble deposit. The notice started a public comment period that ended on September 19, 2014. EPA Region 10 also held seven hearings throughout southwest Alaska during the week of August 11, 2014. More than 830 community members participated in the seven hearings, more than 300 of whom provided oral statements. In addition to testimony taken at the hearings, EPA Region 10 received more than 670,000 written comments during the public comment period.

The Pebble Limited Partnership (''PLP''), whose subsidiaries own the mineral claims to the Pebble deposit, have not yet filed a CWA Section 404 permit application (''permit application'') with the U.S. Army Corps of Engineers (''Army Corps''). EPA Region 10's initiation of the section 404(c) process did not prohibit PLP from filing a permit application and the Army Corps could have processed such a permit application while a section 404(c) review was ongoing. The Army Corps could not have, however, issued a final decision on a permit application while a section 404(c) process remained open and unresolved. 33 CFR 323.6(b).

In 2014, PLP filed three lawsuits against EPA relating to the Agency's work in the Bristol Bay watershed. As part of one of the lawsuits, PLP obtained a preliminary injunction on November 25, 2014, which halted EPA Region 10's section 404(c) review process until the case was resolved in May of 2017. Prior to the preliminary injunction, the next step in the section 404(c) process would have been for EPA Region 10 to either forward a Recommended Determination to EPA Headquarters or to withdraw the Proposed Determination pursuant to 40 CFR 231.5(a).

The EPA and PLP resolved all outstanding lawsuits in a May 11, 2017 settlement agreement and the court subsequently dissolved the injunction and dismissed the case. Under the settlement agreement, the EPA agreed to ''initiate a process to propose to withdraw the Proposed Determination.'' Settlement Agreement at page 5, *available at https://www.epa.gov/sites/production/files/2017-05/documents/pebble-settlement-agreement-05-11-17.pdf.* Today's action is the agreed-upon initiation. In addition, should PLP submit a permit application for this project, the Agency agreed to not exercise its discretion regarding section 404(c) review for a certain period of time. Specifically, the settlement agreement limits the Agency's ability to move forward with a signed Recommended Determination if PLP submits a permit application to the Army Corps within 30 months from the date of settlement. If PLP files a permit

application during that time, EPA may not move forward with a signed Recommended Determination for 48 months from the effective date of the settlement agreement or following issuance of a final environmental impact statement on PLP's permit application, whichever comes first. The settlement agreement does not require or guarantee that PLP will submit a permit application, nor does it guarantee or prejudge a particular outcome of that permitting process or EPA's decision-making under section 404(c) or otherwise constrain EPA's discretion except as provided in the terms of the agreement.

Pursuant to the settlement agreement and policy direction from EPA's Administrator, EPA is proposing to withdraw the July 2014 Proposed Determination at this time and is taking public comment on this proposal. The proposal reflects the Administrator's decision to provide PLP with additional time to submit a permit application to the Army Corps and potentially allow the Army Corps permitting process to initiate without having an open and unresolved section 404(c) review. While the pendency of a section 404(c) review would not preclude PLP from submitting an application and the Army Corps from reviewing that application, as noted above, the Army Corps could not have issued a permit while a section 404(c) process was ongoing. A withdrawal of the Proposed Determination would remove any uncertainty, real or perceived, about PLP's ability to submit a permit application and have that permit application reviewed. Because the Agency retains the right under the settlement agreement to ultimately exercise the full extent of its discretion under section 404(c), including the discretion to act prior to any potential Army Corps authorization of discharge of dredged or fill material associated with mining the Pebble deposit, the Agency believes that withdrawing the Proposed Determination now, while allowing the factual record regarding any forthcoming permit application to develop, is appropriate at this time for this particular matter.

The Agency is only seeking public comment on whether to withdraw the July 2014 Proposed Determination at this time for the reasons stated above. In light of the basis upon which EPA is considering withdrawal of the Proposed Determination, EPA is not soliciting comment on the proposed restrictions or on science or technical information underlying the Proposed Determination. While EPA's regulations provide for a specified time period for decision making in 40 CFR 231.5(a), EPA has determined that there is good cause to extend this period under 40 CFR 231.8 to allow for this process and full consideration of the comments submitted.

Under EPA's regulations, when a Regional Administrator decides to withdraw a proposed determination, the Regional Administrator is required to notify the Administrator of such decision. The Administrator then has ten days to determine whether to review the withdrawal decision. The regulations also require the Administrator to provide notice to ''all persons who commented on the proposed determination or participated at the hearing,'' and specifies that ''[s]uch persons may submit timely written recommendations concerning review.'' 40 CFR 231.5(c). Rather than require parties to comment on today's proposed withdrawal of the Proposed Determination and then to comment again should the Regional Administrator finalize the withdrawal and forward it to the Administrator, the EPA is providing notice through this **Federal Register** notice to all who commented on the Proposed Determination in the 2014 comment period or participated in any of the hearings the Agency held on this matter and providing them and other interested parties with a timely opportunity to provide recommendations regarding further review by the Administrator of any final decision to withdraw. Specifically, EPA is also taking public comment now on whether the Administrator should review and reconsider a final withdrawal decision, if such a decision is made.

Providing the opportunity to make recommendations regarding the potential for Administrator review in today's notice is the most efficient and effective way to provide such an opportunity. The Administrator is actively engaged in this matter because of his involvement with and direction regarding the settlement agreement, and this process enables the Administrator to effectively receive and consider any such recommendations that are submitted. Finally, this approach provides for earlier input by the public in the process (*i.e.,* on whether the Agency should withdraw the Proposed Determination now), thereby enhancing transparency regarding the Agency's decision-making, conserving Agency and public resources, and avoiding duplicative comment periods and comments. While EPA's regulations provide for a 10-day review period for the Administrator, EPA has determined that there is good cause to extend this period under 40 CFR 231.8 to allow for this process and full consideration of the comments submitted concerning the Administrator's review.

In summary, the EPA is seeking comments on:

- Whether to withdraw the July 2014 Proposed Determination at this time for the reasons stated above; and
- if a final withdrawal decision is made following this comment period, whether the Administrator should review and reconsider the withdrawal decision.

Following the close of the public comment period, in making the decision whether to withdraw the July 2014 Proposed Determination the EPA will consider the public comments submitted in response to this notice consistent with 40 CFR 231.5.

II. Solicitation of Comments on the Proposal To Withdraw the Proposed Determination and Recommendations Regarding the Potential for Additional Review by the Administrator

Please see the section entitled **ADDRESSES** for information about how to obtain a copy of the July 2014 Proposed Determination, the settlement agreement, and how to submit comments on the proposal to withdraw the July 2014 Proposed Determination as well as recommendations regarding the potential for review by the Administrator. The EPA Administrator and Region 10 Regional Administrator are soliciting comments as described.

The record will remain open for comments until October 17, 2017. EPA has received a number of emails and letters regarding the July 2014 Proposed Determination since EPA announced the May 11, 2017 settlement agreement. EPA will enter this correspondence into the docket and all comments, including this correspondence, will be fully considered as the EPA Administrator and Region 10 Regional Administrator decide whether to withdraw the July 2014 Proposed Determination at this time.

Dated: July 10, 2017.

Michelle L. Pirzadeh,

Acting Regional Administrator, EPA Region 10.

[FR Doc. 2017–15181 Filed 7–18–17; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL DEPOSIT INSURANCE CORPORATION

Notice to All Interested Parties of the Termination of the Receivership of 10165—Peoples First Community Bank, Panama City, Florida

Notice is hereby given that the Federal Deposit Insurance Corporation (''FDIC'') as Receiver for Peoples First Community Bank, Panama City, Florida (''the Receiver'') intends to terminate its receivership for said institution. The FDIC was appointed receiver of Peoples First Community Bank on December 18, 2009. The liquidation of the receivership assets has been completed. To the extent permitted by available funds and in accordance with law, the Receiver will be making a final dividend payment to proven creditors.

Based upon the foregoing, the Receiver has determined that the continued existence of the receivership will serve no useful purpose. Consequently, notice is given that the receivership shall be terminated, to be effective no sooner than thirty days after the date of this Notice. If any person wishes to comment concerning the termination of the receivership, such comment must be made in writing and sent within thirty days of the date of this Notice to: Federal Deposit Insurance Corporation, Division of Resolutions and Receiverships, Attention: Receivership Oversight Department 34.6, 1601 Bryan Street, Dallas, TX 75201.

No comments concerning the termination of this receivership will be considered which are not sent within this time frame.

Date: July 14, 2017.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

[FR Doc. 2017–15118 Filed 7–18–17; 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 agreement to the Secretary, Federal Maritime Commission, Washington, DC 20573, within twelve days of the date this notice appears in the **Federal Register**. A copy of the agreement is 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.: 010099–065.

Title: International Council of Containership Operators.

Parties: China COSCO Shipping Corporation Limited; CMA CGM S.A., ANL Singapore Pte Limited, American President Lines, Ltd., and APL Co. Pte. Ltd. (acting as a single party); Crowley Maritime Corp.; Evergreen Marine Corporation (Taiwan), Ltd.; Hamburg Süd also operating under the trade name of Compania Chilena de Navegacion Interoceanica; Hapag-Lloyd AG, Hapag-Lloyd USA LLC and United Arab Shipping Company Limited (acting as a single party); Hyundai Merchant Marine Co., Ltd.; Kawasaki Kisen Kaisha, Ltd.; Maersk Line A/S; MSC Mediterranean Shipping Company S.A.; Mitsui O.S.K. Lines, Ltd.; Nippon Yusen Kaisha; Orient Overseas Container Line, Ltd.; Pacific International Lines (Pte) Ltd.; Wan Hai Lines Ltd.; Yang Ming Transport Marine Corp.; and Zim Integrated Shipping Services Ltd.

Filing Party: Sarah Beason, Esq.; K & L Gates LLP; 1601 K Street NW.; Washington, DC 20006–1600.

Synopsis: The amendment updates the membership of the Agreement to reflect the recent merger of Hapag-Lloyd and United Arab Shipping Company.

Agreement No.: 011275–039.

Title: Australia and New Zealand-United States Discussion Agreement.

Parties: CMA CGM, S.A. and ANL Singapore Pte Ltd. (acting as a single party); Hamburg-Süd KG; and MSC Mediterranean Shipping Company S.A.

Filing Party: Wayne R. Rohde, Esq.; Cozen O'Connor LLP; 1200 Nineteenth St. NW.; Washington, DC 200036.

Synopsis: The amendment deletes MSC Mediterranean Shipping Company S.A. as a party to the Agreement, and makes corresponding revisions to Appendix B of the Agreement.

Agreement No.: 011962–013.

Title: Consolidated Chassis Management Pool Agreement.

Parties: The Ocean Carrier Equipment Management Association and its member lines; the Association's subsidiary Consolidated Chassis Management LLC and its affiliates; CCM Holdings LLC; CCM Pools LLC and its subsidiaries; Matson Navigation Co.; and Westwood Shipping Lines.

Filing Party: Jeffrey F. Lawrence and Donald J. Kassilke; Cozen O'Connor; 1200 19th Street NW.; Washington, DC 20036.

Synopsis: The amendment makes various updates to the membership of the Agreement.

Agreement No.: 012223–001.

Title: Assessment Agreement of Carrier Members of United States Maritime Alliance, Ltd.

Parties: APL, Ltd.; Atlantic Container Line; CMA CGM Group; Columbia Coastal Transport; COSCO Container Lines Americas, Inc.; Evergreen Shipping Agency (America) Corp.; Hamburg Sud North America, Inc.; Hapag-Lloyd (America), Inc; Hyundai Merchant Marine (America), Inc.; ''K'' Line America; Maersk Agency USA, Inc.; Mediterranean Shipping Company, USA Inc.; MOL (America) Inc.; NYK Line (North America), Inc; OOCL (USA), Inc.; Turkon America, Inc.; Wallenius Wilhelmsen Logistics Americas, LLC; Yang Ming (America) Corp.; and Zim American Integrated Shipping Services Company, Inc.

Filing Party: William M. Spelman; The Lambos Firm, LLP; 303 South Broadway, Suite 410; Tarrytown, NY 10591.

Synopsis: The amendment updates the membership of the Agreement.

Agreement No.: 012487.

Title: Eastern Car Liner Ltd/Austral Asia Line Pte. Ltd Space Charter Agreement.

Parties: Austral Asia Line Pte. Ltd. and Eastern Car Liner, Ltd.

Filing Party: Neal Mayer; Hoppel, Mayer & Coleman; 1050 Connecticut Ave NW.; Fifth Floor; Washington, DC 20036.

Synopsis: The Agreement authorizes Austral Asia Line to charter space for the carriage of breakbulk and ro/ro shipments to Eastern Car Liner in the U.S. trades served by Austral Asia, which would be mainly the Far East/U.S. Transpacific trade.

By Order of the Federal Maritime Commission.

Dated: July 14, 2017.

Rachel E. Dickon,

Assistant Secretary.

[FR Doc. 2017–15163 Filed 7–18–17; 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 notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire shares of a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal

Reserve Bank indicated. The notices also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than August 2, 2017.

A. Federal Reserve Bank of Dallas (Robert L. Triplett III, Senior Vice President) 2200 North Pearl Street, Dallas, Texas 75201–2272:

1. *Alex O'Brien,* Amarillo, Texas; to acquire voting shares of Bank of Commerce, McLean, Texas.

Board of Governors of the Federal Reserve System, July 14, 2017.

Yao-Chin Chao,

Assistant Secretary of the Board.

[FR Doc. 2017–15171 Filed 7–18–17; 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 August 11, 2017.

A. Federal Reserve Bank of Atlanta (Chapelle Davis, Assistant Vice President) 1000 Peachtree Street NE., Atlanta, Georgia 30309. Comments can also be sent electronically to *Applications.Comments@atl.frb.org:*

1. *FSB, LLC,* Florence, Alabama; to become a bank holding company by acquiring 100 percent of the outstanding voting shares of First Southern Bancshares, Inc., and its subsidiary, First Southern Bank, all of Florence, Alabama.

Board of Governors of the Federal Reserve System, July 14, 2017.

Yao-Chin Chao,

Assistant Secretary of the Board.

[FR Doc. 2017–15172 Filed 7–18–17; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL TRADE COMMISSION

Granting of Requests for Early Termination of the Waiting Period Under the Premerger Notification Rules

Section 7A of the Clayton Act, 15 U.S.C. 18a, as added by Title II of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, requires persons contemplating certain mergers or acquisitions to give the Federal Trade Commission and the Assistant Attorney General advance notice and to wait designated periods before consummation of such plans. Section 7A(b)(2) of the Act permits the agencies, in individual cases, to terminate this waiting period prior to its expiration and requires that notice of this action be published in the **Federal Register**.

The following transactions were granted early termination—on the dates indicated—of the waiting period provided by law and the premerger notification rules. The listing for each transaction includes the transaction number and the parties to the transaction. The grants were made by the Federal Trade Commission and the Assistant Attorney General for the Antitrust Division of the Department of Justice. Neither agency intends to take any action with respect to these proposed acquisitions during the applicable waiting period.

EARLY TERMINATIONS GRANTED JUNE 1, 2017 THROUGH JUNE 30, 2017

		06/01/2017
20171164	G	Crown Castle International Corp.; Pamlico Capital II, L.P.; Crown Castle International Corp.
20171172	G	Verizon Communications Inc.; Carl C. Icahn; Verizon Communications Inc.
20171238	G	Oak Hill Capital Partners IV (Onshore), L.P.; Cypress Investor Holdings, L.P.; Oak Hill Capital Partners IV (Onshore), L.P.
20171249	G	Audax Private Equity Fund V–A, L.P.; Dade Paper & Bag Co.; Audax Private Equity Fund V–A, L.P.
		06/02/2017
20171203	G	Elliot International Limited; Gigamon Inc.; Elliot International Limited.
20171204	G	Elliott Associates, L.P.; Gigamon Inc.; Elliott Associates, L.P.
20171245	G	Tallgrass Equity, LLC; DCP Midstream, LP; Tallgrass Equity, LLC.
20171252	G	ORIX Corporation; Ormat Technologies, Inc.; ORIX Corporation.
		06/05/2017
20171196	G	HSI Holdings I, Inc.; Zhuhai Hengxin Fengye Technology LLC; HSI Holdings I, Inc.
20171226	G	Thoma Bravo Fund XI Global, L.P.; Zhuhai Hengxin Fengye Technology LLC; Thoma Bravo Fund XI Global, L.P.
20171227	G	Ares Corporate Opportunities Fund IV, L.P.; Deva Holdings, Inc.; Ares Corporate Opportunities Fund IV, L.P.
20171237	G	TCV IX, L.P.; Cypress Investor Holdings, L.P.; TCV IX, L.P.
20171268	G	Wartsila Corporation; Greensmith Energy Management Systems, Inc.; Wartsila Corporation.
20171270	G	One Fifty One PLC; Ugo Rista Charitable Trust; One Fifty One PLC.
20171277	G	PAI Europe VI–1 FPCI; Baron Albert Frere; PAI Europe VI–1 FPCI.
20171278	G	PAI Europe VI–1 FPCI; Desmarais Family Residuary Trust; PAI Europe VI–1 FPCI.

EARLY TERMINATIONS GRANTED—Continued
JUNE 1, 2017 THROUGH JUNE 30, 2017

20171279	G	Laurentian Bank of Canada; NCF Holdings LLC; Laurentian Bank of Canada.
20171282	G	Golden Gate Capital Opportunity Fund, L.P.; G.A.L. Manufacturing Corporation; Golden Gate Capital Opportunity Fund, L.P.
20171283	G	Golden Gate Capital Opportunity Fund, L.P.; Hollister-Whitney Elevator Corp.; Golden Gate Capital Opportunity Fund, L.P.
20171284	G	Triton Fund IV LP; Werner Worldwide Holding Company, LP; Triton Fund IV LP.
20171288	G	W. Keith Maxwell III; Verde Energy USA Holdings, LLC; W. Keith Maxwell III.
20171295	G	Ardian North America Fund II, L.P.; Dynamic Technologies S.p.A.; Ardian North America Fund II, L.P.
20171297	G	Koninklijke Philips N.V.; Respiratory Technologies, Inc.; Koninklijke Philips N.V.
20171301	G	OEP VI Feeder (Cayman), L.P.; OME Investment Acquisition S.C.A.; OEP VI Feeder (Cayman), L.P.
20171304	G	The Baring Asia Private Equity Fund VI, L.P. 2; The Baring Asia Private Equity Fund IV, L.P.; The Baring Asia Private Equity Fund VI, L.P. 2.
06/06/2017		
20171217	G	Comcast Corporation; Sympoz, Inc.; Comcast Corporation.
20171232	G	Liberty Interactive Corporation; Lending Tree, Inc.; Liberty Interactive Corporation.
20171300	G	AP VIII Olympus VoteCo, LLC; West Corporation; AP VIII Olympus VoteCo, LLC.
06/07/2017		
20171212	G	Open Road Holdings, LLC; Landmark Media Enterprises, LLC; Open Road Holdings, LLC.
20171215	G	Liberty Interactive Corporation; GCI Liberty, Inc.; Liberty Interactive Corporation.
20171294	G	Cerberus Institutional Partners, L.P.; White Deer Energy L.P. II; Cerberus Institutional Partners, L.P.
20171299	G	HGGC Fund III–A, L.P.; Nutraceutical International Corporation; HGGC Fund III–A, L.P.
20171305	G	Hub Group, Inc.; Timothy J. and Traci M. Estenson; Hub Group, Inc.
20171308	G	TA XII–A L.P.; GI Partners Fund IV L.P.; TA XII–A L.P.
20171335	G	AEA Investors Fund VI LP; Berkshire Fund VII, L.P.; AEA Investors Fund VI LP.
06/08/2017		
20171313	G	Marc A. Gardner; Edward K. Freedman; Marc A. Gardner.
06/09/2017		
20171315	G	Wintime Energy Co., Ltd.; HRC Investment Holding, LLC; Wintime Energy Co., Ltd.
20171333	G	HGGC Fund III–A, L.P.; TA XI, L.P.; HGGC Fund III–A, L.P.
20171334	G	Spirax-Sarco Engineering plc; Irving Place Partners III SPV, L.P.; Spirax-Sarco Engineering plc.
20171342	G	Inception Topco, Inc.; TriCore Solutions Holdings, LLC; Inception Topco, Inc.
20171343	G	Blake Quinn; Johnson Machinery Co.; Blake Quinn.
20171345	G	Golden Gate Capital Opportunity Fund, L.P.; SAASH Co-Investment, LLC; Golden Gate Capital Opportunity Fund, L.P.
06/12/2017		
20171100	G	KKR North America Fund XI (AMG) LLC; The Hunt Legacy Trust; KKR North America Fund LLC.
20171271	G	Elliott Associates, L.P.; NXP Semiconductors N.V.; Elliott Associates, L.P.
20171339	G	Alchemy Copyrights, LLC; Andre de Raaff; Alchemy Copyrights, LLC.
20171371	G	Deere & Company; Wirtgen Group GmbH; Deere & Company.
06/13/2017		
20171254	G	UnitedHealth Group Incorporated; New West Physicians, P.C.; UnitedHealth Group Incorporated.
06/14/2017		
20170689	G	General Electric Company; Baker Hughes Incorporated; General Electric Company.
20171346	G	American International Group, Inc.; Hamilton Insurance Group, Ltd.; American International Group, Inc.
20171372	G	Clayton Dubilier & Rice Fund IX, L.P.; Fidelity National Information Services, Inc.; Clayton Dubilier & Rice Fund IX, L.P.
06/15/2017		
20171340	G	FR XIII Charlie AIV, L.P.; Crestwood Equity Partners LP; FR XIII Charlie AIV, L.P.
20171351	G	Crius Energy Trust; MVC Capital, Inc.; Crius Energy Trust.
20171365	G	GTCR Fund XI/A LP; The Sage Group plc; GTCR Fund XI/A LP.
06/16/2017		
20171368	G	Vista Foundation Fund III, L.P.; Lithium Technologies, Inc.; Vista Foundation Fund III, L.P.
20171374	G	J.W. Childs Equity Partners IV, L.P.; EBL Holding Company, LLC; J.W. Childs Equity Partners IV, L.P.
20171375	G	Mitsui & Co., Ltd.; Accountable Healthcare Holdings Corp.; Mitsui & Co., Ltd.
20171379	G	Michael J. Angelakis; Bowlmor AMF Corp.; Michael J. Angelakis.
20171382	G	Bienestar Jersey Limited; Yellow Wood Brand Acquisition 2012, LP; Bienestar Jersey Limited.
20171392	G	KPS Special Situations Fund IV, LP; Sterling Group Partners III, L.P.; KPS Special Situations Fund IV, LP.
20171393	G	CF Corporation; HRG Group, Inc.; CF Corporation.
20171398	G	Shanghai Hongda Mining Co., Ltd.; Isaac Verbukh; Shanghai Hongda Mining Co., Ltd.

EARLY TERMINATIONS GRANTED—Continued
JUNE 1, 2017 THROUGH JUNE 30, 2017

20171400	G	CD&R Fund X Waterworks B, L.P.; HD Supply Holdings, Inc.; CD&R Fund X Waterworks B, L.P.
20171401	G	Phillips Edison Grocery Center REIT I, Inc.; Phillips Edison Limited Partnership; Phillips Edison Grocery Center REIT I, Inc.
		06/19/2017
20171281	G	PEM Holding Co.; Neil L. Whitesell; PEM Holding Co.
20171318	G	Hangzhou Great Star Industrial Co., Ltd.; Masco Corporation; Hangzhou Great Star Industrial Co., Ltd.
		06/20/2017
20171373	G	MasterCard Incorporated; AvidXchange, Inc.; MasterCard Incorporated.
20171383	G	Vista Equity Partners Fund VI, L.P.; Xactly Corporation; Vista Equity Partners Fund VI, L.P.
20171390	G	TPG Partners VII, L.P.; Kinnser Software Holdings, Inc.; TPG Partners VII, L.P.
20171414	G	New Omaha Holdings L.P.; CardConnect Corp.; New Omaha Holdings L.P.
		06/21/2017
20171273	G	Bain Capital Fund XI, L.P.; H.I.G. Bayside Debt & LBO Fund II, L.P.; Bain Capital Fund XI, L.P.
20171280	G	H.I.G. Bayside Debt and LBO Fund II, L.P.; Irving Place Capital Parnters III SPV, L.P.; H.I.G. Bayside Debt and LBO Fund II, L.P.
20171285	G	Alex Meruelo; Emmis Communications Corporation; Alex Meruelo.
20171289	G	Elliott International Limited; athenahealth, Inc.; Elliott International Limited.
20171290	G	Elliott Associates, L.P.; athenahealth, Inc.; Elliott Associates, L.P.
20171418	G	Apax IX USD L.P.; 3M Company; Apax IX USD L.P.
		06/26/2017
20171367	G	Corvex Master Fund LP; Energen Corporation; Corvex Master Fund LP.
20171384	G	Wheeling Creek Midstream, LLC; Noble Energy, Inc.; Wheeling Creek Midstream, LLC.
20171394	G	WestRock Company; Gary Berkowitz; WestRock Company.
20171411	G	Carlyle Partners VI, L.P.; Albany Molecular Research, Inc.; Carlyle Partners VI, L.P.
20171412	G	GTCR Fund XI/A LP; Albany Molecular Research, Inc.; GTCR Fund XI/A LP.
20171419	G	London Stock Exchange Group plc; Citigroup Inc.; London Stock Exchange Group plc.
20171420	G	Kirby Corporation; Hushang Ansary; Kirby Corporation.
20171421	G	Cerberus Institutional Partners, L.P.; IASIS Investment LLC; Cerberus Institutional Partners, L.P.
20171422	G	ECN Capital Corp.; Service Finance Holdings, LLC; ECN Capital Corp.
20171423	G	Cross Country Healthcare, Inc.; Mathew Price and Sharon Price; Cross Country Healthcare, Inc.
20171425	G	Pamlico Capital III, L.P.; Scott Becker; Pamlico Capital III, L.P.
20171426	G	KPS Special Situations Fund IV, LP; adidas AG; KPS Special Situations Fund IV, LP.
20171432	G	Aspen Buyer LP; American Securities Partners VI, L.P.; Aspen Buyer LP.
20171433	G	Madison Industries Holdings LLC; AB SKF; Madison Industries Holdings LLC.
20171436	G	TPG Partners VII, L.P.; Shane Smith; TPG Partners VII, L.P.
20171440	G	Boing Holding S.a.r.l.; DLR Associates, LLC; Boing Holding S.a.r.l.
		06/27/2017
20171395	G	DXC Technology Company; LLR Equity Partners III, L.P.; DXC Technology Company.
20171399	G	Ensco plc; Atwood Oceanics, Inc.; Ensco plc.
20171437	G	TAO Finance 1, LLC; Shane Smith; TAO Finance 1, LLC.
20171446	G	McKesson Coporation; Lake Capital Partners II LP; McKesson Coporation.
20171461	G	Cardinal Health, Inc.; Liberty Medical Holdings, LLC; Cardinal Health, Inc.
		06/28/2017
20171355	G	GP Investments Acquisition Corp.; Rimini Street, Inc.; GP Investments Acquisition Corp.
20171410	G	GTCR Fund XI/A LP; GreatCall, Inc.; GTCR Fund XI/A LP.
20171415	G	Graphic Packaging Holding Company; Robert F. Brewer; Graphic Packaging Holding Company.
20171416	G	Graphic Packaging Holding Company; John C. Reiss; Graphic Packaging Holding Company.
		06/29/2017
20171206	G	HCA Healthcare, Inc.; Tenet Healthcare Corporation; HCA Healthcare, Inc.
20171251	G	HCA Healthcare, Inc.; Community Health System, Inc.; HCA Healthcare, Inc.
20171322	G	Vivendi S.A.; Vincent Bollore'; Vivendi S.A.
20171380	G	JP Morgan Chase & Co.; Sonus Networks, Inc.; JP Morgan Chase & Co.
20171381	G	Sonus Networks, Inc.; JP Morgan Chase & Co.; Sonus Networks, Inc.
20171435	G	KKR European Fund IV L.P.; A-Gas (Orb) Limited; KKR European Fund IV L.P.
20171449	G	Kevin Knight; Swift Transportation Company; Kevin Knight.
20171450	G	Gary Knight; Swift Transportation Company; Gary Knight.
20171451	G	Keith Knight; Swift Transportation Company; Keith Knight.

EARLY TERMINATIONS GRANTED—Continued
JUNE 1, 2017 THROUGH JUNE 30, 2017

06/30/2017		
20171402	G	Black Diamond Thematic Ltd.; Bunge Limited; Black Diamond Thematic Ltd.
20171403	G	Double Black Diamond Ltd.; Bunge Limited; Double Black Diamond Ltd.
20171431	G	JTEKT Corporation; Fuji Kiko Co., Ltd.; JTEKT Corporation.
20171438	G	Baylor Scott & White Holdings; Texas Spine and Joint Hospital, Ltd.; Baylor Scott & White Holdings.
20171439	G	Firmenich International SA; MidOcean Partners III, L.P.; Firmenich International SA.
20171442	G	SemGroup Corporation; Alinda Infrastructure Fund II, L.P.; SemGroup Corporation.
20171445	G	GI Peak Holding Corporation; JR Shaw; GI Peak Holding Corporation.
20171447	G	GI Partners Fund V LP; GI Partners Fund IV L.P.; GI Partners Fund V LP.
20171455	G	Sovos Brands Limited Partnership; Rao's Specialty Foods, Inc.; Sovos Brands Limited Partnership.
20171456	G	Teladoc, Inc.; Best Doctors Holdings, Inc.; Teladoc, Inc.
20171465	G	Alliance Data Systems Corporation; Signet Jewelers Limited; Alliance Data Systems Corporation.
20171466	G	Oaktree Power Opportunities Fund IV, L.P.; S.C. Sachs Company, Inc.; Oaktree Power Opportunities Fund IV, L.P.
20171471	G	CEOF AIV Cayman, L.P.; Commercial Metals Company; CEOF AIV Cayman, L.P.
20171472	G	Frazier Healthcare Growth Buyout Fund VIII L.P.; Chudy Group, LLC; Frazier Healthcare Growth Buyout Fund VIII L.P.
20171473	G	Jun Wang; SomaLogic, Inc.; Jun Wang.
20171479	G	Compagnie Generale des Establissements Michelin; FleetCor Technologies, Inc.; Compagnie Generale des Establissements Michelin.
20171481	G	Wal-Mart Stores, Inc.; Bonobos, Inc.; Wal-Mart Stores, Inc.
20171494	G	Clayton Dubilier & Rice Fund IX, L.P.; Direct Vet Marketing, Inc.; Clayton Dubilier & Rice Fund IX, L.P.
20171496	G	Hellman & Friedman Capital Partners VIII, L.P.; General Atlantic Partners 93, L.P.; Hellman & Friedman Capital Partners VIII, L.P.

FOR FURTHER INFORMATION CONTACT: Theresa Kingsberry, Program Support Specialist, Federal Trade Commission Premerger Notification Office, Bureau of Competition, Room CC–5301, Washington, DC 20024, (202) 326–3100.

By direction of the Commission.

April J. Tabor,

Acting Secretary.

[FR Doc. 2017–15093 Filed 7–18–17; 8:45 am]

BILLING CODE 6750–01–P

GENERAL SERVICES ADMINISTRATION

[OMB Control No. 3090–0291; Docket No. 2017–0001; Sequence 3]

Submission for OMB Review; FSRS Registration Requirements for Prime Grant Awardees

AGENCY: Office of the Integrated Award Environment, General Services Administration (GSA).

ACTION: Notice of request for public comments regarding an extension to an existing OMB clearance.

SUMMARY: Under the provisions of the Paperwork Reduction Act of 1995, the Regulatory Secretariat Division will be submitting to the Office of Management and Budget (OMB) a request to review and approve a renewal of the currently approved information collection requirement regarding FSRS Registration Requirements for Prime Grant Awardees. A notice was published in the **Federal Register** at 82 FR 19722 on April 28, 2017. No comments were received.

DATES: Submit comments on or before August 18, 2017.

ADDRESSES: Submit comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to: Office of Information and Regulatory Affairs of OMB, Attention: Desk Officer for GSA, Room 10236, NEOB, Washington, DC 20503. Additionally submit a copy to GSA by any of the following methods:

- *Regulations.gov: http://www.regulations.gov.* Submit comments via the Federal eRulemaking portal by searching OMB control number 3090–0291. Select the link ''Comment Now'' that corresponds with ''Information Collection 3090–0291, FSRS Registration Requirements for Prime Grant Awardees.'' Follow the instructions provided on the screen. Please include your name, company name (if any), and ''Information Collection 3090–0291, FSRS Registration Requirements for Prime Grant Awardees on your attached document.
- *Mail:* General Services Administration, Regulatory Secretariat Division (MVCB), 1800 F Street NW., Washington, DC 20405. ATTN: IC 3090–0291, FSRS Registration Requirements for Prime Grant Awardees.

Instructions: Please submit comments only and cite Information Collection 3090–0291, FSRS Registration Requirements for Prime Grant Awardees, in all correspondence related to this collection. All comments received will be posted without change to *http://www.regulations.gov,* including any personal and/or business confidential information provided.

FOR FURTHER INFORMATION CONTACT: John Corro, Procurement Analyst, Office of the Integrated Award Environment, GSA, at telephone number 202–215–9767; or via email at *john.corro@gsa.gov.*

SUPPLEMENTARY INFORMATION:

A. Purpose

The Federal Funding Accountability and Transparency Act (P.L.109–282, as amended by section 6202(a) of P.L.110–252), known as FFATA or the Transparency Act, requires information disclosure of entities receiving Federal financial assistance through Federal awards such as Federal contracts, sub-contracts, grants and sub-grants, FFATA 2(a),(2),(i),(ii). The system that collects this information is called the FFATA Sub-award Reporting System (FSRS, *www.fsrs.gov*). This information collection requires information necessary for prime awardee registration in FSRS to create a user log-in and enable sub-award reporting for their entity. To register in FSRS for a user log-in, an entity is required to provide their Data Universal Numbering System (DUNS) number. FSRS then pulls core data about the entity from their System for Award Management (SAM) registration to include the legal business name, physical address, mailing address and Commercial and Government Entity (CAGE) code. The entity completes the FSRS registration by providing contact information within the entity for approval.

If a prime awardee has already registered in FSRS to report contracts-related Transparency Act financial data, a new log-in will not be required. In addition, if a prime awardee had a user account in the Electronic Subcontract Reporting System (eSRS), a new log-in will not be required.

B. Annual Reporting Burden

Respondents: 5,678.
Responses per Respondent: 1.
Total annual responses: 5,678.
Hours Per Response: .5.
Total Burden Hours: 2,839.

C. Public Comments

Public comments are particularly invited on: Whether this collection of information is necessary and whether it will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected.

Obtaining Copies of Proposals: Requesters may obtain a copy of the information collection documents from the General Services Administration, Regulatory Secretariat Division (MVCB), 1800 F Street NW., Washington, DC 20405, telephone 202–501–4755. Please cite OMB Control No. 3090–0291, FSRS Registration Requirements for Prime Grant Awardees, in all correspondence.

Dated: July 12, 2017.

David A. Shive,

Chief Information Officer, General Services Administration.

[FR Doc. 2017–15154 Filed 7–18–17; 8:45 am]

BILLING CODE 6820–XY–P

GENERAL SERVICES ADMINISTRATION

[OMB Control No. 3090–0292; Docket No. 2017–0001; Sequence 4]

Submission for OMB Review; FFATA Subaward and Executive Compensation Reporting Requirements

AGENCY: Office of the Integrated Award Environment, General Services Administration (GSA).

ACTION: Notice of request for comments regarding an extension to an existing OMB information collection.

SUMMARY: Under the provisions of the Paperwork Reduction Act of 1995, the Regulatory Secretariat Division will be submitting to the Office of Management and Budget (OMB) a request to review and approve a renewal of the currently approved information collection requirement regarding FFATA Subaward and Executive Compensation Reporting Requirements.

DATES: Submit comments on or before August 18, 2017.

ADDRESSES: Submit comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to: Office of Information and Regulatory Affairs of OMB, Attention: Desk Officer for GSA, Room 10236, NEOB, Washington, DC 20503. Additionally submit a copy to GSA by any of the following methods:

• *Regulations.gov: http://www.regulations.gov.*

Submit comments via the Federal eRulemaking portal by searching the OMB control number 3090–0292. Select the link ''Comment Now'' that corresponds with ''Information Collection 3090–0292, FFATA Subaward and Executive Compensation Reporting Requirements''. Follow the instructions provided on the screen. Please include your name, company name (if any), and ''Information Collection 3090–0292, FFATA Subaward and Executive Compensation Reporting Requirements'' on your attached document.

• *Mail:* General Services Administration, Regulatory Secretariat Division (MVCB), 1800 F Street NW., Washington, DC 20405. ATTN: IC 3090–0292, FFATA Subaward and Executive Compensation Reporting Requirements.

Instructions: Please submit comments only and cite Information Collection 3090–0292, FFATA Subaward and Executive Compensation Reporting Requirements, in all correspondence related to this collection. Comments received generally will be posted without change to *http://www.regulations.gov,* including any personal and/or business confidential information provided. To confirm receipt of your comment(s), please check *www.regulations.gov,* approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT: Dennis Harrison, Procurement Analyst, Office of the Integrated Award Environment, GSA, at telephone number 202–215–9767; or via email at *dennis.harrison@gsa.gov.*

SUPPLEMENTARY INFORMATION: A notice was published in the **Federal Register** at 82 FR 19721 on April 28, 2017. No comments were received.

A. Purpose

The Federal Funding Accountability and Transparency Act (Pub. L. 109–282, as amended by section 6202(a) of Pub. L. 110–252), known as FFATA or the Transparency Act requires information disclosure of entities receiving Federal financial assistance through Federal awards such as Federal contracts, sub-contracts, grants and sub-grants, FFATA 2(a), (2), (i), (ii). Beginning October 1, 2010, the currently approved Paperwork Reduction Act submission directed compliance with the Transparency Act to report prime and first-tier sub-award data. Specifically, Federal agencies and prime awardees of grants were to ensure disclosure of executive compensation of both prime and subawardees and sub-award data pursuant to the Transparency Act. This information collection requires reporting of only the information enumerated under the Transparency Act.

B. Annual Reporting Burden

Sub-Award Responses: 107,614.

Hours per Response: 1.

Total Burden Hours: 107,614.

Executive Compensation Responses: 41,298.

Hours per Response: 1.

Total Burden Hours: 41,298.

Total Annual Burden Hours: 148,912.

C. Public Comments

Public comments are particularly invited on: Whether this collection of information is necessary and whether it will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected.

Obtaining Copies of Proposals: Requesters may obtain a copy of the information collection documents from the General Services Administration, Regulatory Secretariat Division (MVCB), 1800 F Street NW., Washington, DC 20405, telephone 202–501–4755. Please cite OMB Control No. 3090–0292, FFATA Subaward and Executive Compensation Reporting Requirements, in all correspondence.

Dated: July 12, 2017.

David A. Shive,

Chief Information Officer, General Services Administration.

[FR Doc. 2017–15147 Filed 7–18–17; 8:45 am]

BILLING CODE 6820–WY–P

GENERAL SERVICES ADMINISTRATION

[Notice–MG–2017–02; Docket No. 2017–0002; Sequence No. 13]

Office of Federal High-Performance Buildings; Green Building Advisory Committee; Notification of Upcoming Conference Calls

AGENCY: Office of Government-wide Policy, General Services Administration (GSA).

ACTION: Meeting notice.

SUMMARY: Notice of this meeting and these conference calls is being provided according to the requirements of the Federal Advisory Committee Act. This notice provides the agenda and schedule for the October 24, 2017 meeting of the Green Building Advisory Committee (the Committee) and schedule for a series of conference calls, supplemented by Web meetings, for two task groups of the Committee. The meeting is open to the public and the site is accessible to individuals with disabilities. The conference calls are open for the public to listen in. Interested individuals must register to attend as instructed below under **SUPPLEMENTARY INFORMATION**.

DATES:

Meeting date: The meeting will be held on Tuesday, October 24, 2017, starting at 9:00 a.m., Eastern Daylight Time (EDT), and ending no later than 4:00 p.m., EDT.

Task group conference call dates: The conference calls will be held according to the following schedule:

The *Health and Wellness Task Group* will hold recurring, weekly conference calls on Wednesdays beginning August 2, 2017, through October 18, 2017 from 11:00 a.m. to 12:00 p.m., EDT.

The *High Performance Building Adoption Task Group* will hold recurring, weekly conference calls on Thursdays beginning August 3, 2017 through October 19, 2017 from 3:00 p.m. to 4:00 p.m., EDT.

FOR FURTHER INFORMATION CONTACT: Mr. Ken Sandler, Designated Federal Officer, Office of Federal High-Performance Buildings, Office of Government-wide Policy, General Services Administration, 1800 F Street NW., Washington, DC 20405, telephone 202–219–1121 (*Note:* This is not a toll-free number). Additional information about the Committee, including meeting materials and updates on the task groups and their schedules, will be available on-line at *http://www.gsa.gov/gbac.*

SUPPLEMENTARY INFORMATION:

Procedures for Attendance and Public Comment: Contact Mr. Ken Sandler at *ken.sandler@gsa.gov* to register to attend the meeting and/or listen in to any or all of these conference calls. To attend the meeting and/or conference calls, submit your full name, organization, email address, and phone number, and which you would like to attend. Requests to attend the October 24, 2017 meeting must be received by 5:00 p.m., EDT, on Tuesday, October 17, 2017. Requests to listen in to the conference calls must be received by 5:00 p.m., EDT, on Tuesday, August 1, 2017. (GSA will be unable to provide technical assistance to any listener experiencing technical difficulties. Testing access to the Web meeting site in advance of calls is recommended.)

Contact Ken Sandler at *ken.sandler@gsa.gov* to register to comment during the October 24, 2017 meeting public comment period. Registered speakers/organizations will be allowed a maximum of five minutes each, and will need to provide written copies of their presentations. Requests to comment at the meeting must be received by 5:00 p.m., EDT, on Tuesday, October 17, 2017. Written comments also may be provided to Mr. Sandler at *ken.sandler@gsa.gov* by the same deadline.

Background: The Administrator of GSA established the Committee on June 20, 2011 (**Federal Register**/Vol. 76, No. 118) pursuant to Section 494 of the Energy Independence and Security Act of 2007 (EISA, 42 U.S.C. 17123). Under this authority, the Committee provides independent policy advice and recommendations to GSA to improve federal buildings (assets, operations, use, and resilience) to enhance human health and performance, and safeguard social, economic, and environmental security.

The Committee currently has two active task groups. The High Performance Building Adoption task group is pursuing the motion of a committee member to provide recommendations to ''accelerate the adoption of high performance [Federal] buildings.'' The Health and Wellness task group is pursuing the motion of a committee member to ''develop guidelines to integrate health and wellness features into government facilities programs.''

The conference calls will allow the task groups to coordinate the development of consensus recommendations to the full Committee, which will, in turn, decide whether to proceed with formal advice to GSA based upon these recommendations.

October 24, 2017 Meeting Agenda

- Welcome, Introductions, Updates & Plans for Today
- High Performance Building Adoption: Task Group Report & Discussion
- Working Lunch (with Presentation)
- Health and Wellness: Task Group Report & Discussion
- Topics Proposed by Committee Members Future/Directions of the Committee
- Public Comment Period
- Closing Comments
- Adjourn

Detailed agendas, background information, and updates for the meeting and conference calls will be posted on GSA's Web site at *http://www.gsa.gov/gbac.*

Meeting Access: The Committee will convene its October 24, 2017 meeting at GSA Central Office, Room 1425, 1800 F Street NW., Washington, DC 20405, and the site is accessible to individuals with disabilities.

Dated: July 13, 2017.

Kevin Kampschroer,

Federal Director, Office of Federal High-Performance Buildings, General Services Administration.

[FR Doc. 2017–15155 Filed 7–18–17; 8:45 am]

BILLING CODE 6820–14–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifier: CMS–10636]

Agency Information Collection Activities: Submission for OMB Review; Comment Request

AGENCY: Centers for Medicare & Medicaid Services, HHS.

ACTION: Notice.

SUMMARY: The Centers for Medicare & Medicaid Services (CMS) is announcing an opportunity for the public to comment on CMS' intention to collect information from the public. Under the Paperwork Reduction Act of 1995 (PRA), federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension or reinstatement of an existing collection of information, and to allow a second opportunity for public comment on the notice. Interested persons are invited to send comments regarding the burden estimate or any other aspect of this collection of information, including the necessity and utility of the proposed information

collection for the proper performance of the agency's functions, the accuracy of the estimated burden, ways to enhance the quality, utility, and clarity of the information to be collected; and the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

DATES: Comments on the collection(s) of information must be received by the OMB desk officer by August 18, 2017.

ADDRESSES: When commenting on the proposed information collections, please reference the document identifier or OMB control number. To be assured consideration, comments and recommendations must be received by the OMB desk officer via one of the following transmissions: OMB, Office of Information and Regulatory Affairs, Attention: CMS Desk Officer, Fax Number: (202) 395–5806 *OR*, Email: *OIRA_submission@omb.eop.gov*.

To obtain copies of a supporting statement and any related forms for the proposed collection(s) summarized in this notice, you may make your request using one of following:

1. Access CMS' Web site address at Web site address at *https://www.cms.gov/Regulations-and-Guidance/Legislation/Paperwork ReductionActof1995/PRA-Listing.html*.

2. Email your request, including your address, phone number, OMB number, and CMS document identifier, to *Paperwork@cms.hhs.gov*.

3. Call the Reports Clearance Office at (410) 786–1326.

FOR FURTHER INFORMATION CONTACT: William Parham at (410) 786–4669.

SUPPLEMENTARY INFORMATION: Under the Paperwork Reduction Act of 1995 (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. The term ''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 publish a 30-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension, revision or reinstatement of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, CMS is publishing this notice that summarizes the following proposed collection(s) of information for public comment:

1. *Type of Information Collection Request:* New collection (Request for a new OMB control number); *Title of Information Collection:* Three-Year Network Adequacy Review for Medicare Advantage Organizations; *Use:* All Medicare Advantage organizations (MAOs) offering coordinated care plans, network-based private fee-for-service (PFFS) plans, and network-based medical savings account (MSA) plans, as well as section 1876 cost organizations, maintain a network of appropriate providers that is sufficient to provide adequate access to covered services to meet the needs of the population served. To enforce this requirement, CMS has developed network adequacy criteria which set forth the minimum number of providers and maximum travel time and distance from enrollees to providers, for required provider specialty types in each county in the United States and its territories. MAOs must be in compliance with the current CMS Medicare Advantage (MA) Network Adequacy Criteria Guidance, which is updated and published annually on CMS's Medicare Advantage Applications Web site. Additional network policy guidance is also located in chapter 4 of the Medicare Managed Care Manual. This proposed collection of information is essential to appropriate and timely compliance monitoring by CMS, in order to ensure that all active MAO contracts offering network-based plans maintain an adequate network. *Form Number:* CMS–10636 (OMB control number 0938–New); *Frequency:* Yearly; *Affected Public:* Private sector (Business or other for-profits); *Number of Respondents:* 484; *Total Annual Responses:* 1,652; *Total Annual Hours:* 15,692. (For policy questions regarding this collection contact Theresa Wachter at 410–786–1157.)

Dated: July 13, 2017.

William N. Parham, III,

Director, Paperwork Reduction Staff, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2017–15071 Filed 7–18–17; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifier CMS–10224 and CMS–222–17]

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Centers for Medicare & Medicaid Services.

ACTION: Notice.

SUMMARY: The Centers for Medicare & Medicaid Services (CMS) is announcing an opportunity for the public to comment on CMS' intention to collect information from the public. 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 or reinstatement of an existing collection of information) and to allow 60 days for public comment on the proposed action. Interested persons are invited to send comments regarding our burden estimates or any other aspect of this collection of information, including the necessity and utility of the proposed information collection for the proper performance of the agency's functions, the accuracy of the estimated burden, ways to enhance the quality, utility, and clarity of the information to be collected, and the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

DATES: Comments must be received by September 18, 2017.

ADDRESSES: When commenting, please reference the document identifier or OMB control number. To be assured consideration, comments and recommendations must be submitted in any one of the following ways:

1. *Electronically.* You may send your comments electronically to *http://www.regulations.gov*. Follow the instructions for ''Comment or Submission'' or ''More Search Options'' to find the information collection document(s) that are accepting comments.

2. *By regular mail.* You may mail written comments to the following address: CMS, Office of Strategic Operations and Regulatory Affairs, Division of Regulations Development, Attention: Document Identifier/OMB Control Number ____, Room C4–26–05, 7500 Security Boulevard, Baltimore, Maryland 21244–1850.

To obtain copies of a supporting statement and any related forms for the proposed collection(s) summarized in this notice, you may make your request using one of following:

1. Access CMS' Web site address at *http://www.cms.hhs.gov/PaperworkReductionActof1995*.

2. Email your request, including your address, phone number, OMB number, and CMS document identifier, to *Paperwork@cms.hhs.gov*.

3. Call the Reports Clearance Office at (410) 786–1326.

FOR FURTHER INFORMATION CONTACT: William Parham at (410) 786–4669.

SUPPLEMENTARY INFORMATION:

Contents

This notice sets out a summary of the use and burden associated with the following information collections. More detailed information can be found in each collection's supporting statement and associated materials (see **ADDRESSES**).

CMS–10224 Healthcare Common Procedure Coding System (HCPCS)—Level II Code Modification Request Process

CMS–222–92 Independent Rural Health Center/Freestanding Federally Qualified Health Center Cost Report

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. The term ''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 requires federal agencies to publish a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension or reinstatement of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, CMS is publishing this notice.

Information Collection

1. *Type of Information Collection Request:* Extension of a currently approved collection; *Title of Information Collection:* Healthcare Common Procedure Coding System (HCPCS)—Level II Code Modification Request Process; *Use:* In October 2003, the Secretary of Health and Human Services (HHS) delegated authority under the Health Insurance Portability and Accountability Act (HIPAA) legislation to Centers for Medicare and Medicaid Services (CMS) to maintain and distribute HCPCS Level II Codes. As stated in 42 CFR Sec. 414.40 (a) CMS establishes uniform national definitions of services, codes to represent services, and payment modifiers to the codes. The HCPCS codeset has been maintained and distributed via modifications of codes, modifiers and descriptions, as a direct result of data received from applicants. Thus, information collected in the application is significant to codeset maintenance. The HCPCS codeset maintenance is an ongoing process, as changes are implemented and updated annually; therefore, the process requires continual collection of information from applicants on an annual basis. As new technology evolves and new devices, drugs and supplies are introduced to the market, applicants submit applications to CMS requesting modifications to the HCPCS Level II codeset. Applications have been received prior to HIPAA implementation and must continue to be collected to ensure quality decision-making. The HIPAA of 1996 required CMS to adopt standards for coding systems that are used for reporting health care transactions. The regulation that CMS published on August 17, 2000 (45 CFR 162.10002) to implement the HIPAA requirement for standardized coding systems established the HCPCS Level II codes as the standardized coding system for describing and identifying health care equipment and supplies in health care transactions. HCPCS Level II was selected as the standardized coding system because of its wide acceptance among both public and private insurers. Public and private insurers were required to be in compliance with the August 2000 regulation by October 1, 2002. *Form Number:* CMS–10224 (OMB control number: 0938–1042); *Frequency:* Annually; *Affected Public:* Private Sector: Business or other for-profit, Not-for-profit institutions; *Number of Respondents:* 100; *Total Annual Responses:* 100; *Total Annual Hours:* 1100. (For policy questions regarding this collection contact Kimberley Combs-Miller at 410–786–6707).

2. *Type of Information Collection Request:* Extension of a currently approved collection; *Title of Information Collection:* Independent Rural Health Center/Freestanding Federally Qualified Health Center Cost Report; *Use:* Providers of services participating in the Medicare program are required under sections 1815(a), 1833(e) and 1861(v)(1)(A) of the Social Security Act (42 U.S.C. 1395g) to submit annual information to achieve settlement of costs for health care services rendered to Medicare beneficiaries. In addition, regulations at 42 CFR 413.20 and 413.24 require adequate cost data and cost reports from providers on an annual basis. The Form CMS–222–17 cost report is needed to determine a provider's reasonable costs incurred in furnishing medical services to Medicare beneficiaries and reimbursement due to or from a provider. *Form Number:* CMS–222–17 (OMB control number: 0938–0107); *Frequency:* Annually; *Affected Public:* Private Sector: Business or other for-profit, Not-for-profit institutions; *Number of Respondents:* 1,744; *Total Annual Responses:* 1,744; *Total Annual Hours:* 95,920. (For policy questions regarding this collection contact Yaakov Feinstein at 410–786–3137).

Dated: July 13, 2017.

William N. Parham, III,

Director, Paperwork Reduction Staff, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2017–15083 Filed 7–18–17; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifier CMS–216–94 and 265–11]

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Centers for Medicare & Medicaid Services.

ACTION: Notice.

SUMMARY: The Centers for Medicare & Medicaid Services (CMS) is announcing an opportunity for the public to comment on CMS' intention to collect information from the public. 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 or reinstatement of an existing collection of information) and to allow 60 days for public comment on the proposed action. Interested persons are invited to send comments regarding our burden estimates or any other aspect of this collection of information, including the necessity and utility of the proposed information collection for the proper performance of the agency's functions, the accuracy of the estimated burden, ways to enhance the quality, utility, and

clarity of the information to be collected, and the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

DATES: Comments must be received by September 18, 2017.

ADDRESSES: When commenting, please reference the document identifier or OMB control number. To be assured consideration, comments and recommendations must be submitted in any one of the following ways:

1. *Electronically.* You may send your comments electronically to *http://www.regulations.gov.* Follow the instructions for ''Comment or Submission'' or ''More Search Options'' to find the information collection document(s) that are accepting comments.

2. *By regular mail.* You may mail written comments to the following address: CMS, Office of Strategic Operations and Regulatory Affairs, Division of Regulations Development, Attention: Document Identifier/OMB Control Number ___, Room C4–26–05, 7500 Security Boulevard, Baltimore, Maryland 21244–1850.

To obtain copies of a supporting statement and any related forms for the proposed collection(s) summarized in this notice, you may make your request using one of following:

1. Access CMS' Web site address at *http://www.cms.hhs.gov/PaperworkReductionActof1995.*

2. Email your request, including your address, phone number, OMB number, and CMS document identifier, to *Paperwork@cms.hhs.gov.*

3. Call the Reports Clearance Office at (410) 786–1326.

FOR FURTHER INFORMATION CONTACT: William Parham at (410) 786–4669.

SUPPLEMENTARY INFORMATION:

Contents

This notice sets out a summary of the use and burden associated with the following information collections. More detailed information can be found in each collection's supporting statement and associated materials (see **ADDRESSES**).

CMS–216–94 Organ Procurement Organization/Histocompatibility Laboratory Cost Report
CMS–265–11 Independent Renal Dialysis Facility Cost Report

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. The term ''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 requires federal agencies to publish a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension or reinstatement of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, CMS is publishing this notice.

Information Collection

1. *Type of Information Collection Request:* Extension of a currently approved collection; *Title of Information Collection:* Organ Procurement Organization/Histocompatibility Laboratory Cost Report; *Use:* Providers of services participating in the Medicare program are required under sections 1815(a) and 1861(v)(1)(A) of the Social Security Act (42 U.S.C. 1395g) to submit annual information to achieve settlement of costs for health care services rendered to Medicare beneficiaries. In addition, regulations at 42 CFR 413.20 and 413.24 require adequate cost data and cost reports from providers on an annual basis. The Form CMS–216–94 cost report is needed to determine a provider's reasonable costs incurred in furnishing medical services to Medicare beneficiaries and reimbursement due to or due from a provider. *Form Number:* CMS–216–94 (OMB Control Number: 0938–0102); *Frequency:* Annually; *Affected Public:* Private Sector: Business or other for-profit, Not-for-profit institutions; *Number of Respondents:* 102; *Total Annual Responses:* 102; *Total Annual Hours:* 4590. (For policy questions regarding this collection contact Amelia Citerone at 410–786–3901).

2. *Type of Information Collection Request:* Extension of a currently approved collection; *Title of Information Collection:* Independent Renal Dialysis Facility Cost Report; *Use:* Providers of services participating in the Medicare program are required under sections 1815(a) and 1861(v)(1)(A) of the Social Security Act (42 U.S.C. 1395g) to submit annual information to achieve settlement of costs for health care services rendered to Medicare beneficiaries. In addition, regulations at 42 CFR 413.20 and 413.24 require adequate cost data and cost reports from providers on an annual basis. The Form CMS–265–11 cost report is needed to determine a provider's reasonable costs incurred in furnishing medical services to Medicare beneficiaries. *Form Number:* CMS–265–11 (OMB control number: 0938–0236); *Frequency:* Annually; *Affected Public:* Private Sector: Business or other for-profit, Not-for-profit institutions; *Number of Respondents:* 6,821; *Total Annual Responses:* 6,821; *Total Annual Hours:* 443,365. (For policy questions regarding this collection contact Gail Duncan at 410–786–7278).

Dated: July 13, 2017.

William N. Parham, III,

Director, Paperwork Reduction Staff, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2017–15080 Filed 7–18–17; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

[CFDA Number 93.676]

Announcement of the Award of Five Single-Source Low-Cost Extension Supplement Grants Within the Office of Refugee Resettlement's Unaccompanied Alien Children's (UAC) Program

AGENCY: Office of Refugee Resettlement (ORR), Administration for Children and Families (ACF), U.S. Department of Health and Human Services (HHS).

ACTION: Notice of Award of five single-source low-cost extension supplement grants under the Unaccompanied Alien Children's (UAC) Program.

SUMMARY: ACF, ORR, announces the award of five single-source low-cost extension supplement grants for a total of $20,954,962 under the Unaccompanied Alien Children's (UAC) Program.

DATES: Low-cost extension supplement grants will support activities from January 1, 2017 through March 31, 2017.

FOR FURTHER INFORMATION CONTACT: Jallyn Sualog, Director, Division of Children's Services, Office of Refugee Resettlement, 330 C Street SW., Washington, DC 20201. Phone: 202–401–4997. Email: *DCSProgram@acf.hhs.gov.*

SUPPLEMENTARY INFORMATION: The following supplement grants will support the immediate need for additional capacity of shelter services to accommodate the increasing number of UACs referred by DHS into ORR care. The increase in the UAC population necessitates the need for expansion of services to expedite the release of UAC.

In order to be prepared for an increase in referrals for shelter services, ORR will solicit proposals from one grantee to accommodate the extensive amount of referrals from DHS.

State	Grantee	Shelter current funding ending 9/30/16 ($)	Low-cost extension 1/1/17–3/31/17 ($)
Texas	International Educational Services, Inc.	$27,082,262	$7,081,914
Texas	International Educational Services, Inc.	15,451,597	8,026,034
Texas	International Educational Services, Inc.	6,180,591	1,547,774
Texas	International Educational Services, Inc.	8,269,202	2,012,586
Texas	International Educational Services, Inc.	9,148,344	2,286,654
Total		66,131,996	20,954,962

ORR has specific requirements for the provision of services. Award recipients must have the infrastructure, licensing, experience, and appropriate level of trained staff to meet those requirements. The expansion of the existing shelter services program through this supplemental award is a key strategy for ORR to be prepared to meet its responsibility of safe and timely release of Unaccompanied Alien Children referred to its care by DHS and so that the US Border Patrol can continue its vital national security mission to prevent illegal migration, trafficking, and protect the borders of the United States.

Statutory Authority: This program is authorized by—

(A) Section 462 of the Homeland Security Act of 2002, which in March 2003, transferred responsibility for the care and custody of Unaccompanied Alien Children from the Commissioner of the former Immigration and Naturalization Service (INS) to the Director of ORR of the Department of Health and Human Services (HHS).

(B) The Flores Settlement Agreement, Case No. CV85–4544RJK (C. D. Cal. 1996), as well as the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (Pub. L. 110–457), which authorizes post release services under certain conditions to eligible children. All programs must comply with the Flores Settlement Agreement, Case No. CV85–4544–RJK (C.D. Cal. 1996), pertinent regulations and ORR policies and procedures.

Christopher Beach,

Senior Grants Policy Specialist, Division of Grants Policy, Office of Administration, Administration for Children and Families.

[FR Doc. 2017–15117 Filed 7–18–17; 8:45 am]

BILLING CODE 4184–45–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Community Living

Agency Information Collection Activities; Proposed Collection; Public Comment Request; Extension of the Certification of Maintenance of Effort for Title III and Certification of Long-Term Care Ombudsman Program Expenditures

AGENCY: Administration for Community Living, HHS.

ACTION: Notice.

SUMMARY: The Administration for Community Living (ACL) is announcing an opportunity for public comment on two proposed collections of certain information by the agency. Under the Paperwork Reduction Act of 1995 (the PRA), Federal agencies are required to publish a 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.

DATES: Submit written or electronic comments on the collection of information by September 18, 2017.

ADDRESSES: Submit electronic comments on the collection of information to: Jesse E. Moore, Jr. at *jesse.moore@acl.hhs.gov.* Submit written comments on the collection of information to Administration for Community Living, Washington, DC 20201, attention Jesse Moore.

FOR FURTHER INFORMATION CONTACT: Jesse E. Moore, Jr., Aging Services Program Specialist, Administration for Community Living, Washington, DC 20201, 202–795–7578.

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, ACL is publishing a notice of the proposed collection of information set forth in this document. With respect to the following collection of information, ACL invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of ACL's functions, including whether the information will have practical utility; (2) the accuracy of ACL'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. This notice solicits comments on the information collection requirements relating to: (1) The Certification on Maintenance of Effort under Title III of the Older Americans Act (OAA); and (2) Certification of Long-Term Care Ombudsman Program Expenditures for Older Americans Act Title III and Title VII Grantees. These proposed data collections would extend the Certification of Maintenance of Effort for Title III, and make minor revisions to, and extend, the Certification of Long-Term Care Ombudsman Program

Expenditures. While separate in terms of the data gathered, the financial review and certification of funds processes that are completed to generate the information gathered on these forms are generally done at the same time by the States. To reduce burden, these forms are being presented together for renewal since both are issued under the same Program Instruction, and they have the same due date to ACL.

The Certification of Maintenance of Effort under Title III and Certification of Long-Term Care Ombudsman (LTCO) Program Expenditures provide statutorily required information regarding each state's contribution to programs funded under the Older Americans Act and compliance with legislative requirements, pertinent Federal regulations, and other applicable instructions and guidelines issued by ACL. This information will be used for Federal oversight of Title III Programs and Title VII Ombudsman Program expenditures.

In addition to renewing OMB approval of these data collection instruments, minor changes are being proposed to the LTCO Expenditures Certification and an accompanying document which provides specific statutory references related to Ombudsman program minimum funding, non-supplanting requirements and state authorization to expend Title III–B funds on Ombudsman activities. Specifically, changes include making the reference to the Fiscal Year at the bottom of the form a fillable field to allow the date to be changed annually; listing the ''Administration for Community Living (ACL)'' as the intended recipient of the completed form; and updating statutory language references (*i.e.,* Section 306(a)(9)) provided on the second page, to reflect changes made during the 2016 reauthorization of the OAA.

ACL estimates the burden of this collection of information as follows: 56 State Agencies on Aging respond annually, and it takes each agency an average of one half (½) hour per State agency per year to complete each form for a total of twenty-eight hours for all state agencies annually. The half hour estimate is based on prior years' experience with States in completing these forms.

The proposed data collection tools may be found on the ACL Web site for review at: *https://www.acl.gov/sites/default/files/programs/2017-06/MOE%20and%20LTCO%20Certification%202017%20-%20FINAL.pdf.*

Respondent/data collection activity	Number of respondents	Responses per respondent (/year)	Hours per response	Annual burden hours
Certification on Maintenance of Effort under Title III	56	1	½	28
Certification of Long-Term Care Ombudsman Program Expenditures	56	1	½	28
Total	112	2	1	56

Dated: July 11, 2017.

Mary Lazare,

Acting Administrator and Assistant Secretary for Aging.

[FR Doc. 2017–14962 Filed 7–18–17; 8:45 am]

BILLING CODE 4154–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Service Administration

Advisory Committee on Heritable Disorders in Newborns and Children

AGENCY: Health Resources and Service Administration (HRSA), Department of Health and Human Services (HHS).

ACTION: Notice of meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, notice is hereby given that a meeting is scheduled for the Advisory Committee on Heritable Disorders in Newborns and Children (ACHDNC). This meeting will be open to the public but advance registration is required. Please register online at *http://www.achdncmeetings.org/* by 12:00 p.m. ET on August 1, 2017. Information about the ACHDNC can be obtained by accessing the following Web site: *https://www.hrsa.gov/advisorycommittees/mchbadvisory/heritabledisorders/index.html.*

DATES: The meeting will be held on August 3, 2017, 9:30 a.m. to 5:00 p.m. ET and August 4, 2017, 9:30 a.m. to 3:00 p.m. ET. Meeting times may be revised; please check the Committee's Web site for updates.

ADDRESSES: This meeting will be held in-person at 5600 Fishers Lane, 5th Floor Pavilion, Rockville, MD 20857. The meeting will also be accessible via Webcast. Instructions on accessing the meeting via Webcast will be provided upon registration. Please note that 5600 Fishers Lane requires security screening on entry. Visitors must provide a driver's license, passport, or other form of government-issued photo identification to be granted entry into the facility. Non-US citizens planning to attend in person will need to provide additional information to HRSA by July 24, 2017, 12:00 p.m. EDT. Please see contact information below.

FOR FURTHER INFORMATION CONTACT: Anyone requesting information regarding the ACHDNC should contact Ann Ferrero, Maternal and Child Health Bureau (MCHB), HRSA, in one of three ways: (1) Send a request to the following address: Ann Ferrero, MCHB, HRSA 5600 Fishers Lane, Room 18N100C, Rockville, MD 20857; (2) call 301–443–3999; or (3) send an email to: *AFerrero@hrsa.gov.*

SUPPLEMENTARY INFORMATION: The ACHDNC provides advice to the Secretary of HHS on the development of newborn screening activities, technologies, policies, guidelines, and programs for effectively reducing morbidity and mortality in newborns and children having, or at risk for, heritable disorders. In addition, ACHDNC's recommendations regarding inclusion of additional conditions and inherited disorders for screening which have been adopted by the Secretary are then included in the Recommended Uniform Screening Panel (RUSP). Conditions listed on the RUSP constitute part of the comprehensive preventive health guidelines supported by HRSA for infants and children under section 2713 of the Public Health Service Act, codified at 42 U.S.C. 300gg-13. Under this provision, non-grandfathered health plans are required to cover screenings included in the HRSA-supported comprehensive guidelines without charging a co-payment, co-insurance, or deductible for plan years (*i.e.,* policy years) beginning on or after the date that is 1 year from the Secretary's adoption of the condition for screening.

The meeting agenda will include: (1) Presentations and discussion on the processes states use to identify and follow up on out of range newborn screening results; (2) a presentation on phase one of the spinal muscular atrophy evidence review; (3) presentations on newborn screening topics such as the clinical and public health impact of Critical Congenital Heart Defects, quality measures in newborn screening, and a review of newborn screening technology; and (4) updates from the Laboratory Standards and Procedures workgroup, Follow-up and Treatment workgroup, and Education and Training workgroup. The Committee will not be voting on a proposed addition of a condition to the RUSP. Agenda items are subject to change. The final meeting agenda will be available 2 days prior to the meeting on the Committee's Web site: *http://www.hrsa.gov/advisorycommittees/mchbadvisory/heritabledisorders.*

Members of the public will have the opportunity to provide comments. All comments are part of the official Committee record. To submit written comments or request time for an oral comment at the meeting, please register online by 12:00 p.m. on July 28, 2017, at *http://www.achdncmeetings.org/.* To ensure all individuals who have registered and requested time for oral comments are accommodated, the allocated time for comments may be limited. Individuals associated with groups or who plan to provide comments on similar topics may be asked to combine their comments and present them through a single representative. No audiovisual presentations are permitted. Written comments should identify the individual's name, address, email, telephone number, professional or organization affiliation, background or area of expertise (*i.e.,* parent, family member, researcher, clinician, public health) and the topic/subject matter.

Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify Ann Ferrero using the address and phone number above at least 10 days prior to the meeting.

Jason E. Bennett,

Director, Division of the Executive Secretariat.

[FR Doc. 2017–15113 Filed 7–18–17; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

Findings of Research Misconduct

AGENCY: Office of the Secretary, HHS

ACTION: Notice.

SUMMARY: Notice is hereby given that the Office of Research Integrity (ORI) has taken final action in the following case:

Alec Mirchandani, Florida Atlantic University: Based on the report of the inquiry conducted by Florida Atlantic University (FAU), the Respondent's admission, and analysis conducted by ORI, ORI found that Mr. Alec Mirchandani, former post-baccalaureate research volunteer in the Center for Complex Systems and Brain Sciences, Florida Atlantic University (FAU), engaged in research misconduct in research supported by National Institute of Mental Health (NIMH), National Institutes of Health (NIH), grant 1 R15 MH099590–01A1.

ORI found that Respondent engaged in research misconduct by knowingly and intentionally: (1) Fabricating the results of the T-maze behavioral experiment for control mice, (2) falsifying the laboratory and vivarium entry logs in an effort to cover up his actions, and (3) reporting the fabricated and falsified data to his laboratory supervisors.

Specifically, ORI found that Respondent knowingly and intentionally:

- Fabricated the results that he recorded for the T-maze behavioral experiment in three of the five TMZ control mice on the laboratory data sheets and white board on fourteen (14) of the sixteen (16) eligible days in June 2016, to make it appear as though he had conducted the experiments;
- Falsified the animal transfer logs on twelve (12) of the sixteen (16) eligible days in June 2016, to make it appear as though he had conducted the experiments;
- Fabricated the times he recorded on the laboratory data sheets on fourteen (14) of the sixteen (16) eligible days in June 2016, to make it appear as though he had conducted the experiments;
- incorporated and recorded the fabricated and falsified data with his previous data in his laboratory notebook and reported the results to his laboratory supervisor and principal investigator, such that the experimental control data (five animals) for experiments conducted from January 2016–June 30, 2016, were not accurately represented.

Mr. Mirchandani has entered into a Voluntary Settlement Agreement with ORI, in which he voluntarily agreed, beginning on June 29, 2017:

(1) That if within two (2) years from the effective date of the Agreement, Respondent receives or applies for U.S. Public Health Service (PHS) support, Respondent agrees to have his research supervised for a period of one (1) year, beginning on the date of his employment in a position in which he receives or applies for PHS support, and agrees to notify his employer(s)/institution(s) of the terms of this supervision. Respondent agrees that prior to the submission of an application for PHS support for a research project on which the Respondent's participation is proposed and prior to Respondent's participation in any capacity on PHS-supported research, Respondent shall ensure that a plan for supervision of Respondent's duties is submitted to ORI for approval. The supervision plan must be designed to ensure the scientific integrity of Respondent's research contribution. Respondent agrees that he shall not participate in any PHS-supported research until such a supervision plan is submitted to and approved by ORI. Respondent agrees to maintain responsibility for compliance with the agreed upon supervision plan.

(2) To exclude himself voluntarily from serving in any advisory capacity to PHS including, but not limited to, service on any PHS advisory committee, board, and/or peer review committee, or as a consultant for a period of one (1) year, beginning with the effective date of the Agreement.

FOR FURTHER INFORMATION CONTACT: Director, Office of Research Integrity, 1101 Wootton Parkway, Suite 750, Rockville, MD 20852, (240) 453–8200.

Kathryn M. Partin,

Director, Office of Research Integrity.

[FR Doc. 2017–15159 Filed 7–18–17; 8:45 am]

BILLING CODE 4150–31–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Allergy and Infectious Diseases; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections

552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Allergy and Infectious Diseases Special Emphasis Panel; NIAID Investigator Initiated Program Project Applications (P01).

Date: August 16, 2017.

Time: 12:00 p.m. to 3:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 5601 Fishers Lane, Rockville, MD 20892 (Telephone Conference Call).

Contact Person: Lynn Rust, Ph.D., Scientific Review Officer, Scientific Review Program, Division of Extramural Activities, Room 3G42A, National Institutes of Health/NIAID, 5601 Fishers Lane, MSC 9823, Bethesda, MD 20892–9823, (240) 669–5069, *lrust@niaid.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: July 14, 2017.

Natasha M. Copeland,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2017–15153 Filed 7–18–17; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Aging; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Aging Special Emphasis Panel; Health and Retirement.

Date: August 15, 2017.

Time: 1:30 p.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute on Aging, Gateway Building, 2W200, 7201 Wisconsin Ave., Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Kimberly Firth, Ph.D., National Institutes of Health, National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Suite 2C212, Bethesda, MD 20892, 301–402–7702, *firthkm@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: July 13, 2017.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2017–15152 Filed 7–18–17; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Special Emphasis Panel: Cardiovascular and Respiratory AREA.

Date: August 16, 2017.

Time: 12:00 p.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Chee Lim, Ph.D., Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive Room 4128, Bethesda, MD 20892, 301–435–1850, *limc4@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; PAR Panel Shared Instrumentation Biomedical Imaging.

Date: August 18, 2017.

Time: 8:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Embassy Suites at the Chevy Chase Pavilion, 4300 Military Road NW., Washington, DC 20015.

Contact Person: Jan Li, MD, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5106, Bethesda, MD 20892, 301.402.9607, *Jan.Li@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: July 13, 2017.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2017–15151 Filed 7–18–17; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[Docket No. USCG–2016–0915; OMB Control Number: 1625–0093]

Collection of Information Under Review by Office of Management and Budget

AGENCY: Coast Guard, DHS.

ACTION: Thirty-day notice requesting comments.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995 the U.S. Coast Guard is forwarding an Information Collection Request (ICR), abstracted below, to the Office of Management and Budget (OMB), Office of Information and Regulatory Affairs (OIRA), requesting approval for reinstatement, without change, of the following collection of information: 1625–0093, Facilities Transferring Oil or Hazardous Materials in Bulk—Letter of Intent and Operations Manual. Our ICR describes the information we seek to collect from the public. Review and comments by OIRA ensure we only impose paperwork burdens commensurate with our performance of duties.

DATES: Comments must reach the Coast Guard and OIRA on or before August 18, 2017.

ADDRESSES: You may submit comments identified by Coast Guard docket number [USCG–2016–0915] to the Coast Guard using the Federal eRulemaking Portal at *http://www.regulations.gov.* Alternatively, you may submit comments to OIRA using one of the following means:

(1) *Email: dhsdeskofficer@omb.eop.gov.*

(2) *Mail:* OIRA, 725 17th Street NW., Washington, DC 20503, attention Desk Officer for the Coast Guard.

A copy of the ICR is available through the docket on the Internet at *http://www.regulations.gov.* Additionally, copies are available from: Commandant (CG–612), Attn: Paperwork Reduction Act Manager, U.S. Coast Guard, 2703 Martin Luther King Jr Ave. SE., Stop 7710, Washington, DC 20593–7710.

FOR FURTHER INFORMATION CONTACT: Mr. Anthony Smith, Office of Information Management, telephone 202–475–3532, or fax 202–372–8405, for questions on these documents.

SUPPLEMENTARY INFORMATION:

Public Participation and Request for Comments

This Notice relies on the authority of the Paperwork Reduction Act of 1995; 44 U.S.C. Chapter 35, as amended. An ICR is an application to OIRA seeking the approval, extension, or renewal of a Coast Guard collection of information (Collection). The ICR contains information describing the Collection's purpose, the Collection's likely burden on the affected public, an explanation of the necessity of the Collection, and other important information describing the Collection. There is one ICR for each Collection.

The Coast Guard invites comments on whether this ICR should be granted based on the Collection being necessary for the proper performance of Departmental functions. In particular, the Coast Guard would appreciate comments addressing: (1) The practical utility of the Collection; (2) the accuracy of the estimated burden of the Collection; (3) ways to enhance the quality, utility, and clarity of information subject to the Collection; and (4) ways to minimize the burden of the Collection on respondents, including the use of automated collection techniques or other forms of information technology. These comments will help OIRA determine whether to approve the ICR referred to in this Notice.

We encourage you to respond to this request by submitting comments and related materials. Comments to Coast Guard or OIRA must contain the OMB Control Number of the ICR. They must also contain the docket number of this request, [USCG–2016–0915], and must be received by August 18, 2017.

Submitting Comments

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.

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).

OIRA posts its decisions on ICRs online at *http://www.reginfo.gov/public/do/PRAMain* after the comment period for each ICR. An OMB Notice of Action on each ICR will become available via a hyperlink in the OMB Control Number: 1625–0093.

Previous Request for Comments

This request provides a 30-day comment period required by OIRA. The Coast Guard has published the 60-day notice (81 FR 85990, November 29, 2016) required by 44 U.S.C. 3506(c)(2). That Notice elicited no comments. Accordingly, no changes have been made to the Collections.

Information Collection Request

Title: Facilities Transferring Oil or Hazardous Materials in Bulk—Letter of Intent and Operations Manual.

OMB Control Number: 1625–0093.

Summary: A Letter of Intent is a notice to the Coast Guard Captain of the Port that an operator intends to operate a facility that will transfer bulk oil or hazardous materials to or from vessels. An Operations Manual (OM) is also required for this type of facility. The OM establishes procedures to follow when conducting transfers and in the event of a spill.

Need: Under 33 U.S.C. 1321 and Executive Order 12777 the Coast Guard is authorized to prescribe regulations to prevent the discharge of oil and hazardous substances from facilities and to contain such discharges. The Letter of Intent regulation is contained in 33 CFR 154.110 and the OM regulations are contained in 33 CFR part 154 subpart B.

Forms: N/A.

Respondents: Operators of facilities that transfer oil or hazardous materials in bulk.

Frequency: On occasion.

Hour Burden Estimate: The estimated burden has decreased from 45,749 hours to 21,803 hours a year due to a reduction in the estimated annual number of responses.

Authority: The Paperwork Reduction Act of 1995; 44 U.S.C. Chapter 35, as amended.

Dated: July 12, 2017.

Marilyn Scott-Perez,

U.S. Coast Guard, Chief, Office of Information Management.

[FR Doc. 2017–15127 Filed 7–18–17; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[Docket No. USCG–2016–0600; OMB Control Number: 1625–0087]

Collection of Information Under Review by Office of Management and Budget

AGENCY: Coast Guard, DHS.

ACTION: Thirty-day notice requesting comments.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995 the U.S. Coast Guard is forwarding an Information Collection Request (ICR), abstracted below, to the Office of Management and Budget (OMB), Office of Information and Regulatory Affairs (OIRA), requesting approval for reinstatement, without change, of the following collection of information: 1625–0087, U.S. Coast Guard International Ice Patrol (IIP) Customer Survey. Our ICR describes the information we seek to collect from the public. Review and comments by OIRA ensure we only impose paperwork burdens commensurate with our performance of duties.

DATES: Comments must reach the Coast Guard and OIRA on or before August 18, 2017.

ADDRESSES: You may submit comments identified by Coast Guard docket number [USCG–2016–0600] to the Coast Guard using the Federal eRulemaking Portal at *http://www.regulations.gov.* Alternatively, you may submit comments to OIRA using one of the following means:

(1) *Email: dhsdeskofficer@omb.eop.gov.*

(2) *Mail:* OIRA, 725 17th Street NW., Washington, DC 20503, attention Desk Officer for the Coast Guard.

A copy of the ICR is available through the docket on the Internet at *http://www.regulations.gov.* Additionally, copies are available from: Commandant (CG–612), Attn: Paperwork Reduction Act Manager, U.S. Coast Guard, 2703 Martin Luther King Jr Ave. SE., Stop 7710, Washington, DC 20593–7710.

FOR FURTHER INFORMATION CONTACT: Mr. Anthony Smith, Office of Information Management, telephone 202–475–3532, or fax 202–372–8405, for questions on these documents.

SUPPLEMENTARY INFORMATION:

Public Participation and Request for Comments

This Notice relies on the authority of the Paperwork Reduction Act of 1995; 44 U.S.C. Chapter 35, as amended. An ICR is an application to OIRA seeking the approval, extension, or renewal of a Coast Guard collection of information (Collection). The ICR contains information describing the Collection's purpose, the Collection's likely burden on the affected public, an explanation of the necessity of the Collection, and other important information describing the Collection. There is one ICR for each Collection.

The Coast Guard invites comments on whether this ICR should be granted based on the Collection being necessary for the proper performance of Departmental functions. In particular, the Coast Guard would appreciate comments addressing: (1) The practical utility of the Collection; (2) the accuracy of the estimated burden of the Collection; (3) ways to enhance the quality, utility, and clarity of information subject to the Collection; and (4) ways to minimize the burden of the Collection on respondents, including the use of automated collection techniques or other forms of information technology. These comments will help OIRA determine whether to approve the ICR referred to in this Notice.

We encourage you to respond to this request by submitting comments and related materials. Comments to Coast Guard or OIRA must contain the OMB Control Number of the ICR. They must also contain the docket number of this request, [USCG–2016–0600], and must be received by August 18, 2017.

Submitting Comments

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.

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).

OIRA posts its decisions on ICRs online at *http://www.reginfo.gov/public/do/PRAMain* after the comment period for each ICR. An OMB Notice of Action on each ICR will become available via a hyperlink in the OMB Control Number: 1625–0087.

Previous Request for Comments

This request provides a 30-day comment period required by OIRA. The Coast Guard has published the 60-day notice (81 FR 85985, November 29, 2016) required by 44 U.S.C. 3506(c)(2). That Notice elicited no comments. Accordingly, no changes have been made to the Collections.

Information Collection Request

Title: U.S. Coast Guard International Ice Patrol (IIP) Customer Survey.

OMB Control Number: 1625–0087.

Summary: This information collection provides feedback on the processes of delivery and products distributed to the mariner by the International Ice Patrol.

Need: In accordance with Executive Order 12862, the U.S. Coast Guard is directed to conduct surveys (both qualitative and quantitative) to determine the kind and quality of services our customers want and expect, as well as their satisfaction with USCG's existing services. This survey will be limited to data collections that solicit strictly voluntary opinions and will not collect information that is required or regulated.

Forms: CG–16700, North American Ice Service (NAIS) Customer Survey.

Respondents: Owners and operators of vessels transiting the North Atlantic.

Frequency: Annually.

Hour Burden Estimate: The estimated annual burden remains 120 hours.

Authority: The Paperwork Reduction Act of 1995; 44 U.S.C. Chapter 35, as amended.

Dated: July 12, 2017.

Marilyn Scott-Perez,

U.S. Coast Guard, Chief, Office of Information Management.

[FR Doc. 2017–15128 Filed 7–18–17; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[Docket No. USCG–2017–0129]

Information Collection Request to Office of Management and Budget; OMB Control Number: 1625—New

AGENCY: Coast Guard, DHS.

ACTION: Sixty-day notice requesting comments.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995, the U.S. Coast Guard intends to submit an Information Collection Request (ICR) to the Office of Management and Budget (OMB), Office of Information and Regulatory Affairs (OIRA), requesting approval for the following collection of information: 1625—New, *GOCOASTGUARD.COM* Prospect Questionnaire, Chat Questionnaire and The Officer Program Application. Our ICR describes the information we seek to collect from the public. Before submitting this ICR to OIRA, the Coast Guard is inviting comments as described below.

DATES: Comments must reach the Coast Guard on or before September 18, 2017.

ADDRESSES: You may submit comments identified by Coast Guard docket number [USCG–2017–0129] to the Coast Guard 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.

A copy of the ICR is available through the docket on the Internet at *http://www.regulations.gov.* Additionally, copies are available from: Commandant (CG–612), ATTN: Paperwork Reduction Act Manager, U.S. Coast Guard, 2703 Martin Luther King Jr. Ave. SE., Stop 7710, Washington, DC 20593–7710.

FOR FURTHER INFORMATION CONTACT: Mr. Anthony Smith, Office of Information Management, telephone 202–475–3532, or fax 202–372–8405, for questions on these documents.

SUPPLEMENTARY INFORMATION:

Public Participation and Request for Comments

This Notice relies on the authority of the Paperwork Reduction Act of 1995; 44 U.S.C. Chapter 35, as amended. An ICR is an application to OIRA seeking the approval, extension, or renewal of a Coast Guard collection of information (Collection). The ICR contains information describing the Collection's purpose, the Collection's likely burden on the affected public, an explanation of the necessity of the Collection, and other important information describing the Collection. There is one ICR for each Collection.

The Coast Guard invites comments on whether this ICR should be granted based on the Collection being necessary for the proper performance of Departmental functions. In particular, the Coast Guard would appreciate comments addressing: (1) The practical utility of the Collection; (2) the accuracy of the estimated burden of the Collection; (3) ways to enhance the quality, utility, and clarity of information subject to the Collection; and (4) ways to minimize the burden of the Collection on respondents, including the use of automated collection techniques or other forms of information technology. In response to your comments, we may revise this ICR or decide not to seek approval for the Collection. We will consider all comments and material received during the comment period.

We encourage you to respond to this request by submitting comments and related materials. Comments must contain the OMB Control Number of the ICR and the docket number of this request, [USCG–2017–0129], and must be received by September 18, 2017.

Submitting Comments

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.

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).

Information Collection Request

Title: GOCOASTGUARD.COM Prospect Questionnaire, Chat Now Questionnaire, and Officer Program Application.

OMB Control Number: 1625—New.

Summary: This collection contains the recruiting Web site *gocoastguard.com* Prospect Questionnaire (CGRC–1130), the Officer Program Application (CGRC–1131), and the Chat Now Questionnaire (CGRC–1132) that are used to screen active duty and reserve enlisted and officer applicants.

Need: The information is needed to initiate the recruiting and commissioning of active duty and reserve, enlisted and officer members. 14 U.S.C. 468 authorizes the United States Coast Guard to recruit personnel for military service. The information requested on the *gocoastguard.com* Web site is collected in accordance with section 503 of Title 10 U.S.C. and may be used to identify and process individuals interested in applying for enlistment or commission into the United States Coast Guard or Coast Guard Reserve.

Forms: Prospect Questionnaire (CGRC–1130), the Officer Program Application (CGRC–1131), and the Chat Now Questionnaire (CGRC–1132).

Respondents: Approximately 50,000 applicants apply annually to initiate the screening process.

Frequency: On occasion. Applicants may apply more than once, by initially completing the Chat Now Questionnaire (CGRC–1132) to answer questions on eligibility and may apply for both enlisted and officer programs through the Prospect Questionnaire (CGRC–1130) and/or Officer Program Application (CGRC–1131).

Hour Burden Estimate: This is a new collection. The estimated annual burden is 25,000 annual hours.

Authority: The Paperwork Reduction Act of 1995; 44 U.S.C. Chapter 35, as amended.

Dated: July 12, 2017.

Marilyn Scott-Perez,

U.S. Coast Guard, Chief, Office of Information Management.

[FR Doc. 2017–15116 Filed 7–18–17; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[Docket No. USCG–2016–0896; OMB Control Number: 1625–0084]

Collection of Information Under Review by Office of Management and Budget

AGENCY: Coast Guard, DHS.

ACTION: Thirty-day notice requesting comments.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995 the U.S. Coast Guard is forwarding an Information Collection Request (ICR), abstracted below, to the Office of Management and Budget (OMB), Office of Information and Regulatory Affairs (OIRA), requesting approval for reinstatement, without change, of the following collection of information: 1625–0084, Audit Reports under the International Safety Management Code. Our ICR describes the information we seek to collect from the public. Review and comments by OIRA ensure we only impose paperwork burdens commensurate with our performance of duties.

DATES: Comments must reach the Coast Guard and OIRA on or before August 18, 2017.

ADDRESSES: You may submit comments identified by Coast Guard docket number [USCG–2016–0896] to the Coast Guard using the Federal eRulemaking Portal at *http://www.regulations.gov.* Alternatively, you may submit comments to OIRA using one of the following means:

(1) Email: *dhsdeskofficer@omb.eop.gov.*

(2) Mail: OIRA, 725 17th Street NW., Washington, DC 20503, attention Desk Officer for the Coast Guard.

A copy of the ICR is available through the docket on the Internet at *http://www.regulations.gov.* Additionally, copies are available from: COMMANDANT (CG–612), ATTN: PAPERWORK REDUCTION ACT MANAGER, U.S. COAST GUARD, 2703 MARTIN LUTHER KING JR AVE SE., STOP 7710, WASHINGTON, DC 20593–7710.

FOR FURTHER INFORMATION CONTACT: Mr. Anthony Smith, Office of Information Management, telephone 202–475–3532, or fax 202–372–8405, for questions on these documents.

SUPPLEMENTARY INFORMATION:

Public Participation and Request for Comments

This Notice relies on the authority of the Paperwork Reduction Act of 1995; 44 U.S.C. Chapter 35, as amended. An ICR is an application to OIRA seeking the approval, extension, or renewal of a Coast Guard collection of information (Collection). The ICR contains information describing the Collection's purpose, the Collection's likely burden on the affected public, an explanation of the necessity of the Collection, and other important information describing the Collection. There is one ICR for each Collection. The Coast Guard invites comments on whether this ICR should be granted based on the Collection being necessary for the proper performance of Departmental functions. In particular, the Coast Guard would appreciate comments addressing: (1) The practical utility of the Collection; (2) the accuracy of the estimated burden of the Collection; (3) ways to enhance the quality, utility, and clarity of information subject to the Collection; and (4) ways to minimize the burden of the Collection on respondents, including the use of automated collection techniques or other forms of information technology. These comments will help OIRA determine whether to approve the ICR referred to in this Notice.

We encourage you to respond to this request by submitting comments and related materials. Comments to Coast Guard or OIRA must contain the OMB Control Number of the ICR. They must also contain the docket number of this request, [USCG–2016–0896], and must be received by August 18, 2017.

Submitting Comments

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.

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).

OIRA posts its decisions on ICRs online at *http://www.reginfo.gov/public/do/PRAMain* after the comment period for each ICR. An OMB Notice of Action on each ICR will become available via a hyperlink in the OMB Control Number: 1625–0084.

Previous Request for Comments

This request provides a 30-day comment period required by OIRA. The Coast Guard has published the 60-day notice (81 FR 85991, November 29, 2016) required by 44 U.S.C. 3506(c)(2). That Notice elicited no comments. Accordingly, no changes have been made to the Collections.

Information Collection Request

Title: Audit Reports under the International Safety Management Code.

OMB Control Number: 1625–0084.

Summary: This information helps to determine whether U.S. vessels, subject to SOLAS 74, engaged in international trade, are in compliance with that treaty. Organizations recognized by the Coast Guard conduct ongoing audits of vessels' and companies' safety management systems.

Need: Title 46 U.S.C. 3203 authorizes the Coast Guard to prescribe regulations regarding safety management systems. Title 33 CFR part 96 contains the rules for those systems and hence the safe operation of vessels.

Forms: N/A.

Respondents: Owners and operators of vessels, and organizations authorized to issue ISM Code certificates for the United States.

Frequency: On occasion.

Hour Burden Estimate: The estimated burden has decreased from 17,660 hours to 10,221 hours a year due to a decrease in the estimated annual number of response.

Authority: The Paperwork Reduction Act of 1995; 44 U.S.C. Chapter 35, as amended.

Dated: July 12, 2017.

Marilyn Scott-Perez,

U.S. Coast Guard, Chief, Office of Information Management.

[FR Doc. 2017–15177 Filed 7–18–17; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[Docket No. USCG–2017–0507]

Lower Mississippi River Waterway Safety Advisory Committee; Vacancies

AGENCY: U.S. Coast Guard, Department of Homeland Security.

ACTION: Request for Applicants.

SUMMARY: The U.S. Coast Guard seeks applications for membership on the Lower Mississippi River Waterway Safety Advisory Committee. The Lower Mississippi River Waterway Safety Advisory Committee advises and makes recommendations to the Department of Homeland Security on a wide range of matters regarding all facets of navigation safety related to the Lower Mississippi River.

DATES: Completed applications should be submitted to the U.S. Coast Guard on or before September 18, 2017.

ADDRESSES: Applicants should send a cover letter expressing interest in an appointment to the Lower Mississippi River Waterway Safety Advisory Committee that also identifies which membership category the applicant is applying under, along with a resume detailing the applicant's experience via one of the following methods:

- *By E–MAIL: brian.j.porter@uscg.mil,* Subject line: The Lower Mississippi River Waterway Safety Advisory Committee.
- *By Fax:* (504)365–2287 ATTN: Lieutenant Brian Porter, Alternate Designated Federal Officer; or
- *By Mail:* Lieutenant Brian Porter, Alternate Designated Federal Officer, 200 Hendee Street, New Orleans, Louisiana, 70114.

FOR FURTHER INFORMATION CONTACT: Lieutenant Brian Porter, Alternate Designated Federal Officer of the Lower Mississippi River Waterway Safety Advisory Committee; telephone (504) 365–2375 or Email at *brian.j.porter@uscg.mil.*

SUPPLEMENTARY INFORMATION: The Lower Mississippi River Waterway Safety Advisory Committee is a federal advisory committee established and operating under the authority found in section 19 of the Coast Guard Authorization Act of 1991, (Public Law 102–241) as amended by section 621 of the Coast Guard Authorization Act of 2010 (Public Law 111–281). This Committee operates in accordance with the provisions of the Federal Advisory Committee Act (Title 5, U.S C., Appendix).

The Lower Mississippi River Waterway Safety Advisory Committee advises the U.S. Coast Guard on matters relating to communications, surveillance, traffic management, anchorages, development and operation of the New Orleans Vessel Traffic Service, and other related topics dealing with navigation safety on the Lower Mississippi River as required by the U.S. Coast Guard.

The Committee expects to meet at least two times annually. It may also meet for extraordinary purposes with the approval of the Designated Federal Officer. Each member serves for a term of 2 years. Members serve a maximum of two consecutive terms. All members serve at their own expense and receive no salary or other compensation from the Federal Government; however members may be reimbursed for travel and per diem.

We will consider applications for 25 positions that expire or become vacant on May 23, 2018. To be eligible, you should have experience regarding the transportation, equipment, and techniques that are used to ship cargo and to navigate vessels on the Lower Mississippi River and its connecting navigable waterways, including the Gulf of Mexico. The 25 positions available for application are as follows:

1. Five members representing River Port authorities between Baton Rouge, Louisiana, and the Head of Passes of the Lower Mississippi River, of which one member shall be from the Port of St. Bernard and one member from the Port of Plaquemines.

2. Two members representing vessel owners domiciled in the state of Louisiana.

3. Two members representing organizations which operate harbor tugs or barge fleets in the geographical area covered by the committee.

4. Two members representing companies which transport cargo or passengers on the navigable waterways in the geographical area covered by the Committee.

5. Three members representing State Commissioned Pilot organizations, with one member each representing the New Orleans-Baton Rouge Steamship Pilots Association, the Crescent River Port Pilots Association, and the Associated Branch Pilots Association.

6. Two at-large members who utilize water transportation facilities located in the geographical area covered by the committee.

7. Three members, each of which represents one of three categories: consumers, shippers, and importers-exporters that utilize vessels which utilize the navigable waterways covered by the committee.

8. Two members representing those licensed merchant mariners, other than pilots, who perform shipboard duties on those vessels which utilize navigable waterways covered by the committee.

9. One member representing an organization that serves in a consulting or advisory capacity to the maritime industry.

10. One member representing an environmental organization.

11. One member representing the general public.

12. One member representing the Associated Federal Pilots and Docking Masters of Louisiana.

To be eligible, you should have experience regarding the transportation, equipment, and techniques that are used to ship cargo and navigate waterways, including the Gulf of Mexico.

Registered lobbyists are not eligible to serve on federal advisory committees in an individual capacity. See ''Revised Guidance on Appointment of Lobbyists to Federal Advisory Committees, Boards and Commissions'' (79 FR 47482, August 13, 2014).

The positions referred to in (1), (2), (3), (4), (5), (7), (8), (9), (10), and (12) are representatives.

The positions referred to in (6), and (11) are designated as a Special Government Employee as defined in Section 202(a), Title 18, U.S.C.

Applicants for appointment as a Special Government Employee are required to complete a Confidential Financial Disclosure Report (OGE Form 450). The U.S. Coast Guard may not release the reports or the information in them to the public except under an order issued by a Federal court or as otherwise provided under the Privacy Act (5 U.S.C. 552a). Applicants can obtain this form by going to the Web site of the Office of Government Ethics (*www.oge.gov*) or by contacting the individual listed above in **FOR FURTHER INFORMATION CONTACT.**

The Department of Homeland Security does not discriminate in selection of Committee members on the basis of race, color, religion, sex, national origin, political affiliation, sexual orientation, gender identity, marital status, disabilities and genetic information, age, membership in an employee organization, or any other non-merit factor. The Department of Homeland Security strives to achieve a widely diverse candidate pool for all of its recruitment actions.

If you are interested in applying to become a member of the Committee, send your cover letter and resume to Lieutenant Brian Porter, Alternate Designated Federal Officer of the Lower Mississippi River Waterway Safety Advisory Committee via one of the transmittal methods in the **ADDRESSES** section by the deadline in the **DATES** section of this notice. All email submittals will receive email receipt confirmation.

Dated: July 11, 2017.

D.R. Callahan,

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

[FR Doc. 2017–15162 Filed 7–18–17; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4315–DR; Docket ID FEMA–2017–0001]

Oklahoma; Amendment No. 1 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Oklahoma (FEMA–4315–DR), dated May 26, 2017, and related determinations.

DATES: July 7, 2017.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the State of Oklahoma is hereby amended to include the following areas among those areas determined to have been adversely affected by the event declared a major disaster by the President in his declaration of May 26, 2017.

Dewey, Pawnee, and Rogers Counties for Public Assistance.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050 Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance

(Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Brock Long,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2017–15178 Filed 7–18–17; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2017–0002; Internal Agency Docket No. FEMA–B–1730]

Changes in Flood Hazard Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice lists communities where the addition or modification of Base Flood Elevations (BFEs), base flood depths, Special Flood Hazard Area (SFHA) boundaries or zone designations, or the regulatory floodway (hereinafter referred to as flood hazard determinations), as shown on the Flood Insurance Rate Maps (FIRMs), and where applicable, in the supporting Flood Insurance Study (FIS) reports, prepared by the Federal Emergency Management Agency (FEMA) for each community, is appropriate because of new scientific or technical data. The FIRM, and where applicable, portions of the FIS report, have been revised to reflect these flood hazard determinations through issuance of a Letter of Map Revision (LOMR). The LOMR will be used by insurance agents and others to calculate appropriate flood insurance premium rates for new buildings and the contents of those buildings. For rating purposes, the currently effective community number is shown in the table below and must be used for all new policies and renewals.

DATES: These flood hazard determinations will become effective on the dates listed in the table below and revise the FIRM panels and FIS report in effect prior to this determination for the listed communities.

From the date of the second publication of notification of these changes in a newspaper of local circulation, any person has 90 days in which to request through the community that the Deputy Associate Administrator for Insurance and Mitigation reconsider the changes. The flood hazard determination information may be changed during the 90-day period.

ADDRESSES: The affected communities are listed in the table below. Revised flood hazard information for each community is available for inspection at both the online location and the respective community map repository address listed in the table below. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service Center at *www.msc.fema.gov* for comparison.

Submit comments and/or appeals to the Chief Executive Officer of the community as listed in the table below.

FOR FURTHER INFORMATION CONTACT: Rick Sacbibit, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 400 C Street SW., Washington, DC 20472, (202) 646–7659, or (email) *patrick.sacbibit@fema.dhs.gov;* or visit the FEMA Map Information eXchange (FMIX) online at *www.floodmaps.fema.gov/fhm/fmx_main.html.*

SUPPLEMENTARY INFORMATION: The specific flood hazard determinations are not described for each community in this notice. However, the online location and local community map repository address where the flood hazard determination information is available for inspection is provided.

Any request for reconsideration of flood hazard determinations must be submitted to the Chief Executive Officer of the community as listed in the table below.

The modifications are made pursuant to section 201 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4105, and are in accordance with the National Flood Insurance Act of 1968, 42 U.S.C. 4001 *et seq.,* and with 44 CFR part 65.

The FIRM and FIS report are the basis of the floodplain management measures that the community is required either to adopt or to show evidence of having in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program (NFIP).

These flood hazard determinations, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own or pursuant to policies established by other Federal, State, or regional entities. The flood hazard determinations are in accordance with 44 CFR 65.4.

The affected communities are listed in the following table. Flood hazard determination information for each community is available for inspection at both the online location and the respective community map repository address listed in the table below. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service Center at *www.msc.fema.gov* for comparison.

(Catalog of Federal Domestic Assistance No. 97.022, ''Flood Insurance.'')

Dated: June 16, 2017.

Roy E. Wright,

Deputy Associate Administrator for Insurance and Mitigation, Department of Homeland Security, Federal Emergency Management Agency.

State and county	Location and case No.	Chief executive officer of community	Community map repository	Online location of letter of map revision	Effective date of modification	Community No.
Arizona: Greenlee	Unincorporated Areas of Greenlee County (17–09–0131P).	The Honorable David Gomez, Chairman, Board of Supervisors, Greenlee County, P.O. Box 908, Clifton, AZ 85533.	Greenlee County, Planning and Zoning Department, 253 5th Street, Clifton, AZ 85533.	*http://www.msc.fema.gov/lomc*	Sep. 14, 2017	040110
California:						
Riverside	City of Wildomar (17–09–0430P).	The Honorable Timothy Walker, Mayor, City of Wildomar, 23873 Clinton Keith Road, Suite 201, Wildomar, CA 92595.	City Hall, 23873 Clinton Keith Road, Suite 201, Wildomar, CA 92595.	*http://www.msc.fema.gov/lomc*	Sep. 15, 2017	060221
Riverside	Unincorporated Areas of Riverside County (17–09–0232P).	The Honorable John F. Tavaglione, Chairman, Board of Supervisors, Riverside County, 4080 Lemon Street, 5th Floor, Riverside, CA 92501.	Riverside County Flood Control and Water Conservation District, 1995 Market Street, Riverside, CA 92502.	*http://www.msc.fema.gov/lomc*	Sep. 8, 2017	060245
Hawaii:						
Honolulu	City and County of Honolulu, (16–09–2530P).	The Honorable Kirk Caldwell, Mayor, City of Honolulu, 530 South King Street, Room 300, Honolulu, HI 96813.	Department of Planning and Permitting, 650 South King Street, Honolulu, HI 96813.	*http://www.msc.fema.gov/lomc*	Sep. 8, 2017	150001
Maui	Maui County (17–09–0740P).	The Honorable Alan M. Arakawa, Mayor, Maui County, 200 South High Street, Kalana O Maui Building, 9th Floor, Wailuku, HI 96793.	County of Maui Planning Department, 2200 Main Street, Suite 335, Wailuku, HI 96793.	*http://www.msc.fema.gov/lomc*	Sep. 8, 2017	150003
Indiana: Marion	City of Indianapolis (17–05–1432P).	The Honorable Joe Hogsett, Mayor, City of Indianapolis, 2501 City-County Building, 200 East Washington Street, Indianapolis, IN 46204.	City Hall, 1200 Madison Avenue, Suite 100, Indianapolis, IN 46225.	*http://www.msc.fema.gov/lomc*	Sep.12, 2017	180159
Kansas: Johnson	City of Overland Park (17–07–0741P).	The Honorable Carl Gerlach, Mayor, City of Overland Park, City Hall, 8500 Santa Fe Drive, Overland Park, KS 66212.	City Hall, 8500 Santa Fe Drive, Overland Park, KS 66212.	*http://www.msc.fema.gov/lomc*	Sep. 5, 2017	200174
Michigan: Macomb	Charter Township of Clinton (17–05–2484P).	Mr. Robert J. Cannon, Supervisor, Charter Township of Clinton, 40700 Romeo Plank Road, Clinton Township, MI 48038.	City Hall, 40700 Romeo Plank Road, Clinton Township, MI 48038.	*http://www.msc.fema.gov/lomc*	Sep. 14, 2017	260121
Missouri: St. Louis	City of Maryland Heights (17–07–0909P).	The Honorable Michael Moeller, Mayor, City of Maryland Heights, 11911 Dorsett Road, Maryland Heights, MO 63043.	Maryland Heights Government Center, 11911 Dorsett Road, Maryland Heights, MO 63043.	*http://www.msc.fema.gov/lomc*	Sep. 15, 2017	290889
South Carolina: Spartanburg	Unincorporated Areas of Spartanburg County (17–04–2662P).	Ms. Katherine L. O'Neill, County Administrator, Spartanburg County, Administration Building, 366 North Church Street, Spartanburg, SC 29303.	Spartanburg County Administration Building, 366 North Church Street, Spartanburg, SC 29303.	*http://www.msc.fema.gov/lomc*	Sep. 19, 2017	450176
Wisconsin:						
Kenosha	Village of Pleasant Prairie (17–05–1426P).	Mr. John P. Steinbrink, Village President, Village of Pleasant Prairie, Village Hall, 9915 39th Avenue, Pleasant Prairie, WI 53158.	Village Hall, 9915 39th Avenue, Pleasant Prairie, WI 53158.	*http://www.msc.fema.gov/lomc*	Sep. 12, 2017	550613
Waukesha	Village of Sussex (17–05–0249P).	Mr. Jeremy Smith, Village Administrator, Village of Sussex, N64W23760 Main Street, Sussex, WI 53089.	Village Hall, N64W23760 Main Street, Sussex, WI 53089.	*http://www.msc.fema.gov/lomc*	Aug. 25, 2017	550490

[FR Doc. 2017–15175 Filed 7–18–17; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2017–0002]

Changes in Flood Hazard Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Final notice.

SUMMARY: New or modified Base (1-percent annual chance) Flood Elevations (BFEs), base flood depths, Special Flood Hazard Area (SFHA) boundaries or zone designations, and/or regulatory floodways (hereinafter referred to as flood hazard determinations) as shown on the indicated Letter of Map Revision (LOMR) for each of the communities listed in the table below are finalized. Each LOMR revises the Flood Insurance Rate Maps (FIRMs), and in some cases the Flood Insurance Study (FIS) reports, currently in effect for the listed communities. The flood hazard determinations modified by each LOMR will be used to calculate flood insurance premium rates for new buildings and their contents.

DATES: Each LOMR was finalized as in the table below.

ADDRESSES: Each LOMR is available for inspection at both the respective Community Map Repository address listed in the table below and online through the FEMA Map Service Center at *www.msc.fema.gov.*

FOR FURTHER INFORMATION CONTACT: Rick Sacbibit, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 400 C Street SW., Washington, DC 20472 (202) 646–7659, or (email) *patrick.sacbibit@fema.dhs.gov;* or visit the FEMA Map Information eXchange (FMIX) online at *www.floodmaps.fema.gov/fhm/fmx_main.html.*

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) makes the final flood hazard determinations as shown in the LOMRs for each community listed in the table below. Notice of these modified flood hazard determinations has been published in newspapers of local circulation and 90 days have elapsed since that publication. The Deputy Associate Administrator for Insurance and Mitigation has resolved any appeals resulting from this notification.

The modified flood hazard determinations are made pursuant to section 206 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4105, and are in accordance with the National Flood Insurance Act of 1968, 42 U.S.C. 4001 *et seq.,* and with 44 CFR part 65.

For rating purposes, the currently effective community number is shown and must be used for all new policies and renewals.

The new or modified flood hazard information is the basis for the floodplain management measures that the community is required either to adopt or to show evidence of being already in effect in order to remain qualified for participation in the National Flood Insurance Program (NFIP).

This new or modified flood hazard information, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own or pursuant to policies established by other Federal, State, or regional entities.

This new or modified flood hazard determinations are used to meet the floodplain management requirements of the NFIP and also are used to calculate the appropriate flood insurance premium rates for new buildings, and for the contents in those buildings. The changes in flood hazard determinations are in accordance with 44 CFR 65.4.

Interested lessees and owners of real property are encouraged to review the final flood hazard information available at the address cited below for each community or online through the FEMA Map Service Center at *www.msc.fema.gov.*

(Catalog of Federal Domestic Assistance No. 97.022, ''Flood Insurance.'')

Dated: June 16, 2017.

Roy E. Wright,

Deputy Associate Administrator for Insurance and Mitigation, Department of Homeland Security, Federal Emergency Management Agency.

State and county	Location and case No.	Chief executive officer of community	Community map repository	Date of modification	Community No.
Colorado:					
Adams (FEMA Docket No.: B–1700).	Unincorporated areas of Adams County (16–08–0431P).	The Honorable Eva J. Henry, Chair, Adams County Board of Commissioners, 4430 South Adams County Parkway, Brighton, CO 80601.	Adams County Stormwater Management Division, 4430 South Adams County Parkway, Brighton, CO 80601.	May 3, 2017	080001
Florida:					
Collier (FEMA Docket No.: B–1700).	City of Marco Island (16–04–7301P).	The Honorable Larry Honig, Chairman, City of Marco Island Council, 51 Bald Eagle Drive, Marco Island, FL 34145.	City Hall, 51 Bald Eagle Drive, Marco Island, FL 34145.	May 4, 2017	155166
Hillsborough (FEMA Docket No.: B–1700).	City of Plant City (16–04–6033P).	The Honorable Rick A. Lott, Mayor, City of Plant City, P.O. Box C, Plant City, FL 33563.	Engineering Division, 302 West Reynolds Street, Plant City, FL 33563.	Apr. 27, 2017	120113
Manatee (FEMA Docket No.: B–1700).	City of Bradenton (16–04–6478P).	The Honorable Wayne H. Poston, Mayor, City of Bradenton, 101 Old Main Street West, Bradenton, FL 34205.	City Hall, 101 Old Main Street West, Bradenton, FL 34205.	May 2, 2017	120155
Manatee (FEMA Docket No.: B–1700).	Unincorporated areas of Manatee County (16–04–6478P).	The Honorable Betsy Benac, Chair, Manatee County Board of Commissioners, P.O. Box 1000, Bradenton, FL 34206.	Manatee County Building and Development Services Department, 1112 Manatee Avenue West, 4th Floor, Bradenton, FL 34205.	May 2, 2017	120153
Marion (FEMA Docket No.: B–1700).	Unincorporated areas of Marion County (16–04–8287P).	The Honorable Carl Zalak, III, Chairman, Marion, County Board of Commissioners, 601 Southeast 25th Avenue, Ocala, FL 34471.	Marion County Growth Services Zoning Division, 2710 East Silver Springs Boulevard, Ocala, FL 34470.	May 3, 2017	120160

State and county	Location and case No.	Chief executive officer of community	Community map repository	Date of modification	Community No.
Miami-Dade (FEMA Docket No.: B–1700).	City of Sunny Isles Beach (16–04–6613P).	The Honorable George "Bud" Scholl, Mayor, City of Sunny Isles Beach, 18070 Collins Avenue, Sunny Isles Beach, FL 33160.	Building Department, 18070 Collins Avenue, Sunny Isles Beach, FL 33160.	May 5, 2017	120688
Osceola (FEMA Docket No.: B–1700).	City of St. Cloud (16–04–3373P).	The Honorable Nathan Blackwell, Mayor, City of St. Cloud, 1300 9th Street, St. Cloud, FL 34769.	Public Services Department, 1300 9th Street, St. Cloud, FL 34769.	May 3, 2017	120191
Osceola (FEMA Docket No.: B–1700).	Unincorporated areas of Osceola County (16–04–3373P).	The Honorable Brandon Arrington, Chairman, Osceola County Board of Commissioners, 1 Courthouse Square, Suite 4700, Kissimmee, FL 34741.	Osceola County Community Development Department, 1 Courthouse Square, Suite 1100, Kissimmee, FL 34741.	May 3, 2017	120189
Louisiana:					
Ouachita (FEMA Docket No.: B–1700).	City of Monroe (16–06–3067P).	The Honorable Jamie Mayo, Mayor, City of Monroe, 400 Lea Joyner Memorial Expressway, Monroe, LA 71201.	Planning and Zoning Division, 3901 Jackson Street, Monroe, LA 71201.	Apr. 28, 2017	220136
Ouachita (FEMA Docket No.: B–1700).	Unincorporated areas of Ouachita Parish (16–06–3067P).	The Honorable Scotty Robinson, President, Ouachita Parish Police Jury, 301 South Grand Street, Suite 201, Monroe, LA 71201.	Ouachita Parish Ray Oliver Wright Health Unit, 1650 Desiard Street, Suite 202, Monroe, LA 71201.	Apr. 28, 2017	220135
New York:					
Steuben (FEMA Docket No.: B–17672).	Town of Hornellsville (16–02–1795P).	The Honorable Kenneth Isaman, Supervisor, Town of Hornellsville, 4 Park Avenue, Arkport, NY 14807.	Town Hall, 4 Park Avenue, Arkport, NY 14807.	May 2, 2017	360777
Pennsylvania:					
Centre (FEMA Docket No.: B–1700).	Township of Ferguson (16–03–2371P).	Mr. Mark Kunkle, Manager, Township of Ferguson, 3147 Research Drive, State College, PA 16801.	Township Hall, 3147 Research Drive, State College, PA 16801.	May 5, 2017	420260
Texas:					
Bexar (FEMA Docket No.: B–1700).	City of San Antonio (16–06–2124P).	The Honorable Ivy R. Taylor, Mayor, City of San Antonio, P.O. Box 839966, San Antonio, TX 78283.	Transportation and Capital Improvements Department, Storm Water Division, 1901 South Alamo Street, San Antonio, TX 78204.	Apr. 27, 2017	480045
Bexar (FEMA Docket No.: B–1700).	City of San Antonio (16–06–2247P).	The Honorable Ivy R. Taylor, Mayor, City of San Antonio, P.O. Box 839966, San Antonio, TX 78283.	Transportation and Capital Improvements Department, Storm Water Division, 1901 South Alamo Street, San Antonio, TX 78204.	Apr. 26, 2017	480045
Bexar (FEMA Docket No.: B–1700).	Unincorporated areas of Bexar County (16–08–4363P).	The Honorable Nelson W. Wolff, Bexar County Judge, 101 West Nueva Street, 10th Floor, San Antonio, TX 78205.	Bexar County Public Works Department, 33 North Pecos-La Trinidad Street, Suite 420, San Antonio, TX 78207.	May 5, 2017	480035
Harris (FEMA Docket No.: B–1700).	City of Houston (16–06–1650P).	The Honorable Sylvester Turner, Mayor, City of Houston, P.O. Box 1562, Houston, TX 77251.	Floodplain Management Department, 1002 Washington Avenue, Houston, TX 77002.	Apr. 28, 2017	480296
Harris (FEMA Docket No.: B–1700).	City of Pasadena (16–06–1957P).	The Honorable Johnny Isbell, Mayor, City of Pasadena, 1211 Southmore Avenue, Pasadena, TX 77502.	Engineering Department, 1114 Davis Street, Pasadena, TX 77502.	Apr. 27, 2017	480307
Harris (FEMA Docket No.: B–1700).	Unincorporated areas of Harris County (16–06–1650P).	The Honorable Edward M. Emmett, Harris County Judge, 1001 Preston Street, Suite 911, Houston, TX 77002.	Harris County Permit Office, 10555 Northwest Freeway, Suite 120, Houston, TX 77092.	Apr. 28, 2017	480287
Travis (FEMA Docket No.: B–1700).	City of Austin (16–06–3081P).	The Honorable Steve Adler, Mayor, City of Austin, P.O. Box 1088, Austin, TX 78767.	City Hall, 505 Barton Springs Road, 12th Floor, Austin, TX 78703.	May 1, 2017	480624
Travis (FEMA Docket No.: B–1700).	Unincorporated areas of Travis County (16–06–3081P).	The Honorable Sarah Eckhardt, Travis County Judge, P.O. Box 1748, Austin, TX 78767.	Travis County Department of Transportation and Natural Resources, 700 Lavaca Street, 5th Floor, Austin, TX 78767.	May 1, 2017	481026
Virginia:					
Chesterfield (FEMA Docket No.: B–1700).	Unincorporated areas of Chesterfield County (16–03–1954P).	The Honorable Dorothy Jaeckle, Chair, Chesterfield County Board of Supervisors, P.O. Box 40, Chesterfield, VA 23832.	Chesterfield County Department of Environmental Engineering, 9800 Government Center Parkway, Chesterfield, VA 23832.	Apr. 26, 2017	510035
Henrico (FEMA Docket No.: B–1700).	Unincorporated areas of Henrico County (16–03–1954P).	The Honorable Richard W. Glover, Chairman, Henrico County Board of Supervisors, P.O. Box 90775, Henrico, VA 23273.	Henrico County Department of Public Works, 4301 East Parham Road, Henrico, VA 23228.	Apr. 26, 2017	510077

[FR Doc. 2017–15084 Filed 7–18–17; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2017–0002]

Final Flood Hazard Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Final Notice.

SUMMARY: Flood hazard determinations, which may include additions or modifications of Base Flood Elevations (BFEs), base flood depths, Special Flood Hazard Area (SFHA) boundaries or zone designations, or regulatory floodways on the Flood Insurance Rate Maps (FIRMs) and where applicable, in the supporting Flood Insurance Study (FIS) reports have been made final for the communities listed in the table below.

The FIRM and FIS report are the basis of the floodplain management measures that a community is required either to adopt or to show evidence of having in effect in order to qualify or remain qualified for participation in the Federal Emergency Management Agency's (FEMA's) National Flood Insurance Program (NFIP). In addition, the FIRM and FIS report are used by insurance agents and others to calculate appropriate flood insurance premium rates for buildings and the contents of those buildings.

DATES: The date of October 5, 2017 has been established for the FIRM and, where applicable, the supporting FIS report showing the new or modified flood hazard information for each community.

ADDRESSES: The FIRM, and if applicable, the FIS report containing the final flood hazard information for each community is available for inspection at the respective Community Map Repository address listed in the tables below and will be available online through the FEMA Map Service Center at *www.msc.fema.gov* by the effective date indicated above.

FOR FURTHER INFORMATION CONTACT: Rick Sacbibit, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 400 C Street SW., Washington, DC 20472, (202) 646–7659, or (email) *patrick.sacbibit@fema.dhs.gov;* or visit the FEMA Map Information eXchange (FMIX) online at *www.floodmaps.fema.gov/fhm/fmx_main.html.*

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) makes the final determinations listed below for the new or modified flood hazard information for each community listed. Notification of these changes has been published in newspapers of local circulation and 90 days have elapsed since that publication. The Deputy Associate Administrator for Insurance and Mitigation has resolved any appeals resulting from this notification.

This final notice is issued in accordance with section 110 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and 44 CFR part 67. FEMA has developed criteria for floodplain management in floodprone areas in accordance with 44 CFR part 60.

Interested lessees and owners of real property are encouraged to review the new or revised FIRM and FIS report available at the address cited below for each community or online through the FEMA Map Service Center at *www.msc.fema.gov.*

The flood hazard determinations are made final in the watersheds and/or communities listed in the table below.

(Catalog of Federal Domestic Assistance No. 97.022, ''Flood Insurance.'')

Dated: June 16, 2017.

Roy E. Wright,

Deputy Associate Administrator for Insurance and Mitigation, Department of Homeland Security, Federal Emergency Management Agency.

Community	Community map repository address
Cape May County, New Jersey (All Jurisdictions)	
Docket No.: FEMA–B–1471	
Borough of Avalon	Construction Office, 3100 Dune Drive, Avalon, NJ 08202.
Borough of Cape May Point	Clerk's Office, 215 Lighthouse Avenue, Cape May Point, NJ 08212.
Borough of Stone Harbor	Construction Office, 9508 2nd Avenue, Stone Harbor, NJ 08247.
Borough of West Cape May	Borough Hall, 732 Broadway, West Cape May, NJ 08204.
Borough of West Wildwood	Borough Hall, 701 West Glenwood Avenue, West Wildwood, NJ 08260.
Borough of Wildwood Crest	Construction Department, 6101 Pacific Avenue, Wildwood Crest, NJ 08260.
Borough of Woodbine	Borough Hall, 501 Washington Avenue, Woodbine, NJ 08270.
City of Cape May	Assessor's Office, 643 Washington Street, Cape May, NJ 08204.
City of North Wildwood	City Hall, 901 Atlantic Avenue, North Wildwood, NJ 08260.
City of Ocean City	Community Operations Department, 115 East 12th Street, Ocean City, NJ 08226.
City of Sea Isle City	City Hall, 233 John F Kennedy Boulevard, Sea Isle City, NJ 08243.
City of Wildwood	Zoning Office, 4400 New Jersey Avenue, Wildwood, NJ 08260.
Township of Dennis	Dennis Township Municipal Building, 571 Petersburg Road, Dennisville, NJ 08214.
Township of Middle	Middle Township Construction Office, 10 South Boyd Street, Cape May Court House, NJ 08210.
Township of Upper	Upper Township Engineering Office, 2100 Tuckahoe Road, Petersburg, NJ 08270.

[FR Doc. 2017–15085 Filed 7–18–17; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2017–0002]

Changes in Flood Hazard Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Final Notice.

SUMMARY: New or modified Base (1-percent annual chance) Flood Elevations (BFEs), base flood depths, Special Flood Hazard Area (SFHA) boundaries or zone designations, and/or regulatory floodways (hereinafter referred to as flood hazard determinations) as shown on the indicated Letter of Map Revision (LOMR) for each of the communities listed in the table below are finalized. Each LOMR revises the Flood Insurance Rate Maps (FIRMs), and in some cases the Flood Insurance Study (FIS) reports, currently in effect for the listed communities. The flood hazard determinations modified by each LOMR will be used to calculate flood insurance premium rates for new buildings and their contents.

DATES: Each LOMR was finalized as in the table below.

ADDRESSES: Each LOMR is available for inspection at both the respective Community Map Repository address listed in the table below and online through the FEMA Map Service Center at *www.msc.fema.gov*.

FOR FURTHER INFORMATION CONTACT: Rick Sacbibit, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 400 C Street SW., Washington, DC 20472, (202) 646–7659, or (email) *patrick.sacbibit@fema.dhs.gov;* or visit the FEMA Map Information eXchange (FMIX) online at *www.floodmaps.fema.gov/fhm/fmx_main.html*.

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) makes the final flood hazard determinations as shown in the LOMRs for each community listed in the table below. Notice of these modified flood hazard determinations has been published in newspapers of local circulation and 90 days have elapsed since that publication. The Deputy Associate Administrator for Insurance and Mitigation has resolved any appeals resulting from this notification.

The modified flood hazard determinations are made pursuant to section 206 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4105, and are in accordance with the National Flood Insurance Act of 1968, 42 U.S.C. 4001 *et seq.,* and with 44 CFR part 65.

For rating purposes, the currently effective community number is shown and must be used for all new policies and renewals.

The new or modified flood hazard information is the basis for the floodplain management measures that the community is required either to adopt or to show evidence of being already in effect in order to remain qualified for participation in the National Flood Insurance Program (NFIP).

This new or modified flood hazard information, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own or pursuant to policies established by other Federal, State, or regional entities.

This new or modified flood hazard determinations are used to meet the floodplain management requirements of the NFIP and also are used to calculate the appropriate flood insurance premium rates for new buildings, and for the contents in those buildings. The changes in flood hazard determinations are in accordance with 44 CFR 65.4.

Interested lessees and owners of real property are encouraged to review the final flood hazard information available at the address cited below for each community or online through the FEMA Map Service Center at *www.msc.fema.gov*.

(Catalog of Federal Domestic Assistance No. 97.022, ''Flood Insurance.'')

Dated: June 28, 2017.

Roy E. Wright,

Deputy Associate Administrator for Insurance and Mitigation, Department of Homeland Security, Federal Emergency Management Agency.

State and county	Location and case No.	Chief executive officer of community	Community map repository	Date of modification	Community No.
Colorado:					
Broomfield (FEMA Docket No.: B–1700).	City and County of Broomfield (16–08–0399P).	The Honorable Randy Ahrens, Mayor, City and County of Broomfield, 1 DesCombes Drive, Broomfield, CO 80020.	Engineering Department, 1 DesCombes Drive, Broomfield, CO 80020.	Apr. 21, 2017	085073
Florida:					
Charlotte (FEMA Docket No.: B–1672).	Unincorporated areas of Charlotte County (16–04–6702P).	The Honorable Bill Truex, Chairman, Charlotte County Board of Commissioners, 18500 Murdock Circle, Port Charlotte, FL 33948.	Charlotte County Floodplain Management Department, 18500 Murdock Circle, Port Charlotte, FL 33948.	Apr. 4, 2017	120061
Charlotte (FEMA Docket No.: B–1700).	Unincorporated areas of Charlotte County (16–04–6809P).	The Honorable Bill Truex, Chairman, Charlotte County Board of Commissioners, 18500 Murdock Circle, Port Charlotte, FL 33948.	Charlotte County Floodplain Management Department, 18500 Murdock Circle, Port Charlotte, FL 33948.	Apr. 12, 2017	120061
Collier (FEMA Docket No.: B–1672).	City of Naples (16–04–8542P).	The Honorable Bill Barnett, Mayor, City of Naples, 735 8th Street South, Naples, FL 34102.	Building Department, 295 Riverside Circle, Naples, FL 34102.	Apr. 5, 2017	125130
Monroe (FEMA Docket No.: B–1700).	Unincorporated areas of Monroe County (17–04–0132P).	The Honorable George Neugent, Mayor, Monroe County Board of Commissioners, 25 Ships Way, Big Pine Key, FL33043.	Monroe County Building Department, 2798 Overseas Highway, Marathon, FL 33050.	Apr. 13, 2017	125129
Osceola (FEMA Docket No.: B–1700).	City of Kissimmee (16–04–5037P).	The Honorable Jose Alvarez, Mayor, City of Kissimmee, 101 Church Street, Kissimmee, FL 34741.	City Hall, 101 Church Street, Kissimmee, FL 34741.	Apr. 21, 2017	120190
Seminole (FEMA Docket No.: B–1700).	Unincorporated areas of Seminole County (17–04–0173P).	The Honorable John Horan, Chairman, Seminole County Board of Commissioners, 1101 East 1st Street, Sanford, FL 32771.	Seminole County Development Review Division, 1101 East 1st Street, Sanford, FL 32771.	Apr. 21, 2017	120289

State and county	Location and case No.	Chief executive officer of community	Community map repository	Date of modification	Community No.
Massachusetts:					
Bristol (FEMA Docket No.: B–1700).	Town of Fairhaven (17–01–0064P).	The Honorable Charles K. Murphy, Sr., Chairman, Town of Fairhaven Board of Selectmen, 40 Center Street, Fairhaven, MA 02719.	Town Hall, 40 Center Street, Fairhaven, MA 02719.	Apr. 21, 2017	250054
Essex (FEMA Docket No.: B–1700).	Town of Essex (16–01–0826P).	The Honorable Lisa J. O'Donnell, Chair, Town of Essex, Board of Selectmen, 30 Martin Street, Essex, MA 01929.	Town Hall, 30 Martin Street, Essex, MA 01929.	Apr. 10, 2017	250080
Essex (FEMA Docket No.: B–1700).	Town of Ipswich (16–01–0826P).	Ms. Robin Crosbie, Manager, Town of Ipswich, 25 Green Street, Ipswich, MA 01938.	Town Hall, 25 Green Street, Ipswich, MA 01938.	Apr. 10, 2017	250086
Norfolk (FEMA Docket No.: B–1700).	City of Quincy (17–01–0360X).	The Honorable Thomas P. Koch, Mayor, City of Quincy, 1305 Hancock Street, Quincy, MA 02169.	Department of Public Works, 55 Sea Street, Quincy, MA 02169.	Apr. 14, 2017	255219
Plymouth (FEMA Docket No.: B–1700).	Town of Marion (16–01–2701P).	The Honorable Jonathan E. Dickerson, Chairman, Board of Selectmen, 2 Spring Street, Marion, MA 02738.	Building Department, 2 Spring Street, Marion, MA 02738.	Apr. 14, 2017	255213
Montana:					
Flathead (FEMA Docket No.: B–1700).	Unincorporated areas of Flathead County (16–08–0919P).	The Honorable Pamela Holmquist, Chair, Flathead County, Board of Commissioners, 800 South Main Street, Suite 302, Kalispell, MT 59901.	Flathead County Planning and Zoning Department, 40 11th Street West, Suite 220, Kalispell, MT 59901.	Apr. 20, 2017	300023
Oklahoma:					
Rogers (FEMA Docket No.: B–1672).	City of Collinsville (16–06–2264P).	The Honorable Bud York, Mayor, City of Collinsville, P.O. Box 730, Collinsville, OK 74021.	Engineering Department, 106 North 12th Street, Collinsville, OK 74021.	Apr. 6, 2017	400360
Rogers (FEMA Docket No.: B–1672).	Unincorporated areas of Rogers County (16–06–2264P).	The Honorable Dan Delozier, Chairman, Rogers County Board of Commissioners, 200 South Lynn Riggs Boulevard, Clamore, OK 74017.	Rogers County Planning and Development Department, 200 South Lynn Riggs Boulevard, Clamore, OK 74017.	Apr. 6, 2017	405379
South Dakota:					
Pennington (FEMA Docket No.: B–1700).	City of Box Elder (16–08–1014P).	The Honorable Larry Larson, Mayor, City of Box Elder, 420 Villa Drive, Box Elder, SD 57719.	City Hall, 420 Villa Drive, Box Elder, SD 57719.	Apr. 5, 2017	460089
Texas:					
Bexar (FEMA Docket No.: B–1700).	City of San Antonio (16–06–1504P).	The Honorable Ivy R. Taylor, Mayor, City of San Antonio, P.O. Box 839966, San Antonio, TX 78283.	Transportation and Capital Improvements Department, Storm Water Division, 1901 South Alamo Street, San Antonio, TX 78204.	Apr. 19, 2017	480045
Bexar (FEMA Docket No.: B–1700).	City of Schertz (16–06–3179P).	The Honorable Michael Carpenter, Mayor, City of Schertz, 1400 Schertz Pkwy, Schertz, TX 78154.	Public Works Department, 10 Commercial Place, Schertz, TX 78154.	Apr. 18, 2017	480269
Bexar (FEMA Docket No.: B–1700).	Unincorporated areas of Bexar County (16–08–4345P).	The Honorable Nelson W. Wolff, Bexar County Judge, 101 West Nueva Street, 10th Floor, San Antonio, TX 78205.	Bexar County Public Works Department, 33 North Pecos-La Trinidad Street, Suite 420, San Antonio, TX 78207.	Apr. 20, 2017	480035
Guadalupe (FEMA Docket No.: B–1700).	City of Schertz (16–06–4249P).	The Honorable Michael Carpenter, Mayor, City of Schertz, 1400 Schertz Parkway, Schertz, TX 78154.	Public Works Department, 10 Commercial Place, Schertz, TX 78154.	Apr. 12, 2017	480269
Harris (FEMA Docket No.: B–1700).	Unincorporated areas of Harris County (16–06–3975P).	The Honorable Edward M. Emmett, Harris County Judge, 1001 Preston Street, Suite 911, Houston, TX 77002.	Harris County Permit Office, 10555 Northwest Freeway, Suite 120, Houston, TX 77092.	Apr. 14, 2017	480287
Harris (FEMA Docket No.: B–1700).	Unincorporated areas of Harris County (17–06–0582X).	The Honorable Edward M. Emmett, Harris County Judge, 1001 Preston Street, Suite 911, Houston, TX 77002.	Harris County Permit Office, 10555 Northwest Freeway, Suite 120, Houston, TX 77092.	Apr. 14, 2017	480287
Travis (FEMA Docket No.: B–1672).	City of Austin (16–06–2294P).	The Honorable Steve Adler, Mayor, City of Austin, P.O. Box 1088, Austin, TX 78767.	Watershed Engineering Division, 505 Barton Springs Road, 12th Floor, Austin, TX 78704.	Apr. 3, 2017	480624
Travis (FEMA Docket No.: B–1700).	City of Pflugerville (16–06–3121P).	The Honorable Jeff Coleman, Mayor, City of Pflugerville, P.O. Box 589, Pflugerville, TX 78660.	Development Services Department, 201–B East Pecan Street, Pflugerville, TX 78691.	Apr. 10, 2017	481028
Washington D.C. (FEMA Docket No.: B–1700).	District of Columbia (16–03–2348P).	The Honorable Muriel Bowser, Mayor, District of Columbia, 1350 Pennsylvania Avenue Northwest, Washington, DC 20004.	Department of Energy and Environment, 1200 1st Street Northeast, 5th Floor, Washington, DC 20002.	Apr. 17, 2017	110001

[FR Doc. 2017–15086 Filed 7–18–17; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4321–DR; Docket ID FEMA–2017–0001]

Nebraska; Major Disaster and Related Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of a major disaster for the State of Nebraska (FEMA–4321–DR), dated June 26, 2017, and related determinations.

DATES: The declaration was issued June 26, 2017.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated June 26, 2017, the President issued a major disaster declaration under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the ''Stafford Act''), as follows:

I have determined that the damage in certain areas of the State of Nebraska resulting from a severe winter storm and straight-line winds during the period of April 29 to May 3, 2017, is of sufficient severity and magnitude to warrant a major disaster declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the ''Stafford Act''). Therefore, I declare that such a major disaster exists in the State of Nebraska.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes such amounts as you find necessary for Federal disaster assistance and administrative expenses.

You are authorized to provide Public Assistance in the designated areas and Hazard Mitigation throughout the State. Consistent with the requirement that Federal assistance be supplemental, any Federal funds provided under the Stafford Act for Hazard Mitigation will be limited to 75 percent of the total eligible costs. Federal funds provided under the Stafford Act for Public Assistance also will be limited to 75 percent of the total eligible costs, with the exception of projects that meet the eligibility criteria for a higher Federal cost-sharing percentage under the Public Assistance Alternative Procedures Pilot Program for Debris Removal implemented pursuant to section 428 of the Stafford Act.

Further, you are authorized to make changes to this declaration for the approved assistance to the extent allowable under the Stafford Act.

The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, David G. Samaniego, of FEMA is appointed to act as the Federal Coordinating Officer for this major disaster.

The following areas of the State of Nebraska have been designated as adversely affected by this major disaster:

Blaine, Custer, Furnas, Garfield, Gosper, Holt, Loup, Red Willow, Rock, and Valley Counties for Public Assistance.

All areas within the State of Nebraska are eligible for assistance under the Hazard Mitigation Grant Program.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Brock Long,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2017–15088 Filed 7–18–17; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLES961000 L14400000 BK0000 17X]

Filing of Plat Survey; Eastern States

AGENCY: Bureau of Land Management, Interior

ACTION: Notice of Official Filing.

SUMMARY: The Bureau of Land Management-Eastern States (BLM–ES) is publishing this Notice to inform the public of the intent to officially file the survey plat listed below, and afford a proper period of time to protest this action prior to the plat filing, 30 calendar days from the date of this publication. During this time, the plat will be available for review in the BLM–ES Public Room. The survey, executed at the request of the Bureau of Indian Affairs (BIA) and the BLM, is necessary for the management of these lands.

DATES: Unless there are protests of this action, the filing of the plat described in this Notice will happen on August 18, 2017.

ADDRESSES: You may submit written protests to the BLM-Eastern States, Suite 950, 20 M Street SE., Washington DC, 20003.

FOR FURTHER INFORMATION CONTACT: Dominica Van Koten, Chief Cadastral Surveyor for Eastern States; (202) 912–7756; email: *dvankote@blm.gov;* or U.S. Postal Service: BLM–ES, 20 M Street SE., Washington, DC, 20003. Attn: Cadastral Survey. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 to contact the above individual during normal business hours. The FIRS is available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: The BIA and BLM requested this survey for Township 7 North, Range 10 East, Choctaw Meridian, Mississippi. The plat of survey represents the dependent resurvey of a portion of the sub-divisional lines. The survey of the sub-division of sections 14 and 23, and the metes and bounds survey of parcels held in trust for the Mississippi Band of Choctaw and which are identified as: sections 14 and 23 of Township 7 North, Range 10 East, of the Choctaw Meridian, in the state of Mississippi; was accepted September 30, 2016. A copy of the described plat will be placed in the open files, and available to the public as a matter of information.

A person or party who wishes to protest a survey must file a notice that they wish to protest with the Chief, Branch of Cadastral Survey. A statement of reasons for a protest may be filed with the notice of protest and must be filed with the Chief, Branch of Cadastral Survey within 30 days after the protest is filed. If a protest against the survey is received prior to the date of official filing, the filing will be stayed pending consideration of the protest. A plat will not be officially filed until the day after all protests have been dismissed or otherwise resolved. 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 the BLM in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Authority: 43 CFR 1831.1

Leon Chmura,

Acting Chief Cadastral Surveyor.

[FR Doc. 2017–15174 Filed 7–18–17; 8:45 am]

BILLING CODE 4310–GJ–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLNVB010000 L19900000.DF0000 241A 15X 1109HF MO# 4500107331]

Notice of Intent To Prepare a Supplemental Environmental Impact Statement for the Mount Hope Project, Eureka County, Nevada

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of intent.

SUMMARY: In compliance with the National Environmental Policy Act of 1969, as amended (NEPA), and the Federal Land Policy and Management Act of 1976, as amended, the Bureau of Land Management (BLM) Mount Lewis Field Office, Battle Mountain, Nevada, intends to prepare a Supplemental Environmental Impact Statement (SEIS) for the Mount Hope Project, a new open pit and milling operation for the recovery of molybdenum, in Eureka County, Nevada. This notice initiates the NEPA process for the SEIS.

DATES: The BLM will provide opportunities for public comment upon publication of the Draft SEIS.

ADDRESSES: Print and electronic copies of the 2012 Final Environmental Impact Statement (EIS) for the Mount Hope Project, along with background materials, are available at the BLM Mount Lewis Field Office, 50 Bastian Road, Battle Mountain, Nevada, during regular business hours of 7:30 a.m. to 4:30 p.m., Monday through Friday, except holidays. Copies of the 2012 Final EIS are also available for download at the following Web site: *http://bit.ly/2oJRBm3.*

FOR FURTHER INFORMATION CONTACT: Christine Gabriel, Project Manager, telephone: 775–635–4000; address: 50 Bastian Road, Battle Mountain, NV 89820. Contact Ms. Gabriel if you wish to add your name to our mailing list. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Relay Service (FRS) at 1–800–877–8339 to contact the above individual during normal business hours. The FRS is available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: The Notice of Availability for the Mount Hope Project Final EIS was published in the **Federal Register** on October 12, 2012 (77 FR 62256). The BLM signed the Record of Decision on November 16, 2012. The Eureka Moly, LLC (EML) Mount Hope Project is a new open pit and milling operation for the recovery of molybdenum, located in central Nevada. The project encompasses approximately 8,355 acres of new surface disturbance, 8,092 of which are on public lands administered by the BLM, and 263 acres on private lands controlled by EML.

On December 28, 2016, the United States Court of Appeals for the Ninth Circuit partially reversed and vacated the BLM's decision with respect to certain aspects of the agency's air quality impact and cumulative air impacts analysis. The court also remanded to the BLM to clarify the status of any public water reserves (PWRs). The SEIS will provide updated information and discussion regarding certain air quality data and analysis used in the original EIS, and will also provide clarifying language regarding PWRs potentially impacted by the project.

The BLM will consult with Native American tribes, all the stakeholders included in the original EIS, and all other interested parties.

Authority: 40 CFR 1501.7

Jon D. Sherve,

Field Manager, Mount Lewis Field Office .

[FR Doc. 2017–15173 Filed 7–18–17; 8:45 am]

BILLING CODE 4310–HC–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–23515; PPWOCRADN0–PCU00RP14.R50000]

Notice of Inventory Completion: U.S. Army Corps of Engineers, Huntington District; Correction

AGENCY: National Park Service, Interior.

ACTION: Notice; correction.

SUMMARY: The U.S. Army Corps of Engineers, Huntington District (Huntington District) has corrected an inventory of associated funerary objects, published in a Notice of Inventory Completion in the **Federal Register** on December 2, 2016. This notice corrects the number of associated funerary objects. Lineal descendants or representatives of any Indian Tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these associated funerary objects should submit a written request to the Huntington District. If no additional requestors come forward, transfer of control of the associated funerary objects to the lineal descendants, Indian Tribes, or Native Hawaiian organizations stated in this notice may proceed.

DATES: Lineal descendants or representatives of any Indian Tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these associated funerary objects should submit a written request with information in support of the request to the Huntington District at the address in this notice by August 18, 2017.

ADDRESSES: Mr. Rodney Parker, District Archeologist, U.S. Army Corps of Engineers, Huntington District, 502, Eighth Street, Huntington, WV 25701, telephone (304) 399–5729, email *rodney.d.parker@usace.army.mil.*

SUPPLEMENTARY INFORMATION: Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the correction of an inventory of associated funerary objects under the control of the Huntington District. The associated funerary objects were removed from Bluestone Lake in Summers County, WV; Deer Creek Lake in Pickaway County, OH; Fishtrap Lake in Pike County, KY; Meldahl Lock and Dam in Adams County, OH; Paint Creek Lake in Highland County, OH; and Paintsville Lake in Johnson County, KY.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003(d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native associated funerary objects. The National Park Service is not responsible for the determinations in this notice.

This notice corrects the number of associated funerary objects published in a Notice of Inventory Completion in the **Federal Register** (81 FR 87067–87069, December 2, 2016). Transfer of control of the items in this correction notice has not occurred.

Correction

In the **Federal Register** (81 FR 87068, December 2, 2016), column 1, paragraph 1, sentence 4, under the heading ''History and Description of the Remains,'' is corrected by substituting the following sentence:

The 1,336 associated funerary objects are 788 shell beads, 23 shell pendants, 1 biface fragment, 4 flakes, 2 unmodified rocks, 1

engraved stone, 101 ceramic sherds, 205 fragments of unmodified fauna remains, 3 fragments modified faunal remains, 2 bone awl, 1 bone fish hook, 1 bone bead, 1 charcoal sample, 2 shell earrings, 157 fragments of unmodified shell, 1 shell spoon fragment, and 43 soil samples.

In the **Federal Register** (81 FR 87068, December 2, 2016), column 2, paragraph 2, sentence 4, under the heading ''History and Description of the Remains,'' is corrected by substituting the following sentence:

The 57 associated funerary objects are 21 fragments of unmodified animal bone, 28 fragments of unmodified mussel shell, and 8 fragments of charcoal.

In the **Federal Register** (81 FR 87068, December 2, 2016) column 2, paragraph 3, sentence 4, under the heading ''History and Description of the Remains,'' is corrected by substituting the following sentence:

The 1 associated funerary object is 1 projectile point fragment.

In the **Federal Register** (81 FR 87068, December 2, 2016) column 2, paragraph 5, sentence 4, under the heading ''History and Description of the Remains,'' is corrected by substituting the following sentence:

The 57 associated funerary objects are 4 chert tools, 3 projectile points, 8 flakes, 1 slate gorget, 35 fragments of unmodified faunal remains, 1 fragment of modified faunal remain, 1 fragment modified antler, 1 mica fragment, 2 fragments of unmodified shell, and 1 fragment of charcoal.

In the **Federal Register** (81 FR 87068, December 2, 2016) column 3, paragraph 1, sentence 9, under the heading ''History and Description of the Remains,'' is corrected by substituting the following sentence:

The 1,107 funerary objects are 7 core fragments, 2 groundstone tools, 87 flakes, 1 hematite fragment, 3 miscellaneous rock fragments, 347 ceramic sherds, 564 fragments of unmodified faunal remains, 86 fragments of unmodified shell, 1 modified wood fragment, and 9 shell beads.

In the **Federal Register** (81 FR 87068, December 2, 2016) columns 3, paragraph 2, sentence 5, under the heading ''History and Description of the Remains,'' is corrected by substituting the following sentence:

The 1,577 funerary objects are 1534 shell beads, 29 unmodified faunal remains, 7 modified faunal remains, 2 modified shell fragments, and 1 bone bead. 1 shell pendant, and 3 ochre pigment fragments.

In the **Federal Register** (81 FR 87069, December 2, 2016) columns 2, paragraph 1, sentence 1, under the heading ''Determinations Made by the Huntington District,'' is corrected by substituting the following sentence:

Pursuant to 25 U.S.C. 3001(3)(A), the 4,151 funerary objects described in this notice are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony.

Additional Requestors and Disposition

Lineal descendants or representatives of any Indian Tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these associated funerary items should submit a written request with information in support of the request to Mr. Rodney Parker, District Archeologist, U.S. Army Corps of Engineers, Huntington District, 502, Eighth Street, Huntington, WV 25701, telephone (304) 399–5729, email *rodney.d.parker@usace.army.mil,* by August 18, 2017. After that date, if no additional requestors have come forward, transfer of control of the associated funerary objects to the Absentee-Shawnee Tribe of Indians of Oklahoma, Eastern Shawnee Tribe of Oklahoma, and Shawnee Tribe may proceed.

The Huntington District is responsible for notifying the Absentee-Shawnee Tribe of Indians of Oklahoma, Eastern Shawnee Tribe of Oklahoma, and Shawnee Tribe that this notice has been published.

Dated: June 5, 2017.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2017–15109 Filed 7–18–17; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–23520; PPWOCRADN0–PCU00RP14.R50000]

Notice of Inventory Completion: History Colorado, Formerly Colorado Historical Society, Denver, CO

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: History Colorado, formerly Colorado Historical Society, has completed an inventory of human remains, in consultation with the appropriate Indian Tribes or Native Hawaiian organizations, and has determined that there is no cultural affiliation between the human remains and any present-day Indian Tribes or Native Hawaiian organizations. Representatives of any Indian Tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains should submit a written request to History Colorado. If no additional requestors come forward, transfer of control of the human remains to the Indian Tribes or Native Hawaiian organizations stated in this notice may proceed.

DATES: Representatives of any Indian Tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains should submit a written request with information in support of the request to History Colorado at the address in this notice by August 18, 2017.

ADDRESSES: Sheila Goff, NAGPRA Liaison, History Colorado, 1200 Broadway, Denver, CO 80203, telephone (303) 866–4531, email *sheila.goff@state.co.us.*

SUPPLEMENTARY INFORMATION: Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains under the control of History Colorado, Denver, CO. The human remains were recovered from Southwest Colorado.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003(d)(3) and 43 CFR 10.11(d). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains. The National Park Service is not responsible for the determinations in this notice.

Consultation

A detailed assessment of the human remains was made by History Colorado professional staff in consultation with representatives of the Arapaho Tribe of the Wind River Reservation, Wyoming; Cheyenne and Arapaho Tribes, Oklahoma (previously listed as the Cheyenne-Arapaho Tribes of Oklahoma); Hopi Tribe of Arizona; Kiowa Indian Tribe of Oklahoma; Mescalero Apache Tribe of the Mescalero Reservation, New Mexico; Navajo Nation, Arizona, New Mexico & Utah; Northern Cheyenne Tribe of the Northern Cheyenne Indian Reservation, Montana; Ohkay Owingeh, New Mexico (previously listed as the Pueblo of San Juan); Pueblo of Acoma, New Mexico; Pueblo of Jemez, New Mexico; Pueblo of Laguna, New Mexico; Pueblo of Nambe, New Mexico; Pueblo of Picuris, New Mexico; Pueblo of Pojoaque, New Mexico; Pueblo of San Felipe, New Mexico; Pueblo of San Ildefonso, New Mexico; Pueblo of Sandia, New Mexico;

Pueblo of Santa Ana, New Mexico; Pueblo of Santa Clara, New Mexico; Pueblo of Zia, New Mexico; Southern Ute Indian Tribe of the Southern Ute Reservation, Colorado; and Ute Mountain Ute Tribe (previously listed as the Ute Mountain Tribe of the Ute Mountain Reservation, Colorado, New Mexico & Utah). The Apache Tribe of Oklahoma; Crow Creek Sioux Tribe of the Crow Creek Reservation, South Dakota; Fort Sill Apache Tribe of Oklahoma; Jicarilla Apache Nation, New Mexico; Pueblo of Isleta, New Mexico; Pueblo of Taos, New Mexico; Pueblo of Tesuque, New Mexico; Ysleta del Sur Pueblo (previously listed as the Ysleta Del Sur Pueblo of Texas); and Zuni Tribe of the Zuni Reservation, New Mexico, were invited to consult, but did not participate. Hereafter, all Indian Tribes listed above are referred to as ''The Consulted and Invited Tribes.''

History and Description of the Remains

At an unknown time, human remains representing, at minimum, one individual were removed from private property in Southwest Colorado. In February of 2017, the human remains were anonymously sent by mail to the Anasazi Heritage Center, Dolores, CO. The Montezuma County Coroner ruled out a forensic interest in the human remains and transferred them to the Office of the State Archaeologist (OSAC), where they are identified as Office of Archaeology and Historic Preservation (OAHP) Case Number 321. Osteological analysis by Dr. Dawn Mulhern of Fort Lewis College indicates that the human remains are likely of Native American ancestry. The human remains represent one individual of indeterminate age or sex. No known individuals were identified. No associated funerary objects are present.

At some time in the 1890s, human remains representing, at minimum, one individual were removed from an unknown location in Southwest Colorado. In March 2017, the human remains were given to the OSAC, where they are identified as OAHP Case Number 322. Osteological description by Dr. Diane France indicates that the human remains are likely of Native American ancestry. The human remains represent one individual of indeterminate age or sex. No known individuals were identified. No associated funerary objects are present.

History Colorado, in partnership with the Colorado Commission of Indian Affairs, Southern Ute Indian Tribe of the Southern Ute Reservation, Colorado, and the Ute Mountain Ute Tribe (previously listed as the Ute mountain Tribe of the Ute Mountain Reservation, Colorado, New Mexico & Utah), conducted consultations among the Indian Tribes with ancestral ties to the State of Colorado to develop the process for disposition of culturally unidentifiable Native American human remains and associated funerary objects originating from inadvertent discoveries on Colorado State and private lands. As a result of the consultation, a process was developed, *Process for Consultation, Transfer, and Reburial of Culturally Unidentifiable Native American Human Remains and Associated Funerary Objects Originating From Inadvertent Discoveries on Colorado State and Private Lands,* (2008, unpublished, on file with the Colorado Office of Archaeology and Historic Preservation). The Indian Tribes consulted are those who have expressed their wishes to be notified of discoveries in the Southwest Consultation Region as established by the *Process,* where these individuals originated.

The Native American Graves Protection and Repatriation Review Committee (Review Committee) is responsible for recommending specific actions for disposition of culturally unidentifiable human remains. On November 3–4, 2006, the *Process* was presented to the Review Committee for consideration. A January 8, 2007, letter on behalf of the Review Committee from the Designated Federal Officer transmitted the provisional authorization to proceed with the *Process* upon receipt of formal responses from the Jicarilla Apache Nation, New Mexico, and the Kiowa Indian Tribe of Oklahoma, subject to forthcoming conditions imposed by the Secretary of the Interior. On May 15–16, 2008, the responses from the Jicarilla Apache Nation, New Mexico, and the Kiowa Indian Tribe of Oklahoma were submitted to the Review Committee. On September 23, 2008, the Assistant Secretary for Fish and Wildlife and Parks, as the designee for the Secretary of the Interior, transmitted the authorization for the disposition of culturally unidentifiable human remains according to the *Process* and NAGPRA, pending publication of a Notice of Inventory Completion in the **Federal Register**. This notice fulfills that requirement.

43 CFR 10.11 was promulgated on March 15, 2010, to provide a process for the disposition of culturally unidentifiable Native American human remains recovered from tribal or aboriginal lands as established by the final judgment of the Indian Claims Commission or U.S. Court of Claims, a treaty, Act of Congress, or Executive Order, or other authoritative governmental sources. As there is no evidence to suggest that the human remains reported in this notice originated from tribal or aboriginal lands, they are eligible for transfer of control under the *Process.*

Determinations Made by History Colorado

Officials of History Colorado have determined that:

• Pursuant to 25 U.S.C. 3001(9), the human remains described in this notice are Native American based on osteological analysis.

• Pursuant to 25 U.S.C. 3001(9), the human remains described in this notice represent the physical remains of two individuals of Native American ancestry.

• Pursuant to 25 U.S.C. 3001(2), a relationship of shared group identity cannot be reasonably traced between the Native American human remains and any present-day Indian Tribe.

• Pursuant to 43 CFR 10.11(c)(2)(ii) and the *Process,* the disposition of the human remains may be to the Southern Ute Indian Tribe of the Southern Ute Reservation, Colorado, and the Ute Mountain Ute Tribe (previously listed as the Ute Mountain Tribe of the Ute Mountain Reservation, Colorado, New Mexico & Utah).

Additional Requestors and Disposition

Representatives of any Indian Tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains should submit a written request with information in support of the request to Sheila Goff, NAGPRA Liaison, History Colorado, 1200 Broadway, Denver, CO 80203, telephone (303) 866–4531, email *sheila.goff@state.co.us,* by August 18, 2017. After that date, if no additional requestors have come forward, transfer of control of the human remains to the Southern Ute Indian Tribe of the Southern Ute Reservation, Colorado, and the Ute Mountain Ute Tribe (previously listed as the Ute Mountain Tribe of the Ute Mountain Reservation, Colorado, New Mexico & Utah) may proceed.

History Colorado is responsible for notifying The Consulted and Invited Tribes that this notice has been published.

Dated: June 5, 2017.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2017–15107 Filed 7–18–17; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–23503; PPWOCRADN0–PCU00RP14.R50000]

Notice of Inventory Completion: U.S. Department of Defense, Army Corps of Engineers, Nashville District, Nashville, TN

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: The U.S. Army Corps of Engineers, Nashville District (USACE), has completed an inventory of human remains and associated funerary objects, in consultation with the appropriate Indian Tribes or Native Hawaiian organizations, and has determined that there is no cultural affiliation between the human remains and associated funerary objects and any present-day Indian Tribes or Native Hawaiian organizations. Representatives of any Indian Tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains and associated funerary objects should submit a written request to the U.S. Army Corps of Engineers, Nashville District. If no additional requestors come forward, transfer of control of the human remains and associated funerary objects to the Indian Tribes or Native Hawaiian organizations stated in this notice may proceed.

DATES: Representatives of any Indian Tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains and associated funerary objects should submit a written request with information in support of the request to the U.S. Army Corps of Engineers, Nashville District, at the address in this notice by August 18, 2017.

ADDRESSES: Dr. Valerie McCormack, Archaeologist, Department of Defense, Nashville District, Corps of Engineers, U.S. Army Corps of Engineers, Nashville District, 110 9th Avenue South, Room A–405, Nashville, TN 37203, telephone (615) 736–7847, email *valerie.j.mccormack@usace.army.mil*.

SUPPLEMENTARY INFORMATION: Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains and associated funerary objects under the control of the U.S. Army Corps of Engineers, Nashville District, Nashville, TN. The human remains and associated funerary objects were removed from Trigg County, KY, and Stewart County, TN.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003(d)(3) and 43 CFR 10.11(d). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains and associated funerary objects. The National Park Service is not responsible for the determinations in this notice.

Consultation

A detailed assessment of the human remains was made by the U.S. Army Corps of Engineers, Nashville District, and the St. Louis District's Mandatory Center for Expertise for the Curation and Management of Archaeological Collections (MCX–CMAC) professional staff in consultation with representatives of the Absentee Shawnee Tribe of Indians of Oklahoma, Cherokee Nation, Eastern Band of Cherokee Indians, Eastern Shawnee Tribe of Oklahoma, Shawnee Tribe, The Chickasaw Nation, The Osage Nation, and United Keetoowah Band of Cherokee Indians in Oklahoma (hereafter referred to as ''The Consulted Tribes'').

History and Description of the Remains

In 1959, human remains representing, at minimum, one individual were removed from the Stone site (40SW23) in Stewart County, TN. Michael D. Coe and F. William Fischer of the University of Tennessee undertook archaeological research at the Stone site prior to the inundation of Lake Barkley. Coe and Fisher documented extensive looting and encountered little undisturbed area of the site. Artifacts indicate a Mississippian occupation. The collection is stored in the McClung Museum, University of Tennessee, Knoxville, TN. As indicated by excavation notes, the human remains consist of an infant encased in plaster that is housed within a burlap. Due to the plaster encasement, the MCX–CMAC could not verify the number or age of individuals encased within the plaster. No known individual was identified. No associated funerary objects are present.

In 1959, human remains representing, at minimum, two individuals were removed from the Shamble site (40SW41) in Stewart County, TN. Michael D. Coe and F. William Fischer of the University of Tennessee undertook archaeological research at the Shamble site prior to the inundation of Lake Barkley. Artifacts indicate Woodland and Mississippian occupation and a mound at the site dates to the Mississippian period. The collection is stored in the McClung Museum, University of Tennessee, Knoxville, TN. The human remains consist of an adult male and an adult probable male. No known individuals were identified. No associated funerary objects are present.

In 1962, human remains representing, at minimum, 26 individuals were removed from the Hogan site (40SW24) in Stewart County, TN. J.B. Graham of the University of Tennessee undertook excavation of the site prior to the inundation of Lake Barkley. Artifacts indicated Archaic, Woodland, and Mississippian occupation. The Mississippian occupation covered approximately five acres and contained a stone box grave cemetery. The collection is stored in the McClung Museum, University of Tennessee, Knoxville, TN. The human remains consist of one adult female, three adult probable females, three adult males, 10 adults of indeterminate sex, five sub-adults, and four infants. No known individuals were identified. The 87 associated funerary objects include fragments of a copper rattle consisting of 12 copper fragments and 12 pebbles, 2 reconstructed pottery vessels, 3 pottery vessels, 1 clay owl effigy, 1 pottery trowel, 1 pottery sherd, 1 shell gorget, 8 shell gorget fragments, 6 mussel shells, 8 mussel shell fragments, 1 scalloped quart pendant, 1 limestone disc, 2 bone awls, 1 bone needle, 22 bone scraper fragments, 1 hammerstone, 2 chert flakes, and 2 cannel coals.

In 1962, human remains representing, at minimum, eight individuals were removed from the Buchanan site (40SW33) in Stewart County, TN. J.B. Graham of the University of Tennessee undertook excavation of the site prior to the inundation of Lake Barkley. Artifacts indicate Archaic, Woodland, and Mississippian occupation of less than an acre in size. The collection is stored in the McClung Museum, University of Tennessee, Knoxville, TN. The human remains date to the Archaic and Mississippian period and consist of two adult probable females, two adult probable males, two adults of indeterminate sex, and two infants. No known individuals were identified. The 44 associated funerary objects are pottery sherds representing two vessels.

On July 10, 1962, human remains representing, at minimum, two individuals were removed from the Harry Rodgers site (15TR17) in Trigg County, KY. Rudolf Berle Clay of the University of Kentucky collected the remains from a sand bank. Artifacts

indicated Woodland and Mississippian occupation. The collection is stored at the Webb Museum, University of Kentucky, Lexington, KY. The human remains consist of an adult probable male and an infant. No known individuals were identified. No associated funerary objects are present.

In July of 1962, human remains representing, at minimum, one individual were removed from the Wilson site (15TR19) in Trigg County, KY. Rudolf Berle Clay of the University of Kentucky collected the remains from a sand bank. The collection is stored at the Webb Museum, University of Kentucky, Lexington, KY. The human remains consist of an adult probable male. No known individual was identified. No associated funerary objects are present.

These sites were excavated as part of the U.S. Army Corps of Engineers, Lake Barkley Project, by the University of Kentucky and the University of Tennessee, using funds provided by the National Park Service under the River Basins Archaeological Salvage Program.

Determinations Made by the Nashville District

Officials of the U.S. Army Corps of Engineers, Nashville District have determined that:

- Pursuant to 25 U.S.C. 3001(9), the human remains described in this notice are Native American based on the archeological context.
- Pursuant to 25 U.S.C. 3001(9), the human remains described in this notice represent the physical remains of 40 individuals of Native American ancestry.
- Pursuant to 25 U.S.C. 3001(3)(A), the 131 objects described in this notice are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony.
- Pursuant to 25 U.S.C. 3001(2), a relationship of shared group identity cannot be reasonably traced between the Native American human remains and associated funerary objects and any present-day Indian Tribe.
- According to final judgments of the Indian Claims Commission or the Court of Federal Claims, the land from which the Native American human remains and associated funerary objects from sites 15TR19, 40SW23, and 40SW41 were removed is the aboriginal land of the Cherokee Nation, Eastern Band of Cherokee Indians, and United Keetoowah Band of Cherokee Indians in Oklahoma.
- Treaties, Acts of Congress, or Executive Orders, indicate that the land from which the Native American human remains from sites 15TR17, 40SW24, and 40SW33 were removed is the aboriginal land of Cherokee Nation, Eastern Band of Cherokee Indians, and United Keetoowah Band of Cherokee Indians in Oklahoma.
- Pursuant to 43 CFR 10.11(c)(1), the disposition of the human remains and associated funerary objects may be jointly to the Cherokee Nation, Eastern Band of Cherokee Indians, and United Keetoowah Band of Cherokee Indians in Oklahoma.

Additional Requestors and Disposition

Representatives of any Indian Tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains and associated funerary objects should submit a written request with information in support of the request to: Dr. Valerie McCormack, Archaeologist, Department of Defense, Nashville District, Corps of Engineers, U.S. Army Corps of Engineers, Nashville District, 110 9th Avenue South, Room A–405, Nashville, TN 37203, telephone (615) 736–7847, email *valerie.j.mccormack@usace.army.mil* by August 18, 2017. After that date, if no additional requestors have come forward, transfer of control of the human remains and associated funerary objects to the Cherokee Nation, Eastern Band of Cherokee Indians, and United Keetoowah Band of Cherokee Indians in Oklahoma may proceed.

The U.S. Army Corps of Engineers, Nashville District is responsible for notifying The Consulted Tribes that this notice has been published.

Dated: June 1, 2017.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2017–15106 Filed 7–18–17; 8:45 am]

BILLING CODE 4312–52–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–1015]

Certain Hand Dryers and Housings for Hand Dryers; Commission Determination To Review In-Part an Initial Determination Granting Complainant's Motion for Summary Determination of Section 337 Violation by the Defaulting Respondents

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined to review in-part an initial determination (''ID'') (Order No. 27) of the presiding administrative law judge (''ALJ'') granting Complainant's motion for summary determination of section 337 violation by Defaulting Respondents. Specifically, the Commission has determined to review the ID's analysis and findings with respect to the existence of a domestic industry. The Commission also requests written submissions, under the schedule set forth below, on remedy, the public interest, and bonding.

FOR FURTHER INFORMATION CONTACT: Houda Morad, Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone (202) 708–4716. Copies of non-confidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone (202) 205–2000. General information concerning the Commission may also be obtained by accessing its Internet server at *https://www.usitc.gov.* The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.* Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

SUPPLEMENTARY INFORMATION: The Commission instituted this investigation on August 1, 2016, based on a complaint filed by Complainant Excel Dryer, Inc. of East Longmeadow, Massachusetts, alleging a violation of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337 (''section 337''), based upon the importation into the United States, or in the sale of certain hand dryers and housings for hand dryers by reason of trade dress infringement, the threat or effect of which is to destroy or substantially injure an industry in the United States. *See* 81 FR 50549–50 (Aug. 1, 2016). The notice of investigation identified twelve respondents, namely: ACL Group (Intl.) Ltd. of Skelbrooke, United Kingdom (''ACL''); Alpine Industries Inc. of Irvington, New Jersey (''Alpine''); FactoryDirectSale of Ontario, California; Fujian Oryth Industrial Co., Ltd. (a/k/a Oryth) of Fujian, China (''Oryth''); Jinhua Kingwe Electrical Co. Ltd., (a/k/a Kingwe) of Jinhua City, China (''Kingwe''); Penson & Co. of Shanghai, China (''Penson''); Taizhou Dihour Electrical Appliances Co., Ltd., a/k/a

Dihour of Wenling City, China (''Dihour''); TC Bunny Co., Ltd. of Shanghai, China (''TC Bunny''); Toolsempire of Ontario, California; US Air Hand Dryer of Sacramento, California (''US Air''); Sovereign Industrial (Jiaxing) Co. Ltd. d/b/a Vinovo of Jiaxing, China (''Vinovo''); and Zhejiang Aike Appliance Co., Ltd. of Zhejiang, China (''Aike''). *See id.* In addition, the Office of Unfair Import Investigations is a party in this investigation. *See id.*

The ALJ terminated six respondents from the investigation based on consent order stipulations and the entry of consent orders, namely: Respondent Alpine (Order No. 11 (Sept. 8, 2016), *unreviewed,* Comm'n Notice (Oct. 11, 2016)); Respondent Kingwe (Order No. 12 (Sept. 8, 2016), *unreviewed,* Comm'n Notice (Oct. 11, 2016)); Respondent ACL (Order No. 15 (Sept. 28, 2016), *unreviewed,* Comm'n Notice (Oct. 27, 2016)); Respondent Aike (Order No. 16 (Oct. 4, 2016), *unreviewed,* Comm'n Notice (Nov. 3, 2016)); Respondent Toolsempire (Order No. 18 (Oct. 11, 2016) *unreviewed,* Comm'n Notice (Nov. 14, 2016)); and Respondent FactoryDirectSale (Order No. 19 (Oct. 11, 2016), *unreviewed,* Comm'n Notice (Nov. 14, 2016)). The ALJ found the six remaining respondents in default (collectively, ''the Defaulting Respondents'') based on their failure to respond to the complaint and notice of investigation, namely: Respondents Penson and Dihour (Order No. 21 (Oct. 31, 2016), *unreviewed,* Comm'n Notice (Nov. 28, 2016)); and Respondents US Air, Oryth, TC Bunny, and Vinovo (Order No. 24 (Feb. 2, 2017), *unreviewed,* Comm'n Notice (Feb. 22, 2017)).

On March 24, 2017, Complainant Excel filed a motion for summary determination on domestic industry and violation of section 337 by the Defaulting Respondents. Complainant Excel also requested a general exclusion order, cease and desist orders, and a bond of 100% during Presidential review. On April 5, 2017, the Commission Investigative Attorney filed a response in support of Complainant's Motion and requested remedy. On June 2, 2017, the ALJ issued the subject ID/RD (Order No. 27) granting Complainant's motion for summary determination on domestic industry and violation of section 337 by the Defaulting Respondents and recommending that the Commission issue a general exclusion order and cease and desist orders, and set a bond at 100% during the Presidential review period. No petitions for review of the subject ID were filed.

The Commission has determined to review the ID in-part. Specifically, the Commission has determined to review the ID's analysis and findings with respect to the existence of a domestic industry. The Commission does not request any submissions on the issue under review.

In connection with the final disposition of this investigation, the Commission may (1) issue an order that could result in the exclusion of the subject articles from entry into the United States, and/or (2) issue one or more cease and desist orders that could result in the respondent(s) being required to cease and desist from engaging in unfair acts in the importation and sale of such articles. Accordingly, the Commission is interested in receiving written submissions that address the form of remedy, if any, that should be ordered. If a party seeks exclusion of an article from entry into the United States for purposes other than entry for consumption, the party should so indicate and provide information establishing that activities involving other types of entry either are adversely affecting it or likely to do so. For background, *see Certain Devices for Connecting Computers via Telephone Lines,* Inv. No. 337–TA–360, USITC Pub. No. 2843 (Dec. 1994) (Comm'n Op.). In particular, the written submissions should address any request for a cease and desist order in the context of recent Commission opinions, including those in *Certain Arrowheads with Deploying Blades and Components Thereof and Packaging Therefor,* Inv. No. 337–TA–977, Comm'n Op. (Apr. 28, 2017) and *Certain Electric Skin Care Devices, Brushes and Chargers Therefor, and Kits Containing the Same,* Inv. No. 337–TA–959, Comm'n Op. (Feb. 13, 2017). Specifically, if Complainant seeks a cease and desist order against a defaulting respondent, the written submissions should respond to the following requests:

(1) Please identify with citations to the record any information regarding commercially significant inventory in the United States as to each respondent against whom a cease and desist order is sought. If Complainant also relies on other significant domestic operations that could undercut the remedy provided by an exclusion order, please identify with citations to the record such information as to each respondent against whom a cease and desist order is sought.

(2) In relation to the infringing products, please identify any information in the record, including allegations in the pleadings, that addresses the existence of any domestic inventory, any domestic operations, or any sales-related activity directed at the United States for each respondent against whom a cease and desist order is sought.

If the Commission contemplates some form of remedy, it must consider the effects of that remedy upon the public interest. The factors the Commission will consider include the effect that an exclusion order and/or cease and desist orders would have on (1) the public health and welfare, (2) competitive conditions in the U.S. economy, (3) U.S. production of articles that are like or directly competitive with those that are subject to investigation, and (4) U.S. consumers. The Commission is therefore interested in receiving written submissions that address the aforementioned public interest factors in the context of this investigation.

If the Commission orders some form of remedy, the U.S. Trade Representative, as delegated by the President, has 60 days to approve or disapprove the Commission's action. *See* Presidential Memorandum of July 21, 2005, 70 FR 43251 (July 26, 2005). During this period, the subject articles would be entitled to enter the United States under bond, in an amount determined by the Commission and prescribed by the Secretary of the Treasury. The Commission is therefore interested in receiving submissions concerning the amount of the bond that should be imposed if a remedy is ordered.

Written Submissions: Parties to the investigation, interested government agencies, and any other interested parties are encouraged to file written submissions on the issues of remedy, the public interest, and bonding. Complainant and the Commission investigative attorney are also requested to submit proposed remedial orders for the Commission's consideration. Complainant is also requested to state the HTSUS numbers under which the accused products are imported and to supply the names of known importers of the infringing articles.

Written submissions must be filed no later than close of business on July 28, 2017. Reply submissions must be filed no later than the close of business on August 4, 2017. Such submissions should address the ALJ's recommended determinations on remedy and bonding which were made in Order No. 27. No further submissions on any of these issues will be permitted unless otherwise ordered by the Commission.

Persons filing written submissions must file the original document electronically on or before the deadlines

stated above and submit eight (8) true paper copies to the Office of the Secretary by noon the next day pursuant to section 210.4(f) of the Commission's Rules of Practice and Procedure (19 CFR 210.4(f)). Submissions should refer to the investigation number (''Inv. No. 337–TA–1015'') in a prominent place on the cover page and/or the first page. (*See* Handbook for Electronic Filing Procedures, *https://www.usitc.gov/secretary/documents/handbook_on_filing_procedures.pdf*). Persons with questions regarding filing should contact the Secretary (202–205–2000).

Any person desiring to submit a document to the Commission in confidence must request confidential treatment. All such requests should be directed to the Secretary to the Commission and must include a full statement of the reasons why the Commission should grant such treatment. *See* 19 CFR 201.6. Documents for which confidential treatment by the Commission is properly sought will be treated accordingly. All information, including confidential business information and documents for which confidential treatment is properly sought, submitted to the Commission for purposes of this Investigation may be disclosed to and used: (i) By the Commission, its employees and Offices, and contract personnel (a) for developing or maintaining the records of this or a related proceeding, or (b) in internal investigations, audits, reviews, and evaluations relating to the programs, personnel, and operations of the Commission including under 5 U.S.C. Appendix 3; or (ii) by U.S. government employees and contract personnel,[1] solely for cybersecurity purposes. All non-confidential written submissions will be available for public inspection at the Office of the Secretary and on EDIS.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in part 210 of the Commission's Rules of Practice and Procedure (19 CFR part 210).

By order of the Commission.

Issued July 14, 2017.

Lisa R. Barton,

Secretary to the Commission.

[FR Doc. 2017–15137 Filed 7–18–17; 8:45 am]

BILLING CODE 7020–02–P

[1] All contract personnel will sign appropriate nondisclosure agreements.

DEPARTMENT OF JUSTICE

Bureau of Alcohol, Tobacco, Firearms and Explosives

[OMB Number 1140–0080]

Agency Information Collection Activities; Proposed eCollection eComments Requested; Extension Without Change of a Currently Approved Collection; Notification of Change of Mailing or Premise Address

AGENCY: Bureau of Alcohol, Tobacco, Firearms and Explosives, Department of Justice.

ACTION: 60-day notice.

SUMMARY: The Department of Justice (DOJ), Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), will submit the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995.

DATES: Comments are encouraged and will be accepted for 60 days until September 18, 2017.

FOR FURTHER INFORMATION CONTACT: If you have additional comments, particularly with respect to the estimated public burden or associated response time, have suggestions, need a copy of the proposed information collection instrument with instructions, or desire any additional information, please contact Shawn Stevens, ATF Industry Liaison, Federal Explosives Licensing Center, either by mail at Federal Explosives Licensing Center, 244 Needy Road, Martinsburg, WV 25405 or by email at *Shawn.Stevens@atf.gov.*

SUPPLEMENTARY INFORMATION: Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
—Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
—Evaluate whether and if so how the quality, utility, and clarity of the information to be collected can be enhanced; and
—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of this information collection:

1. *Type of Information Collection (*check justification or form 83): Extension, without change, of a currently approved collection.

2. *The Title of the Form/Collection:* Notification of Change of Mailing or Premise Address.

3. *The agency form number, if any, and the applicable component of the Department sponsoring the collection:*

Form number (if applicable): None.

Component: Bureau of Alcohol, Tobacco, Firearms and Explosives, U.S. Department of Justice.

4. *Affected public who will be asked or required to respond, as well as a brief abstract:*

Primary: Business or other for-profit

Other (if applicable): Individuals or households

Abstract: During the term of a license or permit, a licensee or permittee may move his business or operations to a new address at which he intends to regularly carry on his business or operations, without procuring a new license or permit. However, in every case, the licensee or permittee shall notify the Chief, Federal Explosives Licensing Center of the change. This collection of information is contained in 27 CFR 555.54.

5. *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* An estimated 1,000 respondents will utilize this collection, and it will take each respondent approximately 10 minutes to prepare the required response to this collection.

6. *An estimate of the total public burden (in hours) associated with the collection:* The estimated annual public burden associated with this collection is 170 hours which is equal to 1000 (the total # of respondents) * .17 (10 minutes).

If additional information is required contact: Melody Braswell, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street NE., 3E.405A, Washington, DC 20530.

Dated: July 14, 2017.

Melody Braswell,

Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2017–15123 Filed 7–18–17; 8:45 am]

BILLING CODE 4410–14–P

MISSISSIPPI RIVER COMMISSION

Sunshine Act Meetings

AGENCY HOLDING THE MEETINGS: Mississippi River Commission.

TIME AND DATE: 9:00 a.m., August 7, 2017.

PLACE: On board MISSISSIPPI V at City Front, Cape Girardeau, Missouri.

STATUS: Open to the public.

MATTERS TO BE CONSIDERED: (1) Summary report by President of the Commission on national and regional issues affecting the U.S. Army Corps of Engineers and Commission programs and projects on the Mississippi River and its tributaries; (2) District Commander's overview of current project issues within the St. Louis and Memphis Districts; and (3) Presentations by local organizations and members of the public giving views or comments on any issue affecting the programs or projects of the Commission and the Corps of Engineers.

TIME AND DATE: 9:00 a.m., August 9, 2017.

PLACE: On board MISSISSIPPI V at Beale Street Landing, Memphis, Tennessee.

STATUS: Open to the public.

MATTERS TO BE CONSIDERED: (1) Summary report by President of the Commission on national and regional issues affecting the U.S. Army Corps of Engineers and Commission programs and projects on the Mississippi River and its tributaries; (2) District Commander's overview of current project issues within the Memphis District; and (3) Presentations by local organizations and members of the public giving views or comments on any issue affecting the programs or projects of the Commission and the Corps of Engineers.

TIME AND DATE: 9:00 a.m., August 11, 2017.

PLACE: On board MISSISSIPPI V at City Front, Vicksburg, Mississippi.

STATUS: Open to the public.

MATTERS TO BE CONSIDERED: (1) Summary report by President of the Commission on national and regional issues affecting the U.S. Army Corps of Engineers and Commission programs and projects on the Mississippi River and its tributaries; (2) District Commander's overview of current project issues within the Vicksburg District; and (3) Presentations by local organizations and members of the public giving views or comments on any issue affecting the programs or projects of the Commission and the Corps of Engineers.

TIME AND DATE: 9:00 a.m., August 18, 2017.

PLACE: On board MISSISSIPPI V at CENAC Towing Dock, Houma, Louisiana.

STATUS: Open to the public.

MATTERS TO BE CONSIDERED: (1) Summary report by President of the Commission on national and regional issues affecting the U.S. Army Corps of Engineers and Commission programs and projects on the Mississippi River and its tributaries; (2) District Commander's overview of current project issues within the New Orleans District; and (3) Presentations by local organizations and members of the public giving views or comments on any issue affecting the programs or projects of the Commission and the Corps of Engineers.

CONTACT PERSON FOR MORE INFORMATION: Mr. Charles A. Camillo, telephone 601–634–7023.

Charles A. Camillo,

Director, Mississippi River Commission.

[FR Doc. 2017–15218 Filed 7–17–17; 11:15 am]

BILLING CODE 3720–58–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 40–9091; NRC–2011–0148]

Strata Energy, Inc.; Ross Uranium In Situ Recovery Facility; Source and Byproduct Materials License

AGENCY: Nuclear Regulatory Commission.

ACTION: Final environmental assessment and finding of no significant impact; issuance.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is considering an amendment of Source and Byproduct Materials License SUA–1601 to modify a License Condition for the Strata Energy, Inc. (Strata) Ross *In Situ* Recovery (ISR) Project. Specifically, Strata is requesting that NRC approve modifications to License Condition 11.3 (A) and (B) which pertain to requirements for the minimum density of baseline wells for a wellfield and distance to and spacing of the perimeter wells for a wellfield. The NRC has prepared a final environmental assessment (EA) and finding of no significant impact (FONSI) for this licensing action.

DATES: The EA and FONSI referenced in this document are available on July 12, 2017.

ADDRESSES: Please refer to Docket ID NRC–2011–0148 when contacting the NRC about the availability of information regarding this document. You may obtain publicly-available information related to this document using any of the following methods:

- *Federal Rulemaking Web site:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2011–0148. Address questions about NRC dockets to Carol Gallagher; telephone: 301–415–3463; email: *Carol.Gallagher@nrc.gov.* For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly-available documents online in the ADAMS Public Documents collection at *http://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''*ADAMS Public Documents*'' and then select ''*Begin Web-based ADAMS Search.*'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or via email to *pdr.resource@nrc.gov.* The ADAMS accession number for each document referenced (if it is available in ADAMS) is provided the first time that it is mentioned in this document.
- *NRC's PDR:* You may examine and purchase copies of public documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

FOR FURTHER INFORMATION CONTACT: Jessie Muir Quintero, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington DC 20555–0001; telephone: 301–415–7476; email: *Jessie.Quintero@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Introduction

The NRC is considering amending License Condition 11.3 (A) and (B) of License SUA–1601 issued to Strata. As required by part 51 of title 10 of the *Code of Federal Regulations* (10 CFR), the NRC prepared a final EA (ADAMS Accession No. ML17191A371). Based on the results of the final EA, described as follows, the NRC has determined not to prepare an environmental impact

statement (EIS) for the amendment, and is issuing a FONSI.

II. Environmental Assessment

Description of the Proposed Action

The proposed action would amend License Condition 11.3 (A) and (B) of Strata's Ross license. Strata's amendment request consists of modifying the minimum density requirement in a wellfield baseline monitoring program and the distance to and spacing of wells on the perimeter monitoring well ring (ADAMS Accession No. ML16004A032).

Need for the Proposed Action

The proposed action would allow Strata flexibility in the placement of wells to avoid certain natural features and infrastructure.

Environmental Impacts of the Proposed Action

The NRC assessed the environmental impacts to ground water as a result of amending License Condition 11.3 (A) and (B) and determined that there would be no significant impact to ground-water quality. The NRC determined the proposed changes to the License Condition—changes to well density requirements and distance to and spacing of wells in perimeter monitoring well ring—would still maintain Strata's ability to develop appropriate baseline and restoration data and continue the timely and accurate identification of ground-water excursions.

Environmental Impacts of the Alternatives to the Proposed Action

As an alternative to the proposed action, the NRC staff considered denial of the proposed action (*i.e.,* the ''no-action'' alternative). The No-Action Alternative would mean that the NRC would not approve the requested change to License Condition 11.3 (A) and (B). The No-Action alternative would result in Strata operating the Ross project as currently licensed, thus the impacts would be the same as those already considered in the Ross Supplemental EIS (ADAMS Accession No. ML14056A096).

Agencies and Persons Consulted

On June 14, 2017, the NRC staff sent a copy of the draft EA to the Wyoming Department of Environmental Quality (DEQ) for their review and comment. The state official responded on July 6, 2017, that DEQ had reviewed the EA and did not have any comments (ADAMS Accession No. ML17191A327).

III. Finding of No Significant Impact

Based on its review of the proposed action, and in accordance with the requirements in 10 CFR part 51, the NRC staff has determined that amending License Condition 11.3(A) and (B) for the Ross ISR project would not significantly affect ground-water quality. The NRC staff has determined that pursuant to 10 CFR 51.31, preparation of an EIS is not required for the proposed action and, pursuant to 10 CFR 51.32, a FONSI is appropriate.

On the basis of the final EA, the NRC concludes that the proposed action will not have a significant effect on the quality of the human environment. Accordingly, the NRC has determined not to prepare an EIS for the proposed action.

Dated at Rockville, Maryland, this 12th day of July 2017.

For the U.S. Nuclear Regulatory Commission.

Craig G. Erlanger,

Director, Division of Fuel Cycle Safety, Safeguards, and Environmental Review, Office of Nuclear Material Safety and Safeguards.

[FR Doc. 2017–15144 Filed 7–18–17; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2017–0164]

New ListServ for Waste Incidental to Reprocessing (WIR) Program Documents

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of process change; issuance.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is issuing a notice regarding a process change. The NRC is migrating to a ListServ, to distribute emails with links to publicly-available documents related to the Waste Incidental to Reprocessing (WIR) Program. The current method of using email lists will be discontinued. If a member of the public does not currently receive such NRC emails and they would like to receive those NRC emails in the future, then they need to voluntarily sign-up for the WIR ListServ via a link to the NRC Public Web site. The instructions for signing up for the WIR ListServ are provided in this **Federal Register** notice.

ADDRESSES: Please refer to Docket ID NRC–2017–0164 when contacting the NRC about the availability of information regarding this document. You may obtain publicly-available information related to this document using any of the following methods:

- *Federal Rulemaking Web site:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2017–0164. Address questions about NRC dockets to Carol Gallagher; telephone: 301–415–3463; email: *Carol.Gallagher@nrc.gov.* For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly-available documents online in the ADAMS Public Documents collection at *http://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''ADAMS Public Documents'' and then select ''*Begin Web-based ADAMS Search.*'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.*
- *NRC's PDR:* You may examine and purchase copies of public documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

FOR FURTHER INFORMATION CONTACT: Harry Felsher, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–6559; email: *Harry.Felsher@nrc.gov.*

SUPPLEMENTARY INFORMATION: For those members of the public who are currently on the NRC WIR email list and already receive NRC emails with links to publicly-available WIR Program documents, your email address has already been transferred to the WIR ListServ and you do not need to do anything to continue to receive those NRC emails in the future. If any other member of the public would like to start receiving NRC emails with a link to future publicly-available WIR Program documents, then they need to voluntarily sign-up for the WIR LIstServ using the link and instructions provided below.

The only way to sign-up for the WIR ListServ is to: (1) Go to the following Web page on the NRC Public Web site: *https://www.nrc.gov/public-involve/listserver.html,* (2) scroll down to the section entitled ''Lyris Subscription Services,'' (3) enter the email address where you want to receive the NRC WIR ListServ emails, (4) check the box entitled ''Waste Incidental to Reprocessing (WIR),'' and (5) click ''Subscribe.''

Note that after you are subscribed to an NRC ListServ, you will receive an email from the NRC indicating which ListServ you have subscribed to, which email address you used to subscribe to that ListServ, and instructions on how you can unsubscribe to that ListServ, if desired. You are responsible for ensuring that the ListServ has your current email address.

Dated at Rockville, Maryland this 10th day of July 2017.

For the Nuclear Regulatory Commission.

Andrea Kock,

Deputy Director, Division of Decommissioning, Uranium Recovery and Waste Programs, Office of Nuclear Material Safety and Safeguards.

[FR Doc. 2017–15145 Filed 7–18–17; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 72–1; NRC–2017–0103]

GE-Hitachi Nuclear Energy Americas, LLC; GE-Hitachi Morris Operation Independent Spent Fuel Storage Installation

AGENCY: Nuclear Regulatory Commission.

ACTION: License amendment application; issuance.

SUMMARY: By letter dated February 15, 2017, as supplemented March 9, 2017, and as supplemented June 6, 2017, GE-Hitachi (GEH) submitted to the Nuclear Regulatory Commission (NRC) a license amendment request (LAR) No. 15, Materials License No. SNM–2500 (LAR 2500–15) for the GEH Facility at Morris, Illinois, in accordance with NRC's regulations. The amendment provides clarification for the storage of liquid and solid waste treatment products. The amendment requested no changes to the technical or regulatory provisions of the license. The application included adequate justification for the proposed changes. The NRC has approved and issued the amendment in its letter dated June 29th, 2017, along with its safety evaluation report.

DATES: July 19, 2017.

ADDRESSES: Please refer to Docket ID NRC–2017–0103 when contacting the NRC about the availability of information regarding this document. You may access publicly-available information related to this document using any of the following methods:

- *Federal Rulemaking Web site:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2017–0103. Address questions about NRC dockets to Carol Gallagher; telephone: 301–415–3463; email: *Carol.Gallagher@nrc.gov.* For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly-available documents online in the ADAMS Public Documents collection at *http://www.nrc.gov/reading-rm/adams.html.* To begin the search, select "*ADAMS Public Documents*" and then select "*Begin Web-based ADAMS Search.*" For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* The ADAMS accession number for each document referenced (if it is available in ADAMS) is provided the first time that it is mentioned in this document. The GE-Hitachi Morris Operation License Amendment Request No. 15 is available in ADAMS under Accession Nos. ML17046A072, ML17072A381, and ML17157B369, respectively.
- *NRC's PDR:* You may examine and purchase copies of public documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

FOR FURTHER INFORMATION CONTACT: Christian Jacobs, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–6825: email: *Christian.Jacobs@nrc.gov.*

SUPPLEMENTARY INFORMATION: On December 21, 2004, the NRC renewed Special Nuclear Materials License No. SNM–2500 for the GEMO independent spent fuel storage installation (ISFSI) (ADAMS Accession No. ML043630433), located near Morris, Illinois. The renewed license authorizes GE-Hitachi Nuclear Energy Americas, LLC, to possess, store, and transfer spent nuclear fuel and associated radioactive materials at the GEMO ISFSI for a term of 20 years. The NRC also issued an environmental assessment and finding of no significant impact related to the issuance of the renewed ISFSI license on November 30, 2004 (ADAMS Accession No. ML043360409), in accordance with the National Environmental Policy Act, and in conformance with the applicable requirements of part 51 of title 10 of the *Code of Federal Regulations* (10 CFR).

Pursuant to 10 CFR 72.46 and 72.58, the NRC has docketed, approved and issued Amendment No. 15 to Special Nuclear Materials License No. SNM–2500, held by GE-Hitachi Nuclear Energy Americas, LLC, for the possession, transfer and storage of spent fuel at the GEMO ISFSI. Amendment No. 15 is effective as of the date of issuance.

Amendment No. 15 complies with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's rules and regulations. The Commission has made appropriate findings, as required by the Act and the Commission's rules and regulations in 10 CFR chapter 1, which are set forth in Amendment No. 15. The issuance of Amendment No. 15 satisfied the criteria specified in 10 CFR 51.22(c)(10)(v) for a categorical exclusion. Thus, the preparation of an environmental assessment or an environmental impact statement was not required.

A Notice of Opportunity to Request a Hearing and to Petition for Leave to Intervene in connection with this action was published in the **Federal Register** on April 24, 2017 (82 FR 18937). No request for a hearing or petition for leave to intervene was filed following this notice.

Dated at Rockville, Maryland, this 12th day of July 2017.

For the Nuclear Regulatory Commission.

John McKirgan,

Chief, Spent Fuel Licensing Branch, Division of Spent Fuel Management, Office of Nuclear Material Safety and Safeguards.

[FR Doc. 2017–15146 Filed 7–18–17; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50–498 and 50–499; NRC–2016–0092]

STP Nuclear Operating Company; South Texas Project, Units 1 and 2

AGENCY: Nuclear Regulatory Commission.

ACTION: Exemption; issuance.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is granting exemptions from certain portions of the acceptance criteria for emergency core cooling, and the general design criteria for emergency core cooling, containment heat removal, and atmosphere cleanup for the use of a risk-informed analysis to evaluate the effects of debris in containment following a loss-of-coolant accident (LOCA) for the South Texas Project (STP), Units 1 and 2, located in Matagorda County, Texas, Docket Nos. 50–498 and 50–499, respectively. The exemptions are in response to a request dated June 19,

2013, from the STP Nuclear Operating Company (STPNOC, the licensee) related to STPNOC's proposed approach to resolve a generic safety concern for pressurized water reactors (PWRs) associated with potential clogging of emergency core cooling and containment spray system strainers during certain design basis events.

DATES: The exemption was issued on July 11, 2017.

ADDRESSES: Please refer to Docket ID NRC–2016–0092 when contacting the NRC about the availability of information regarding this document. You may obtain publicly-available information related to this document using any of the following methods:

- *Federal Rulemaking Web site:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2016–0092. Address questions about NRC dockets to Carol Gallagher; telephone: 301–415–3463; email: *Carol.Gallagher@nrc.gov.* For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly-available documents online in the ADAMS Public Documents collection at *http://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''*ADAMS Public Documents*'' and then select ''*Begin Web-based ADAMS Search.*'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* For the convenience of the reader, the ADAMS accession numbers are provided in a table in the ''Availability of Documents'' section of this document.
- *NRC's PDR:* You may examine and purchase copies of public documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

FOR FURTHER INFORMATION CONTACT: Lisa Regner, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington DC 20555–0001; telephone: 301–415–1906, email: *Lisa.Regner@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

The licensee is the holder of Facility Operating License Nos. NPF–76 and NPF–80, which authorize operation of the STP Units 1 and 2, respectively. The licenses provide, among other things, that the facility is subject to all rules, regulations, and orders of the NRC now or hereafter in effect. The facility consists of two PWRs located in Matagorda County, Texas.

In 1996, the NRC identified Generic Safety Issue (GSI)-191 associated with the effects of debris accumulation on PWR sump performance during design-basis accidents. As part of the actions to resolve GSI–191, the NRC issued Generic Letter (GL) 2004–02, ''Potential Impact of Debris Blockage on Emergency Recirculation during Design Basis Accidents at Pressurized-Water Reactors,'' dated September 13, 2004, to holders of operating licenses for PWRs. In GL 2004–02, the NRC staff requested that licensees perform an evaluation of their emergency core cooling systems (ECCS) and containment spray system (CSS) recirculation functions considering the potential for debris-laden coolant to be circulated by the ECCS and the CSS after a LOCA or high energy line break inside containment and, if appropriate, take additional actions to ensure system function. The GL required that licensees provide a written response to the NRC, pursuant to section 50.54(f) of title 10 of the *Code of Federal Regulations* (10 CFR), describing the results of their evaluation and any modifications made, or planned, to ensure the ECCS and CSS remain functional.

II. Request/Action

By letter dated June 19, 2013, as supplemented by letters dated August 20, 2015, and April 13, 2016, STPNOC submitted requests for exemptions pursuant to 10 CFR 50.12, ''Specific exemptions,'' from the requirements of 10 CFR 50.46, ''Acceptance criteria for emergency core cooling systems for light-water nuclear power reactors,'' and 10 CFR part 50, appendix A, General Design Criterion (GDC) 35, ''Emergency core cooling,'' GDC 38, ''Containment heat removal,'' and GDC 41, ''Containment atmosphere cleanup,'' to use a risk-informed methodology instead of the traditional deterministic methodology, to resolve the concerns associated with GSI–191 and respond to GL 2004–02.

Specifically, the licensee requested an exemption from 10 CFR 50.46(a)(1)(i), which, in part, requires ECCS cooling performance to be calculated in accordance with an acceptable evaluation model, as described in 10 CFR 50.46(a)(1), for postulated LOCAs of different sizes, locations and other properties sufficient to provide assurance that the most severe LOCAs are evaluated in order to demonstrate that acceptance criteria in 10 CFR 50.46(b) are met. The NRC staff interprets 10 CFR 50.46(a)(1) requirement to calculate ECCS performance for ''other properties'' as requiring licensees to consider the impacts of debris generation and transport in containment. The most significant form of debris in nuclear power reactor containments is piping and component insulation that becomes debris during LOCAs, is transported and accumulates in the sumps, and clogs the sumps strainers, thus creating resistance to coolant flow. Fibrous debris from this insulation can also enter the reactor core and directly impede heat transfer from the fuel to the coolant. The licensee also requested exemptions from GDC 35, which contain ECCS performance requirements, and GDCs 38 and 41, which respectively set performance requirements for reactor containment heat removal following a LOCA and for containment atmosphere cleanup following postulated accidents.

The approval of a risk-informed methodology would require exemptions from 10 CFR 50.46(a)(1)(i) and GDCs 35, 38, and 41 because the NRC has interpreted these regulations as requiring a deterministic approach and bounding calculation to show compliance with ECCS and CSS performance criteria in 10 CFR 50.46(b) and GDCs 35, 38 and 41. Issuance of exemptions is an appropriate means to grant relief from the use of a deterministic approach to show compliance with these requirements.

The licensee's 10 CFR 50.46 deterministic analysis considered the debris in containment and demonstrated that the debris loading could prevent acceptable ECCS and CSS operation and core cooling for certain pipe ruptures. Based on its analysis, the licensee concluded that the amount of debris in the STP containment would need to be reduced to demonstrate compliance with 10 CFR 50.46 criteria using a deterministic analysis for certain large-break LOCA sizes because, for those breaks, the plant-specific testing threshold for generation and transport of debris was exceeded.

Additionally, the licensee's deterministic thermal-hydraulic (TH) analysis could not show that hot-leg LOCAs greater than 16 inches could maintain adequate cooling. While not all large-break hot-leg LOCAs resulted in a loss of in-core cooling due to strainer blockage, the licensee categorized all hot-leg breaks greater than 16 inches as assumed to fail in order to simplify the TH analysis.

The licensee requested exemptions from the requirement to use a deterministic analysis for specific scenarios of LOCA breaks producing and transporting debris in excess of the plant-specific tested debris limits and

for large hot-leg breaks. Since it determined that the probability of consequences from debris effects is very low, the licensee requested an exemption to use a risk-informed analysis to show adequate assurance of ECCS and CSS functionality, in accordance with the criteria in Regulatory Guide (RG) 1.174, ''An Approach for Using Probabilistic Risk Assessment in Risk-Informed Decisions on Plant-Specific Changes to the Licensing Basis.'' The RG 1.174 was developed in consideration of the Commission's Policy Statements on safety goals and the use of probabilistic risk assessment methods in nuclear regulatory activities (''Safety Goals for the Operations of Nuclear Power Plants; Policy Statement,'' August 4, 1986, 51 FR 30028; and ''Use of Probabilistic Risk Assessment Methods in Nuclear Activities; Final Policy Statement,'' August 16, 1995, 60 FR 42622, respectively). Therefore, RG 1.174 provides an acceptable method for licensees and NRC staff to use in assessing the impact of licensing basis changes when the licensee chooses to use risk information.

The GDC 35, in part, requires that the ECCS safety system functions adequately to transfer heat from the reactor core following a LOCA and in the presence of a worst single failure, at a rate such that (a) fuel and clad damage that could interfere with continued effective core cooling is prevented and (b) clad metal-water reactor is limited to negligible amounts. The licensee stated in its submittal that the function of the ECCS emergency sump is assumed to fail for debris that exceeds the amount determined in acceptable plant-specific testing. Failure of the sump and strainers result in loss of cooling to the core. The licensee requested an exemption from the deterministic requirements of GDC 35 to use a risk-informed approach to show ECCS function for those LOCA breaks that exceed the plant-specific testing debris threshold, and for large hot-leg breaks. The use of a risk-informed analysis, in accordance with the criteria in RG 1.174, would allow the licensee to show that the risk from debris effects is very low.

The GDC 38 requires containment heat removal, rapid reduction of containment pressure and temperature, and maintenance of pressure and temperature at an acceptably low level following a LOCA, and in the presence of a single failure, to preserve containment function. The STPNOC proposed that an exemption be granted from the deterministic requirements in GDC 38, for those LOCA breaks that exceed the plant-specific testing debris threshold. Current STP design basis calculations are based on the reactor containment fan coolers functioning in conjunction with the CSS and ECCS, both of which can be affected by debris. Using deterministic assumptions, STPNOC's analysis and testing does not assure that the emergency sump strainers will be available to support the CSS and ECCS function considering the effects of debris produced by those breaks that can generate and transport debris amounts greater than the plant-specific testing threshold. The licensee requested an exemption from the deterministic requirements of GDC 38 to use a risk-informed analysis, in accordance with the criteria in RG 1.174, to show that the risk from debris effects is very low.

The GDC 41, in part, requires containment atmosphere cleanup to control substances that may be released into the reactor containment, to reduce the concentration and quality of fission products released to the environment following postulated accidents, and to control the concentration of hydrogen or oxygen and other substances in the containment atmosphere following postulated accidents, assuming a single failure. The licensee stated that using deterministic assumptions, STPNOC's analysis and testing cannot demonstrate that the emergency sump strainers will be available to support the CSS function considering the effects of debris produced and transported by breaks not bounded by acceptable plant-specific testing. The licensee requested an exemption from the deterministic requirements of GDC 41 to use a risk-informed analysis, in accordance with the criteria in RG 1.174, to show that the risk from debris effects is very low.

III. Discussion

Pursuant to 10 CFR 50.12, the Commission may, upon application by any interested person or upon its own initiative, grant exemptions from the requirements of 10 CFR part 50, when (1) the exemptions are authorized by law, will not present an undue risk to public health or safety, and are consistent with the common defense and security; and (2) when special circumstances are present. Under 10 CFR 50.12(a)(2)(ii), special circumstances are present ''when application of the regulation in the particular circumstances would not serve the underlying purpose of the rule or is not necessary to achieve the underlying purpose of the rule.''

The licensee proposed to use a risk-informed methodology instead of a deterministic approach to account for the effects of debris in containment for portions of the LOCA analysis applicable to breaks that exceed the STP plant-specific debris testing threshold and large hot-leg piping breaks. The STPNOC methodology, termed Risk over Deterministic, or RoverD, divides the loss of core cooling design-basis analysis into two portions: the ''deterministic analysis'' and the ''risk-informed analysis.'' The risk-informed analysis is used by the licensee for breaks that generate and transport debris exceeding the plant-specific testing threshold. These breaks result in low density fiber glass fiber fines estimated to arrive in the ECCS sump post-LOCA in amounts that are equal to or greater than the amount of fines used in acceptable strainer testing. The acceptable limit was determined using testing methods intended to determine the maximum ECCS strainer head loss for the tested condition.

Also, the licensee evaluated the in-core TH aspects of fibrous debris to prevent adequate fuel cooling, finding that hot-leg breaks greater than 16 inches have the potential to prevent adequate in-core cooling. In order to simplify its TH evaluation, the licensee assumed that all large breaks greater than 16 inches in the hot-leg will result in the loss of the cooling function. For ECCS and CSS analyses other than the postulated large-break LOCAs in the hot-leg piping in containment and those breaks that exceed the STP plant-specific testing limit, STPNOC applied a deterministic methodology. If the exemptions were granted for these postulated breaks, the requirement to use a deterministic methodology for all other postulated LOCA breaks would continue to apply.

A. Special Circumstances

Under the regulations in 10 CFR 50.12, the Commission may grant exemptions from the requirements of 10 CFR part 50 provided certain findings are made; namely, that special circumstances are present, the exemptions present no undue risk to public health and safety, the exemptions are consistent with the common defense and security, and the exemptions are authorized by law. The exemptions would allow the licensee to use a risk-informed methodology to show compliance with 10 CFR 50.46(b), and GDCs 35, 38, and 41, specifically for the analyses of debris in containment impacting emergency cooling function during postulated large-break hot-leg LOCAs and those breaks that exceed the plant-specific testing threshold.

The licensee requested exemptions citing the special circumstances criteria

of 10 CFR 50.12(a)(2)(ii), because compliance in the particular circumstances would not serve the underlying purpose of the rule or is not necessary to achieve the underlying purpose of the rule. The licensee stated that these special circumstances are common to all of the requested exemptions.

The licensee stated that an objective of each of the regulations for which an exemption is proposed is to maintain low risk to the public health and safety through the adequate functioning of the ECCS and CSS safety systems. These systems must be supported by adequate functioning of the containment sumps. The regulations in 10 CFR 50.46(a)(1)(i) and GDCs 35, 38, and 41 are met when the licensee is able to demonstrate, using a bounding calculation or other deterministic method that the ECCS and CSS are capable of functioning during design basis events. The STPNOC stated that its risk-informed analysis to show adequate functioning of ECCS and CSS considering the impacts of debris during certain LOCA events demonstrates that the risk of failure of these systems is very small. The licensee stated that special circumstances exist because the underlying intent of the regulations, to ensure adequate protection of public health and safety is met when applying a risk-informed approach to address GSI–191 and respond to GL 2004–02. Further, it states that the risk-informed approach is consistent with RG 1.174, and supports operation of those functions with a high degree of reliability. Thus, the licensee concludes that the underlying intent of each regulation is met and the special circumstances described in 10 CFR 50.12(a)(2)(ii) apply to each of the exemptions proposed by STPNOC.

The NRC staff evaluated the STPNOC submittal and supplements, and discussed the details of its evaluation of the risk-informed approach in an NRC safety evaluation available in ADAMS under Accession No. ML17019A001. Although 10 CFR 50.46(a)(1) requires a deterministic approach, the GDCs do not specify that a risk-informed methodology may not be used to show compliance; however, because the NRC has interpreted each of these regulations as requiring a deterministic approach, an exemption is an appropriate means to grant the licensee relief to use an alternative approach. The underlying purpose of each regulation is to protect public health and safety in the event of a LOCA by establishing criteria for emergency core cooling, containment cooling and containment atmosphere cleanup system performance. In its safety evaluation, the NRC staff concluded, in part, that the licensee adequately demonstrated that the change in risk attributable to debris in postulated hot-leg LOCAs greater than 16 inches, and those breaks that exceed the plant specific threshold, is very small. The NRC staff also concluded that the licensee's proposal for demonstrating compliance with the ECCS and CSS performance requirements meet the risk acceptance guidelines in RG 1.174 because the approach is related to a permissible exemption request, is consistent with defense-in-depth philosophy, maintains sufficient safety margins, results in a small increase in risk, and the impact of this approach is monitored by the licensee using performance measurement strategies. Therefore, the licensee's use of the risk-informed analysis to consider the impacts of debris meets the underlying requirements of 10 CFR 50.46 and GDCs 35, 38, and 41, to ensure that a licensee demonstrates that the ECCS and CSS will provide adequate cooling for the reactor core and containment, as well as containment atmosphere cleanup following postulated design-basis accidents.

Based on the above, the NRC staff concludes that special circumstances under 10 CFR 50.12(a)(2)(ii) exist because compliance with the deterministic requirements of 10 CFR 50.46(a)(1)(i), and GDCs 35, 38, and 41 is not necessary to achieve the underlying purpose of each rule.

B. The Exemption Presents No Undue Risk to Public Health and Safety

The provisions of 10 CFR 50.46 and GDCs 35, 38, and 41 establish criteria for the emergency core cooling, containment cooling, and containment atmosphere cleanup system performance. As part of the amendment requests, the STPNOC submitted exemption requests to change its design-basis analysis specified in the Updated Final Safety Analysis Report (UFSAR) to use new risk-informed and deterministic methodologies to specifically account for the impacts of debris in containment. The licensee justified its use of the risk-informed approach by stating that the proposed risk-informed approach meets the key principles in RG 1.174 in that it is consistent with defense-in-depth philosophy, maintains sufficient safety margins, results in a small increase in risk, and is monitored by the licensee using performance measurement strategies.

Additionally, the licensee stated that the proposed exemptions to use the risk-informed method are consistent with Key Principle 1 in RG 1.174 that requires a proposed change to the licensing basis (or amendment) to meet current regulations unless the change is explicitly related to a requested exemption. The licensee's probabilistic risk analysis results provided by the licensee and evaluated by the NRC staff in its safety evaluation, showed that the increase in risk associated with debris generation and transport on ECCS and CSS function following postulated LOCAs is very low, in accordance with the criteria in RG 1.174.

The NRC staff concluded that the risk is consistent with the guidance in RG 1.174 and with the Commission policy statements on safety goals and the use of probabilistic risk assessment methods in nuclear regulatory activities; therefore, the requested exemption presents no undue risk to public health and safety.

C. The Exemption Is Consistent With the Common Defense and Security

The requested exemptions to use a risk-informed methodology allow STPNOC to resolve a generic safety concern for PWRs associated with potential clogging of the ECCS and CSS strainers during certain design-basis events. The change is adequately controlled by safety acceptance criteria and technical specification requirements and is not related to security issues. Because the common defense and security is not impacted by the exemption, the exemption is consistent with the common defense and security.

D. The Exemptions Are Authorized by Law

The exemptions to use a risk-informed methodology allow STPNOC to show compliance with 10 CFR 50.46(a)(1)(i), and GDCs 35, 38, and 41, when considering debris in containment generated and transported during postulated hot-leg LOCA breaks greater than 16 inches, and those breaks that exceed the plant-specific testing threshold. These regulations were promulgated under, and are consistent with the Commission's authority under Section 161 of the Atomic Energy Act. Because the application of a risk-informed methodology to show compliance with 10 CFR 50.46, and GDC 35, 38, and 41 would not violate the Atomic Energy Act of 1954, as amended, or the Commission's regulations, the exemptions are authorized by law provided all requisite findings are made.

E. Environmental Considerations

Pursuant to 10 CFR 51.21, ''Criteria for and identification of licensing and regulatory actions requiring environmental assessments,'' the NRC has prepared an Environmental Assessment (EA) summarizing the findings of its review of the environmental impacts of the proposed action under the National Environmental Policy Act. The NRC staff determined that special circumstances under 10 CFR 51.21 exist to warrant preparation of an EA because STP is the pilot plant to propose a risk-informed approach to resolve GSI–191 as recognized in Staff Requirement Memorandum SECY–12–0093, ''Closure Options for Generic Safety Issue–191, Assessment of Debris Accumulation on Pressurized-Water Reactor Sump Performance,'' dated December 14, 2012. Because this is the first approval of a risk-informed approach, the NRC staff considered preparations of an EA to be a prudent course of action that would further the purposes of the National Environmental Policy Act. Based on its review, the NRC concluded that an environmental impact statement is not required and that the proposed action will have no significant impact on the environment.

The NRC published a final EA on the proposed action in the **Federal Register** on May 9, 2017 (82 FR 21568).

IV. Conclusions

Accordingly, the Commission has determined that, pursuant to 10 CFR 50.12, exemptions are authorized by law, will not present an undue risk to the public health and safety, are consistent with the common defense and security, and special circumstances are present pursuant to 10 CFR 50.12(a)(2)(ii). Therefore, the NRC hereby grants STPNOC a one-time exemption from 10 CFR 50.46(a)(1), and 10 CFR part 50, appendix A, GDCs 35, 38, and 41 to use a risk-informed methodology in lieu of a deterministic methodology to show conformance with the ECCS and CSS performance criteria accounting for debris in containment for large-break hot-leg LOCAs and those breaks that exceed the plant-specific STP testing threshold.

V. Availability of Documents

The documents identified in the following table are available for public inspection through the NRC's Agencywide Documents Access and Management System (ADAMS).

Title	Date	ADAMS accession No.
NRC Generic Letter 2004–02, Potential Impact of Debris Blockage on Emergency Recirculation During Design Basis Accidents at Pressurized-Water Reactors	9/13/2004	ML042360586
STPNOC letter to NRC, Revised STP Pilot Submittal and Requests for Exemptions and License Amendment for a Risk-Informed Approach to Resolving Generic Safety Issue (GSI)-191	6/19/2013	ML131750250 (Package)
STPNOC letter to NRC, Supplement 2 to STP Pilot Submittal and Requests for Exemptions and License Amendment for a Risk-Informed Approach to Address Generic Safety Issue (GSI)-191 and Respond to Generic Letter (GL) 2004–02	8/20/15	ML15246A125 (Package)
STPNOC letter to NRC, South Texas Project, Units 1 and 2—Revision to Proposed Exemption to 10 CFR 50.46 Described in Pilot Submittal and Requests for Exemptions and License Amendment for a Risk-Informed Approach to Address Generic Safety Issue (GSI)-191 and Respond to Generic Letter (GL) 2004–02	4/13/2016	ML16111B204
Regulatory Guide 1.174, Revision 2, ''An Approach for Using Probabilistic Risk Assessment in Risk-Informed Decisions on Plant-Specific Changes to the Licensing Basis''	5/2011	ML100910006
NRC letter to STPNOC, South Texas Project, Units 1 and 2—Issuance of Amendment Nos. 212 and 198—Risk-Informed Approach to Resolve Generic Safety Issue-191 (includes Safety Evaluation)	7/11/2017	ML17019A001 (Package)
Commission SRM–SECY–12–0093, Staff Requirements—SECY–12–0093—Closure Options for Generic Safety Issue—191, Assessment of Debris Accumulation on Pressurized-Water Reactor Sump Performance	12/14/2012	ML12349A378
NRC Letter to STPNOC, South Texas Project, Units 1 and 2—Letter, Environmental Assessment and Finding of No Significant Impact, Revise Licensing Basis as Documented in the UFSAR and Request for Exemptions, Risk-Informed approach to Address GSI-191	5/02/2017	ML16278A598

Dated at Rockville, Maryland, this 11th day of July 2017.

For the Nuclear Regulatory Commission.

Eric J. Benner,

Deputy Director, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. 2017–15136 Filed 7–18–17; 8:45 am]

BILLING CODE 7590–01–P

PENSION BENEFIT GUARANTY CORPORATION

Proposed Submission of Information Collection for OMB Review; Comment Request; Annual Reporting (Form 5500 Series)

AGENCY: Pension Benefit Guaranty Corporation.

ACTION: Notice of request for extension of OMB approval without change.

SUMMARY: The Pension Benefit Guaranty Corporation (PBGC) is requesting that the Office of Management and Budget (OMB) extend approval without change, under the Paperwork Reduction Act of 1995, of its collection of information for Annual Reporting (OMB control number 1212–0057, expires July 31, 2017). This notice informs the public of PBGC's request and solicits public comment on the collection of information.

DATES: Comments must be submitted by August 18, 2017.

ADDRESSES: Comments should be sent to the Office of Informatioon and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for Pension Benefit Guaranty Corporation, via electronic mail at *OIRA_DOCKET@omb.eop.gov* or by fax to (202) 395–6974. A copy of the request will be posted at *https://www.pbgc.gov/prac/pg/other/guidance/paperwork-notices*. It may also be obtained without charge by writing to the Disclosure Division of the Office of the General Counsel, Pension Benefit Guaranty Corporation, 1200 K Street NW., Washington, DC 20005, or calling 202–326–4040 during normal business hours. TTY and TDD users may call the Federal relay service toll-free at 1 800–877–8339 and ask to be connected to 202–326–4040.

FOR FURTHER INFORMATION CONTACT: Jo Amato Burns (*burns.jo.amato@pbgc.gov*), Regulatory Affairs Group, Office of the General Counsel, Pension Benefit Guaranty Corporation, 1200 K Street NW., Washington, DC 20005, 202–326–4400, extension 3072, or Deborah Chase Murphy (*murphy.deborah@pbgc.gov*), Assistant General Counsel, same address and phone number, extension 3451. TTY and TDD users may call the Federal relay service toll-free at 800–877–8339

and ask to be connected to 202–326–4400, extension 3072 or extension 3451.

SUPPLEMENTARY INFORMATION: The Employee Retirement Income Security Act of 1974 (ERISA) contains three separate sets of provisions—in Title I (Labor provisions), Title II (Internal Revenue Code provisions), and Title IV (PBGC provisions)—requiring administrators of employee pension and welfare benefit plans (collectively referred to as employee benefit plans) to file returns or reports annually with the federal government.

PBGC, the Department of Labor (DOL), and the Internal Revenue Service (IRS) work together to produce the Form 5500 Annual Return/Report for Employee Benefit Plan and Form 5500–SF Short Form Annual Return/Report for Small Employee Benefit Plan (Form 5500 Series), through which the regulated public can satisfy the combined reporting/filing requirements applicable to employee benefit plans.

The collection of information has been approved by OMB under control number 1212–0057 through July 31, 2017. PBGC is requesting that OMB extend its approval for another three years without change. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

On May 1, 2017 (82 FR 20396), PBGC published a notice informing the public that it intended to request OMB approval and soliciting public comment. Only one comment was received and it supported the information collection.

Estimates are that PBGC will receive approximately 23,700 filings per year under this collection of information. PBGC further estimates that the total annual burden of this collection of information will be 1,200 hours and $1,655,000.

Issued in Washington, DC.

Deborah Chase Murphy,

Assistant General Counsel for Regulatory Affairs, Pension Benefit Guaranty Corporation.

[FR Doc. 2017–15111 Filed 7–18–17; 8:45 am]

BILLING CODE 7709–02–P

POSTAL REGULATORY COMMISSION

[Docket Nos. MC2017–158 and CP2017–222]

New Postal Products

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing a recent Postal Service filing 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:* July 21, 2017.

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
II. Docketed Proceeding(s)

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).:* MC2017–158 and CP2017–222; *Filing Title:* Request of the United States Postal Service to Add Priority Mail Contract 334 to Competitive Product List and Notice of Filing (Under Seal) of Unredacted Governors' Decision, Contract, and Supporting Data; *Filing Acceptance Date:* July 13, 2017; *Filing Authority:* 39 U.S.C. 3642 and 39 CFR 3020.30 *et seq.; Public Representative:* Jennaca D. Upperman; *Comments Due:* July 21, 2017.

This notice will be published in the **Federal Register**.

Stacy L. Ruble,

Secretary.

[FR Doc. 2017–15160 Filed 7–18–17; 8:45 am]

BILLING CODE 7710–FW–P

POSTAL REGULATORY COMMISSION

[Docket No. CP2016–35]

New Postal Products

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing a recent Postal Service filing 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:* July 20, 2017.

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).:* CP2016–35; *Filing Title:* Notice of United States Postal Service of Amendment to Priority Mail Contract 160, with Portions Filed Under Seal; *Filing Acceptance Date:* July 12, 2017; *Filing Authority:* 39 CFR 3015.5; *Public Representative:* Kenneth R. Moeller; *Comments Due:* July 20, 2017.

This notice will be published in the **Federal Register**.

Ruth Ann Abrams,

Acting Secretary.

[FR Doc. 2017–15079 Filed 7–18–17; 8:45 am]

BILLING CODE 7710–FW–P

POSTAL SERVICE

Notice of Availability: Draft Programmatic Environmental Assessment for Commercial Off-the-Shelf Vehicle Acquisitions, Nationwide

AGENCY: Postal Service.

ACTION: Notice of availability of a Programmatic Environmental Assessment.

SUMMARY: To comply with the requirements of the National Environmental Policy Act (NEPA), the Postal Service has prepared and is making available for comments a Draft Programmatic Environmental Assessment (PEA) for Commercial Off-the-Shelf (COTS) Vehicle Acquisitions (the Proposed Action), which is national in scope. This PEA evaluated the environmental impacts of the Proposed Action and an Alternative Action versus taking No Action. The Draft PEA can be reviewed online at *http://about.usps.com/what-we-are-doing/green/pdf/cots-pea.pdf.*

DATES: Comments should be received no later than 5:00 p.m. ET, August 3, 2017.

ADDRESSES: Direct written comments to: Davon Collins, Environmental Counsel, U.S. Postal Service, Room 6333, 475 L'Enfant Plaza SW., Washington, DC 20260, email *davon.m.collins@usps.gov.*

FOR FURTHER INFORMATION CONTACT: Davon M. Collins, (202) 268–4570.

SUPPLEMENTARY INFORMATION: To stabilize its delivery fleet pending the development of a longer-term solution to its vehicle needs and in furtherance of its statutory Universal Service Obligation, the Postal Service is considering the purchase of an estimated 26,000 COTS delivery vehicles to accommodate route growth over the next three years, and to replace accident-damaged, aged and high-maintenance-cost vehicles.

Pursuant to the requirements of NEPA, the Postal Service's implementing procedures at 39 CFR 775, and the President's Council on Environmental Quality Regulations (40 CFR parts 1500–1508), the Postal Service has prepared a PEA to evaluate the environmental impacts of the following three actions on the physical, biological, cultural, and socioeconomic environments. To assist in this process, the Postal Service is soliciting the public's input and comments.

The *Proposed Action* would accommodate an increase in delivery points and routes anticipated over each of the next three years through the purchase of an estimated 7,000 new delivery vehicles and establishment of new delivery routes; and replace an estimated 19,000 accident-damaged, aged and high-maintenance-cost delivery vehicles, and aged minivans with new COTS vehicles. The *Alternative Action* would accommodate the expected increase in routes through the lease of additional vehicles, and provide for replacement of high-maintenance-cost and aged vehicles with leased vehicles. Under the *No Action Alternative,* the Postal Service would not implement the COTS Vehicle Acquisitions. The existing delivery fleet would be maintained at the status quo; existing delivery vehicles would continue to be used and incur increasingly higher maintenance costs as the vehicles continued to age; and existing delivery routes would be expanded to address annual city and rural delivery growth, incurring additional mileage and corresponding increased costs for maintenance and repair ofexisting vehicles.

The Draft PEA concludes that the Proposed Action would not result in significant adverse impacts on the physical, biological, cultural, and socioeconomic environments. The Proposed Action would result in beneficial impacts to current air quality nationwide, as the new vehicles would have better emission controls than the vehicles being replaced, and therefore decrease emissions as compared with the No Action Alternative, and at a significantly lower cost than the Alternative Action. Adverse impacts to other aspects of the environment such as biological, water, and cultural resources; energy resources; waste management; and community services would be minor to insignificant. The Proposed Action would also have an insignificant but beneficial socioeconomic impact nationwide, as new hires and additional related material purchases would produce beneficial economic results.

Unless substantive comments are received during the 15-day comment period and significant issues are identified, the Postal Service will finalize the PEA, issue a Finding of No Significant Impact (FONSI), and proceed with the project. Should a FONSI be issued, it will be available for public viewing at *http://about.usps.com/what-we-are-doing/green/welcome.htm,* and the Postal Service would not publish another notice for this project. In the event significant issues are identified, the Postal Service will either issue a Mitigated FONSI, listing required mitigation measures, or publish a new

Notice of Intent to prepare an Environmental Impact Statement.

Stanley F. Mires,

Attorney, Federal Compliance.

[FR Doc. 2017–15082 Filed 7–18–17; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of notice required under 39 U.S.C. 3642(d)(1):* July 19, 2017.

FOR FURTHER INFORMATION CONTACT: Maria W. Votsch, 202–268–6525.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on July 13, 2017, it filed with the Postal Regulatory Commission a *Request of the United States Postal Service to Add Priority Mail Contract 334 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2017–158, CP2017–222.

Stanley F. Mires,

Attorney, Federal Compliance.

[FR Doc. 2017–15081 Filed 7–18–17; 8:45 am]

BILLING CODE 7710–12–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–81136; File No. SR–GEMX–2017–29]

Self-Regulatory Organizations; Nasdaq GEMX, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend the Schedule of Fees To Assess Connectivity Fees

July 13, 2017.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on June 29, 2017, Nasdaq GEMX, LLC (''GEMX'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend the Schedule of Fees to assess fees for OTTO Port, CTI Port, FIX Port, FIX Drop Port and Disaster Recovery Port connectivity, and to provide monthly [sic] cap on those fees of $7,500. The Exchange is also proposing to delete fees and descriptions thereof for connectivity no longer used by the Exchange.

The text of the proposed rule change is available on the Exchange's Web site at *www.ise.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to amend the Schedule of Fees to assess fees for OTTO[3] Port, CTI[4] Port, FIX[5] Port, FIX Drop[6] Port and Disaster Recovery Port[7] connectivity, and to provide a monthly cap on those fees of $7,500. The Exchange recently completed the migration of the Exchange's trading system to the Nasdaq INET architecture.[8] This migration included the adoption of new connectivity, including OTTO, CTI, FIX, FIX Drop, Disaster Recovery Ports, which are the same as connectivity options currently used to connect to the Exchange's affiliates, including Nasdaq Options Market (''NOM''), Nasdaq BX (''BX'') and Nasdaq Phlx (''Phlx'').[9] When the Exchange adopted these new ports it did not assess a fee for them so that members would not be double charged for connectivity to the old Exchange architecture and the new Nasdaq INET architecture.[10]

The Exchange is proposing to amend the Nasdaq GEMX Schedule of Fees Section IV.E.4. to assess a fee of $650 per month, per port, per account number[11] for OTTO, CTI, FIX, and FIX Drop ports. The Exchange is proposing to assess a fee of $50 per month, per port, per account number for Disaster Recovery Ports. The Exchange notes that it is adding ''per account number'' to the fees described above to clarify that

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] OTTO is an interface that allows market participants to connect and send orders, auction orders and auction responses into ISE Gemini [sic]. Data includes the following: (1) Options Auction Notifications (*e.g.,* Flash, PIM, Solicitation and Facilitation or other information); (2) Options Symbol Directory Messages; (3) System Event Messages (*e.g.,* start of messages, start of system hours, start of quoting, start of opening); (5) Option Trading Action Messages (*e.g.,* halts, resumes); (6) Execution Messages; (7) Order Messages (order messages, risk protection triggers or purge notifications).

[4] CTI is a real-time clearing trade update is a message that is sent to a member after an execution has occurred and contains trade details. The message containing the trade details is also simultaneously sent to The Options Clearing Corporation. The information includes, among other things, the following: (i) The Clearing Member Trade Agreement or ''CMTA'' or The Options Clearing Corporation or ''OCC'' number; (ii) Exchange badge or house number; (iii) the Exchange internal firm identifier; and (iv) an indicator which will distinguish electronic and non-electronically delivered orders; (v) liquidity indicators and transaction type for billing purposes; (vi) capacity.

[5] FIX is an interface that allows market participants to connect and send orders and auction orders into ISE Gemini [sic]. Data includes the following: (1) Options Symbol Directory Messages; (2) System Event Messages (*e.g.,* start of messages, start of system hours, start of quoting, start of opening); (3) Option Trading Action Messages (*e.g.,* halts, resumes); (4) Execution Messages; (5) Order Messages (order messages, risk protection triggers or purge notifications).

[6] FIX Drop is a real-time order and execution update is a message that is sent to a member after an order been received/modified or an execution has occurred and contains trade details. The information includes, among other things, the following: (1) Executions, (2) cancellations, (3) modifications to an existing order, (4) busts or post-trade corrections.

[7] Disaster Recovery ports provide connectivity to the exchange's disaster recovery data center in Chicago to be utilized in the event the exchange has to fail over during the trading day. DR Ports are available for SQF, SQF Purge, CTI, OTTO, FIX and FIX Drop.

[8] *See* Securities Exchange Act Release No. 80011 (February 10, 2017), 82 FR 10927 (February 16, 2017) (SR–ISEGemini–2016–17).

[9] *See* NOM Rules, Chapter XV Options Pricing, Sec. 3 NOM—Ports and other Services; BX Rules, Chapter XV Options Pricing, Sec. 3 BX—Ports and other Services; and Phlx Pricing Schedule, VII. Other Member Fees, B. Port Fees.

[10] *See* Securities Exchange Act Release No. 80213 (March 10, 2017), 82 FR 14066, 37499 [sic] (March 16, 2017) (SR–ISEGemini–2017–10).

[11] Account numbers are used to identify member order entry ports.

billing for the ports is also based on account numbers, which allows the Exchange to identify the members that are fee liable for the port. The Exchange notes that this is similar to how the Exchange's sister exchanges bill these fees.[12] Last, the Exchange is proposing to limit the total amount of fees paid for these ports by applying a $7,500 monthly fee cap per member.

The Exchange is also proposing to delete ''Market Makers API Quoting, Order Entry and Listening'' and its associated $100 per month, per API fee from Nasdaq GEMX Schedule of Fees Section IV.E.1., and ''Nasdaq GEMX Only'' and its associated $100 per session, per month fee from Nasdaq GEMX Schedule of Fees Section IV.E.2. (EAM Options API).[13] The Exchange notes that both of these connectivity options are no longer available on the Exchange post-migration.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[14] in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,[15] in particular, in that it provides for the equitable allocation of reasonable dues, fees, and other charges among members and issuers and other persons using any facility, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange believes that the proposed fees are reasonable because they are similar to the fees assessed by other exchanges. As noted above, NOM, BX and Phlx provide some or all of the same connectivity options. For example, Nasdaq assesses a fee of $750 per port, per month for OTTO Ports, $650 per port, per month for CTI, FIX (order entry) Ports and FIX Drop Ports. Moreover, Nasdaq assesses a fee of $25 per port, per month for equities Disaster recovery ports (OUCH, RASH, and DROP).[16] Although the proposed Disaster Recovery port fee is higher than the fee assessed by Nasdaq, the higher fee is reasonable because it reflects the ongoing costs in maintaining and supporting the ports, as well as the initial investment in such ports for the Exchange and the fewer subscribers among which it may spread fixed costs associated with offering the ports. As such, the Exchange believes that the proposed fees are consistent with those of other exchanges and therefore reasonable. The Exchange also believes that the proposed $7,500 fee cap is reasonable because, taken together with the proposed new fees, it will allow the Exchange to cover costs while reducing the impact of the fees on members that subscribe to a large number of ports. Because members generally need an increasing number of ports as provided under the Nasdaq GEMX Schedule of Fees Section IV.E.4. as their activity expands on the Exchange, the Exchange believes that without such a cap members may be inhibited from growing their activity on the Exchange. As a general principal, the Exchange believes that greater participation on the Exchange by members improves market quality for all market participants. Thus, in arriving at a fee cap of $7,500, the Exchange balanced the desire to improve market quality against the need to cover costs and make a profit. Last, the Exchange notes that BX provides its options participants a $7,500 per month fee cap for its options market connectivity.[17]

The Exchange believes that the proposed fees are an equitable allocation and are not unfairly discriminatory because the Exchange must ultimately assesses [sic] fees to cover the costs associated with offering the connectivity. The Exchange notes that members have historically paid fees for Exchange connectivity and, in adopting the connectivity for which the Exchange is proposing to assess a fee, it noted that it was not adopting a fee at that time to avoid being double charged for connectivity to the old Exchange architecture and the new Nasdaq INET architecture. Now that members no longer have connectivity to the old Exchange architecture, and therefore are not assessed connectivity fees, the Exchange is now proposing to assess fees for connectivity to the new Nasdaq INET architecture of the Exchange. The Exchange believes that the proposed $7,500 fee cap is an equitable allocation and is not unfairly discriminatory because the [sic] any member that subscribes to connectivity under the rule that would otherwise exceed $7,500 per month will have its fees capped. Although members that do not have fees under the rule in excess of $7,500 per month will not benefit from the fee cap, the Exchange notes that any member may increase the number of ports subscribed to receive the fee cap, should their activity on the Exchange warrant increased subscription. Moreover, members that do not qualify for the fee cap will benefit from the greater liquidity provided by members that conduct a sufficient level of activity on the Exchange to require connectivity in excess of the fee cap. For these reasons, the Exchange believes that the proposed fees are an equitable allocation and are not unfairly discriminatory.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. In terms of inter-market competition, the Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive, or rebate opportunities available at other venues to be more favorable. In such an environment, the Exchange must continually adjust its fees to remain competitive with other exchanges and with alternative trading systems that have been exempted from compliance with the statutory standards applicable to exchanges. Because competitors are free to modify their own fees in response, and because market participants may connect to third parties instead of directly connecting to the Exchange, the Exchange believes that the degree to which fee changes in this market may impose any burden on competition is extremely limited.

In this instance, the proposed changes to the charges assessed for connectivity to the Exchange are consistent with the fees assessed by other exchanges for the same or similar connectivity. Moreover, the Exchange must assess fees to cover the costs incurred in providing connectivity and members had been assessed fees for Exchange connectivity prior to the sunset of the old Exchange architecture. As a consequence, competition will not be burdened by the proposed fees. In sum, if the changes proposed herein are unattractive to market participants, it is likely that the Exchange will lose market share as a result. Accordingly, the Exchange does not believe that the proposed changes will impair the ability of members or competing order execution venues to maintain their competitive standing in the financial markets.

[12] *See, e.g.,* NOM Rules, Chapter XV Options Pricing, Section 3(b) (billing per port, per month, per mnemonic).

[13] The Exchange is retaining Nasdaq GEMX and Nasdaq ISE connectivity until ISE connectivity is migrated, which the Exchange anticipates will occur in the third quarter 2017.

[14] 15 U.S.C. 78f(b).

[15] 15 U.S.C. 78f(b)(4) and (5).

[16] *See* Rule 7015(g)(2).

[17] *See* BX Rules, Chapter XV Options Pricing, Sec. 3(b).

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.[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: (i) Necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

• Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or

• Send an email to *rule-comments@sec.gov.* Please include File Number SR–GEMX–2017–29 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–GEMX–2017–29. 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–GEMX–2017–29, and should be submitted on or before August 9, 2017.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[19]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 2017–15097 Filed 7–18–17; 8:45 am]

BILLING CODE 8011–01–P

[18] 15 U.S.C. 78s(b)(3)(A)(ii).

[19] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34- 81137; File No. SR–BatsEDGX–2017–29]

Self-Regulatory Organizations; Bats EDGX Exchange, Inc.; Notice of Filing of a Proposed Rule Change To Adopt New Rules That Describe the Trading of Complex Orders on the Exchange for the Exchange's Equity Options Platform

July 13, 2017.

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 June 30, 2017, 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 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 for the Exchange's equity options platform (''EDGX Options'') to adopt new rules that describe the trading of complex orders on the Exchange.

The text of the proposed rule change is available at the Exchange's Web site at *www.bats.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

Overview

The Exchange proposes to adopt new rules that describe the trading of complex orders on the Exchange. Proposed new Rule 21.20, Complex Orders, details the functionality of the System [3] in the handling of complex orders on the Exchange. The proposed rules are based substantially on similar rules of other exchanges.[4] The Exchange believes that the similarity of its proposed complex order rules to those of other exchanges will allow the Exchange's proposed complex order functionality to fit seamlessly into the greater options marketplace and benefit market participants who are already familiar with similar functionality offered on other exchanges. The Exchange notes that for simplicity it has omitted from its proposal certain functionality that is offered by other options exchanges in connection with their complex order platforms but that the Exchange does not proposed to offer

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The term ''System'' means the automated trading system used by EDGX Options for the trading of options contracts. *See* Exchange Rule 16.1(a)(59).

[4] *See, e.g.,* Chicago Board Options Exchange, Inc. (''CBOE'') Rule 6.53C; C2 Options Exchange, Inc. (''C2'') Rule 6.13; Miami International Securities Exchange (''MIAX'') Rule 518; International Securities Exchange LLC (''ISE'') Rule 722; NYSE MKT LLC (''NYSE MKT'') Rule 980NY; BOX Options Exchange LLC (''BOX'') Rule 7240; NASDAQ OMX PHLX LLC (''PHLX'') Rule 1098; NYSE Arca, Inc. (''NYSEArca'') Rule 6.91.

initially, including stock-option orders and derived orders.

Additionally, the Exchange is proposing to amend Exchange Rule 21.1, Definitions, to add two new Times in Force to be added in conjunction with the proposed change, ''Good Til Cancelled'' (or ''GTC'') and ''At the Open'' (or ''OPG''). The Exchange is also proposing to amend: Exchange Rule 21.15, Data Dissemination, to add references to data feeds to be added in conjunction with the proposed change; and Rule 21.16, Risk Monitor Mechanism, to make clear that complex orders are considered in connection with existing risk protections offered by the Exchange.[5]

Definitions

Proposed Rule 21.20(a) provides definitions of terms that apply to the trading of complex orders, and such terms are used throughout this proposed rule change. The Exchange proposes to specify that for purposes of Rule 21.20, the included terms will have the meanings specified in proposed paragraph (a). A term defined elsewhere in Exchange Rules will have the same meaning with respect to Rule 21.20, unless otherwise defined in paragraph (a). Below is a summary of the proposed definitions.

The term ''ABBO'' means the best bid(s) or offer(s) disseminated by other Eligible Exchanges (as defined in Rule 27.1(a)(7))[6] and calculated by the Exchange based on market information received by the Exchange from OPRA.

The term ''BBO'' means the best bid or offer on the Simple Book (as defined below) on the Exchange.

A ''Complex Order Auction'' or ''COA'' is an auction of a complex order as set forth in proposed Rule 21.20(d), described below.

A ''COA-eligible order'' is a complex order designated to be placed into a Complex Order Auction upon receipt that meets the requirements of Rule 21.20(d)(l), as described below.

A ''complex order'' is any order involving the concurrent purchase and/or sale of two or more different options in the same underlying security (the ''legs'' or ''components'' of the complex order),[7] for the same account, in a ratio that is equal to or greater than one-to-three (.333) and less than or equal to three-to-one (3.00) and for the purposes of executing a particular investment strategy. Only those complex orders in the classes designated by the Exchange and communicated to Members with no more than the applicable number of legs, as determined by the Exchange on a class-by-class basis and communicated to Members, are eligible for processing. The Exchange will communicate this information to Members via specifications and/or a Regulatory Circular.

The ''Complex Order Book'' or ''COB'' is the Exchange's electronic book of complex orders. All Members may submit orders to trade against interest or rest in the COB pursuant to the proposed Rule.

The term ''complex strategy'' means a particular combination of components and their ratios to one another. New complex strategies can be created as the result of the receipt of a complex instrument creation request or complex order for a complex strategy that is not currently in the System. The Exchange is thus proposing two methods to create a new complex strategy, one of which is a message that a Member can send to create the strategy and the other is a message a Member can send that will generate the strategy and that is also an order for that same strategy. These methods will be equally available to all Members but [sic] anticipates that Market Makers and other liquidity providers who anticipate providing larger amounts of trading activity in complex strategies are the most likely to send in a complex instrument creation request (*i.e.,* to prepare for their trading in the complex strategy throughout the day), whereas other participants are more likely to simply send a complex order that simultaneously creates a new strategy. The Exchange may limit the number of new complex strategies that may be in the System at a particular time and will communicate any such limitation to Members via specifications and/or Regulatory Circular.

The term ''NBBO'' means the national best bid or offer as calculated by the Exchange based on market information received by the Exchange from the appropriate Securities Information Processor (''SIP'').[8]

The term ''regular trading'' means trading of complex orders that occurs during a trading session other than: (i) At the opening or re-opening of the COB for trading following a halt, or (ii) during the COA process (as described below and in proposed Rule 21.20(d)).

The ''Simple Book'' is the Exchange's regular electronic book of orders.

The ''Synthetic Best Bid or Offer'' (''SBBO'') is calculated using the best displayed price for each component of a complex strategy from the Simple Book.

The ''Synthetic National Best Bid or Offer'' (''SNBBO'') is calculated using the NBBO for each component of a complex strategy to establish the best net bid and offer for a complex strategy.

Types of Complex Orders

Proposed Rule 21.20(b), Availability of Types of Complex Orders, describes the various types and specific times-in-force for complex orders handled by the System.

As an initial matter, proposed Rule 21.20(b) states that the Exchange will determine and communicate to Members via specifications and/or a Regulatory Circular listing which complex order types, among the complex order types set forth in the proposed Rule, are available for use on the Exchange. Additional information will be issued as additional complex order types, among those complex order types set forth in the proposed Rule, become available for use on the Exchange. Additional information will also be issued when a complex order type that had been in usage on the Exchange will no longer be available for use. This is substantially similar to, and based upon, the manner in which MIAX determines the available order types for its complex order book.[9] The purpose of this provision is to enable the Exchange to modify the complex order types that are available on the Exchange as market conditions change. The Exchange believes that this enhances its ability to remain competitive as markets and market conditions evolve.

Among the complex order types that may be submitted are limit orders and market orders, and orders with a Time in Force of Good Til Day (''GTD''),

[5] The Exchange represents that prior to operating the proposed Complex Order Book it will separately file to propose amendments to Exchange Rule 20.6, Nullification and Adjustment of Options Transactions Including Obvious Errors, to establish the process for handling complex order obvious errors based on the rules of other exchanges that offer complex order functionality. *See, e.g.,* CBOE Rule 6.25, Interpretation and Policy .07.

[6] ''Eligible Exchange'' means a national securities exchange registered with the SEC in accordance with Section 6(a) of the Act that: (a) Is a Participant Exchange in OCC (as that term is defined in Section VII of the OCC by-laws); (b) is a party to the OPRA Plan (as that term is described in Section I of the OPRA Plan); and (c) if the national securities exchange chooses not to become a party to the Options Order Protection and Locked/Crossed Markets Plan, is a participant in another plan approved by the Commission providing for comparable Trade-Through and Locked and Crossed Market protection. *See* Exchange Rule 27.1(a)(7).

[7] The different options in the same underlying security that comprise a particular complex order are referred to as the ''legs'' or ''components'' of the complex order throughout this proposal.

[8] All U.S. exchanges and associations that quote and trade exchange-listed securities must provide their data to a centralized SIP for data consolidation and dissemination. *See* 15 U.S.C. 78c(22)(A).

[9] *See* MIAX Rule 518(b)(1).

Immediate or Cancel (''IOC''), DAY, GTC, or OPG, as such terms are defined in Exchange Rule 21.1(f), as proposed to be amended.[10] In addition, the Exchange proposes to accept the following complex orders: Complex Only orders, COA-eligible orders, do-not-COA orders, and orders with Match Trade Prevention modifiers, as such terms are defined below.

The Exchange proposes to allow orders with a Time in Force of DAY or IOC to only check against the COB (*i.e.,* rather than the COB and the Simple Book) (such orders [sic] ''Complex Only Orders''). Unless designated as Complex Only, and for all other Times in Force, an order will check against both the COB and the Simple Book. The Exchange notes that the Complex Only Order option is analogous to functionality on the MIAX complex order book, which includes certain types of orders and quotes that do not leg into the simple marketplace but instead will only execute against or post to the MIAX complex book.[11] The Exchange also believes the proposed functionality is analogous to other types of functionality already offered by the Exchange that provides Members the ability to direct the Exchange not to route their orders away from the Exchange [12] or not to remove liquidity from the Exchange.[13] Similar to such analogous features, the Exchange believes that Members may utilize Complex Only Order functionality as part of their strategy to maintain additional control over their executions, in connection with their attempt to provide and not remove liquidity, or in connection with applicable fees for executions.

As noted above, the Exchange proposes to define a COA-eligible order as a complex order designated to be placed into a Complex Order Auction upon receipt that meets the requirements of Rule 21.20(d)(l), as described below. The Exchange proposes to allow all types of orders to initiate a COA but proposes to have certain types of orders default to initiating a COA upon arrival with the ability to opt-out of initiating a COA and other types of orders default to not initiating a COA upon arrival with the ability to opt-in to initiating a COA.[14] Specifically, as proposed, complex orders that are marked as IOC will, by default, not initiate a COA upon arrival, but a Member that submits an order marked IOC may elect to opt-in to initiating a COA and any quantity of the IOC order not executed will be cancelled at the end of the COA. All other Times in Force will by default initiate a COA, but a Member may elect to opt-out of initiating a COA. Orders with instructions to (or which default to) initiate a COA are referred to as COA-eligible orders, subject to the additional eligibility requirements set forth in the proposed rule, while orders with instructions not to (or which default not to) initiate a COA are referred to as do-not-COA orders.

The Exchange also proposes to allow the use of certain Match Trade Prevention (''MTP'') Modifiers, which allow a Member to avoid trading against the Member's own orders or orders of affiliates as specified on an identifier established by the Member (''Unique Identifiers).[15] As proposed, the System will support, when trading against other complex orders on the COB, complex orders with the following MTP Modifiers defined in Rule 21.1(g): MTP Cancel Newest,[16] MTP Cancel Oldest[17] and MTP Cancel Both.[18] When Legging (as defined below) into the Simple Book, a complex order with any MTP Modifier will be cancelled if it would execute against any leg on the Simple Book that includes an order with an MTP Modifier and the same Unique Identifier as the complex order.

Trading of Complex Orders

Proposed Rule 21.20(c), Trading of Complex Orders, describes the manner in which complex orders will be handled and traded on the Exchange. The Exchange will determine and communicate to Members via specifications and/or Regulatory Circular which complex order origin codes (*i.e.,* non-broker-dealer customers, broker-dealers that are not Market Makers on an options exchange, and/or Market Makers on an options exchange) are eligible for entry onto the COB.[19] The proposed rule also states that complex orders will be subject to all other Exchange Rules that pertain to orders submitted to the Exchange generally, unless otherwise provided in proposed Rule 21.20.

Proposed Rule 21.20(c)(1)(A) provides that bids and offers on complex orders may be expressed in $0.01 increments, and the component(s) of a complex order may be executed in $0.01 increments, regardless of the minimum increments otherwise applicable to individual components of the complex order,[20] and that if any component of a complex strategy would be executed at a price that is equal to a Priority Customer [21] bid or offer on the Simple

[10] For a complete description of these order types and Times in Force, see Exchange Rule 21.1, as proposed to be amended. The Exchange is proposing to offer similar order types and modifiers to those offered by other options exchanges. *See, e.g.,* CBOE Rule 6.53C(b); BOX Rule 7240(b)(4); MIAX Rule 518(b)(1).

[11] *See* MIAX Rule 518 (c)(2)(iii) (stating that cAOC orders and market maker quotes on the MIAX complex order book are not eligible for legging to the MIAX simple order book).

[12] *See* EDGX Rule 21.1(d)(7), which describes ''Book Only Orders'' as orders that do not route to away options exchanges.

[13] *See* EDGX Rule 21.1(d)(8), which describes ''Post Only Orders'' as orders that do not route to away options exchanges or remove liquidity from the Exchange.

[14] The Exchange believes that this gives market participants extra flexibility to control the handling and execution of their complex orders by the System by giving them the additional ability to determine whether they wish to have their complex order initiate a COA. Despite the fact that the Exchange is proposing certain defaults that would be in effect, the Exchange believes its proposal is similar to CBOE Rule 6.53C(d)(ii)(B), which allows a CBOE Trading Permit Holders to affirmatively request, on an order-by-order basis, that a COA-eligible order with two legs not be placed into a CBOE Complex Order Auction (a ''do-not-COA'' request). The Exchange further believes that the proposed default values are consistent with the terms of the orders (*e.g.,* IOC is intended as an immediate execution or cancellation whereas COA is a process that includes a short delay in order to broadcast and provide participants time to respond).

[15] *See* Rule 21.1(g).

[16] Pursuant to Rule 21.1(g)(1), an incoming order marked with the MTP Cancel Newest (''MCN'') modifier will not execute against opposite side resting interest marked with any MTP modifier originating from the same Unique Identifier. The incoming order marked with the MCN modifier will be cancelled back to the originating User(s). The resting order marked with an MTP modifier will remain on the EDGX Options Book.

[17] Pursuant to Rule 21.1(g)(2), an incoming order marked with the MTP Cancel Oldest (''MCO'') modifier will not execute against opposite side resting interest marked with any MTP modifier originating from the same Unique Identifier. The resting order marked with the MTP modifier will be cancelled back to the originating User(s). The incoming order marked with the MCO modifier will remain on the EDGX Options Book.

[18] Pursuant to Rule 21.1(g)(4), an incoming order marked with the MTP Cancel Both (''MCB'') modifier will not execute against opposite side resting interest marked with any MTP modifier originating from the same Unique Identifier. The entire size of both orders will be cancelled back to the originating User(s).

[19] *See* Proposed Rule 21.20(c); *see also* CBOE Rule 6.53C(c)(i), which states that CBOE will determine which classes and which complex order origin types *(i.e.,* non-broker-dealer public customer, broker-dealers that are not Market-Makers or specialists on an options exchange, and/or Market-Makers or specialists on an options exchange) are eligible for entry into the Complex Order Book.

[20] *See* Proposed Rule 21.20(c)(l); *see also* CBOE Rule 6.42(f) and MIAX Rule 518(c)(1).

[21] The term ''Priority Customer'' means any person or entity that is not: (A) A broker or dealer in securities; or (B) a Professional. The term ''Priority Customer Order'' means an order for the account of a Priority Customer. *See* Rule 16.1(a)(45). A ''Professional'' is any person or entity that: (A) Is not a broker or dealer in securities; and (B) places more than 390 orders in listed options per day on average during a calendar month for its own beneficial account(s). All Professional orders shall be appropriately marked by Options Members. *See* Rule 16.1(a)(46).

Book, at least one other component of the complex strategy must trade at a price that is better than the corresponding BBO.[22]

Additionally, respecting execution pricing, proposed Rule 21.20(c)(1)(C) states generally that a complex order will not be executed at a net price that would cause any component of the complex strategy to be executed: (i) At a price of zero; or (ii) ahead of a Priority Customer Order on the Simple Book without improving the BBO of at least one component of the complex strategy. These restrictions are designed to protect the priority of Priority Customer Orders that is established in the Simple Book.

Execution of Complex Orders

Proposed Rule 21.20(c)(2) describes: The process of accepting orders prior to the opening of the COB for trading (and prior to re-opening after a halt); the process by which the Exchange will open the COB or re-open the COB following a halt (the ''Opening Process''); the prices at which executions may occur on the Exchange for complex strategies, including through the Opening Process; execution of complex orders against the individual components or ''legs'' on the Simple Book; and the process of evaluation that is conducted by the System on an ongoing basis respecting complex orders.

Proposed Rule 21.20(c)(2)(A) states that Members may submit orders to the Exchange as set forth in Rule 21.6, which currently allows orders to be entered into the System beginning at 7:30 a.m. Eastern Time. The proposed Rule also states that any orders designated for the Opening Process will be queued until 9:30 a.m. at which time they will be eligible to be executed in the Opening Process. Any orders designated for a re-opening following a halt will be queued until the halt has ended, at which time they will be eligible to be executed in the Opening Process. Finally, proposed Rule 21.20(c)(2)(A) states that beginning at 7:30 a.m. and updated every five seconds thereafter, indicative prices and order imbalance information associated with the Opening Process will be disseminated by the Exchange while orders are queued prior to 9:30 a.m. or, in the case of a halt, prior to re-opening.[23]

Proposed Rule 21.20(c)(2)(B) states that complex orders do not participate in the Opening Process for the individual option series conducted pursuant to Rule 21.7.[24] The proposed rule also states that the Opening Process for the COB will operate both at the beginning of each trading session and upon re-opening after a halt. The Opening Process will commence when all legs of the complex strategy are open on the Simple Book. If there are complex orders that have been queued but none that can match, the System will open and transition such orders to the COB.

Proposed Rule 21.20(c)(2)(C) describes the manner in which the System determines the equilibrium price to be used for the purpose of execution of complex orders in the Opening Process. If there are complex orders that can match, the System will determine the equilibrium price where the most complex orders can trade. If there are multiple price levels that would result in the same number of strategies executed, the System will choose the price that would result in the smallest remaining imbalance. If there are multiple price levels that would result in the same number of strategies executed and would leave the same ''smallest'' imbalance, the System will choose the price that is closest to the Volume Based Tie Breaker (''VBTB'') as the opening price. For purposes of proposed subparagraph (C), the VBTB is the midpoint of the SNBBO. If there is no valid VBTB available, the System will use the midpoint of the highest and lowest potential opening prices as the opening price. If the midpoint price would result in an invalid increment, the System will round up to the nearest permissible increment and use that as the opening price. If executing at the equilibrium price would require printing at the same price as a Priority Customer on any leg in the Simple Book, the System will adjust the equilibrium price to a price that is better than the corresponding bid or offer in the marketplace by at least a $0.01 increment.

Pursuant to proposed paragraph Proposed Rule 21.20(c)(2)(D), when an equilibrium price is established at or within the SNBBO, the Exchange will execute matching complex orders in price/time priority at the equilibrium price. Any remaining complex order or the remaining portion thereof will be entered into the COB, subject to the Member's instructions. If the System cannot match orders because it cannot determine an equilibrium price (*i.e.,* all queued orders are Market Orders) or a permissible equilibrium price (*i.e.,* within the SNBBO that also satisfies proposed Rule 21.20(c)(1)(C), as described above), the System will open and transition such orders to the COB after a configurable time period established by the Exchange. The Exchange believes this configurable time period is important because the opening price protections are relatively restrictive (*i.e.,* based on the SNBBO) and the Exchange wants to have the ability to periodically optimize the process in a manner that will allow sufficient opportunity to have Opening Process executions without also waiting too long to transition to regular trading.

Next, with respect to the execution of orders on the COB, as described in proposed paragraph (c)(2)(E), incoming complex orders will be executed by the System in accordance with the provisions below, and will not be executed at prices inferior to the SBBO or at a price that is equal to the SBBO when there is a Priority Customer Order at the best SBBO price. Complex orders will never be executed at a price that is outside of the individual component prices on the Simple Book. Furthermore, the net price of a complex order executed against another complex order on the COB will never be inferior to the price that would be available if the complex order legged into the Simple Book. The purpose of this provision is to prevent a component of a complex order from being executed at a price that is inferior to the best-priced contra-side orders on the Simple Book (on which the SBBO is based) and to prevent a component of a complex order from being executed at a price that compromises the priority already established by a Priority Customer on the Simple Book. The Exchange believes that such priority should be protected and that such protection should be extended to the execution of complex orders on the COB.[25]

[22] *See* Proposed Rule 21.20(c)(l)(B); *see also,* ISE Rule 722(b)(2), which states that in this situation at least one leg must trade at a price that is better by at least one minimum trading increment, and PHLX Rule 1098(c)(iii), which states in this situation that at least one option leg must trade at a better price than the established bid or offer for that option contract and no option leg is executed at a price outside of the established bid or offer for that option contract.

[23] *See infra* Market Data Feeds section.

[24] This is similar to the opening of complex orders on other exchanges. For instance, complex orders on CBOE and NYSE MKT do not participate in the respective opening auction processes for individual component option series legs. *See* CBOE Rule 6.53C, Interpretation and Policy .11; NYSE MKT Rule 952NY.

[25] The Exchange also notes that this provision is based on and substantially similar to MIAX Rule 518(c)(2)(B) [sic]. Exchanges other than MIAX also protect Priority and Public Customer priority. ISE Priority Customer Orders on the Exchange shall have priority over Professional Orders and market maker quotes at the same price in the same options series. *See* ISE Rule 713(c); *see also,* CBOE Rule 6.45(a)(ii)(A), which states that CBOE Public Customer orders in the electronic book have

Continued

Incoming complex orders that could not be executed because the executions would be priced (i) outside of the SBBO, or (ii) equal to the SBBO due to a Priority Customer Order at the best SBBO price, will be cancelled if such complex orders are not eligible to be placed on the COB. Complex orders will be executed without consideration of any prices for the complex strategy that might be available on other exchanges trading the same complex strategy provided, however, that such complex order price may be subject to the Drill-Through Price Protection set forth in Interpretation and Policy .04(f) of proposed Rule 21.20.[26]

Proposed Rule 21.20(c)(2)(F) describes the Legging process through which complex orders, under certain circumstances, are executed against the individual components of a complex strategy on the Simple Book. Complex orders up to a maximum number of legs (determined by the Exchange on a class-by-class basis as either two, three, or four legs and communicated to Members via specifications and/or Regulatory Circular) may be automatically executed against bids and offers on the Simple Book for the individual legs of the complex order (''Legging''), provided the complex order can be executed in full or in a permissible ratio by such bids and offers.[27]

As proposed, all two leg COA-eligible Customer complex orders will be allowed to leg into the Simple Book without restriction. The benefit of Legging against the individual components of a complex order on the Simple Book is that complex orders can access the full liquidity of the Exchange's Simple Book, thus enhancing the possibility of executions at the best available prices on the Exchange. The Exchange believes this is particularly true for Customer complex orders and, thus, does not propose to limit the ability of such orders to leg into the Simple Book (when such orders are two leg orders).

Notwithstanding the foregoing, the Exchange is proposing to establish, in proposed Rule 21.20(c)(2)(F), that complex orders that could otherwise be eligible for Legging will only be permitted to trade against other complex orders in the COB in certain situations. Specifically, proposed Rule 21.20(c)(2)(F) would provide that other than two leg COA-eligible Customer complex orders, any other complex orders (*i.e.,* non-Customer orders or non-COA-eligible Customer orders) with two option legs where both legs are buying or both legs are selling and both legs are calls or both legs are puts may only trade against other complex orders on the COB and will not be permitted to leg into the Simple Book. Proposed Rule 21.20(c)(2)(F) would impose a similar restriction by stating that complex orders with three or four option legs where all legs are buying or all legs are selling may only trade against other complex orders on the COB and will not leg into the Simple Book (regardless of whether the option leg is a call or a put).[28]

Currently, liquidity providers (typically Market Makers, though such functionality is not currently limited to registered Market Makers) in the Simple Book are protected by way of the Risk Monitor Mechanism (''Risk Monitor'')[29] by limiting the number of contracts they execute in an option class on the Exchange within a specified time period (a ''specified time period'') or on an absolute basis for the trading day (''absolute limits'').[30] The Risk Monitor automatically cancels and removes the liquidity provider's orders from the Exchange's disseminated quotation in all series of a particular option class when it has determined that a participant has traded a number of contracts equal to or above a percentage of their quotations (the ''percentage trigger'') during the specified time period or on an absolute basis. The purpose of the Risk Monitor is to allow Market Makers and other liquidity providers to provide liquidity across potentially hundreds of options series without executing the full cumulative size of all such quotes before being given adequate opportunity to adjust the price and/or size of their quotes.

All of a participant's quotes in each option class are considered firm until such time as the Risk Monitor's threshold has been equaled or exceeded and the participant's quotes are removed by the Risk Monitor in all series of that option class.[31] Thus the Legging of complex orders presents higher risk to Market Makers and other liquidity providers as compared to simple orders being entered in multiple series of an options class in the simple market, as it can result in such participants exceeding their established risk thresholds by a greater number of contracts. Although Market Makers and other liquidity providers can limit their risk through the use of the Risk Monitor, the participant's quotes are not removed until after a trade is executed. As a result, because of the way complex orders leg into the regular market as a single transaction, Market Makers and other liquidity providers may end up trading more than the cumulative risk thresholds they have established, and are therefore exposed to greater risk. The Exchange believes that Market Makers and other liquidity providers may be compelled to change their quoting and trading behavior to account for this additional risk by widening their quotes and reducing the size associated with their quotes, which would diminish the Exchange's quality of markets and the quality of the markets in general.

Based on the foregoing, the Exchange has proposed to modify the Risk Monitor as described in greater detail further below and has also proposed limitations to Rule 21.20(c)(2)(F). The purpose of the limitations in proposed Rule 21.20(c)(2)(F) is to minimize the impact of Legging on single leg Market Makers and other liquidity providers by limiting a potential source of unintended risk when certain types of complex orders leg into the Simple Book. The Exchange believes that the proposed limitation on the availability of Legging to (i) complex orders with two option legs where both legs are buying or both legs are selling and both legs are calls or both legs are puts, and

priority, and NYSE MKT Rule 964NY(b)(2)(A), which provides that bids and offers in the Consolidated Book for Customer accounts have first priority over other bids or offers at the same price.

[26] The Drill-Through Price Protection feature is a price protection mechanism under which, when in operation as requested by the submitting Member or pursuant to the Exchange's default settings, a buy (sell) order will not be executed at a price that is higher (lower) than the SNBBO or the SNBBO at the time of order entry plus (minus) a buffer amount (the ''Drill-Through Price'').

[27] *See* proposed Rule 21.20(c)(2)(F). This is similar to CBOE Rule 6.53C(c)(ii)(l), which states that complex orders in the COB will automatically execute against individual orders or quotes residing in the EBook provided the complex order can be executed in full (or in a permissible ratio) by the orders and quotes in EBook; *see also* BOX Rule 7240(b)(3)(ii) providing that Complex Orders will be automatically executed against bids and offers on the BOX Book for the individual legs of the Complex Order to the extent that the Complex Order can be executed in full or in a permissible ratio by such bids and offers.

[28] This is substantially similar to ISE Rules 722(b)(3)(ii)(A) and (B), which state that complex orders with 2 option legs where both legs are buying or both legs are selling and both legs are calls or both legs are puts may only trade against other complex orders in the complex order book. The trading system will not generate legging orders for these complex orders, and complex orders with 3 or 4 option legs where all legs are buying or all legs are selling may only trade against other complex orders in the complex order book. *See also* Securities Exchange Act Release No. 73023 (September 9, 2014), 79 FR 55033 (September 15, 2014) (SR–ISE–2014–10).

[29] *See* Exchange Rule 21.16.

[30] As described later in this proposal, the Exchange proposes to amend the Rule governing the Risk Monitor, Rule 21.16, with respect to complex orders.

[31] *See* Exchange Rule 612(c) [sic].

(ii) complex orders with three or four option legs where all legs are buying or all legs are selling regardless of whether the option leg is a call or a put, should serve to reduce the risk of Market Makers and other liquidity providers trading above their risk tolerance levels. However, as noted above, the Exchange believes it is appropriate not to apply this limitation to two-leg COA-eligible Customer orders in order to afford such orders the execution benefit that comes from Legging.

Proposed Rule 21.20(c)(2)(G) sets forth the process for evaluation of complex orders, and the COB, on a regular basis and for various conditions and events that result in the System's particular handling and execution of complex orders in response to such regular evaluation, conditions and events. The System will evaluate complex orders initially once all components of the complex strategy are open as set forth in proposed Rule 21.20(c)(2)(B)–(D) as described above, upon receipt as set forth in proposed Rule 21.20(c)(5)(A) as described below, and continually as set forth in proposed Rule 21.20(c)(5)(B) as described below.[32]

The purpose of the evaluation process for complex orders is to determine (i) their eligibility to initiate, or to participate in, a COA as described in proposed Rule 21.20(d)(1); (ii) their eligibility to participate in the managed interest process as described in proposed Rule 21.20(c)(4); (iii) their eligibility for full or partial execution against a complex order resting on the COB or through Legging into the Simple Book (as described in proposed Rule 21.20(c)(2)(F)); (iv) whether the complex order should be cancelled; and (v) whether the complex order or any remaining portion thereof should be placed or remain on the COB.

The continual and event-triggered evaluation process ensures that the System is monitoring and assessing the COB for incoming complex orders, and changes in market conditions or events that cause complex orders to re-price and/or execute, and conditions or events that result in the cancellation of complex orders on the COB. This ensures the integrity of the Exchange's System in handling complex orders and results in a fair and orderly market for complex orders on the Exchange.

Complex Order Priority

Proposed Rule 21.20(c)(3) describes how the System will establish priority for complex orders. As described below, the proposed priority structure for the COB differs from the priority structure applicable to the Simple Book as established in Exchange Rule 21.8.[33] A complex order may be executed at a net credit or debit price against another complex order without giving priority to bids or offers established in the marketplace that are no better than the bids or offers comprising such net credit or debit; provided, however, that if any of the bids or offers established in the marketplace consist of a Priority Customer Order, at least one component of the complex strategy must trade at a price that is better than the corresponding BBO by at least a $0.01 increment.[34]

Regarding execution and allocation of complex orders, proposed Rule 21.20(c)(3)(B) establishes that complex orders will be automatically executed against bids and offers on the COB in price priority. Bids and offers at the same price on the COB will be executed in time priority. Complex orders that leg into the Simple Book will be executed in accordance with Rule 21.8, which includes Priority Customer priority as well as pro rata executions. The Exchange notes that although it has proposed a different priority model for its COB (price-time) than its Simple Book (pro rata), the Exchange has proposed to operate the COB to respect Priority Customer priority on the Simple Book and will also continue to execute orders that leg into the Simple Book based on its existing priority model. The Exchange believes that operating the COB with price-time priority and without providing allocation benefits to particular types of Members will allow the Exchange to launch complex order functionality with relatively straightforward features and results. The Exchange also notes that this same priority model (COB as price-time and Simple Book as pro rata) is used by at least one other options exchange.[35]

Managed Interest Process for Complex Orders

In order to ensure that complex orders (which are non-routable) receive the best executions on the Exchange, proposed Rule 21.20(c)(4) sets forth the price(s) at which complex orders will be placed on the COB. More specifically, the managed interest process is used to manage the prices at which a complex order that is not immediately executed upon entry is handled by the System, including how such an order is priced and re-priced on the COB. The managed interest process is initiated when a complex order that is eligible to be placed on the COB cannot be executed against either the COB or the Simple Book (with the individual legs) at the complex order's net price, and is intended to ensure that a complex order to be managed does not result in a locked or crossed market on the Exchange. Once initiated, the managed interest process for complex orders will be based upon the SBBO.[36]

Under the managed interest process, a complex order that is resting on the COB and is either a complex market order as described in proposed Rule 21.20(c)(6) and discussed below, or has a limit price that locks or crosses the current opposite side SBBO when the SBBO is the best price, may be subject to the managed interest process for complex orders as discussed herein. If the order is not a COA-eligible order as defined in proposed Rules 21.20(a)(4) described above and 21.20(d)(1) described below, the System will first determine if the inbound complex order can be matched against other complex orders resting on the COB at a price that is at or inside the SBBO (provided there are no Priority Customer Orders on the Simple Book at that price). Second, the System will determine if the inbound complex order can be executed by Legging against individual orders resting on the Simple Book at the SBBO. A complex order subject to the managed interest process will never be executed at a price that is through the individual component prices on the Simple Book. Furthermore, the net price of a complex order subject to the managed interest process that is executed against another

[32] MIAX performs similar evaluations in the operation of its complex order book. *See* MIAX Rule 518(c)(2)(v).

[33] Exchange Rule 21.8, Priority of Quotes and Orders, describes among other things the various execution priority, trade allocation and participation guarantees generally applicable to the Simple Book. Some sections of Exchange Rule 21.8 are cross-referenced herein and will apply as noted to complex orders, as the context requires.

[34] *See* Proposed Rule 21.20(c)(3)(A); *see also* MIAX Rule 518(c)(3), which states that at least one leg must trade at a price that is better than the corresponding bid or offer in the marketplace by at least a $0.01 increment; ISE Rule 722(b)(2), which states that in this situation at least one leg must trade at a price that is better by at least one minimum trading increment; and PHLX Rule 1098(c)(iii), requiring in this situation that at least one option leg is executed at a better price than the established bid or offer for that option contract and no option leg is executed at a price outside of the established bid or offer for that option contract.

[35] *See* ISE Rule 713, which sets forth a pro rata priority model for ISE's simple book and ISE Rule 722(b)(3), which provides ISE flexibility to vary the application from class to class but includes price-time priority on the ISE COB as an option.

[36] A complex order for which the Drill-Through Price Protection is engaged will be managed to the Drill-Through Price as described below and in proposed Rule 21.20, Interpretations and Policy .04(f).

complex order on the COB will never be inferior to the price that would be available if the complex order legged into the Simple Book. When the opposite side SBBO includes a Priority Customer Order, the System will book and display such booked complex order on the COB at a price (the ''book and display price'') that is $0.01 away from the current opposite side SBBO. When the opposite side SBBO does not include a Priority Customer Order and is not available for execution in the ratio of such complex order, or cannot be executed through Legging with the Simple Book, the System will place such complex order on the COB and display such booked complex order at a book and display price that will lock the current opposite side SBBO (*i.e.,* because it is a price at which another complex order can trade).

Example—*Complex order managed interest when Priority Customer Interest at the SBBO is Present*

EDGX Market Maker A quote Mar 50 Call 6.00–6.50 (10x10)
EDGX Market Maker B quote Mar 55 Call 2.00–2.30 (10x10)
EDGX Priority Customer Order Mar 55 Call 2.10 bid (1)

- The Exchange receives an initiating Priority Customer complex order to buy 1 Mar 50 Call and sell 2 Mar 55 Calls for a 2.30 debit, 100 times.
- Assume the do-not-COA instruction is present on this order, so the order will not initiate a COA auction upon arrival regardless of any other factor.
- The SBBO is 1.40 debit bid at 2.30 credit offer.
- Since the Mar 55 call is 2.10 bid for only one contract (the Priority Customer Order), the complex order cannot be legged against the Simple Book at a 2.30 debit as a 2.30 debit would require selling two March 55 Calls at 2.10 while buying one March 50 Call at 6.50. Since there is Priority Customer interest on one leg of the complex order on the Simple Book, the inbound complex order cannot trade at this price by matching with other complex liquidity.
- Thus, the order is managed for display purposes at a price one penny inside of the opposite side SBBO, 2.29 and is available to trade with other complex liquidity at 2.29. The combination of the Simple Book and the COB will be a one penny wide market of 2.29 debit bid at 2.30 credit offer.
- If additional interest were to arrive on the Mar 55 Call 2.10 bid, the inbound complex order would be re-evaluated and would in this example become eligible to leg with the Priority Customer interest on the Simple Book at the 2.30 credit offer.

Example—*Complex order managed interest when the ratio to allow Legging does not exist, and there is no Priority Customer Interest.*

EDGX Market Maker A quote Mar 50 call 6.00–6.50 (10x10)
EDGX Market Maker B Mar 55 call 2.00–2.30 (10x10)
EDGX Broker-Dealer A order Mar 55 Call 2.10 bid (1)

- The Exchange receives an initiating Priority Customer complex order to buy 1 Mar 50 call and sell 2 Mar 55 calls for a 2.30 debit, 100 times.
- The SBBO is 1.40 debit bid at 2.30 credit offer.
- Assume the do-not-COA instruction is present on this order, so the order will not initiate a COA auction upon arrival regardless of any other factor.
- Since the Mar 55 call is 2.10 bid for only one contract (the Broker Dealer order), the complex order cannot be legged against the Simple Book at a 2.30 debit, as a 2.30 debit would require selling two March 55 Calls at 2.10 while buying one March 50 Call at 6.50. Although the inbound complex order cannot trade at this time because there is insufficient interest to buy the March 55 Call, there is no Priority Customer interest on either side of the 2.30 credit offer and therefore the order will be able to trade at that price when sufficient interest exists. Thus, the order is managed for display purposes at a price locking the opposite side SBBO 2.30 and is available to trade against other complex interest at 2.30. The combination of the Simple Book and the COB will be a locked market of 2.30 debit bid at 2.30 credit offer.

Should the SBBO change, the complex order's book and display price will continuously re-price to the new SBBO until: (i) The complex order has been executed in its entirety; (ii) if not executed, the complex order's book and display price has reached its limit price or, in the case of a complex market order, the new SBBO, subject to any applicable price protections; (iii) the complex order has been partially executed and the remainder of the order's book and display price has reached its limit price or, in the case of a complex market order, the new SBBO, subject to any applicable price protections; or (iv) the complex order or any remaining portion of the complex order is cancelled. If the Exchange receives a new complex order for the complex strategy on the opposite side of the market from the managed complex order that can be executed, the System will immediately execute the remaining contracts from the managed complex order to the extent possible at the complex order's current book and display price. If unexecuted contracts remain from the complex order on the COB, the complex order's size will be revised and disseminated to reflect the complex order's remaining contracts at its current managed book and display price.

The purpose of using the calculated SBBO is to enable the System to determine a valid trading price range for complex strategies and to protect orders resting on the Simple Book by ensuring that they are executed when entitled. Additionally, the managed interest process is designed to ensure that the System will not execute any component of a complex order at a price that would trade through an order on the Simple Book or that would disrupt the established priority of Priority Customer interest resting on the Simple Book.[37] The Exchange believes that this is reasonable because it prevents the components of a complex order from trading at a price that is inferior to a price at which the individual components may be traded on the Exchange and it maintains the priority for Priority Customers resting on the Simple Book.

Evaluation Process

Proposed Rule 21.20(c)(5) describes how and when the System determines to execute or otherwise handle complex orders in the System. As stated above, the System will evaluate complex orders and the COB on a regular basis and will respond to the existence of various conditions and/or events that trigger an evaluation. Evaluation results in the various manners of handling and executing complex orders as described herein. The System will evaluate complex orders initially once all components of the complex strategy are open as set forth in proposed Rule 21.20(c)(2)(B)–(D), upon receipt as set forth in proposed Rule 21.20(c)(5)(A), and continually as set forth in proposed Rule 21.20(c)(5)(B), each of which as described herein.

Proposed Rule 21.20(c)(5)(A) describes the evaluation process that occurs upon receipt of complex orders once a complex strategy is open for trading. After a complex strategy is open for trading, all new complex orders that are received for the complex strategy are evaluated upon arrival. The System will determine if such complex orders are COA-eligible orders using the process and criteria described in proposed Rule 21.20(d). The System will also evaluate: (i) Whether such complex orders are

[37] For a complete description of priority in the Simple Book, *see* Exchange Rule 21.8.

eligible for full or partial execution against a complex order resting on the COB; (ii) whether such complex orders are eligible for full or partial execution through Legging with the Simple Book (as described in proposed Rule 21.20(c)(2)(F) and discussed above); (iii) whether all or any remaining portion of a complex order should be placed on the COB; (iv) the eligibility of such complex orders (as applicable) to participate in the managed interest process as described above; [38] and (v) whether such complex orders should be cancelled.[39]

Proposed Rule 21.20(c)(5)(B) describes the System's ongoing regular evaluation of the COB. The System will continue, on a regular basis, to evaluate the factors listed in (i)–(v) described above with respect to evaluation performed on receipt.

The System will also continue to evaluate whether there is a halt affecting any component of a complex strategy, and, if so, the System will handle complex orders in the manner set forth in proposed Interpretation and Policy .05, as described below.

Proposed Rule 21.20(c)(5)(C) states that if the System determines that a complex order is a COA-eligible order (described below), such complex order will be submitted into the COA process as described in proposed Rule 21.20(d) and discussed below.

Proposed Rule 21.20(c)(5)(D) describes the handling of orders that are determined not to be COA-eligible. If the System determines that a complex order is not a COA-eligible order, such complex order may be, as applicable: (i) Immediately matched and executed against a complex order resting on the COB; (ii) executed against the individual components of the complex order on the Simple Book through Legging (as described in proposed Rule 21.20(c)(2)(F) above); placed on the COB and managed pursuant to the managed interest process as described in proposed Rule 21.20(c)(4) and discussed above; or cancelled by the System if the time-in-force (*e.g.,* IOC) of the complex order does not allow it to rest on the COB.

Proposed Rule 21.20(c)(6) states that complex orders may be submitted as market orders and may be designated as COA-eligible. The proposed rule then distinguishes between complex market orders designated as COA-eligible and those that are not so designated. Proposed Rule 21.20(c)(6)(A) states that complex market orders designated as COA-eligible may initiate a COA upon arrival. The COA process is set forth in proposed Rule 21.20(d) and discussed below. Proposed Rule 21.20(c)(6)(B) states that complex market orders not designated as COA-eligible will trade immediately with any contra-side complex orders, or against the individual legs, up to and including the SBBO, and if not fully executed due to applicable price protections, may be posted to the COB subject to the managed interest process, and the Evaluation Process, each as described above.

Complex Order Auction Process

Proposed Rule 21.20(d), COA Process, describes the process for determining if a complex order is eligible to begin a COA. All option classes will be eligible to participate in a COA.

Proposed Rule 21.20(d)(l) defines and describes the handling of a COA eligible order. A ''COA-eligible order'' means a complex order that, as determined by the Exchange, is eligible to initiate a COA based upon the Member's instructions, the order's marketability (*i.e.,* if the price of such order is equal to or better than the current SBBO, subject to applicable restrictions when a Priority Customer Order comprises a portion of the SBBO) as determined by the Exchange, number of components, and complex order origin codes (*i.e.,* non-broker-dealer customers, broker-dealers that are not market makers on an options exchange, and/or market makers on an options exchange as determined by the Exchange). Determinations by the Exchange with respect to COA eligibility will be communicated to Members via specifications and/or Regulatory Circular).[40] Other exchanges also have limited auction eligibility for complex orders based on order origin code.[41]

In order to initiate a COA upon receipt, a COA-eligible order must be designated as such (either affirmatively or by default) and must meet the criteria described in proposed Rule 21.20, Interpretation and Policy .02, as described below.

Complex orders processed through a COA may be executed without consideration to prices of the same complex interest that might be available on other exchanges. A COA will be allowed to occur at the same time as other COAs for the same complex strategy. The Exchange has not proposed to limit the frequency of COAs for a complex strategy and could have multiple COAs occurring concurrently with respect to a particular complex strategy.[42] The Exchange represents that it has systems capacity to process multiple overlapping COAs consistent with the proposal, including systems necessary to conduct surveillance of activity occurring in such auctions.[43]

Proposed Rule 21.20(d)(2) describes the circumstances under which a COA is begun. Upon receipt of a COA-eligible order, the Exchange will begin the COA process by sending a COA auction message to all subscribers to the Exchange's data feeds that deliver COA auction messages.[44] The COA auction message will identify the COA auction ID, instrument ID (*i.e.,* complex strategy), origin code, quantity, and side of the market of the COA-eligible order. The Exchange may also determine to include the price in COA auction messages and if it does so it will announce such determination in published specifications and/or a Regulatory Circular to Members. The price included in the COA auction message will be the limit order price, unless the COA is initiated by a complex market order, in which case such price will be the SBBO, subject to any applicable price protections.

Proposed Rule 21.20(d)(3) defines the amount of time within which participants may respond to a COA auction message. The term ''Response Time Interval'' means the period of time during which responses to the RFR may be entered. The Exchange will determine the duration of the Response Time Interval, which shall not exceed 500 milliseconds, and will communicate it to Members via specifications and/or Regulatory Circular.[45]

[38] *See* proposed Rule 21.20(c)(4).

[39] For example, an order might be cancelled based on applicable price protections or MTP Modifiers, as described above.

[40] *See* MIAX Rule 518(d)(1); *see also* CBOE Rule 6.53C(d)(i) and NYSE MKT Rule 980NY(e)(l), which list Customers, broker-dealers that are not Market-Makers or specialists on an options exchange, and/or Market-Makers or specialists on an options exchange.

[41] *See id. See also, e.g.,* CBOE Regulatory Circular RG14–143 (October 14, 2014), limiting Complex Order Auction (''COA'') eligibility to non-broker-dealer public customer orders and professional customer orders.

[42] The Exchange notes that ISE historically has permitted multiple complex auctions in the same strategy to run concurrently, though this functionality is currently dormant in connection with the transition to Nasdaq INET Technology. *See* Securities Exchange Act Release No. 80524 (April 25, 2017), 82 FR 20405 (May 1, 2017) (SR–ISE–2017–33).

[43] *See also* proposed Interpretation and Policy .02 to Rule 21.20, as described below in the COA Eligibility section.

[44] *See infra* Market Data Feeds section.

[45] The Exchange has based its Response Time Interval on MIAX Rule 518(d)(3), which similarly does not have a minimum Response Time Interval and has a maximum of 500 milliseconds. The Exchange believes that 500 milliseconds is a

Continued

Proposed Rule 21.20(d)(4) states that Members may submit a response to the COA auction message (a ''COA Response'') during the Response Time Interval. COA Responses can be submitted by a Member with any origin code, including Priority Customer. COA Responses may be submitted in $0.01 increments and must specify the price, size, side of the market (*i.e.,* a response to a buy COA as a sell or a response to a sell COA as a buy) and COA auction ID for the COA to which the response is targeted. Multiple COA Responses from the same Member may be submitted during the Response Time Interval. COA Responses represent non-firm interest that can be modified or withdrawn at any time prior to the end of the Response Time Interval, though any modification to a COA Response other than a decrease of size will result in a new timestamp and a loss of priority. COA Responses will not be displayed by the Exchange. At the end of the Response Time Interval, COA Responses are firm (*i.e.,* guaranteed at their price and size). Any COA Responses not executed in full will expire at the end of the COA.[46] Any COA Responses not executable based on the price of the COA will be cancelled immediately.

Proposed Rule 21.20(d)(5) describes how COA-eligible orders are handled following the Response Time Interval. At the end of the Response Time Interval, COA-eligible orders may be executed in whole or in part. COA-eligible orders will be executed against the best priced contra side interest, and any unexecuted portion of a COA-eligible order remaining at the end of the Response Time Interval will be placed on the COB and ranked pursuant to proposed Rule 21.20(c)(3) as discussed above or cancelled, if IOC.

The COA will terminate: (i) Upon receipt of a new non-COA-eligible order on the same side as the COA but with a better price, in which case the COA will be processed and the new order will be posted to the COB; (ii) if an order is received that would improve the SBBO on the same side as the COA in progress to a price better than the auction price, in which case the COA will be processed, the new order will be posted to the Simple Book and the SBBO will be updated; or (iii) if a Priority Customer Order is received that would join or improve the SBBO on the same side as the COA in progress to a price equal to or better than the auction price, in which case the COA will be processed, the new order will be posted to the Simple Book and the SBBO will be updated. Additionally, a COA will terminate immediately without trading if any individual component or underlying security of a complex strategy in the COA process is subject to a halt as described in proposed Rule 21.20, Interpretation and Policy .05.

COA Pricing

Proposed Rule 21.20(d)(6) describes the manner in which the System prices and executes complex orders at the conclusion of the Response Time Interval.

The proposed Rule initially states the broader pricing policy and functionality of all trading of complex orders in the System (whether a trade is executed in the COA process or in regular trading). Specifically, a complex strategy will not be executed at a net price that would cause any component of the complex strategy to be executed: (A) At a price of zero; or (B) ahead of a Priority Customer Order on the Simple Book without improving the BBO on at least one component of the complex strategy by at least $.01. At the conclusion of the Response Time Interval, COA-eligible orders will be allocated pursuant to proposed Rule 21.20(d)(7).

Example—COA takes place $.01 inside of the SBBO to avoid a situation where nothing can trade and the incoming order cannot be satisfied at the COA price.

EDGX Market Maker (''MM'')–A Mar 50 Call 0.99–1.05 (10x10)

EDGX MM–B Mar 55 Call 0.80–0.95 (10x10)

EDGX Priority Customer Order to buy a Mar 50 Call for 1.00 (2)

- The Exchange receives an initiating Priority Customer complex order to sell 3 Mar 50 calls and buy 2 Mar 55 calls at a 1.10 credit, 100 times. The COA-eligible instruction is present on this complex order, so the complex order will initiate a COA upon arrival if it equals or improves the SBBO.
- The SBBO is 1.10 debit bid at 1.55 credit offer.
- Since the initiating Priority Customer Order price would equal or improve the SBBO upon arrival, the COA meets the eligibility requirements and a COA auction message is broadcast showing the COA auction ID, instrument ID, origin code, quantity, side of the market, and price, and a 500 millisecond Response Time Interval is started.
- The System starts the COA at the initiating Priority Customer price offering to sell 100 strategies at 1.10 (but will be restricted to executing at 1.11 or better). The following responses are received:
  - @50 milliseconds MM–C COA Response to buy 100 @1.10 debit arrives
  - @150 milliseconds MM–D COA Response to buy 50 @1.11 debit arrives
- @500 milliseconds the Response Time Interval expires, the COA ends and the trade is allocated against initiating Priority Customer in the following manner:
  - 50 trade vs. MM–D @1.11
  - Nothing can trade at 1.10 due to the presence of Priority Customer interest in the March 50 Call on the Simple Book at 1.00 in insufficient quantity to meet the ratio required by the Priority Customer Order. Therefore, the 1.10 COA Response by MM–C expires untraded at the end of the COA and the balance of the initiating Priority Customer complex order to sell is placed on the COB at a managed and displayed price of 1.11.

Trade Allocation Following the COA

Proposed Rule 21.20(d)(7) describes the allocation of complex orders that are executed in a COA. Once the COA is complete (at the end of the Response Time Interval), such orders will be allocated first in price priority based on their original limit price, and thereafter as stated herein.

Priority Customer Orders resting on the Simple Book have first priority. COA Responses and all other interest on the COB will have second priority and will be allocated in time priority (*i.e.,* Priority Customer complex orders do not receive a priority advantage over other orders). Remaining individual orders in the Simple Book (*i.e.,* non-Priority Customer orders) will have third and final priority and will allocated pursuant to the Simple Book's priority algorithm, as described in Exchange Rule 21.8.

The following examples illustrate the manner in which complex orders are allocated at the conclusion of the COA as well as the Exchange's initiation of a second COA process in the event a same-side COA-eligible order is received while a COA is already underway (in contrast to such order ''joining'' the COA that had already begun).

Example—Priority Customer Response does not have priority over other responding participants.

EDGX MM–A Mar 50 Call 6.00–6.50 (10x10)

EDGX MM–B Mar 55 Call 3.00–3.30 (10x10)

reasonable amount of time within which participants can respond to a COA auction message.

[46] This differs slightly from, but has the same effect as, the language in CBOE Rule 6.53C(d)(vii), which states that any COA Responses not accepted in whole or in a permissible ratio will expire at the end of the Response Time Interval.

- The Exchange receives an initiating Priority Customer complex order to buy 1 Mar 50 call and Sell 1 Mar 55 call for a 3.20 debit, 1000 times.
- The COA-eligible instruction is present on this complex order, so the complex order will initiate a COA upon arrival if it equals or improves the SBBO.
- The SBBO is 2.70 debit bid at 3.50 credit offer.
- Since the initiating Priority Customer Order price would improve the SBBO upon arrival, the COA meets the eligibility requirements and a COA auction message is broadcast showing the COA auction ID, instrument ID, origin code, quantity, side of the market, and price, and a 500 millisecond Response Time Interval is started.
- The System starts the auction at the initiating Priority Customer price bidding 3.20 to buy 1000 contracts. The following responses are received:
  - @50 milliseconds MM–A COA Response @3.10 credit sell of 250 arrives
  - @150 milliseconds MM–C COA Response @3.00 credit sell of 500 arrives
  - @200 milliseconds MM–D COA Response @3.20 credit sell of 500 arrives
  - @250 milliseconds Priority Customer 2 COA Response @3.10 credit sell of 250 arrives
- @500 milliseconds the Response Time Interval ends, the COA ends and the trade is allocated against the initiating Priority Customer using the single best price at which the greatest quantity can trade in the following manner:
  - 500 trade vs. MM–C @3.00 (MM–C achieved price priority by offering at 3.00)
  - 250 trade vs. MM–A @3.10 (other interest allocated in time priority, including Priority Customer)
  - 250 trade vs. Priority Customer 2 response @3.10 (other interest allocated in time priority, including Priority Customer)

Example—Arrival of unrelated marketable complex order on the same side.

EDGX MM–A Mar 50 Call 6.00–6.50 (10x10)

EDGX MM–B Mar 55 Call 3.00–3.30 (10x10)

- The Exchange receives an initiating Priority Customer complex order to buy 1 Mar 50 call and Sell 1 Mar 55 call for a 3.20 debit, 1000 times.
- The COA-eligible order instruction is present on this order, so the order will initiate an auction upon arrival if it equals or improves the SBBO.
- The SBBO is 2.70 debit bid at 3.50 credit offer.
- Since the initiating Priority Customer Order price would improve the SBBO upon arrival, the COA meets the eligibility requirements and a COA auction message is broadcast showing the COA auction ID, instrument ID, origin code, quantity, side of the market, and price, and a 500 millisecond Response Time Interval is started.
- The System starts the auction (''COA #1'') at the initiating Priority Customer price bidding 3.20 to buy 1000 contracts. The following responses are received:
  - @50 milliseconds BD1 COA Response @3.10 credit sell of 250 arrives
  - @150 milliseconds MM–A COA Response @3.00 credit sell of 500 arrives
  - @200 milliseconds MM–B COA Response @3.20 credit sell of 500 arrives
  - @250 milliseconds MM–C COA Response @3.10 credit sell of 250 arrives
  - @350 milliseconds BD2 submits an unrelated complex order @3.20 debit buy of 200
- The System starts the auction at the initiating Broker-Dealer (BD2) price bidding 3.20 to buy 200 contracts. The following responses are received:
  - @50 milliseconds BD1 COA Response @3.10 credit sell of 250 arrives
  - @100 milliseconds MM–A COA Response @3.00 credit sell of 100 arrives
  - @200 milliseconds MM–B COA Response @3.20 credit sell of 500 arrives
- @500 milliseconds the Response Time Interval for COA #1 ends, COA #1 ends and the trade is allocated against the initiating Priority Customer in the following manner:
  - Initiating Priority Customer buys 500 vs. MM–A @3.00 (the Priority Customer initiating order has origin code priority over BD2. MM–A achieved price priority over other responses by offering at 3.00)
  - Initiating Priority Customer buys 250 vs. BD1 @3.10 (BD 1 achieved price priority over MM–B and BD2 and time priority over MM–C)
  - Initiating Priority Customer buys 250 vs. MM–C @3.10 (MM–C achieved price priority over MM–B and BD2 by offering at 3.10)
  - Initiating Priority Customer's order is fulfilled and all COA Responses and portions thereof are cancelled.
- @500 milliseconds the Response Time Interval for COA #2 ends, COA #2 ends and the trade is allocated against the initiating Broker-Dealer in the following manner:
  - Initiating Broker-Dealer buys 100 vs. MM–A @3.00 (MM–A achieved price priority over other responses by offering at 3.00)
  - Initiating Broker-Dealer buys 100 vs. BD1 @3.10 (BD1 achieved price priority over MM–B)
  - Initiating Broker-Dealer's order is fulfilled and all remaining COA Responses and portions thereof are cancelled.

Proposed Rule 21.20(d)(8) states that, consistent with Exchange Rule 21.1(d)(5), the System will reject a complex market order received when the underlying security is subject to a ''Limit State'' or ''Straddle State'' as defined in the Plan to Address Extraordinary Market Volatility Pursuant to Rule 608 of Regulation NMS under the Act (the ''Limit Up-Limit Down Plan''). If the underlying security of a COA-eligible order that is a market order enters a Limit State or Straddle State, the COA will end early without trading and all COA Responses will be cancelled.

Proposed Rule 21.20(d)(9), states that if, during a COA, the underlying security and/or any component of a COA-eligible order is subject to a trading halt, the COA will be handled as set forth in proposed Rule 21.20, Interpretation and Policy .05 as described in detail below.

The Exchange believes that the provisions regarding the COA provide a framework that will enable the efficient trading of complex orders in a manner that is similar to other options exchanges as stated above. Further, this clarity in the operation of the COA and its consistency with other exchanges will help promote a fair and orderly options market. As described above, the COA is designed to work in concert with the COB and with a simple priority of allocation that continues to respect the priority of allocations on the Simple Book (via the Exchange's pro rata allocation methodology).

Interpretations and Policies

The Exchange also proposes several Interpretations and Policies to proposed Rule 21.20.

Market Maker Quoting

The Exchange has not proposed different standards for participation by Market Makers on the COB (*e.g.,* no specific benefits or obligations). Proposed Rule 21.20, Interpretation and Policy .01 makes clear that Market Makers are not required to quote on the COB. Thus, unlike the continuous

quoting requirements in the simple order market, there are no continuous quoting requirements respecting complex orders.[47] Complex strategies are not subject to any requirements that are applicable to Market Makers in the simple market for individual options series or classes. Volume executed in complex strategies is not taken into consideration when determining whether Market Makers are meeting quoting obligations applicable to Market Makers in the simple market for individual options.[48]

COA Eligibility

Proposed Rule 21.20, Interpretation and Policy .02 establishes the method by which the Exchange will determine whether complex order interest is qualified to initiate a COA and also describes the operation of the proposed functionality with respect to the fact multiple COAs would be allowed to operate concurrently. If a COA-eligible order is priced equal to, or improves, the SBBO and is also priced to improve other complex orders resting at the top of the COB, the complex order will be eligible to initiate a COA, provided that if any of the bids or offers on the Simple Book that comprise the SBBO consists of a Priority Customer Order, the COA will only be initiated if it will trade at a price that is better than the corresponding bid or offer by at least a $0.01 increment.

Pursuant to the proposed Rule, a COA will be allowed to commence even to the extent a COA for the same complex strategy is already underway. The Exchange notes at the outset that based on how Exchange Systems operate (and computer processes generally), it is impossible for COAs to occur ''simultaneously'', meaning that they would commence and conclude at exactly the same time. Thus, although it is possible as proposed for one or more COAs to overlap, each COA will be started in a sequence and with a time that will determine its processing. The Exchange proposes to codify in Interpretation and Policy .02 that to the extent there is more than one COA for a specific complex strategy underway at a time, each COA will conclude sequentially based on the exact time each COA commenced, unless terminated early pursuant to proposed paragraph (d)(5)(C) of the Rule.[49] At the time each COA concludes, such COA will be allocated pursuant to the proposed Rule and will take into account all COA Responses and unrelated complex orders on the COB at the exact time of conclusion.

Thus, even if there are two COAs that commence and conclude at nearly the same time each COA will have a distinct conclusion at which time the COA will be allocated. In turn, when the first COA concludes, orders on the Simple Book and unrelated complex orders that then exist will be considered for participation in the COA. If unrelated orders are fully executed in such COA, then there will be no unrelated orders for consideration when the subsequent COA is processed (unless new unrelated order interest has arrived). If instead there is remaining unrelated order interest after the first COA has been allocated, then such unrelated order interest will be considered for allocation when the subsequent COA is processed. As another example, each COA Response is required to specifically identify the COA for which it is targeted [50] and if not fully executed will be cancelled back at the conclusion of the COA.[51] Thus, COA Responses will only be considered in the specified COA.

Dissemination of Information

Proposed Rule 21.20, Interpretation and Policy .03 is a regulatory provision that prohibits the dissemination of information related to COA-eligible orders by the submitting Member to third parties. Such conduct will be deemed conduct inconsistent with just and equitable principles of trade as described in Exchange Rule 3.1.

Price and Other Protections

Proposed Interpretation and Policy .04 establishes Price Protection standards that are intended to ensure that certain types of complex strategies will not be executed outside of a preset standard minimum and/or maximum price limit. These Rules are based on and similar to portions of Interpretation and Policy .08 to CBOE Rule 6.53C.

First, in paragraph (a) of Proposed Rule 21.20, Interpretation and Policy .04, the Exchange proposed to define various terms necessary for such Interpretation,[52] as follows:

- A ''vertical'' spread is a two-legged complex order with one leg to buy a number of calls (puts) and one leg to sell the same number of calls (puts) with the same expiration date but different exercise prices.
- A ''butterfly'' spread is a three-legged complex order with two legs to buy (sell) the same number of calls (puts) and one leg to sell (buy) twice as many calls (puts), all with the same expiration date but different exercise prices, and the exercise price of the middle leg is between the exercise prices of the other legs. If the exercise price of the middle leg is halfway between the exercise prices of the other legs, it is a ''true'' butterfly; otherwise, it is a ''skewed'' butterfly.
- A ''box'' spread is a four-legged complex order with one leg to buy calls and one leg to sell puts with one strike price, and one leg to sell calls and one leg to buy puts with another strike price, all of which have the same expiration date and are for the same number of contracts.

Second, in paragraph (b), the Exchange has proposed to specify credit-to-debit parameters that would prevent execution of, and instead cancel, market orders that would be executed at a net debit price after receiving a partial execution at a net credit price.[53]

Next, in paragraph (c), the Exchange proposes to set forth various Debit/Credit Price Reasonability Checks, as follows. To the extent a price check parameter is applicable, the Exchange will not accept a complex order that is a limit order for a debit strategy with a net credit price that exceeds a pre-set buffer, a limit order for a credit strategy with a net debit price that exceeds a pre-set buffer, or a market order for a credit strategy that would be executed at a net

[47] This is similar to ISE, where market makers are not required to enter quotes on the complex order book. Quotes for complex orders are not subject to any quotation requirements that are applicable to market maker quotes in the regular market for individual options series or classes. *See* ISE Rule 722, Supplementary Material .03.

[48] *See* Proposed Rule 21.20, Interpretation and Policy .01. This is substantially similar to complex quoting functionality currently operative on both MIAX and ISE, where market makers may enter quotes for complex order strategies on the complex order book in their appointed options classes. Just as with the proposed rules, neither MIAX market makers nor ISE market makers are required to enter quotes on the complex order book. Quotes for complex orders are not subject to any quotation requirements that are applicable to MIAX market maker or ISE Market Maker quotes in the regular market for individual options series or classes, nor is any volume executed in complex orders taken into consideration when determining whether MIAX or ISE market makers are meeting quoting obligations applicable to market maker quotes in the regular market for individual options series. *See* MIAX Rule 518, Interpretation and Policy .02; ISE Rule 722, Supplementary Material .03.

[49] In the event there are multiple COAs underway that are each terminated early pursuant to proposed Rule 21.20(d)(5)(C), the COAs will be processed sequentially based on the order in which they commenced.

[50] *See* proposed Rule 21.20(d)(4).

[51] *See id.*

[52] *See* paragraph (a) to Proposed Rule 21.20, Interpretation and Policy .04; *see also* CBOE Rule 6.53C, Interpretation and Policy .08.

[53] *See* paragraph (b) to Proposed Rule 21.20, Interpretation and Policy .04; *see also* CBOE Rule 6.53C, Interpretation and Policy .08(b).

debit price that exceeds a pre-set buffer.[54] The Exchange will determine these pre-set buffer amounts and communicate them to Members via specifications and/or Regulatory Circular.[55]

As proposed in paragraph (c)(2), the System would define a complex order as a debit or credit as follows: (A) A call butterfly spread for which the middle leg is to sell (buy) and twice the exercise price of that leg is greater than or equal to the sum of the exercise prices of the buy (sell) legs is a debit (credit); (B) a put butterfly spread for which the middle leg is to sell (buy) and twice the exercise price of that leg is less than or equal to the sum of the exercise prices of the buy (sell) legs is a debit (credit); and (C) an order for which all pairs and loners are debits (credits) is a debit (credit).[56]

For purposes of Debit/Credit Price Reasonability Checks, a ''pair'' is a pair of legs in an order for which both legs are calls or both legs are puts, one leg is a buy and one leg is a sell, and both legs have the same expiration date but different exercise prices or, for all options except European-style index options, the same exercise price but different expiration dates. A ''loner'' is any leg in an order that the System cannot pair with another leg in the order (including legs in orders for European-style index options that have the same exercise price but different expiration dates). The proposed rule would further specify: that the System first pairs legs to the extent possible within each expiration date, pairing one leg with the leg that has the next highest exercise price; and that the System then, for all options except European-style index options, pairs legs to the extent possible with the same exercise prices across expiration dates, pairing one leg with the leg that has the next nearest expiration date.[57]

A pair of calls is a credit (debit) if the exercise price of the buy (sell) leg is higher than the exercise price of the sell (buy) leg (if the pair has the same expiration date) or if the expiration date of the sell (buy) leg is farther than the expiration date of the buy (sell) leg (if the pair has the same exercise price). A pair of puts is a credit (debit) if the exercise price of the sell (buy) leg is higher than the exercise price of the buy (sell) leg (if the pair has the same expiration date) or if the expiration date of the sell (buy) leg is farther than the expiration date of the buy (sell) leg (if the pair has the same exercise price). A loner to buy is a debit, and a loner to sell is a credit.[58]

In addition to the definitions and parameters described above, proposed paragraph (c)(3) would also state that the System rejects or cancels back to the Member any limit order or any market order (or any remaining size after partial execution of the order), that does not satisfy this check. Also, proposed paragraph (c)(4) would make clear that the check applies to auction responses in the same manner as it does to orders.

In addition to the proposed Debit/Credit Price Reasonability Checks described above, the Exchange proposes to adopt specific Buy Strategy Parameters that would be set forth in paragraph (d) to Interpretation and Policy .04. As proposed, the System will reject a limit order where all the components of the strategy are to buy and the order is priced at zero, any net credit price that exceeds a pre-set buffer, or a net debit price that is less than the number of individual option series legs in the strategy (or applicable ratio) multiplied by the applicable minimum net price increment for the complex order.[59]

Proposed paragraph (e) to Interpretation and Policy .04 would set forth a Maximum Value Acceptable Price Range as an additional price check for vertical, true butterfly or box spreads as well as certain limit and market orders.[60] Specifically, the System will reject an order if the order is a vertical, true butterfly or box spread, or a limit order or market order if it would execute at a price that is outside of an acceptable price range. The acceptable price range is set by the minimum and maximum possible value of the spread, subject to an additional buffer amount determined by the Exchange and communicated to Members via specifications and/or a Regulatory Circular. The maximum possible value of a vertical, true butterfly and box spread is the difference between the exercise prices of (A) the two legs; (B) the middle leg and the legs on either side; and (C) each pair of legs, respectively. The minimum possible value of the spread is zero.

The last paragraph of proposed Interpretation and Policy .04, paragraph (f), would set forth the Exchange's Drill-Through Price Protection. The Drill-Through Price Protection feature is a price protection mechanism applicable to all complex orders under which a buy (sell) order will not be executed at a price that is higher (lower) than the SNBBO or the SNBBO at the time of order entry plus (minus) a buffer amount (the ''Drill-Through Price'').[61] The Exchange will adopt a default buffer amount for the Drill-Through Price Protection and will publish this amount in publicly available specifications and/or a Regulatory Circular. A Member may modify the buffer amount applicable to Drill-Through Price Protections to either a larger or smaller amount than the Exchange default. If a buy (sell) order would execute or post to the COB at a price higher (lower) than the Drill-Through Price, the System will instead post the order to the COB at the Drill-Through Price, unless the terms of the order instruct otherwise. Any order (or unexecuted portion thereof) will rest in the COB (based on the time at which it enters the book for priority purposes) for a time period in milliseconds that may not exceed three seconds (which the Exchange will determine and communicate to Members via specifications and/or Regulatory Circular) with a price equal to the Drill-Through Price. If the order (or unexecuted portion thereof) does not execute during that time period, the System will cancel it.

Example—Application of Drill-Through Protection.

EDGX—quote Mar 50 Call 6.00–6.50 (10x10)
EDGX—quote Mar 55 Call 2.00–2.30 (10x10)
CBOE—Mar 50 Call 6.00–6.50 (10x10)
CBOE—Mar 55 Call 2.00–2.10 (10x10)
ISE—Mar 50 Call 6.00–6.50 (10x10)
ISE—Mar 55 Call 2.10–2.30 (10x10)

- The Exchange receives an initiating Priority Customer Order to buy 1 Mar 50 call and sell 2 Mar 55 calls for a 2.50 debit x 100.
- Assume the Exchange has established two seconds as the amount of time an order will rest in the COB with a price equal to the Drill-Through Price before cancellation.

[54] As proposed, the System would not apply this check to an order for which the System cannot define whether it is a debit or credit. This would primarily be prior to the opening of trading as orders are being queued because prices may not be available in order to make such determination.

[55] The Exchange notes that ISE also employs variable ''pre-set values'' in connection with analogous price protections offered by ISE with respect to its complex order book. *See* Supplementary Material .07(c) to ISE Rule 722.

[56] *See* paragraph (c) to Proposed Rule 21.20, Interpretation and Policy .04; *see also* CBOE Rule 6.53C, Interpretation and Policy .08(c).

[57] *See id.*

[58] *See id.*

[59] *See* paragraph (d) to Proposed Rule 21.20, Interpretation and Policy .04; *see also* CBOE Rule 6.53C, Interpretation and Policy .08(d).

[60] *See* paragraph (e) to Proposed Rule 21.20, Interpretation and Policy .04; *see also* CBOE Rule 6.53C, Interpretation and Policy .08(g).

[61] The Exchange notes that ISE also applies configurable values in connection with an analogous price protection offered by ISE with respect to its complex order book. *See* Supplementary Material .07(a) to ISE Rule 722.

- The SBBO is 1.40 debit bid at 2.50 credit offer.
- The SNBBO is 1.80 debit bid (CBOE) at 2.30 credit offer (ISE).
- Assume the do-not-COA instruction is present on this order, so the order will not initiate a COA auction upon arrival regardless of any other factor.
- Further assume the Member has set its Drill-Through Price Protection with zero tolerance to execute through the SNBBO, so the Exchange will protect the order to the best bid for the strategy or best offer for the strategy available from any single exchange's protected quotation in the Simple Order Market, including the Exchange.
- Due to the Drill-Through Price Protection, the inbound order cannot be legged against the Simple Book for a 2.50 debit (the strategy is offered at 2.30 on ISE). In order to display the order at its maximum tradable price, the inbound order is managed on the COB and displayed at its protected limit of 2.30 debit bid. While the (EDGX) SBBO remains 1.40 debit bid at 2.50 credit offer, the combination of the Simple Book and the COB becomes 2.30 debit bid at 2.50 credit offer.
- If the order managed and displayed at its protected limit of 2.30 debit bid is not executed within 2 seconds it will be cancelled.

Trading Halts

The Exchange is proposing to establish in proposed Rule 21.20, Interpretation and Policy .05, the details regarding the Exchange's handling of complex orders in the context of a trading halt.

Proposed Interpretation and Policy .05, paragraph (a) would govern halts during regular trading and would state that if a trading halt exists for the underlying security or a component of a complex strategy, trading in the complex strategy will be suspended. The COB will remain available for Members to enter and manage complex orders. Incoming complex orders that could otherwise execute or initiate a COA in the absence of a halt will be placed on the COB. This is similar to functionality that is currently operative on other exchanges.[62] Incoming complex orders with a time in force of IOC will be cancelled.

Proposed in Interpretation and Policy .05, paragraph (b) would govern halts during a COA and would state that if, during a COA, any component(s) and/or the underlying security of a COA-eligible order is halted, the COA will end early without trading and all COA Responses will be cancelled. Remaining complex orders will be placed on the COB if eligible, or cancelled. When trading in the halted component(s) and/or underlying security of the complex order resumes, the System will evaluate and re-open the COB pursuant to subparagraph (c)(2)(B)–(D) described above.

Other investor protections proposed by the Exchange are described in Interpretation and Policy .06. Specifically, the Exchange proposes an additional price protection referred to as Fat Finger Price Protection as well as a complex order size protection. Both of these protections will be will be [sic] available for complex orders as determined by the Exchange and communicated to Members via specifications and/or Regulatory Circular.

Pursuant to the Fat Finger Price Protection, the Exchange will define a price range outside of which a complex limit order will not be accepted by the System.[63] The price range will be a number defined by the Exchange and communicated to Members via specifications and/or Regulatory Circular.[64] A Member may also establish a more aggressive or restrictive value than the Exchange default. The default price range for Fat Finger Price Protection will be greater than or equal to a price through the SNBBO for the complex strategy to be determined by the Exchange and communicated to Members via specifications and/or Regulatory Circular. A complex limit order to sell will not be accepted at a price that is lower than the SNBBO bid, and a complex limit order to buy will not be accepted at a price that is higher than the SNBBO offer, by more than the Exchange defined or Member established price range. A complex limit order that is priced through this range will be rejected.

With respect to the proposed order size protection, the System will prevent certain complex orders from executing or being placed on the COB if the size of the complex order exceeds the complex order size protection designated by the Member.[65] If the maximum size of complex orders is not designated by the Member, the Exchange will set a maximum size of complex orders on behalf of the Member by default. Members may designate the complex order size protection on a firm wide basis. The default maximum size for complex orders will be determined by the Exchange and communicated to Members via specifications and/or Regulatory Circular.[66]

Additional Times in Force

As noted above, the Exchange proposes to adopt two new Times in Force not currently available on the Exchange in connection with the proposal, GTC and OPG. The Exchange notes that as proposed, both of these Times in Force will ultimately be available on both the Simple Book and the COB. The Exchange proposes to include GTC and OPG within Rule 21.1(f), which currently lists all Times in Force available for use on EDGX Options. As proposed, ''Good Til Cancelled or ''GTC'' shall mean, for an order so designated, that if after entry into the System, the order is not fully executed, the order (or the unexecuted portion thereof) shall remain available for potential display and/or execution unless cancelled by the entering party, or until the option expires, whichever comes first. ''At the Open'' or ''OPG'' shall mean, for an order so designated, an order that shall only participate in the opening process on the Exchange. An OPG order not executed in the opening process will be cancelled.

Market Data Feeds

The Exchange currently offers various data feeds that contain information regarding activity on EDGX Options, including auctions conducted by EDGX Options. The Exchange proposes to amend Rule 21.15 to specify the data feeds the Exchange proposes to adopt in connection with this proposal. As set forth in current Rule 21.15, all data products are free of charge, except as otherwise noted in the Fee Schedule; thus, if the Exchange proposes to adopt fees in connection with any of these data feeds, it will file a separate fee filing and will add such fees to the Fee Schedule. The proposed data feeds and related changes are described below.

First, the Exchange currently offers a Multicast PITCH data feed, which is an

[62] The proposed rule is based on and similar to the MIAX process for trading halts, except that MIAX reopens through potential complex auctions whereas the Exchange has proposed reopening through its standard Opening Process. *See* MIAX Rule 518, Interpretation and Policy .05(e)(3); *see also* PHLX Rule 1098(c)(ii)(C), which states that complex orders will not trade on the PHLX system during a trading halt for any options component of the Complex Order.

[63] *See* paragraph (a) of proposed Interpretation and Policy .06 to Rule 21.20.

[64] The Exchange notes that ISE also applies configurable values in connection with an analogous price protection offered by ISE with respect to its complex order book. *See* Supplementary Material .07(d) to ISE Rule 722.

[65] *See* paragraph (b) of proposed Interpretation and Policy .06 to Rule 21.20.

[66] The Exchange notes that ISE also applies configurable values in connection with an analogous size protection offered by ISE with respect to its complex order book. *See* Supplementary Material .07(e) to ISE Rule 722.

uncompressed data feed that offers depth of book quotations and execution information based on options orders entered into the System. The Exchange proposes to adopt a similar, but separate, Multicast PITCH data feed for the COB.

Second, although it offers a ''top of book'' feed for its equities trading platform, EDGX Options does not currently offer such a feed. In connection with this proposal, the Exchange proposes to offer a Multicast TOP data feed. As proposed, Multicast TOP would be an uncompressed data feed that offers top of book quotations and execution information based on options orders entered into the System. The Exchange proposes to offer separate Multicast TOP data feeds for the Exchange's Simple Book and the COB.

Third, the Exchange currently offers an Auction Feed, which is an uncompressed data product that provides information regarding the current status of price and size information related to auctions conducted by the Exchange. The Exchange proposes to adopt a similar, but separate, Auction data feed for the COB.

Fourth, pursuant to current Rule 21.15(c)(2), the Exchange identifies Priority Customer Orders and trades as such on messages disseminated by the Exchange through its Multicast PITCH and Auction data feeds. The Exchange proposes to also disseminate this information on its Multicast TOP data feed.

Finally, the Exchange proposes to re-number the provisions for the DROP and Historical Data products, but does not propose any changes with respect to such products.

Risk Monitor Mechanism

The Exchange proposes to adopt Interpretation and Policy .01 to Rule 21.16 to state that complex orders will participate in the Exchange's existing risk functionality, the Risk Monitor. As noted above, the Risk Monitor functions by counting Member activity both within a specified time period and also on an absolute basis for the trading day and then rejecting or cancelling orders that exceed Member-designated volume, notional, count or percentage triggers. The Exchange proposes to make clear in this Interpretation that for purposes of counting within a specified time period and for purposes of calculating absolute limits, the Exchange will count individual trades executed as part of a complex order when determining whether a volume trigger, notional trigger or count trigger has been reached. Further, the Exchange proposes to make clear that for purposes of counting within a specified time period and for purposes of calculating absolute limits, the Exchange will count the percentage executed of a complex order when determining whether the percentage trigger has been reached.

Implementation Date

If the proposed changes are approved by the Commission, the Exchange proposes to implement the System changes described herein on October 23, 2017.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of the Act,[67] in general, and with Section 6(b)(5) of the Act,[68] in particular, in that it is designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest; and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange believes in particular that its proposal regarding executions of complex orders against the Simple Book is consistent with the Act and furthers the objectives of Section 6(b)(5) of the Act[69] because it provides greater liquidity to the marketplace as a whole by fostering the interaction between the components of complex orders on the COB and the Simple Book. This should enhance the opportunity for executions of both complex orders and simple orders.

The Exchange also believes the interaction of orders will benefit investors by increasing the opportunity for complex orders to receive execution, while also enhancing execution quality for orders on the Simple Book. Generally, the options industry rules for the execution of complex orders provide that two complex orders may execute against one another if the execution prices of the component legs result in a net price that is better than the best customer limit order available for the individual component legs. This permits an exchange, when executing two complex orders against one another, to execute each component leg on the market's best bid or offer so long as the execution does not trade ahead of customer interest.

The Exchange believes it is reasonable to permit complex orders that are the subject of this rule change to leg into the Simple Book. The proposed rule concerning Legging will facilitate the execution of more complex orders, and will thus benefit investors and the general public because complex orders will have a greater chance of execution when they are allowed to leg into the simple market. This will increase the execution rate for these orders, thus providing market participants with an increased opportunity to execute these orders on the Exchange. The prohibition (though inapplicable to two-leg COA-eligible Customer complex orders) against the Legging of complex orders with two option legs where both legs are buying or both legs are selling and both legs are calls or both legs are puts, and on complex orders with three or four option legs where all legs are buying or all legs are selling regardless of whether the option leg is a call or a put, protects investors and the public interest by ensuring that Market Makers providing liquidity do not trade above their established risk tolerance levels, as described above.

Despite the enhanced execution opportunities provided by legging, as described above, the Exchange believes it is reasonable and consistent with the Act to permit Members to submit orders designated as Complex Only Orders that will not leg into the Simple Book. As described above, the Exchange notes that the Complex Only Order option is analogous to functionality on the MIAX complex order book, which includes certain types of orders and quotes that do not leg into the simple marketplace but instead will only execute against or post to the MIAX complex book.[70] The Exchange also believes the proposed functionality is analogous to other types of functionality already offered by the Exchange that provides Members the ability to direct the Exchange not to route their orders away from the Exchange[71] or not to remove liquidity from the Exchange.[72] Similar to such analogous features, the Exchange believes that Members may utilize Complex Only Order functionality as part of their strategy to maintain additional control over their executions, in connection with their attempt to provide and not remove liquidity, or in connection with applicable fees for executions. Based on the foregoing, the Exchange does not believe that Complex

[67] 15 U.S.C. 78a *et seq.*

[68] 15 U.S.C. 78f(b)(5).

[69] *Id.*

[70] *See supra* note 11.

[71] *See supra* note 12.

[72] *See supra* note 13.

Only Order functionality raises any new or novel concepts under the Act, and instead is consistent with the goals of the Act to remove impediments to and to perfect the mechanism of a free and open market and a national market system, and to protect investors and the public interest.

The Exchange also believes it is reasonable to limit other types of complex orders that are eligible to leg into the Simple Book. The Exchange believes that the vast majority of complex orders sent to the Exchange will be unaffected by this proposed rule, including two leg COA-eligible Customer complex orders, which will still be allowed to leg into the Simple Book without restriction. Moreover, the Exchange believes that the potential risk of offering Legging functionality for complex orders such as those impacted by the proposed rule could limit the amount of liquidity that Market Makers are willing to provide in the Simple Book. In particular, Market Makers, without the proposed limitation, are at risk of executing the cumulative size of their quotations across multiple options series without an opportunity to adjust their quotes. Market Makers may be compelled to change their quoting and trading behavior to account for this additional risk by widening their quotes and reducing the size associated with their quotes, which would diminish the Exchange's quality of markets and the quality of the markets in general. The limitations in proposed Rule 21.20(c)(2)(F) substantially diminish a potential source of unintended Market Maker risk when certain types of complex orders leg into the Simple Book, thereby removing impediments to and perfecting the mechanisms of a free and open market and a national market system and, in general, protecting investors and the public interest by adding confidence and stability in the Exchange's marketplace. This benefit to investors far exceeds the small amount of potential liquidity provided by the few complex orders to which this aspect of the proposal applies.

Additionally, investors will have greater opportunities to manage risk with the new availability of trading in complex orders. The proposed adoption of rules governing complex order auctions will facilitate the execution of complex orders while providing opportunities to access additional liquidity and fostering price improvement. The Exchange believes the proposed rules are appropriate in that complex orders are widely recognized by market participants as invaluable, both as an investment, and a risk management strategy. The proposed rules will provide an efficient mechanism for carrying out these strategies. In addition, the proposed complex order rules promote equal access by providing Members that subscribe to the Exchange's data feeds that include auction notifications with the opportunity to interact with orders in the COA. In this regard, any Member can subscribe to the options data provided through the Exchange's data feeds that include auction notifications.

The Exchange believes that the general provisions regarding the trading of complex orders provide a clear framework for trading of complex orders in a manner consistent with other options exchanges. This consistency should promote a fair and orderly national options market system. The Exchange believes that the proposed rules will result in efficient trading and reduce the risk for investors that complex orders could fail to execute by providing additional opportunities to fill complex orders.

The proposed execution and priority rules will allow complex orders to interact with interest in the Simple Book and, conversely, interest on the Simple Book to interact with complex orders in an efficient and orderly manner. Consistent with other exchanges and with well-established principles of customer protection, the proposed rules state that a complex order may be executed at a net credit or debit price against another complex order without giving priority to bids or offers established in the marketplace that are no better than the bids or offers comprising such net credit or debit; provided, however, that if any of the bids or offers established in the marketplace consist of a Priority Customer Order, at least one component of the complex strategy must trade at a price that is better than the corresponding BBO.[73] Additionally, before executing against another complex order, a complex order on the Exchange will execute first against orders on the Simple Book (except in the limited circumstance described in proposed Rule 21.20(c)(2)(F)) if any of the bids or offers established in the simple marketplace consist of a Priority Customer Order. Further, although it would not leg into the Simple Book, a Complex Only Order will similarly be constrained by the pricing provisions of the Rule to the extent a Priority Customer Order is resting on the Simple Book.

For the reasons set forth above, the Exchange believes the proposed rule change regarding complex order execution is consistent with the goals of the Act to remove impediments to and to perfect the mechanism of a free and open market and a national market system, and to protect investors and the public interest.

Types of Complex Orders

The Exchange proposes that complex orders may be submitted as limit orders and market orders, and orders with a Time in Force of GTD, IOC, DAY, GTC, or OPG, as each such term is defined in Exchange Rule 21.1, or as a Complex Only order, COA-eligible or do-not-COA order.[74] In particular, the Exchange believes that limit orders, GTD, IOC, DAY, GTC, and OPG orders all provide valuable limitations on execution price and time that help to protect Exchange participants and investors in both the Simple Book and in the proposed COB. In addition, the Exchange believes that offering participants the ability to utilize MTP Modifiers for complex orders in a similar way to the way they are used on the Simple Book provides such participants with the ability to protect themselves from inadvertently matching against their own interest. The Exchange believes that permitting complex orders to be entered with these varying order types and modifiers will give the Exchange participants greater control and flexibility over the manner and circumstances in which their orders may be executed, modified, or cancelled, and thus will provide for the protection of investors and contribute to market efficiency. In particular, the Exchange notes that while both the Complex Only Order and the do-not-COA instruction may reduce execution opportunities for the entering Member, the Exchange believes that similar features are already offered by other options exchanges in connection with complex order functionality[75] and that they are reasonable limitations a Member may wish to include on their order in order to participate on the COB.

Further, the Exchange believes it is reasonable and appropriate to add GTC and OPG modifiers as new Times in Force that will be generally available for use on the Simple Book or the COB. The Exchange notes that GTC orders are offered by other exchanges[76] as are times in force that, similar to OPG, limit

[73] *See* proposed Rule 21.20(c)(3)(A).

[74] *See* proposed Rule 21.20(b).

[75] *See, e.g.,* CBOE Rule 6.53C(d)(ii)(B) (describing do-not-COA functionality on CBOE); MIAX Rule 518(b)(2)(i) and (c)(2)(iii) (describing cAOC orders, which, in addition to market maker quotes on the MIAX complex order book, are not eligible for legging to the MIAX simple order book).

[76] *See, e.g.,* C2 Rule 6.10(e)(2); ISE Rule 715(r).

an order to participating in an exchange's opening process.[77]

Evaluation

The Exchange believes that the regular and event-driven evaluation of the COB for the eligibility of complex orders to initiate a COA, and to determine their eligibility to participate in the managed interest process, their eligibility for full or partial execution against a complex order resting on the COB or through Legging with the Simple Book, whether the complex order should be cancelled, and whether the complex order or any remaining portion thereof should be placed on the COB are consistent with the principles of the Act to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanisms of a free and open market and a national market system and, in general, to protect investors and the public interest.

Evaluation of the executability of complex orders and for the determination as to whether a complex order is COA-eligible is central to the removal of impediments to, and the perfection of, the mechanisms of a free and open market and a national market system and, in general, the protection of investors and the public interest. The evaluation process ensures that the System will capture and act upon complex orders that are due for execution or placed in a COA. The regular and event-driven evaluation process removes potential impediments to the mechanisms of the free and open market and the national market system by ensuring that complex orders are given the best possible chance at execution at the best price, evaluating the availability of complex orders to be handled in a number of ways as described in this proposal. Any potential impediments to the order handling and execution process respecting complex orders are substantially removed due to their continual and event-driven evaluation for subsequent action to be taken by the System. This protects investors and the public interest by ensuring that complex orders in the System are continually monitored and evaluated for potential action(s) to be taken on behalf of investors that submit their complex orders to the Exchange.

COA Process

The COA process is also designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanisms of a free and open market and a national market system and, in general, to protect investors and the public interest.

Following evaluation, a COA-eligible order may begin a new COA. The COA process promotes just and equitable principles of trade, fosters cooperation and coordination with persons engaged in facilitating transactions in securities, removes impediments to and perfects the mechanisms of a free and open market and a national market system and, in general, protects investors and the public interest by ensuring that eligible complex orders are given every opportunity to be executed at the best prices against an increased level of contra-side liquidity responding to the COA auction message. This mechanism of a free and open market is designed to enhance liquidity and the potential for better execution prices during the Response Time Interval, all to the benefit of investors on the Exchange, and thereby consistent with the Act.

The Exchange believes that the determination to initiate a COA removes impediments to, and perfects the mechanisms of, a free and open market and a national market system and, in general, protects investors and the public interest, by ensuring that a COA is conducted for a complex order only when there is a reasonable and realistic chance for price improvement through a COA. As described above, the Exchange has proposed to initiate a COA if a COA-eligible order is priced equal to, or improves, the SBBO and is also priced to improve other complex orders resting at the top of the COB, provided that if any of the bids or offers on the Simple Book that comprise the SBBO consists of a Priority Customer Order, the COA will only be initiated if it will trade at a price that is better than the corresponding bid or offer by at least a $0.01 increment. The purpose of this provision is to ensure that a complex order will not initiate a COA if it is priced through the bid or offer at a point where it is not reasonable to anticipate that it would generate a meaningful number of COA Responses such that there would be price improvement of the complex order's limit price. Promoting the orderly initiation of a COA is essential to maintaining a fair and orderly market for complex orders; otherwise, the initiation of COAs that are unlikely to result in price improvement might result in unnecessary activity in the marketplace when there is no meaningful opportunity for price improvement.

If a complex order is not priced equal to, or better than, the SBBO or is not priced to improve other complex orders resting at the top of the COB, the Exchange does not believe that it is reasonable to anticipate that it would generate a meaningful number of COA Responses such that there would be price improvement of the complex order's limit price. Promoting the orderly initiation of COAs is essential to maintaining a fair and orderly market for complex orders; otherwise, the initiation of COAs that are unlikely to result in price improvement could affect the orderliness of the marketplace in general. The Exchange believes that this removes impediments to and perfects the mechanisms of a free and open market and a national market system by promoting the orderly initiation of COAs, and by limiting the likelihood of unnecessary COAs that are not expected to result in price improvement.

The Exchange believes the proposed maximum 500 millisecond Response Time Interval promotes just and equitable principles of trade and removes impediments to a free and open market because it allows sufficient time for Members participating in a COA to submit COA Responses and would encourage competition among participants, thereby enhancing the potential for price improvement for complex orders in the COA to the benefit of investors and public interest. The Exchange believes the proposed rule change is not unfairly discriminatory because it establishes a Response Time Interval applicable to all Exchange participants participating in a COA.

The Exchange again notes that it has not proposed to limit the frequency of COAs for a complex strategy and could have multiple COAs occurring concurrently with respect to a particular complex strategy. The Exchange represents that it has systems capacity to process multiple overlapping COAs consistent with the proposal, including systems necessary to conduct surveillance of activity occurring in such auctions. Further, the Exchange reiterates that at least one options exchange has permitted multiple complex auctions in the same strategy to run concurrently and intends to reintroduce such functionality.[78] The Exchange also notes that other options exchanges offer auctions for orders 50 contracts or greater (generally referred to as ''facilitation auctions'') that are

[77] *See, e.g.,* C2 Rule 6.10(c)(7); ISE Rule 715(o).

[78] *See supra* note 42.

permitted to overlap.[79] The Exchange has adopted similar functionality in connection with its Bats Auction Mechanism (''BAM''), which permits overlapping BAM auctions to the extent the order is an order for 50 contracts or greater.[80]

The Exchange does not anticipate overlapping auctions necessarily to be a common occurrence, however, after considerable review, believes that such behavior is more fair and reasonable with respect to Members who submit orders to the COB because the alternative presents other issues to such Members. Specifically, if the Exchange does not permit overlapping COAs then a Member who wishes to submit a COA-eligible order but has its order rejected because another COA is already underway in the complex strategy must either wait for such COA to conclude and re-submit the order to the Exchange (possibly constantly resubmitting the complex order to ensure it is received by the Exchange before another COA commences) or must send the order to another options exchange that accepts complex orders.

The COA process also protects investors and the public interest by creating more opportunities for price improvement of complex orders, all to the benefit of Exchange participants and the marketplace as a whole.

Complex Order Price Protections

The Exchange believes that the proposed complex order price protections will provide market participants with valuable price and order size protections in order to enable them to better manage their risk exposure when trading complex orders. In particular, the Exchange believes the proposed price protection mechanisms will protect investors and the public interest and maintain fair and orderly markets by mitigating potential risks associated with market participants entering orders at clearly unintended prices and orders trading at prices that are extreme and potentially erroneous, which may likely have resulted from human or operational error.

Other Protections

The Exchange is proposing to suspend trading in complex orders, to remove certain complex orders from the COB, and to end a COA early when there is a halt in the underlying security of, or in an individual component of, a complex order. This protection is intended to protect investors and the public interest by causing the System not to execute during potentially disruptive conditions or events that could affect customer protection, and to resume trading in complex orders to the extent possible upon the conclusion or resolution of the potentially disruptive condition or event. The System's proposed functionality during a trading halt protects investors and the public interest by ensuring that the execution of complex orders on behalf of investors and the public will only occur at times when there is a fair and orderly market.

Market Data Feeds

The Exchange believes it is reasonable and appropriate to offer the proposed data feeds described above in order to provide information regarding activity on the COB, including COA auction messages. Each of the proposed data feeds is based on and similar to an existing data feed offered by EDGX Options and/or the EDGX equities trading platform (''EDGX Equities'').[81] Further, information to identify orders as Priority Customer Orders is already being included on the Exchange's Multicast PITCH and Auction data feeds, and the Exchange does not believe that also including this information on the new Multicast TOP data feed raises any novel issues.

Risk Monitor Mechanism

The proposed amendment to Exchange Rule 21.16, Risk Monitor Mechanism, to reject complex orders that exceed Member-designated volume, notional, count or percentage triggers is designed to protect investors and the public interest by assisting Members submitting complex orders in their risk management. Members are vulnerable to the risk from system or other error or a market event that may cause them to send a large number of orders or receive multiple, automatic executions before they can adjust their order exposure in the market. Without adequate risk management tools, such as the Risk Monitor Mechanism, Members could reduce the amount of order flow and liquidity that they provide to the market. Such actions may undermine the quality of the markets available to customers and other market participants. Accordingly, the proposed amendments to the Risk Protection Monitor should instill additional confidence in Members that submit orders to the Exchange that their risk tolerance levels are protected, and thus should encourage such Members to submit additional order flow and liquidity to the Exchange with the understanding that they have this protection respecting all orders they submit to the Exchange, including complex orders, thereby removing impediments to and perfecting the mechanisms of a free and open market and a national market system and, in general, protecting investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The competition among the options exchanges is vigorous and this proposal is intended to afford market participants on EDGX Options the opportunity to execute complex orders in a manner that is similar to that allowed on other options exchanges.

The Exchange believes that the proposal will enhance competition among the various markets for complex order execution, potentially resulting in more active complex order trading on all exchanges.

The Exchange notes that as to intramarket competition, its proposal is designed to treat all Exchange participants in the same category of participant equally. The Exchange believes that it is equitable and reasonable to afford trade allocation priority to certain categories of participants. The proposal to establish first priority to Priority Customer orders resting on the Simple Book is consistent with the long-standing policies of customer protection found throughout the Act and maintains the Exchange's current practice by affording such priority.[82]

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period (i)

[79] *See, e.g.,* ISE Rule 716(d), which governs ISE's facilitation mechanism and does not restrict such auctions to one auction at a time. *See also* Boston Options Exchange (''BOX'') Rule 7270.

[80] *See* EDGX Rule 21.19(a)(3). *See also* Interpretation and Policy .02 to Rule 21.19, which was the basis for related language in Interpretation and Policy .04 of the proposed Rule.

[81] *See* EDGX Rule 13.8 for a description of the EDGX Equities TOP feed and other data feeds and EDGX Rule 21.15 for a description of the current EDGX Options data feeds, including Multicast PITCH and the Auction Feed.

[82] *See* Exchange Rule 21.8.

as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission will: (a) By order approve or disapprove such proposed rule change, or (b) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–BatsEDGX–2017–29 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–BatsEDGX–2017–29. 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–2017–29 and should be submitted on or before August 9, 2017.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[83]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 2017–15098 Filed 7–18–17; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–81138; File No. SR–BX–2017–031]

Self-Regulatory Organizations; NASDAQ BX, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Rule 7018

July 13, 2017.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on June 30, 2017, NASDAQ BX, Inc. (''BX'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend the Exchange's transaction fees at Rule 7018 to assess a new charge for adding displayed liquidity for members that equal or exceed a specified monthly volume threshold, as described further below.

The text of the proposed rule change is available on the Exchange's Web site at *http://nasdaqbx.cchwallstreet.com/,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to amend the Exchange's transaction fees at Rule 7018 to assess a new charge for adding displayed liquidity for members that equal or exceed a specified monthly volume threshold.

The Exchange operates on the ''taker-maker'' model, whereby it pays credits to members that take liquidity and charges fees to members that provide liquidity. Currently, the Exchange assesses three fees to members that provide liquidity on BX through displayed orders if the member meets certain volume requirements. First, the Exchange assesses a charge of $0.0014 per share executed for a displayed order entered by a member that adds liquidity equal to or exceeding 0.25% of total Consolidated Volume during a month. Second, the Exchange assesses a charge of $0.0017 per share executed for a displayed order entered by a member that adds liquidity equal to or exceeding 0.15% of total Consolidated Volume during a month. Third, the Exchange assesses a charge of $0.0018 per share executed for a displayed order entered by a member that adds liquidity equal to or exceeding the member's Growth Target.[3] A member that does not meet any of these categories will be assessed a charge of $0.0020 per share executed for adding displayed liquidity.[4]

The Exchange now proposes to assess a charge of $0.0013 per share executed for a displayed order entered by a member that adds liquidity equal to or exceeding 0.55% of total Consolidated Volume during a month. As with the other charges and credits in Rule 7018, Consolidated Volume shall be defined as the total consolidated volume reported to all consolidated transaction reporting plans by all exchanges and trade reporting facilities during a month in equity securities, excluding executed

[83] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The Growth Target is the liquidity the member added in January 2017 as a percent of total Consolidated Volume plus 0.04% of total Consolidated Volume. *See* Rule 7018.

[4] As set forth in Rule 7018, the Exchange also assesses other charges for adding other kinds of liquidity, such as non-displayed orders and specific order types.

orders with a size of less than one round lot.[5]

By assessing a lower charge on displayed orders for members that add increased liquidity, the Exchange is incentivizing members to add greater liquidity on BX, to the benefit of all BX market participants.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[6] in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,[7] in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Commission and the courts have repeatedly expressed their preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, while adopting a series of steps to improve the current market model, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system ''has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.'' [8]

Likewise, in *NetCoalition* v. *Securities and Exchange Commission* [9] (''NetCoalition'') the D.C. Circuit upheld the Commission's use of a market-based approach in evaluating the fairness of market data fees against a challenge claiming that Congress mandated a cost-based approach.[10] As the court emphasized, the Commission ''intended in Regulation NMS that 'market forces, rather than regulatory requirements' play a role in determining the market data . . . to be made available to investors and at what cost.'' [11]

Further, ''[n]o one disputes that competition for order flow is 'fierce.' . . . As the SEC explained, '[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution'; [and] 'no exchange can afford to take its market share percentages for granted' because 'no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers'. . . .'' [12]

The Exchange believes that the proposed charge and its attendant volume requirement is reasonable. In reducing the charge to add displayed liquidity if the volume threshold is met, the proposed charge and its volume requirement is designed to incentivize members to add greater liquidity to the Exchange. Accordingly, the amount of the charge is less than other charges for adding displayed liquidity, and the volume requirement is correspondingly more stringent than volume requirements for higher charges, *e.g.,* $0.0013 per share executed for adding liquidity equal to or exceeding 0.55% of total Consolidated Volume versus $0.0014 per share executed for adding liquidity equal to or exceeding 0.25% of total Consolidated Volume. The Exchange also notes that Bats BYX Exchange, Inc. assesses a fee of $0.0013 for displayed orders that add liquidity where the member has an average daily add volume that equals or exceeds 0.40% of the Total Consolidated Volume.[13] The Exchange also believes that the amount of the new charge is closely aligned to the requirement for qualifying for that charge, especially in comparison to the other charges for adding liquidity offered by the Exchange and their attendant requirements.

The Exchange believes that the proposed change is equitably allocated among members, and is not designed to permit unfair discrimination. BX notes that participation on the Exchange, and eligibility for this charge, is voluntary, and that the Exchange continues to offer other charge [sic] for which members may attempt to qualify instead of the proposed charge. The proposed charge applies to all members that otherwise qualify for the charge by meeting its volume requirement. The Exchange believes that it is equitable and not unfairly discriminatory to adopt this charge and its volume requirement because the Exchange is attempting, through this charge and its volume requirement, to incentivize members to add greater liquidity to the Exchange, which may benefit all BX market participants.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. In terms of inter-market competition, the Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive, or rebate opportunities available at other venues to be more favorable. In such an environment, the Exchange must continually adjust its fees to remain competitive with other exchanges and with alternative trading systems that have been exempted from compliance with the statutory standards applicable to exchanges. Because competitors are free to modify their own fees in response, and because market participants may readily adjust their order routing practices, the Exchange believes that the degree to which fee changes in this market may impose any burden on competition is extremely limited.

In this instance, the proposed charge for adding displayed liquidity does not impose a burden on competition because the Exchange's execution services are completely voluntary and subject to extensive competition both from other exchanges and from off-exchange venues. The new charge applies equally to all members that otherwise meet the requirement, *i.e.,* adding liquidity equal to or exceeding 0.55% of total Consolidated Volume during a month, and all similarly situated members are equally capable of qualifying for the charge if they choose to meet the requirement. The Exchange believes that the proposed charge will incentivize members to add greater liquidity to the Exchange, which may benefit all BX market participants. The Exchange also notes that Bats BYX Exchange, Inc. assesses the same fee for adding displayed liquidity with a comparable volume requirement.

In sum, if the changes proposed herein are unattractive to market participants, it is likely that the Exchange will lose market share as a result. Accordingly, the Exchange does not believe that the proposed change will impair the ability of members or competing order execution venues to maintain their competitive standing in the financial markets.

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[5] As set forth in Rule 7018(a), for purposes of calculating Consolidated Volume and the extent of a member's trading activity, the date of the annual reconstitution of the Russell Investments Indexes shall be excluded from both total Consolidated Volume and the member's trading activity.

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(4) and (5).

[8] Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (''Regulation NMS Adopting Release'').

[9] *NetCoalition* v. *SEC,* 615 F.3d 525 (D.C. Cir. 2010).

[10] *See NetCoalition,* at 534–535.

[11] *Id.* at 537.

[12] *Id.* at 539 (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782–83 (December 9, 2008) (SR–NYSEArca–2006–21)).

[13] *See* Bats BYX Exchange, Inc. fee schedule.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.[14]

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: (i) Necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–BX–2017–031 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–BX–2017–031. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of 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–BX–2017–031 and should be submitted on or before August 9, 2017.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[15]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 2017–15099 Filed 7–18–17; 8:45 am]

BILLING CODE 8011–01–P

[14] 15 U.S.C. 78s(b)(3)(A)(ii).

[15] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–81139; File No. SR–FINRA–2017–024]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Update Rule Cross-References and Make Non-Substantive Technical Changes to FINRA Rules

July 13, 2017.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on June 30, 2017, Financial Industry Regulatory Authority, Inc. (''FINRA'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by FINRA. FINRA has designated the proposed rule change as constituting a ''non-controversial'' rule change under paragraph (f)(6) of Rule 19b–4 under the Act,[3] which renders the proposal effective upon receipt of this filing by 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 the Substance of the Proposed Rule Change

FINRA is proposing to update cross-references and make other non-substantive changes within FINRA rules.

The text of the proposed rule change is available on FINRA's Web site at *http://www.finra.org,* at the principal office of FINRA 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, FINRA 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. FINRA has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

On October 18, 2016, the SEC approved changes to FINRA Rule 6730 (Transaction Reporting) to expand the Trade Reporting and Compliance Engine (''TRACE'') reporting rules to include most secondary market transactions in marketable U.S. Treasury securities.[4] The rule change requires all FINRA members involved in transactions in U.S. Treasury Securities, as defined in the TRACE rules, to report most transactions in those securities to TRACE. The rule change further requires Reportable TRACE Transactions in U.S. Treasury Securities generally to be reported on the same day as the transaction on an end-of-day basis. Because FINRA is not currently proposing to disseminate any trade-level information to the public regarding transactions in U.S. Treasury Securities, the rule change generally imposed a same-day reporting requirement as opposed to a more immediate requirement, such as 15 minutes. The

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 17 CFR 240.19b–4(f)(6).

[4] *See* Securities Exchange Act Release No. 79116 (October 18, 2016), 81 FR 73167 (October 24, 2016) (Notice of Filing and Order Granting Accelerated Approval of File No. SR–FINRA–2016–027).

implementation date for the changes is July 10, 2017.[5]

The proposed rule change would update the cross reference in FINRA Rule 6730(a)(1) to clarify that Reportable TRACE Transactions in U.S. Treasury Securities are not subject to the 15-minute reporting requirement.

In addition, the proposed rule change would make technical changes to FINRA Rule 6810 (Definitions)[6] to reflect FINRA Manual style convention changes.

FINRA has filed the proposed rule change for immediate effectiveness and has requested that the SEC waive the requirement that the proposed rule change not become operative for 30 days after the date of the filing, so that FINRA can implement the proposed rule change to coincide with effective dates of the affected rule. The implementation date for the proposed changes to FINRA Rule 6730 will be July 10, 2017, to coincide with the implementation date of earlier changes to the rule.[7] The implementation date for the proposed changes to FINRA Rule 6810 will be the date of filing.

2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,[8] which requires, among other things, that FINRA rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. FINRA believes the proposed rule change will provide greater clarity to members and the public regarding FINRA's rules by amending the references in Rule 6810 to conform to FINRA's style conventions and by clarifying in Rule 6730 that Reportable TRACE Transactions in U.S. Treasury Securities are not subject to the 15-minute reporting requirement.

B. Self-Regulatory Organization's Statement on Burden on Competition

FINRA does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule change brings clarity and consistency to FINRA rules without adding any burden on firms.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A)(iii) of the Act[9] and subparagraph (f)(6) of Rule 19b–4 thereunder.[10]

A proposed rule change filed under Rule 19b–4(f)(6) normally does not become operative before 30 days from the date of the filing. However, pursuant to Rule 19b–4(f)(6)(iii),[11] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest.

The Exchange has asked the Commission to waive the 30-day operative delay. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest. The waiver will allow FINRA to update the cross reference in FINRA Rule 6730 to coincide with the implementation date of that rule, which is July 10, 2017. The implementation date for the proposed changes to FINRA Rule 6810 is June 30, 2017, the date FINRA filed the instant proposed rule change. Therefore, the Commission hereby waives the 30-day operative delay and designates the proposed rule change to be operative upon filing with the Commission.[12]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is: (i) Necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–FINRA–2017–024 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–FINRA–2017–024. 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 FINRA. 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–FINRA–2017–024, and should be submitted on or before August 9, 2017.

[5] *See Regulatory Notice* 16–39 (October 2016).

[6] *See* Securities Exchange Act Release No. 80255 (March 15, 2017), 82 FR 14563 (March 21, 2017) (Order Approving File No. SR–FINRA–2017–003).

[7] *See supra* note 4; *see also Regulatory Notice* 16–39 (October 2016).

[8] 15 U.S.C. 78*o*-3(b)(6).

[9] 15 U.S.C. 78s(b)(3)(A)(iii).

[10] 17 CFR 240.19b–4(f)(6).

[11] 17 CFR 240.19b–4(f)(6)(iii).

[12] For purposes only of waiving the operative delay for this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 2017–15100 Filed 7–18–17; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 32733; 812–14787]

Northern Lights Fund Trust and Toews Corporation

July 14, 2017.

AGENCY: Securities and Exchange Commission (''Commission'').

ACTION: Notice.

Notice of an application for an order under section 6(c) of the Investment Company Act of 1940 (the ''Act'') for an exemption from sections 2(a)(32), 5(a)(1), 22(d), and 22(e) of the Act and rule 22c–1 under the Act, under sections 6(c) and 17(b) of the Act for an exemption from sections 17(a)(1) and 17(a)(2) of the Act, and under section 12(d)(1)(J) for an exemption from sections 12(d)(1)(A) and 12(d)(1)(B) of the Act. The requested order would permit (a) actively-managed series of certain open-end management investment companies (''Funds'') to issue shares redeemable in large aggregations only (''Creation Units''); (b) secondary market transactions in Fund shares to occur at negotiated market prices rather than at net asset value (''NAV''); (c) certain Funds to pay redemption proceeds, under certain circumstances, more than seven days after the tender of shares for redemption; (d) certain affiliated persons of a Fund to deposit securities into, and receive securities from, the Fund in connection with the purchase and redemption of Creation Units; (e) certain registered management investment companies and unit investment trusts outside of the same group of investment companies as the Funds (''Acquiring Funds'') to acquire shares of the Funds; and (f) certain Funds (''Feeder Funds'') to create and redeem Creation Units in-kind in a master-feeder structure.

APPLICANTS: Northern Lights Fund Trust (the ''Trust''), a Delaware statutory trust registered under the Act as an open-end management investment company with multiple series, and Toews Corporation (the ''Initial Adviser''), a Delaware corporation registered as an investment adviser under the Investment Advisers Act of 1940.

FILING DATE: The application was filed on June 26, 2017.

HEARING OR NOTIFICATION OF HEARING: An order granting the requested relief 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 August 7, 2017, and should be accompanied by proof of service on 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: Brent J. Fields, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090; Applicants: The Trust, 17605 Wright Street Omaha, NE 68130; the Initial Adviser, 1750 Zion Road, Suite 201, Northfield, NJ 08225.

FOR FURTHER INFORMATION CONTACT: Courtney S. Thornton, Senior Counsel, at (202) 551–6812, or Robert H. Shapiro, Branch Chief, at (202) 551–6821 (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 for 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. Applicants request an order that would allow Funds to operate as actively-managed exchange traded funds (''ETFs'').[1] Fund shares will be purchased and redeemed at their NAV in Creation Units only. All orders to purchase Creation Units and all redemption requests will be placed by or through an ''Authorized Participant,'' which will have signed a participant agreement with a broker-dealer registered under the Securities Exchange Act of 1934 (''Exchange Act'') (together with any future distributor, the ''Distributor''). Shares will be listed and traded individually on a national securities exchange, where share prices will be based on the current bid/offer market. Certain Funds may operate as Feeder Funds in a master-feeder structure. Any order granting the requested relief would be subject to the terms and conditions stated in the application.

2. Each Fund will consist of a portfolio of securities and other assets and investment positions (''Portfolio Positions''). Each Fund will disclose on its Web site the identities and quantities of the Portfolio Positions that will form the basis for the Fund's calculation of NAV at the end of the day.

3. Shares will be purchased and redeemed in Creation Units and generally on an in-kind basis. Except where the purchase or redemption will include cash under the limited circumstances specified in the application, purchasers will be required to purchase Creation Units by depositing specified instruments (''Deposit Instruments''), and shareholders redeeming their shares will receive specified instruments (''Redemption Instruments''). The Deposit Instruments and the Redemption Instruments will each correspond pro rata to the positions in the Fund's portfolio (including cash positions) except as specified in the application.

4. Because shares will not be individually redeemable, applicants request an exemption from section 5(a)(1) and section 2(a)(32) of the Act that would permit the Funds to register as open-end management investment companies and issue shares that are redeemable in Creation Units only.

5. Applicants also request an exemption from section 22(d) of the Act and rule 22c–1 under the Act as secondary market trading in shares will take place at negotiated prices, not at a current offering price described in a Fund's prospectus, and not at a price based on NAV. Applicants state that (a) secondary market trading in shares does not involve a Fund as a party and will not result in dilution of an investment in shares, and (b) to the extent different prices exist during a given trading day, or from day to day, such variances occur

[13] 17 CFR 200.30–3(a)(12).

[1] Applicants request that the order apply to future series of the Trust or of other open-end management investment companies that currently exist or that may be created in the future (each, included in the term ''Fund''), each of which will operate as an actively-managed ETF. Any Fund will (a) be advised by the Initial Adviser or an entity controlling, controlled by, or under common control with the Initial Adviser (each such entity or any successor thereto is included in the term ''Adviser'') and (b) comply with the terms and conditions of the application. For purposes of the requested order, the term ''successor'' is limited to an entity that results from a reorganization into another jurisdiction or a change in the type of business organization.

as a result of third-party market forces, such as supply and demand. Therefore, applicants assert that secondary market transactions in shares will not lead to discrimination or preferential treatment among purchasers. Finally, applicants represent that share market prices will be disciplined by arbitrage opportunities, which should prevent shares from trading at a material discount or premium from NAV.

6. With respect to Funds that hold non-U.S. Portfolio Positions and that effect creations and redemptions of Creation Units in kind, applicants request relief from the requirement imposed by section 22(e) in order to allow such Funds to pay redemption proceeds within fifteen calendar days following the tender of Creation Units for redemption. Applicants assert that the requested relief would not be inconsistent with the spirit and intent of section 22(e) to prevent unreasonable, undisclosed or unforeseen delays in the actual payment of redemption proceeds.

7. Applicants request an exemption to permit Acquiring Funds to acquire Fund shares beyond the limits of section 12(d)(1)(A) of the Act; and the Funds, and any principal underwriter for the Funds, and/or any broker or dealer registered under the Exchange Act, to sell shares to Acquiring Funds beyond the limits of section 12(d)(1)(B) of the Act. The application's terms and conditions are designed to, among other things, help prevent any potential (i) undue influence over a Fund through control or voting power, or in connection with certain services, transactions, and underwritings, (ii) excessive layering of fees, and (iii) overly complex fund structures, which are the concerns underlying the limits in sections 12(d)(1)(A) and (B) of the Act.

8. Applicants request an exemption from sections 17(a)(1) and 17(a)(2) of the Act to permit persons that are affiliated persons, or second tier affiliates, of the Funds, solely by virtue of certain ownership interests, to effectuate purchases and redemptions in-kind. The deposit procedures for in-kind purchases of Creation Units and the redemption procedures for in-kind redemptions of Creation Units will be the same for all purchases and redemptions and Deposit Instruments and Redemption Instruments will be valued in the same manner as those Portfolio Positions currently held by the Funds. Applicants also seek relief from the prohibitions on affiliated transactions in section 17(a) to permit a Fund to sell its shares to and redeem its shares from an Acquiring Fund, and to engage in the accompanying in-kind transactions with the Acquiring Fund.[2] The purchase of Creation Units by an Acquiring Fund directly from a Fund will be accomplished in accordance with the policies of the Acquiring Fund and will be based on the NAVs of the Funds.

9. Applicants also request relief to permit a Feeder Fund to acquire shares of another registered investment company managed by the Adviser having substantially the same investment objectives as the Feeder Fund (''Master Fund'') beyond the limitations in section 12(d)(1)(A) and permit the Master Fund, and any principal underwriter for the Master Fund, to sell shares of the Master Fund to the Feeder Fund beyond the limitations in section 12(d)(1)(B).

10. Section 6(c) of the Act permits the Commission to exempt any persons or transactions from any provision of the Act if such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act. Section 12(d)(1)(J) of the Act provides that the Commission may exempt any person, security, or transaction, or any class or classes of persons, securities, or transactions, from any provision of section 12(d)(1) if the exemption is consistent with the public interest and the protection of investors. Section 17(b) of the Act authorizes the Commission to grant an order permitting a transaction otherwise prohibited by section 17(a) if it finds that (a) the terms of the proposed transaction are fair and reasonable and do not involve overreaching on the part of any person concerned; (b) the proposed transaction is consistent with the policies of each registered investment company involved; and (c) the proposed transaction is consistent with the general purposes of the Act.

For the Commission, by the Division of Investment Management, under delegated authority.

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 2017–15169 Filed 7–18–17; 8:45 am]

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[2] The requested relief would apply to direct sales of shares in Creation Units by a Fund to an Acquiring Fund and redemptions of those shares. Applicants, moreover, are not seeking relief from section 17(a) for, and the requested relief will not apply to, transactions where a Fund could be deemed an affiliated person, or a second-tier affiliate, of an Acquiring Fund because an Adviser or an entity controlling, controlled by or under common control with an Adviser provides investment advisory services to that Acquiring Fund.

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–81142; File No. SR–NYSEArca–2017–73]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend NYSE Arca Equities Rule 7.38 To Specify the Ranking of an Odd Lot Order That Has a Display Price That Is Better Than Its Working Price

July 13, 2017.

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 June 30, 2017, NYSE Arca, Inc. (the ''Exchange'' or ''NYSE Arca'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend NYSE Arca Equities Rule 7.38 (Odd and Mixed Lots) to specify the ranking of an odd lot order that has a display price that is better than its working price. The proposed rule change is available on the Exchange's Web site at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend NYSE Arca Equities Rule 7.38 (Odd and Mixed Lots) (''Rule 7.38'') to specify the ranking of an odd lot order that has a display price that is better than its working price.

Rule 7.38 provides that the working price of an odd lot order will be adjusted both on arrival and when resting on the NYSE Arca Book based on the limit price of the order as follows:

- If the limit price of an odd lot order is equal to or worse than the contra-side PBBO, it will have a working price equal to the limit price.
- If the limit price of an odd lot order is better than the contra-side PBBO, it will have a working price equal to the contra-side PBBO.
- If the PBBO is crossed, the odd lot order will have a working price equal to the same-side PBB or PBO.

By moving the working price, an odd lot order to buy (sell) will not trade at a price above (below) the PBO (PBB), or if the PBBO is crossed, above (below) the PBB (PBO). In either case, if the odd lot order is ranked Priority 2—Display Orders,[4] its display price would not change when its working price is adjusted.

Exchange rules are currently silent regarding how a resting odd lot order that has a display price that is better than its working price would be ranked for trading at that working price.[5] This scenario would only occur if a resting odd lot order is displayed at a price, and then an Away Market PBBO crosses that display price. In that limited scenario, pursuant to Rule 7.38(b)(1) described above, the working price of the odd-lot order would be adjusted to a price inferior to the display price, but it would remain displayed at the now crossed price.

The Exchange proposes to specify that in such case, the ranking and priority category applicable to such an order at its display price, *i.e.,* the price it is displayed and Priority 2—Display Orders, would govern its ranking for purposes of a trade at its different, inferior working price.[6] This ranking would differ from the Exchange's general rule that an order is ranked based on its working price.[7] However, the Exchange believes that if the display price of an order is better than its working price, such order has already demonstrated a public willingness to trade at a more aggressive price because it continues to be published in a market data feed at the more aggressive display price.[8] In such case, the order should receive the benefit of the ranking (both price and priority category) associated with its better display price when determining how that order would be traded at its working price. In other words, an odd-lot order with a better display price than its working price would not be ranked based on its working price, including that it would not be assigned Priority 3—Non-Display Orders at its working price.

The Exchange further believes that if an odd-lot order is assigned a new working price that is worse than its display price, such order should not be assigned a new working time. In other words, when trading at its working price, its time ranking would be based on the working time associated with its display price.[9] Maintaining the original working time of such order would ensure that it maintains its original ranking, even if it trades at a different price.

To effect this change, the Exchange proposes to amend Rule 7.38(b)(1) to provide that an odd-lot order ranked Priority 2—Display Orders would not be assigned a new working time if its working price is adjusted under Rule 7.38(b)(1). In addition, if the display price of an odd lot order to buy (sell) is above (below) its working price, it would be ranked based on its display price.[10]

Because an odd lot order with a display price better than its working price currently trades in this manner, these changes will be in effect when this proposed rule change is operative.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Securities Exchange Act of 1934 (the ''Act''),[11] in general, and furthers the objectives of Section 6(b)(5),[12] in particular, because it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to, and perfect the mechanism of, a free and open market and a national market system and, in general, to protect investors and the public interest.

Specifically, the Exchange believes that the proposed rule change would remove impediments to and perfect the mechanism of a free and open market and a national market system because the Exchange believes that an order that has been displayed should receive the benefit of the ranking of that displayed price if it trades at a less aggressive working price. This scenario would only occur if a resting odd-lot order has been displayed at a price, and then an Away Market PBBO crosses that price and then the working price of that order is adjusted to a price inferior to its display price. In such case, while the odd lot order would be executed at its working price, because it was both willing to trade at a better price *and* is still displayed at that better price, the Exchange proposes that it would be ranked based on its display price for purposes of its execution at the working price. If the PBBO had not crossed the odd-lot order, such order would have had the benefit of the ranking based on its display price and the Exchange believes it would be consistent with the protection of investors and the public for the odd-lot order to retain such ranking when its working price is moved to an inferior price. The Exchange further believes that the

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[4] As described in Rule 7.36(e)(2), Priority 2—Display Orders are non-marketable Limit Orders with a displayed working price.

[5] Pursuant to Rule 7.38(b)(1), on arrival, an odd lot order's working price may be adjusted consistent with the terms of the order. However, an arriving odd-lot order would not be assigned a working price that would be inferior to the price at which the arriving odd lot order would be displayed.

[6] As described in Rule 7.36(c), an order is ranked based on price, priority category, and time. Such ranking is only applicable once an order is resting on the NYSE Arca Book.

[7] Rule 7.36(d) provides than [sic] all orders are ranked based on the working price of an order. Rule 7.36(e)(3) generally provides that non-marketable orders for which the working price is not displayed have third priority behind Market Orders and non-marketable Limit Orders that are displayed at their working price. This proposed rule change would be an exception to these rules.

[8] *See* Rule 7.36(b)(1) (odd-lot sized orders are considered displayed for ranking purposes).

[9] Rule 7.36(f)(2) provides that an order is assigned a new working time any time the working price of the order changes. This proposed rule change would be an exception to this general rule.

[10] For example, assume the PBBO is 10.07 × 10.10 and the Exchange receives orders ranked Priority 2—Display Orders in the following sequence: T1 to buy 25 shares displayed at 10.08, T2 to buy 25 shares displayed at 10.09, T3 to buy 25 shares displayed at 10.08, and T4 to buy 100 shares displayed at 10.07. Assume next that the PBO changes to 10.07. The working price of T1, T2, and T3 will be adjusted to 10.07, but they would keep their original working time. Next, the Exchange receives an incoming order to sell 100 shares at 10.07. The Exchange would trade the incoming order with the resting orders in the following sequence: T2, T1, T3, and then T4 would be allocated the remaining 25 shares. T2 would trade before T1 because it has a better price ranking based on its display price. If the incoming order to sell were for 50 shares, only T2 and T1 would trade.

[11] 15 U.S.C. 78f(b).

[12] 15 U.S.C. 78f(b)(5).

proposed rule change would promote fair and orderly markets that would protect investors and the public interest because it would promote the display of liquidity by ensuring that a displayed odd lot order maintains its ranking even if it trades at a less aggressive price.

The Exchange further believes that the proposed rule change would remove impediments to and perfect the mechanism of a free and open market and a national market system because it would promote transparency in Exchange rules and reduce potential confusion regarding how an odd-lot order would be ranked and execute [sic] in the limited scenario when the display price of a resting odd lot has been crossed, and it has been assigned a working price inferior to its display price.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange believes that the proposed rule change is not designed to address any competitive issues but rather to provide an incentive for market participants to enter aggressively-priced displayed liquidity.

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

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act [13] and Rule 19b–4(f)(6) thereunder.[14]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSEArca–2017–73 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–NYSEArca–2017–73. 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–NYSEArca–2017–73 and should be submitted on or before August 9, 2017.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[15]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 2017–15102 Filed 7–18–17; 8:45 am]

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[13] 15 U.S.C. 78s(b)(3)(A).

[14] 17 CFR 240.19b–4(f)(6). As required under Rule 19b–4(f)(6)(iii), the Exchange provided the Commission with written notice of its intent to file the proposed rule change, along with a brief description and the text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission.

[15] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–81140; File No. SR–NYSEArca–2017–77]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend the NYSE Arca Options Fee Schedule

July 13, 2017.

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 July 10, 2017, NYSE Arca, Inc. (the ''Exchange'' or ''NYSE Arca'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change

The Exchange proposes to amend the NYSE Arca Options Fee Schedule (''Fee Schedule''). The Exchange proposes to implement the fee change effective July 10, 2017.[4] The proposed rule change is available on the Exchange's Web site at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

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

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] The Exchange originally filed to amend the Fee Schedule on July 3, 2017 (SR–NYSEArca–2017–74) and withdrew such filing on July 10, 2017.

and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this filing is to amend the Fee Schedule to offer an incentive for Market Makers to post liquidity in the SPDR S&P 500 ETF Trust (''SPY''). The Exchange also proposes a number of textual changes designed to clarify certain aspects of the Fee Schedule.

Currently, Market Makers receive a $0.28 per contract credit for executions against Market Maker posted liquidity in Penny Pilot Issues and Lead Market Makers (''LMMs'') may receive an additional $.04 per contract credit (for a total of $0.32 per contract credit) for posted liquidity in Penny Pilot Issues that are in the LMM's appointment.[5] Similarly, Market Makers may receive a $0.28 per contract credit for executions against Market Maker posted liquidity in SPY.[6] The Exchange currently offers additional incentives (*i.e.,* enhanced credits) to Market Makers to post liquidity.[7]

The Exchange proposes to add a new incentive to encourage Market Makers to post interest in SPY. Specifically, the Exchange proposes to offer any Market Maker that has posted interest of at least 0.20% of TCADV in SPY during a calendar month, a per contract credit of $0.45 for electronic executions against such posted interest.[8] As is the case today, a Market Maker that qualifies for more than one available credit will always receive the highest rebate applicable to a transaction. For example, a Market Maker that is eligible to receive both the $0.41 per contract credit via the Market Maker Incentive For Penny Pilot Issues as well as the proposed $0.45 per contract credit via the Market Maker Incentive for SPY would receive the latter (higher) credit.

The Exchange also proposes to make the following textual changes to the Fee Schedule regarding Market Maker incentives, which are designed to make the Fee Schedule easier to navigate and comprehend:

- The Exchange proposes to re-locate the reference to Endnote 15 from the beginning to the end of each of the following tables: The Market Maker Incentive For Penny Pilot Issues; the Market Maker Incentive For Non-Penny Pilot Issues; and the MM Tiers (collectively, the ''MM Tables''). Endnote 15 defines an Appointed Market Maker (''MM'') and an Appointed Order Flow Provider (''OFP'').
- The Exchange proposes to add a sentence to the beginning of Endnote 15 to make clear that the qualification thresholds set forth in the MM Tables ''[i]ncludes transaction volume from the OTP Holder's or OTP Firm's affiliates or its Appointed OFP or Appointed MM.'' [9] Consistent with this proposed change, the Exchange proposes to remove the language that appears at the end of each of the MM Tables providing that volume of an Appointed MM or Appointed OFP may be included because it would be duplicative of the proposed new next in Endnote 15.
- The Exchange proposes to modify Endnote 8 to define Total Industry Customer equity and ETF option average daily volume as ''TCADV'' and to use this shorthand reference in each of the MM Tables.
- The Exchange proposes to clarify how the credit for each of the MM Tables is applied, *i.e.,* that it is applied to ''electronic executions of Market Maker posted interest'' in the applicable securities. Consistent with this change, the Exchange proposes to delete the current language that provides the credit is applied to ''Posted Electronic Market Maker Executions'' in the applicable securities.
- In each of the MM Tables, the Exchange proposes to replace reference to ''Posted Orders'' with ''posted interest'' and ''orders'' with ''interest'' to make clear that, where applicable, liquidity may include orders or quotes.
- In the fee table for Market Maker Incentive for Penny Pilot Issues, the Exchange proposes to replace reference to ''both Penny and Non-Penny Issues'' with ''all issues.''
- For consistency, the Exchange proposes to remove the capitalization from ''Non-Penny,'' as appears in the Market Maker Incentive For Non-Penny Pilot Issues, and to remove any capitalization from ''all' and ''issues'' in reference to ''all issues'' in the MM Tables.
- For ease of reference, the Exchange proposes to rename the Market Maker Monthly Posting Credit Tiers and Qualifications for Executions in Penny Pilot Issues and SPY (*i.e.,* the MM Tiers) to ''MARKET MAKER PENNY PILOT AND SPY POSTING CREDIT TIERS,'' and to add the following preamble, followed by reference to Endnotes 8 and 15 (as modified herein): ''OTP Holders and OTP Firms meeting the qualifications below will receive the corresponding credit on electronic executions of Market Maker posted interest in Penny Pilot issues and SPY.'' The Exchange also proposes to update a cross reference to the MM Tiers to reflect the modified name.[10]

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[11] in general, and furthers the objectives of Sections 6(b)(4) and (5) of the Act,[12] 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 that providing an enhanced incentive for executions against posted liquidity in SPY is reasonable, equitable, and not unfairly discriminatory because, among other things, it may encourage greater participation in SPY—which is consistently the most active options issue nationally. The proposed SPY incentive would also provide an additional means for Market Makers to qualify for credits for posting volume on the Exchange. By encouraging activity in SPY, the Exchange believes that opportunities to qualify for other rebates are increased, which benefits all participants through increased Market Maker activity. The Exchange also believes that encouraging a higher level of trading volume in SPY should increase opportunities for OTP Holders and OTP Firms (''OTPs'') to achieve credits available through existing incentive programs, such as the MM

[5] *See* Fee Schedule, Transaction Fee for Electronic Executions, Per Contract. *See also* Market Maker Monthly Posting Credit Tiers and Qualifications for Executions in Penny Pilot Issues and SPY (the ''MM Tiers'').

[6] *See* Fee Schedule, the MM Tiers, Base Rate.

[7] *See id. See, e.g.,* the Market Maker Incentive for Penny Pilot Issues (which provides a $0.41 per contract credit for executions of Marker Maker posted interest provided the Market Maker achieves at least 0.75% of total industry Customer equity and ETF option average daily volume (''TCADV'') from Customer posted interest (*e.g.,* from the Marker Maker's affiliate of Appointed Order Flow Provider) in all issues and an ADV from Market Maker posted interest equal to 0.70% of TCADV).

[8] *See* proposed Fee Schedule, Market Maker Incentive for SPY (including reference to Endnote 8, which sets forth the calculations for monthly posting credits).

[9] *See* proposed Fee Schedule, Endnote 15.

[10] *See* proposed Fee Schedule, Transaction Fee for Electronic Executions, Per Contract.

[11] 15 U.S.C. 78f(b).

[12] 15 U.S.C. 78f(b)(4) and (5).

Tiers, which provides OTPs the ability to achieve per contract credit for electronic executions of posted Market Maker interest in SPY and other Penny Pilot names by combining the volume of the OTP with volume of their affiliates or Appointed Market Maker. To the extent that order flow, which adds liquidity, is increased by the proposal, OTPs will be encouraged to compete for the opportunity to trade on the Exchange, including by sending additional order flow to the Exchange to achieve higher tiers or enhanced rebates. The resulting increased volume and liquidity would benefit all Exchange participants by providing more trading opportunities and tighter spreads.

The Exchange also believes the proposed SPY incentive is not unfairly discriminatory to non-Market Markers (*i.e.,* Customers, Professionals Customers, Firms and Broker-Dealers) because such market participants are not subject to the obligations that apply to Market Makers. The Exchange believes the proposed incentive is reasonable, equitable and not unfairly discriminatory because encouraging Market Makers to direct more volume to the Exchange would also contribute to the Exchange's depth of book as well as to the top of book liquidity.

The Exchange also notes that the proposed credit for posting in SPY is reasonable, equitable, and not unfairly discriminatory as it is consistent with credits offered to Market Makers by other options exchanges.[13]

The Exchange believes that the proposed textual modifications are reasonable, equitable, and not unfairly discriminatory because the proposed changes would add clarity, transparency and internal consistency to the Fee Schedule making it easier to navigate and comprehend, which is in the public interest.

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,[14] 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 changes would encourage competition, including by attracting additional liquidity to the Exchange, which would continue to make the Exchange a more competitive venue for, among other things, order execution and price discovery. The Exchange does not believe that the proposed change would impair the ability of any market participants or competing order execution venues to maintain their competitive standing in the financial markets. Further, the incentive would not impose an unfair burden on non-Market Markers because such market participants are not subject to the heightened obligations that apply to Market Makers. The Exchanges notes that the proposed textual changes are not intended to have any impact on competition, but instead are designed to make the Fee Schedule easier for market participants to navigate and digest, which is in the public interest.

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. 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)[15] of the Act and subparagraph (f)(2) of Rule 19b–4[16] 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)[17] 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:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSEArca–2017–77 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–NYSEArca–2017–77. 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–

[13] *See, e.g.,* MIAX Pearl Fee Schedule, Section 1.a., Transaction Rebates/Fees, Exchange Rebates/Fees—Add/Remove Tiered Rebates/Fees, *available here, http://www.miaxoptions.com/sites/default/files/page-files/MIAX_PEARL_Fee_Schedule_06072017.pdf* (providing an alternative basis to achieve a $0.47 per contract credit in Penny Pilot Issues based on a specified level of SPY volume).

[14] 15 U.S.C. 78f(b)(8).

[15] 15 U.S.C. 78s(b)(3)(A).

[16] 17 CFR 240.19b–4(f)(2).

[17] 15 U.S.C. 78s(b)(2)(B).

NYSEArca–2017–77, and should be submitted on or before August 9, 2017.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[18]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 2017–15101 Filed 7–18–17; 8:45 am]

BILLING CODE 8011–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #15207 and #15208; NEW YORK Disaster # NY–00177]

Presidential Declaration of a Major Disaster for Public Assistance Only for the State of New York

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a Notice of the Presidential declaration of a major disaster for Public Assistance Only for the State of New York (FEMA–4322–DR), dated 07/12/2017.

Incident: Severe Winter Storm and Snowstorm.

Incident Period: 03/14/2017 through 03/15/2017.

DATES: Issued on July 12, 2017.

Physical Loan Application Deadline Date: 09/11/2017.

Economic Injury (Eidl) Loan Application Deadline Date: 04/12/2018.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street SW., Suite 6050, Washington, DC 20416, (202) 205–6734.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the President's major disaster declaration on 07/12/2017, Private Non-Profit organizations that provide essential services of governmental nature may file disaster loan applications at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties: Albany, Broome, Chenango, Clinton, Columbia, Cortland, Delaware, Dutchess, Essex, Franklin, Fulton, Greene, Hamilton, Herkimer, Madison, Montgomery, Oneida, Orleans, Otsego, Rensselaer, Saratoga, Schenectady, Schoharie, Suffolk, Sullivan, Tioga, Tompkins, Ulster.

The Interest Rates are:

	Percent
For Physical Damage:	
Non-Profit Organizations with Credit Available Elsewhere	2.500
Non-Profit Organizations without Credit Available Elsewhere	2.500
For Economic Injury:	
Non-Profit Organizations without Credit Available Elsewhere	2.500

The number assigned to this disaster for physical damage is 15207B and for economic injury is 15208B.

(Catalog of Federal Domestic Assistance Number 59008)

Lisa Lopez-Suarez,

Acting Associate Administrator for Disaster Assistance.

[FR Doc. 2017–15076 Filed 7–18–17; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

Notice of Changes to SBA Secondary Market Program

AGENCY: U.S. Small Business Administration (''SBA'').

SUMMARY: The purpose of this Notice is to provide the public with notification of program changes to SBA's Secondary Market Loan Pooling Program. The changes described in this Notice are being made to ensure that there are sufficient funds to cover the estimated cost of the timely payment guaranty for newly formed SBA 7(a) loan pools. The changes in this Notice will be incorporated, as needed, into the SBA Secondary Market Program Guide, and all other appropriate SBA Secondary Market documents.

DATES: The changes in this Notice will apply to SBA 7(a) loan pools with an issue date on or after October 1, 2017.

ADDRESSES: Address comments concerning this Notice to John M. Wade, Chief Secondary Market Division, U.S. Small Business Administration, 409 3rd Street SW., Washington, DC 20416, or *john.wade@sba.gov.*

FOR FURTHER INFORMATION CONTACT: John M. Wade, Chief, Secondary Market Division, U.S. Small Business Administration, 409 3rd Street SW., Washington, DC 20416, or *john.wade@sba.gov.*

SUPPLEMENTARY INFORMATION: The Secondary Market Improvements Act of 1984 authorized SBA to guaranty the timely payment of principal and interest on Pool Certificates. A Pool Certificate represents a fractional undivided interest in a ''Pool,'' which is an aggregation of SBA guaranteed portions of loans made by SBA Lenders under section 7(a) of the Small Business Act, 15 U.S.C. 636(a). In order to support the timely payment guaranty requirement, SBA established the Master Reserve Fund (''MRF''), which serves as a mechanism to cover the cost of SBA's timely payment guaranty. Borrower payments on the guaranteed portions of pooled loans, as well as SBA guaranty payments on defaulted pooled loans, are deposited into the MRF. Funds are held in the MRF until distributions are made to investors (''Registered Holders'') of Pool Certificates. The interest earned on the borrower payments and the SBA guaranty payments deposited into the MRF supports the timely payments made to Registered Holders.

To facilitate the formation of SBA loan Pools and to enhance the marketability of the SBA Secondary Market (as defined in 13 CFR 120.601), SBA allows loans with different maturity dates to be placed in the same Pool. From time to time, SBA provides instruction to SBA Pool Assemblers on the required loan and pool characteristics necessary to form a Pool. These characteristics include, among other things, the minimum number of guaranteed portions of loans required to form a Pool, the allowable difference between the highest and lowest gross and net note rates of the guaranteed portions of loans in a Pool, and the minimum maturity ratio of the guaranteed portions of loans in a Pool. The minimum maturity ratio is equal to the ratio of the shortest and the longest remaining term to maturity of the guaranteed portions of loans in a Pool.

In November of 2008, SBA published changes to the regulations governing SBA's Secondary Market to allow SBA Pool Assemblers to form and initiate the sale of Weighted Average Coupon (WAC) Pools. *See* 73 FR 67099, November 13, 2008. A WAC Pool is a Pool where the interest rate payable to the Registered Holder is equal to the Dollar-Weighted Average Net Rate of the Pool (as defined in 13 CFR 120.600(l)). All other Pools formed by SBA Pool Assemblers are considered Standard Pools. The minimum maturity ratio for Standard Pools and WAC Pools is currently 80% and 76%, respectively. The minimum maturity ratio for Standard Pools was last adjusted by SBA in 2005. The minimum maturity ratio for WAC Pools was established by SBA in 2008 and has remained unchanged.

[18] 17 CFR 200.30–3(a)(12).

Based on SBA's expectations as to future Pool performance, SBA has determined that, in order to lower the costs associated with SBA's Secondary Market Loan Pooling Program, it is necessary to increase the minimum maturity ratio—in other words, to reduce the difference between the shortest and the longest remaining term of the guaranteed portions of loans in a Pool. A higher minimum maturity ratio will decrease the difference between the amortization rates of the guaranteed portions of loans in a Pool. This will cause the cash flows from the guaranteed portions of loans in the Pool to be more homogenous, and will more closely match the amortization rate of the Pool Certificate. This is an important driver in reducing the cost of SBA's timely payment guaranty on Pool Certificates.

Therefore, effective October 1, 2017, all guaranteed portions of loans in a Pool presented for settlement with SBA's Fiscal Transfer Agent will be required to have a minimum maturity ratio of at least 94% for Standard Pools and WAC Pools. SBA has monitored Pools formed over the last 6 months, and has observed that many existing Pools have a minimum maturity ratio of at least 94%.

SBA will continue to monitor loan and pool characteristics and will provide notification of additional changes as necessary. It is important to note that there is no change to SBA's obligation to honor its guaranty of the amounts owed to Registered Holders of Pool Certificates and that such guaranty continues to be backed by the full faith and credit of the United States.

This program change will be incorporated as necessary into SBA's Secondary Market documents. As indicated above, this change will be effective for Pools with an issue date on or after October 1, 2017, and will modify any previous description or guidance regarding the minimum maturity ratio for Standard Pools or WAC Pools. SBA is making this change pursuant to Section 5(g)(2) of the Small Business Act, 15 U.S.C. 634 (g)(2).

Authority: 15 U.S.C. 634 (g)(2).

William M. Manger

Associate Administrator Office of Capital Access.

[FR Doc. 2017–15180 Filed 7–18–17; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #15209 and #15210; NORTH DAKOTA Disaster #ND–00055]

Presidential Declaration of a Major Disaster for Public Assistance Only for the State of North Dakota

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a Notice of the Presidential declaration of a major disaster for Public Assistance Only for the State of North Dakota (FEMA–4323–DR), dated 07/12/2017.

Incident: Flooding.

Incident Period: 03/23/2017 through 04/29/2017.

DATES: Issued July 12, 2017.

Physical Loan Application Deadline Date: 09/11/2017.

Economic Injury (Eidl) Loan Application Deadline Date: 04/12/2018.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street SW., Suite 6050, Washington, DC 20416, (202) 205–6734.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the President's major disaster declaration on 07/12/2017, Private Non-Profit organizations that provide essential services of governmental nature may file disaster loan applications at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties: Benson, Bottineau, Cavalier, McHenry, Pembina, Pierce, Renville, Rolette, Towner, Walsh and the Turtle Mountain Band of Chippewa Reservation.

The Interest Rates are:

	Percent
For Physical Damage:	
Non-Profit Organizations with Credit Available Elsewhere	2.500
Non-Profit Organizations without Credit Available Elsewhere	2.500
For Economic Injury:	
Non-Profit Organizations without Credit Available Elsewhere	2.500

The number assigned to this disaster for physical damage is 152096 and for economic injury is 152106.

(Catalog of Federal Domestic Assistance Number 59008)

Lisa Lopez-Suarez,

Acting Associate Administrator for Disaster Assistance.

[FR Doc. 2017–15078 Filed 7–18–17; 8:45 am]

BILLING CODE 8025–01–P

DEPARTMENT OF STATE

[Public Notice: 10061]

60-Day Notice of Proposed Information Collection: Certificate of Eligibility for Exchange Visitor (J–1) Status

ACTION: Notice of request for public comment.

SUMMARY: The Department of State is seeking Office of Management and Budget (OMB) approval for the information collection described below. In accordance with the Paperwork Reduction Act of 1995, we are requesting comments on this collection from all interested individuals and organizations. The purpose of this notice is to allow 60 days for public comment preceding submission of the collection to OMB.

DATES: The Department will accept comments from the public up to September 18, 2017.

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

- *Web:* Persons with access to the Internet may comment on this notice by going to *www.Regulations.gov.* You can search for the document by entering ''Docket Number: DOS–2017–0031'' in the Search field. Then click the ''Comment Now'' button and complete the comment form.
- *Email: JExchanges@State.gov.*
- *Regular Mail:* Send written comments to: U.S. Department of State, ECA/EC, SA–5, Floor 5, 2200 C Street NW., Washington, DC 20522–0505, ATTN: **Federal Register** Notice Response.

You must include the DS form number (if applicable), information collection title, and the OMB control number in any correspondence.

FOR FURTHER INFORMATION CONTACT: Direct requests for additional information regarding the collection listed in this notice, including requests for copies of the proposed collection instrument and supporting documents, to G. Kevin Saba, Director, Office of Policy and Program Support, Office of Private Sector Exchange, ECA/EC, SA–5, Floor 5, Department of State, 2200 C Street, NW., Washington, DC 20522–0505, who may be reached at *JExchanges@state.gov.*

SUPPLEMENTARY INFORMATION:

- *Title of Information Collection:* Certificate of Eligibility for Exchange Visitor (J–1) Status.
- *OMB Control Number:* 1405–0119.
- *Type of Request:* Revision of a Currently Approved Collection.
- *Originating Office:* Bureau of Educational and Cultural Affairs, Office of Policy and Program Support (ECA/EC).
- *Form Number:* DS–2019.
- *Respondents:* U.S. Department of State designated sponsors.
- *Estimated Number of Respondents:* 1,500.
- *Estimated Number of Responses:* 325,000.
- *Average Time Per Response:* 45 minutes.
- *Total Estimated Burden Time:* 243,750 annual hours.
- *Frequency:* On occasion.
- *Obligation to Respond:* Required to Obtain or Retain a Benefit''

We are soliciting public comments to permit the Department to:

- Evaluate whether the proposed information collection is necessary for the proper functions of the Department.
- Evaluate the accuracy of our estimate of the time and cost burden for this proposed collection, including the validity of the methodology and assumptions used.
- Enhance the quality, utility, and clarity of the information to be collected.
- Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of information technology.

Please note that comments submitted in response to this Notice are public record. Before including any detailed personal information, you should be aware that your comments as submitted, including your personal information, will be available for public review.

Abstract of Proposed Collection

The collection is the continuation of information collected and needed by the Bureau of Educational and Cultural Affairs in administering the Exchange Visitor Program (J-Nonimmigrant) under the provisions of the Mutual Educational and Cultural Exchange Act, as amended (22 U.S.C. 2451, *et seq.*). The Form DS–2019 is the document that provides the information needed to identify an individual (and spouse and dependents, where applicable) seeking to enter the U.S. as an Exchange Visitor in J-Nonimmigrant status. Changes have been made to Section 6 of the DS–2019 to include a responsible officer/alternate responsible officer attestation that the sponsor has complied with requirements in 22 CFR 62.12(b). In the instructions to Form DS–2019, Section 2 of the instructions has been reworded to ensure that exchange visitors and their accompanying spouses and dependents remain in compliance with insurance requirements under 22 CFR 62.14 during the course of the exchange.

Methodology

Access to Form DS–2019 is made available to Department designated sponsors electronically via the Student and Exchange Visitor Information System (SEVIS).

G. Kevin Saba,

Acting Deputy Assistant Secretary for Private Sector Exchange, Bureau of Educational and Cultural Affairs, U.S. Department of State.

[FR Doc. 2017–15114 Filed 7–18–17; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF STATE

[Public Notice: 10059]

30-Day Notice of Proposed Information Collection: Online Application for Nonimmigrant Visa

ACTION: Notice of request for public comment.

SUMMARY: The Department of State has submitted the information collection described below to the Office of Management and Budget (OMB) for approval. In accordance with the Paperwork Reduction Act of 1995 we are requesting comments on this collection from all interested individuals and organizations. The purpose of this Notice is to allow 30 days for public comment.

DATES: The Department will accept comments from the public up to August 18, 2017.

ADDRESSES: Direct comments to the Department of State Desk Officer in the Office of Information and Regulatory Affairs at the Office of Management and Budget (OMB). You may submit comments by the following methods:

- *Email: oira_submission@omb.eop.gov.* You must include the DS form number, information collection title, and the OMB control number in the subject line of your message.
- *Fax:* 202–395–5806. Attention: Desk Officer for Department of State.

FOR FURTHER INFORMATION CONTACT: Direct requests for additional information regarding the collection listed in this notice, including requests for copies of the proposed collection instrument and supporting documents may be sent to *PRA_BurdentComments@state.gov.*

SUPPLEMENTARY INFORMATION:

- *Title of Information Collection:* Application for Nonimmigrant Visa.
- *OMB Control Number:* 1405–0182.
- *Type of Request:* Revision of a Currently Approved Collection.
- *Originating Office:* CA/VO/L/R.
- *Form Number:* DS–160.
- *Respondents:* All Nonimmigrant Visa Applicants.
- *Estimated Number of Respondents:* 13,345,785.
- *Estimated Number of Responses:* 13,345,785.
- *Average Time per Response:* 75 Minutes.
- *Total Estimated Burden Time:* 16,682,231 hours.
- *Frequency:* Once per respondent.
- *Obligation to Respond:* Required to Obtain or Retain a Benefit.

We are soliciting public comments to permit the Department to:

- Evaluate whether the proposed information collection is necessary for the proper functions of the Department.
- Evaluate the accuracy of our estimate of the time and cost burden for this proposed collection, including the validity of the methodology and assumptions used.
- Enhance the quality, utility, and clarity of the information to be collected.
- Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of information technology. Please note that comments submitted in response to this Notice are public record. Before including any detailed personal information, you should be aware that your comments as submitted, including your personal information, will be available for public review.

Abstract of Proposed Collection

The Online Application for Nonimmigrant Visa (DS–160) is used to collect biographical information from individuals seeking a nonimmigrant visa. The consular officer uses the information collected to determine the applicant's eligibility for a visa.

Methodology

The DS–160 will be submitted electronically to the Department via the internet. The applicant will be instructed to print a confirmation page containing a bar coded record locator,

which will be scanned at the time of processing.

Meredith McEvoy,

Acting Deputy Assistant Secretary, Bureau of Consular Affairs, Department of State.

[FR Doc. 2017–15132 Filed 7–18–17; 8:45 am]

BILLING CODE 4710–06–P

DEPARTMENT OF STATE

[Public Notice: 10056]

30-Day Notice of Proposed Information Collection: Nonimmigrant Visa Application

ACTION: Notice of request for public comment.

SUMMARY: The Department of State has submitted the information collection described below to the Office of Management and Budget (OMB) for approval. In accordance with the Paperwork Reduction Act of 1995 we are requesting comments on this collection from all interested individuals and organizations. The purpose of this Notice is to allow 30 days for public comment.

DATES: The Department will accept comments from the public up to August 18, 2017.

ADDRESSES: Direct comments to the Department of State Desk Officer in the Office of Information and Regulatory Affairs at the Office of Management and Budget (OMB). You may submit comments by the following methods:

- *Email: oira_submission@omb.eop.gov.* You must include the DS form number, information collection title, and the OMB control number in the subject line of your message.
- *Fax:* 202–395–5806. Attention: Desk Officer for Department of State.

FOR FURTHER INFORMATION CONTACT: Direct requests for additional information regarding the collection listed in this notice, including requests for copies of the proposed collection instrument and supporting documents to *PRA_Burdencomments@state.gov.*

SUPPLEMENTARY INFORMATION:

- *Title of Information Collection:* Nonimmigrant Visa Application.
- *OMB Control Number:* 1405–0018.
- *Type of Request:* Revision of a Currently Approved Collection.
- *Originating Office:* CA/VO/L/R.
- *Form Number:* DS–156.
- *Respondents:* Nonimmigrant Visa Applicants.
- *Estimated Number of Respondents:* 3,466.
- *Estimated Number of Responses:* 3,466.
- *Average Time per Response:* 75 minutes.
- *Total Estimated Burden Time:* 4,333 annual hours.
- *Frequency:* Once per respondent.
- *Obligation to Respond:* Required to Obtain or Retain a Benefit.

We are soliciting public comments to permit the Department to:

- Evaluate whether the proposed information collection is necessary for the proper functions of the Department.
- Evaluate the accuracy of our estimate of the time and cost burden for this proposed collection, including the validity of the methodology and assumptions used.
- Enhance the quality, utility, and clarity of the information to be collected.
- Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of information technology.

Please note that comments submitted in response to this Notice are public record. Before including any detailed personal information, you should be aware that your comments as submitted, including your personal information, will be available for public review.

Abstract of Proposed Collection

Form DS–156 is required by regulation of all nonimmigrant visa applicants who do not use the Online Application for Nonimmigrant Visa (Form DS–160). Posts will use the DS–156 in limited circumstances when use of the DS–160 unavailable as outlined below, to elicit information necessary to determine an applicant's visa eligibility.

Methodology

This form will only be used if in the following limited circumstances when applicants cannot access the DS–160, Online Application for Nonimmigrant Visa:

- An applicant has an urgent medical or humanitarian travel need and the consular officer has received explicit permission from the Visa Office to accept form DS–156;
- The applicant is a student exchange visitor who must leave immediately in order to arrive on time for his/her course and the consular officer has explicit permission from the Visa Office to accept form DS–156;
- The applicant is a diplomatic or official traveler with urgent government business and form DS–160 has been unavailable for more than four hours; or
- Form DS–160 has been unavailable for more than three days and the consular officer receives explicit permission from the Visa Office.

In order to obtain a copy of form an applicant must contact the Embassy or consulate at which he or she is applying and request a copy.

Meredith McEvoy,

Acting Deputy Assistant Secretary, Bureau of Consular Affairs, Department of State.

[FR Doc. 2017–15148 Filed 7–18–17; 8:45 am]

BILLING CODE 4710–06–P

SURFACE TRANSPORTATION BOARD

[Docket No. FD 36134]

Portland Vancouver Junction Railroad, LLC—Operation Exemption—Rail Lines of Columbia Business Center, Clark County, Wash.

Portland Vancouver Junction Railroad, LLC (PVJR), a Class III rail carrier, has filed a verified notice of exemption under 49 CFR 1150.41 to operate approximately 3 miles of rail line owned by Columbia Business Center (CBC), a noncarrier, pursuant to an agreement with FC Service LLC, an agent for CBC, also a noncarrier.

According to PVJR, the 3-mile line is located within a business park in Clark County, Wash., and there are no mileposts. PVJR states that the lines interconnect with lines of the BNSF Railway Company (BNSF).

The transaction may be consummated on or after August 4, 2017, the effective date of the exemption (30 days after the verified notice was filed).[1]

PVJR certifies that, as a result of this transaction, its projected revenues would not exceed those that would qualify it as a Class III rail carrier and will not exceed $5 million. PVJR states that the agreement does not involve any provision or agreement that may limit future interchange.

If the verified notice contains false or misleading information, the exemption is void ab initio. Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the effectiveness of the exemption. Petitions to stay must be filed no later than July 27, 2017 (at least seven days before the exemption becomes effective).

An original and 10 copies of all pleadings, referring to Docket No. FD 36134, must be filed with the Surface Transportation Board, 395 E Street SW., Washington, DC 20423–0001. In addition, a copy must be served on

[1] PVJR has requested that the effective date of the exemption be advanced to July 31, 2017, so that operations may commence on August 1, 2017. This request will be addressed in a separate decision.

Richard H. Streeter, Law Office of Richard H. Streeter, 5255 Partridge Lane NW., Washington, DC 20016.

According to PVJR, this action is categorically excluded from environmental review under 49 CFR 1105.6(c).

Board decisions and notices are available on our Web site at *WWW.STB.GOV.*

Decided: July 14, 2017.

By the Board, Scott M. Zimmerman, Acting Director, Office of Proceedings.

Jeffrey Herzig,

Clearance Clerk.

[FR Doc. 2017–15166 Filed 7–18–17; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Summary Notice No. PE–2017–51]

Petition for Exemption; Summary of Petition Received; Rolls-Royce plc

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

ACTION: Notice of Petition for Exemption Received.

SUMMARY: This notice contains a summary of a petition seeking relief from specified requirements of Title 14, Code of Federal Regulations (14 CFR). The purpose of this notice is to improve the public's awareness of, and participation in, the FAA's exemption process. Neither publication of this notice nor the inclusion or omission of information in the summary is intended to affect the legal status of the petition or its final disposition.

DATES: Comments on this petition must identify the petition docket number and must be received on or before August 8, 2017.

ADDRESSES: Send comments identified by docket number FAA–2017–0647 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 20590–0001, 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: In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to *http://www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *http://www.dot.gov/privacy.*

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 20590–0001, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Tara Fitzgerald, Federal Aviation Administration, Engine and Propeller Directorate, Standards Staff, ANE–112, 1200 District Avenue, Burlington, Massachusetts 01803–5229; (781) 238–7130; facsimile: (781) 238–7199; email: *tara.fitzgerald@faa.gov.*

This notice is published pursuant to 14 CFR 11.85.

Issued in Burlington, Massachusetts, on July 6, 2017.

Carlos Pestana,

Acting Assistant Manager, Engine and Propeller Directorate, Aircraft Certification Service.

Petition for Exemption

Docket No.: FAA–2017–0647.

Petitioner: Rolls-Royce plc.

Section of 14 CFR Affected: 14 CFR 33.27(f)(6).

Description of Relief Sought: Rolls-Royce plc petitions for exemption from § 33.27 (f)(6) for the Trent XWB–97 engine model to exclude the entire high-pressure shaft system from failure consideration in determining the highest overspeed that would result from a complete loss of load on a turbine rotor.

[FR Doc. 2017–15157 Filed 7–18–17; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Summary Notice No. 2017–61]

Petition for Exemption; Summary of Petition Received; Mr. Edward Silva

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice.

SUMMARY: This notice contains a summary of a petition seeking relief from specified requirements of Federal Aviation Regulations. The purpose of this notice is to improve the public's awareness of, and participation in, the FAA's exemption process. Neither publication of this notice nor the inclusion or omission of information in the summary is intended to affect the legal status of the petition or its final disposition.

DATES: Comments on this petition must identify the petition docket number and must be received on or before August 8, 2017.

ADDRESSES: Send comments identified by docket number FAA–2015–0226 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: In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to *http://www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *http://www.dot.gov/privacy.*

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: Alphonso Pendergrass (202) 267–4713, Office of Rulemaking, Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591.

This notice is published pursuant to 14 CFR 11.85.

Issued in Washington, DC, on July 12, 2017.

Dale Bouffiou,

Deputy Director, Office of Rulemaking.

Petition for Exemption

Docket No.: FAA–2015–0226.

Petitioner: Mr. Edward Silva.

Section(s) of 14 CFR Affected: §§ 61.39, 61.153 and 61.156.

Description of Relief Sought: Mr. Edward John Silva is a Captain in the U.S. Air Force flying the Boeing C–17 Globemaster III. Captain Silva holds a FAA commercial pilot certificate in the airplane category with single-engine and multiengine class ratings and an instrument rating and would like to obtain an airline transport pilot (ATP) certificate with an airplane category and multiengine class rating. After July 31, 2014, all applicants for the ATP certificate with an airplane category and multiengine class rating are required to complete the training identified in § 61.156 from an FAA-approved provider prior to completing the FAA knowledge and practical tests for this certificate. Prior to August 1, 2014, the training requirement did not exist, therefore a pilot only needed to complete the knowledge test prior to taking the practical test. The previous ATP knowledge test results were good for 24 calendar months; therefore, had Captain Silva taken the ATP knowledge test prior to August 1, 2014, he could have used those results to demonstrate eligibility for the ATP practical test for the duration of the validity period. Captain Silva stated he intended to complete the ATP knowledge test prior to August 1, 2014, but was placed on a short notice deployment and he was unable to complete it while overseas. Captain Silva seeks relief from the requirement to complete the airline transport pilot certification training program required by §§ 61.39, 61.153, and 61.156 prior to taking the practical test based on his military experience and deployment.

[FR Doc. 2017–15074 Filed 7–18–17; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Summary Notice No. PE–2017–48]

Petition for Exemption; Summary of Petition Received; General Electric Company

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

ACTION: Notice of petition for exemption received.

SUMMARY: This notice contains a summary of a petition seeking relief from specified requirements of Title 14, Code of Federal Regulations. The purpose of this notice is to improve the public's awareness of, and participation in, this aspect of the FAA's exemption process. Neither publication of this notice nor the inclusion or omission of information in the summary is intended to affect the legal status of the petition or its final disposition.

DATES: Comments on this petition must identify the petition docket number and must be received on or before August 8, 2017.

ADDRESSES: You may send comments identified by docket number FAA–2017–0471 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 the Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue, SE., 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 20590–0001, 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: In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to *http://www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *http://www.dot.gov/privacy.*

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 20590–0001, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Mark Bouyer, Federal Aviation Administration, Engine and Propeller Directorate, Standards Staff, ANE–110, 1200 District Avenue, Burlington, Massachusetts 01803–5229; (781) 238–7755; facsimile: (781) 238–7199; email: *Mark.Bouyer@faa.gov.*

This notice is published pursuant to 14 CFR 11.85.

Issued in Burlington, Massachusetts, on July 6, 2017.

Carlos A. Pestana,

Acting Assistant Manager, Engine and Propeller Directorate, Aircraft Certification Service.

Petition for Exemption

Docket No.: FAA–2017–0471.

Petitioner: General Electric Company.

Section of 14 CFR Affected: Section 33.27(c).

Description of Relief Sought: The General Electric Company (a.k.a. GE) seeks relief from the requirements of § 33.27(c) for a complete loss of load occurrence on the stage 2 high pressure turbine (HPT) rotor overspeed conditions caused by a failure within a portion (axial segments) of the HPT aft shafting for certain GE9X engine models.

[FR Doc. 2017–15158 Filed 7–18–17; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

Agency Information Collection Activities: Information Collection Renewal; Comment Request; Reporting and Recordkeeping Requirements Associated With Liquidity Coverage Ratio: Liquidity Risk Measurement, Standards, and Monitoring

AGENCY: Office of the Comptroller of the Currency (OCC), Treasury.

ACTION: Notice and request for comment.

SUMMARY: The OCC, 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 a continuing information

collection as required by the Paperwork Reduction Act of 1995 (PRA). In accordance with the requirements of the PRA, the OCC may not conduct or sponsor, and the respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number.

The OCC is soliciting comment concerning the renewal of its information collection titled ''Reporting and Recordkeeping Requirements Associated with Liquidity Coverage Ratio: Liquidity Risk Measurement, Standards, and Monitoring.''

DATES: You should submit written comments by September 18, 2017.

ADDRESSES: Because paper mail in the Washington, DC area and at the OCC is subject to delay, commenters are encouraged to submit comments by email, if possible. Comments may be sent to: Legislative and Regulatory Activities Division, Office of the Comptroller of the Currency, Attention: 1557–0323, 400 7th Street SW., Suite 3E–218, Washington, DC 20219. In addition, comments may be sent by fax to (571) 465–4326 or by electronic mail to *prainfo@occ.treas.gov.* You may personally inspect and photocopy comments at the OCC, 400 7th Street SW., Washington, DC 20219. For security reasons, the OCC requires that visitors make an appointment to inspect comments. You may do so by calling (202) 649–6700 or, for persons who are deaf or hard of hearing, TTY, (202) 649–5597. Upon arrival, visitors will be required to present valid government-issued photo identification and submit to security screening in order to inspect and photocopy comments.

All comments received, including attachments and other supporting materials, are part of the public record and subject to public disclosure. Do not include any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure.

FOR FURTHER INFORMATION CONTACT: Shaquita Merritt, OCC Clearance Officer, (202) 649–5490, Legislative and Regulatory Activities Division, Office of the Comptroller of the Currency, 400 7th Street SW., Washington, DC 20219.

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3520), federal agencies must obtain approval from OMB for each collection of information that they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) to include 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 title 44 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, the OCC is publishing notice of the renewal of the collection of information set forth in this document.

Title: Reporting and Recordkeeping Requirements Associated with Liquidity Coverage Ratio: Liquidity Risk Measurement, Standards, and Monitoring.

OMB Control No.: 1557–0223.

Affected Public: Business or other for-profit.

Type of Review: Regular review.

Abstract: The quantitative liquidity requirement (12 CFR part 50) is designed to promote improvements in the measurement and management of liquidity risk.

The rule applies to large and internationally active banking organizations—generally, bank holding companies, certain savings and loan holding companies, and depository institutions with $250 billion or more in total assets or $10 billion or more in on-balance sheet foreign exposure—and to their consolidated subsidiaries that are depository institutions with $10 billion or more in total consolidated assets.

Section 50.22 requires that, with respect to each asset eligible for inclusion in a national bank or federal savings association's high-quality liquid assets (HQLA) amount, the national bank or federal savings association must implement policies that require eligible HQLA to be under the control of the management function in the national bank or federal savings association responsible for managing liquidity risk. The management function must evidence its control over the HQLA by segregating the HQLA from other assets, with the sole intent to use the HQLA as a source of liquidity, or demonstrating the ability to monetize the assets and making the proceeds available to the liquidity management function without conflicting with a business or risk management strategy of the national bank or federal savings association. In addition, § 50.22 requires that a national bank or federal savings association have a documented methodology that results in a consistent treatment for determining that the national bank or federal savings association's eligible HQLA meet the requirements of § 50.22.

Section 50.40 requires that a national bank or federal savings association notify its appropriate federal banking agency on any day when its liquidity coverage ratio is calculated to be less than the minimum requirement in § 50.10. If a national bank or federal savings association's liquidity coverage ratio is below the minimum requirement in § 50.10 for three consecutive days, or if the OCC has determined that the institution is otherwise materially noncompliant, the national bank or federal savings association must promptly provide a plan for achieving compliance with the minimum liquidity requirement in § 50.10 and all other requirements of § 50.40 to the OCC.

The liquidity plan must include, as applicable: (1) An assessment of the national bank or federal savings association's liquidity position; (2) the actions the national bank or federal savings association has taken and will take to achieve full compliance, including a plan for adjusting the national bank or federal savings association's risk profile, risk management, and funding sources in order to achieve full compliance and a plan for remediating any operational or management issues that contributed to noncompliance; (3) an estimated time frame for achieving full compliance; and (4) a commitment to provide a progress report to the OCC at least weekly until full compliance is achieved.

Frequency of Response: Annual and event generated.

Affected Public: Covered national banks and federal savings associations.

Estimated Number of Respondents: 19.

Estimated Total Annual Burden: 2,361 hours.

Comments submitted in response to this notice will be summarized and included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on:

(a) Whether the collection of information is necessary for the proper performance of the functions of the OCC, including whether the information has practical utility;

(b) The accuracy of the OCC's estimate of the information collection burden;

(c) Ways to enhance the quality, utility, and clarity of the information to be collected;

(d) Ways to minimize the burden of the collection on respondents, including through the use of automated collection techniques or other forms of information technology; and

(e) Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Dated: July 13, 2017.

Karen Solomon,

Deputy Chief Counsel, Office of the Comptroller of the Currency.

[FR Doc. 2017–15135 Filed 7–18–17; 8:45 am]

BILLING CODE 4810–33–P

DEPARTMENT OF VETERANS AFFAIRS

Fund Availability Under the Grants for Transportation of Veterans in Highly Rural Areas Program

AGENCY: Department of Veterans Affairs.

ACTION: Notice of Funding Availability (Grant Renewals).

SUMMARY: The Department of Veterans Affairs (VA) is announcing the availability of funds under the Grants for Transportation of Veterans in Highly Rural Areas program. This Notice of Funding Availability (Notice) contains information concerning the Grants for Transportation of Veterans in Highly Rural Areas program, grant renewal application process, and amount of funding available.

DATES: Applications for assistance under the Grants for Transportation of Veterans in Highly Rural Areas Program must be submitted to *www.grants.gov* by 4:00 p.m. Eastern Daylight Time on August 18, 2017. In the interest of fairness to all competing applicants and with the single exception described below regarding unforeseen technical problems beyond the control of the applicant with the *grants.gov* Web site, this deadline is firm as to date and hour, and VA will not consider any application that is received after the deadline. Applicants should take this practice into account and make early submission of their materials to avoid any risk of loss of eligibility brought about by unanticipated delays, computer service outages (in the case of *grants.gov*), or other delivery-related problems.

ADDRESSES:

Access to the Application

The application can be found at *http://www.grants.gov/web/grants/search-grants.html,* utilizing the ''search by Catalog of Federal Domestic Assistance number'' function, and entering in that search field the number 64.035. Questions should be referred to the Veterans Transportation Program Office at (404) 828–5380 (this is not a toll-free number) or by email at *HRTG@va.gov.* For further information on Grants for Transportation of Veterans in Highly Rural Areas program requirements, see the Final Rule published in the **Federal Register** (78 FR 19586) on April 2, 2013, which is codified in 38 CFR 17.700–730.

Submission of Application Package

Applications may not be sent by facsimile. Applications must be submitted to *www.grants.gov* by the application deadline. Applications must be submitted as a complete package. Materials arriving separately will not be included in the application package for consideration and may result in the application being rejected. All applicable forms cited in the application description must be included.

FOR FURTHER INFORMATION CONTACT: Darren Wallace, National Coordinator, Highly Rural Transportation Grants, Veterans Transportation Program, Member Services (10NF4), 2957 Clairmont Road, Atlanta, GA 30329; (404) 828–5380 (this is not a toll-free number); and Sylvester Wallace at *sylvester.wallace2@va.gov.*

SUPPLEMENTARY INFORMATION:

Funding Opportunity Description

Overview: Access to VA care for veterans that are in highly rural areas continues to be an issue across the United States. VA has established this program to help address barriers to access to care. This program funds innovative approaches to transporting veterans in highly rural areas who typically have longer commute times to Department of Veterans Affairs medical centers (VAMC).

Announcement Type: Notice of Funding Availability (Grant Renewals).

Funding Opportunity Number: VA–HRTG–2017.

Catalog of Federal Domestic Assistance (CFDA) Number: 64.035.

Purpose: VA Veterans Transportation Program (VTP) is pleased to announce that it is seeking grant renewal applications for Grants for Transportation of Veterans in Highly Rural Areas. This program furthers the Department's mission by offering renewal grants to current grantees to enable them to continue to assist veterans in highly rural areas through innovative transportation services to travel to VAMCs and to otherwise assist in providing transportation services in connection with the provision of VA medical care to these veterans.

Authority: Funding applied for under this Notice is authorized by section 307 of the Caregivers and Veterans Omnibus Health Services Act of 2010, Public Law 111–163, (the 2010 Act), as implemented by regulations at 38 CFR 17.700–730, Grants for Transportation of Veterans in Highly Rural Areas. Funds made available under this Notice are subject to the requirements of the aforementioned regulations and other applicable laws and regulations.

Award Information: In accordance with 38 CFR 17.710, VA is issuing this Notice for renewal grants under the Grants for Transportation of Veterans in Highly Rural Areas program for fiscal year 2017. Approximately $2 million is authorized to be appropriated for this fiscal year. If additional funding becomes available, VA will issue additional Notices of Funding Availability to permit other grantees to apply for grants under the program (in accordance with the terms and conditions of such Notices of Funding Availability). The following requirements apply to grants awarded under this Notice:

- One renewal grant may be awarded to each grantee for fiscal year 2017 for each highly rural area in which the grantee provides transportation services. (A listing of the highly rural counties can be found at this Web site under additional resources: *http://www.va.gov/HEALTHBENEFITS/vtp/grant_applicants.asp*)
- Transportation services may not be simultaneously provided by more than one grantee in any single highly rural area.
- No single grant will exceed $50,000.
- A veteran who is provided transportation services through a grantee's use of these grant monies will not be charged for such services.
- Renewal grants awarded under this Notice will be for a 1-year period.
- All awards are subject to the availability of appropriated funds and to any modifications or additional requirements that may be imposed by law.

Eligibility Information

Eligible Applicants

Current 2016 program grantees are the only eligible entities that are eligible to apply for a renewal grant. Interested eligible entities must submit a complete renewal grant application package to be considered for a grant renewal. Further, a renewal grant will only be awarded if the grantee's program will remain substantially the same as the program for which the original grant was awarded. How the grantee will meet this requirement must be specifically addressed in the renewal grant application.

Cost Sharing or Matching

This solicitation does not require grantees to provide matching funds as a condition of receiving such grants.

Other

Additional grant application requirements are specified in the application package. Submission of an incorrect or incomplete application package will result in the application being rejected during the threshold review, the initial review conducted by VA to ensure the application package contains all required forms and certifications. Complete packages will then be subject to the evaluation/scoring and selection processes described in § 17.705(c) and (d), respectively. Applicants will be notified of any additional information needed to confirm or clarify information provided in the renewal grant application and the deadline by which to submit such information.

Application and Submission Information

Renewal applications will be submitted through *grants.gov. Grants.gov* is a ''one-stop storefront'' that provides a unified process for all customers of Federal awards to find funding opportunities and apply for funding. Complete instructions on how to register and submit a renewal grant application can be found at *www.grants.gov.* If the applicant experiences technical difficulties at any point during this process, please call the *grants.gov* customer support hotline at 1–800–518–4726, 24 hours a day, 7 days a week, except Federal holidays.

Registration in *grants.gov* is required prior to submission. VA strongly encourages registering with grants.gov several weeks before the deadline for application submission. The deadline for applying for funding under this announcement is [30 days after publication].

Search for the funding opportunity on grants.gov using the following identifying information. The Catalog of Federal Domestic Assistance (CFDA) number for this solicitation is 64.035, titled ''Veterans transportation program,'' and the funding opportunity number is VA–HRTG–2017.

Submit an application consistent with this solicitation by following the directions in grants.gov. Within 24–48 hours after submitting the electronic application, the applicant should receive an email validation message from *grants.gov.* The validation message will state whether the renewal grant application has been received and validated, or rejected, with an explanation. Applicants are urged to submit their applications at least 72 hours prior to the due date of the application to allow time to receive the validation message and to correct any problems that may have caused a rejection notification.

If an applicant experiences unforeseen grants.gov technical issues beyond the applicant's control that prevents submission of its application by the deadline, the applicant must contact the VTP Office staff no later than 24 hours after the deadline and request approval to submit its application. At that time, VTP Office staff will instruct the applicant to submit specific information detailing the technical difficulties. The applicant must email the following: A description of the technical difficulties, a timeline of submission efforts, the complete grant application, the applicant's Data Universal Numbering System (DUNS) number, and *grants.gov* help desk tracking number(s) received. After the program office reviews all of the information submitted and contacts the grants.gov help desk to validate the technical issues reported, VA will contact the applicant to either approve or deny the request to submit a late application. If the technical issues reported cannot be validated, the application will be rejected as untimely.

To ensure a fair competition for limited discretionary funds, the following conditions are not valid reasons to permit late submissions: (1) Failure to begin the registration process in sufficient time, (2) failure to follow *grants.gov* instructions on how to register and apply as posted on its Web site, (3) failure to follow all of the instructions in the VA solicitation, and (4) technical issues experienced with the applicant's computer or information technology environment. Notifications regarding known technical problems with *grants.gov,* if any, are posted on the *grants.gov* Web site.

Content and Form of Application Submission

This section describes what a renewal application must include. Failure to submit an application that contains all of the specified elements will result in the rejection of the application at the threshold review stage. Moreover, if applications are not adequately responsive to the scope of the solicitation, particularly to any critical element, or fail to include a program narrative, budget detail worksheet including a budget narrative, tribal resolution (if applicable), eligibly entity designation, or a list of the highly rural county or counties to be served, they will be rejected and receive no further consideration.

Threshold Review Criteria: (Critical Elements)

- *Interim Final Report:* A report of your organization's performance for the last three quarters through June 2017.
- *Application deadline:* Applications not received by the application deadline through *www.grants.gov* will not be reviewed.
- *Eligibility:* Applications that do not conform to the eligibility requirements at the beginning section of this document will not be reviewed.
- *Budget detail worksheet including a budget narrative:* VA strongly recommends use of appropriately descriptive file names (*e.g.,* ''Program Narrative,'' ''Budget Detail Worksheet and Budget Narrative,'' ''Timelines,'' ''Memoranda of Understanding,'' ''Resumes'') for all attachments. VA recommends that resumes be included in a single file.
- *Information to complete the Application for Federal Assistance (SF–424):* The SF–424 is a standard form required for use as a cover sheet for submission of pre-applications, applications, and related information. *Grants.gov* takes information from the applicant's profile to populate the fields on this form.
- *Program Narrative:* Provide a detailed narrative of your program scope and specifically discuss the innovative modes and methods of transportation services to be provided. If the provision of transportation services will necessitate procurement or use of specific equipment, such equipment must be specifically listed.

Note on project evaluations: Applicants that propose to use funds awarded through this solicitation to conduct project evaluations should be aware that certain project evaluations (such as systematic investigations designed to develop or contribute to knowledge) may constitute research. However, project evaluations that are intended only to generate internal improvements to a program or service, or are conducted only to meet VA's performance measure data reporting requirements, likely do not constitute research. Research, for the purposes of VA-funded programs, is defined as, ''a systematic investigation, including research development, testing, and evaluation, designed to develop or contribute to generalizable knowledge.'' 38 CFR 16.102(d). In addition, research involving human subjects is subject to certain added protections, as set forth in 38 CFR part 16. Applicants should provide sufficient information for VA to determine whether particular project activities they propose would either

intentionally or unintentionally collect and/or use information in such a way that it meets VA's regulatory definition of research and therefore be subject to the requirements and procedures set forth in 38 CFR part 16.

Budget Detail Worksheet and Budget Narrative

Budget Detail Worksheet: A sample SF 424A Budget Detail Worksheet can be found at the *grants.gov* Web site. Please submit a budget and label it, as the example above indicates. If the budget is submitted in a different format, the budget categories listed in the sample budget worksheet must be included.

Budget Narrative: The Budget Narrative should thoroughly and clearly describe every category of expense listed in the Budget Detail Worksheet. The narrative should be mathematically sound and correspond with the information and figures provided in the Budget Detail Worksheet. The narrative should explain how all costs were estimated and calculated and how they are relevant to the completion of the proposed project. The narrative may include tables for clarification purposes but need not be in a spreadsheet format. As with the Budget Detail Worksheet, the Budget Narrative must be broken down by year. Note: All non-Federal entities have to comply with 2 CFR 200.400–475 Cost Principles and all Office of Management and Budget (OMB) Regulations and Circulars.

Budget Brief (example):

1. Our organization requests ____ for the acquisition of _____ van(s).
2. The total cost of the van(s)____. This is the amount requested from VA.
3. Our organization will utilize ____ for innovative approaches for transporting veterans. This is the amount requested from VA for a maximum of $50,000.

Indirect Cost Rate Agreement (If Applicable)

Indirect costs are allowed only if the applicant has a federally approved indirect cost rate. (This requirement does not apply to units of local government). A copy of the rate approval must be attached. If the applicant does not have an approved rate, one can be requested by contacting the applicant's cognizant Federal agency, which will review all documentation and approve a rate for the applicant organization or, if the applicant's accounting system permits, costs may be allocated in the direct cost categories. If VA is the cognizant Federal agency, obtain information needed to submit an indirect cost rate proposal from the contact person listed in this solicitation.

Tribal Authorizing Resolution (If Applicable)

If an application identifies a subrecipient that is either (1) a tribe or tribal organization or (2) a third party proposing to provide direct services or assistance to residents on tribal lands, then a current authorizing resolution of the governing body of the tribal entity or other enactment of the tribal council or comparable governing body authorizing the inclusion of the tribe or tribal organization and its membership must be included with the application. In those instances when an organization or consortium of tribes proposes to apply for a grant on behalf of a tribe or multiple specific tribes, the application must include a resolution from all tribes that will be included as a part of the services/assistance provided under the grant. A consortium of tribes for which existing consortium bylaws allow action without support from all tribes in the consortium (*i.e.,* without authorizing resolution or other enactment of each tribal governing body) may submit a copy of its consortium bylaws with the application in order to satisfy this requirement.

Submission Dates and Times

Renewal grant applications under the Grants for Transportation of Veterans in Highly Rural Areas program must be submitted to *www.grants.gov* by 4:00 p.m. Eastern Daylight Time on [30 days after publication]. In the interest of fairness to all competing applicants, this deadline is firm as to date and hour and with the single exception described above regarding unforeseen technical problems beyond the control of the applicant with the *grants.gov* Web site, VA will treat as ineligible for consideration any application that is received after the deadline. Applicants should take this into account and make early submission of their materials to avoid any risk of loss of eligibility brought about by unanticipated delays, computer service outages (in the case of *grants.gov*), or other delivery-related problems.

The application can be found at *http://www.grants.gov/web/grants/search-grants.html,* utilizing the ''search by Catalog of Federal Domestic Assistance number'' function, and entering in that search field the number 64.035. Questions should be referred to the Veterans Transportation Program Office at (404) 828–5380 (this is not a toll-free number) or by email at *HRTG@va.gov.* For further information on Grants for Transportation of Veterans in Highly Rural Areas Program requirements, see the governing regulations codified at 38 CFR 17.700–730.

Renewal grant applications may not be sent by facsimile. These applications must be submitted to *www.grants.gov* by the application deadline; they must also be submitted as a complete package. Materials arriving separately will not be included in the application package for consideration and may result in the application being rejected. All applicable forms cited in the application description must be included.

Intergovernmental Review

Some states require that applicants must contact their State's Single Point of Contact (SPOC) to find out and comply with the State's process, to comply with Executive Order (E.O.) 12372 (1982). Names and addresses of the SPOCs are listed in the Office of Management and Budget's homepage at *www.whitehouse.gov/omb/grants_spoc/.*

Funding Restrictions

Grants will only be awarded to those organizations that are eligible under law as described in the eligibility information section.

Other Submission Requirements

For technical assistance with submitting the application, contact the grants.gov customer support hotline at 1–800–518–4726 or via email to *support@grants.gov.* The *grants.gov* support hotline hours of operation are 24 hours a day, 7 days a week, except Federal holidays. For assistance with any other requirement of this solicitation, contact Darren Wallace, National Program Coordinator for Grants for Transportation of Veterans in Highly Rural Areas, at (404) 828–5380 (this is not a toll-free number) or by email to *Sylvester.Wallace2@va.gov.*

Additional forms that may be required in connection with an award are available for download on *www.grants.gov.* Examples of these forms can be viewed at the *grants.gov* Web site. For successful applicants, receipt of funds will be contingent upon submission of all necessary forms. Please note in particular the following forms: Certifications Regarding Lobbying; Debarment, Suspension and Other Responsibility Matters; Drug-Free Workplace Requirement; Disclosure of Lobbying Activities (Required for any applicant that expends any funds for lobbying activities; this form must be downloaded, completed, and then uploaded); and Standard Assurances (SF 424B) (Required to be submitted to

the VTP Office prior to the receipt of any award funds).

Application Review Information

Criteria

VA is committed to ensuring a fair and open process for awarding these renewal grants. The VTP Office will review the renewal grant application to make sure that the information presented is reasonable, understandable, measurable, and achievable, as well as consistent with the solicitation. Peer reviewers will conduct a threshold review of all applications submitted under this solicitation to ensure they meet all of the critical elements and all other minimum requirements as identified herein. The VTP Office may use either internal peer reviewers, external peer reviewers, or a combination to review the applications under this solicitation. An external peer reviewer is an expert in the field of the subject matter of a given solicitation who is not a current VA employee. An internal reviewer is a current VA employee who is well-versed or has expertise in the subject matter of this solicitation. Eligible applications will then be evaluated, scored, and rated by a peer review panel. Peer reviewers' ratings and any resulting recommendations are advisory only.

VTP Member Services Office conducts a financial review of applications for potential discretionary awards to evaluate the fiscal integrity and financial capability of applicants; examines proposed costs to determine if the Budget Detail Worksheet and Budget Narrative accurately explain project costs; and determines whether costs are reasonable, necessary, and allowable under applicable federal cost principles and agency regulations.

Absent explicit statutory authorization or written delegation of authority to the contrary, the Veterans Health Administration, through the VTP Office, will forward the reviewers' recommendations for award to the Secretary of Veterans Affairs, who will then review and approve each award decision. Such determinations by the Secretary will be final. VA will also give consideration to factors including, but not limited to: Underserved populations, geographic diversity, strategic priorities, and available funding when making awards.

Review and Selection Process: Selection of Renewal Grants for Transportation of Veterans in Highly Rural Areas is very competitive. Listed below are the scoring and selection criteria:

1. *Renewal Grant Scoring:* Renewal applications will be scored using the following selection criteria:

A. VA will award up to 55 points (an applicant must score at a minimum of 27.5 points) based on the success of the grantee's program, as demonstrated by the following: Application shows that the grantee or identified subrecipient provided transportation services which allowed participants to be provided medical care timely and as scheduled; and application shows that participants were satisfied with the transportation services provided by the grantee or identified subrecipient, as described in the Notice;

B. VA will award up to 35 points (an applicant must score at a minimum of 17.5 points) based on the cost effectiveness of the program, as demonstrated by the following: The grantee or identified subrecipient administered the program on budget and grant funds were utilized in a sensible manner, as interpreted by information provided by the grantee to VA under 38 CFR 17.725(a)(1–7); and

C. VA will award up to 15 (an applicant must score at a minimum of 7.5 points) points based on the extent to which the program complied with the grant agreement and applicable laws and regulations.

2. *Renewal Grant Selection:* VA will use the following process to award renewal grants:

A. VA will rank those grantees who receive at least the minimum amount of total points (52.5) and points per category set forth in the Notice. The grantees will be ranked in order from highest to lowest scores.

B. VA will use the grantee's ranking as the basis for selection for funding. VA will fund the highest-ranked grantees for which funding is available.

Award Administration Information

Award Notices and Renewal Grant Agreements

After an applicant is selected for a renewal grant in accordance with 38 CFR 17.705(d) and notified as described above, VA will send renewal grant agreement to be executed by the Assistant Deputy Under Secretary for Health for Administrative Operations in VA and the grantee. Upon execution of the renewal grant agreement, VA will obligate the approved amount. Recipients will use the U.S. Department of Health and Human Services Payment Management System for grant drawdowns. Instructions for submitting requests for payment may be found at *www.dpm.psc.gov/.*

The Grant Agreement will be sent through the U.S. Postal Service to the awardee organization as listed on its SF424. Note that any communication between the VTP Office and awardees prior to the issuance of the Notice of Award (NoA) is not authorization to begin performance on the project.

Unsuccessful applicants will be notified of their status by letter, which will likewise be sent through the U.S. Postal Service to the applicant organization as listed on its SF 424.

The renewal grant agreement will provide that:

1. The grantee must operate the program in accordance with the provisions of this section and the grant application;

2. If a grantee's renewal application identified a subrecipient, such subrecipient must operate the program in accordance with the provisions of this section and the grant application; and

3. If a grantee's application identified that funds will be used to procure or operate vehicles to directly provide transportation services, the following requirements must be met:

A. Title to the vehicles must vest solely in the grantee or in the identified subrecipient or with leased vehicles in an identified lender;

B. The grantee or identified subrecipient must, at a minimum, provide motor vehicle liability insurance for the vehicles to the same extent they would insure vehicles procured with their own funds;

C. All vehicle operators must be licensed in a U.S. State or Territory to operate such vehicles;

D. Vehicles must be safe and maintained in accordance with the manufacturer's recommendations; and

E. Vehicles must be operated in accordance with applicable Department of Transportation regulations concerning transit requirements under the Americans with Disabilities Act.

Administrative and National Policy Requirements

Successful applicants selected for awards must agree to comply with additional applicable legal requirements upon acceptance of an award. (VA strongly encourages applicants to review the information pertaining to these additional requirements prior to submitting a renewal application). As to those additional requirements, we note that while their original grants were subject to additional legal requirements as set forth in 38 CFR parts 43 and 49 those regulatory provisions have since been superseded by the Common Rule governing all Federal Grant Programs. The Common Rule is codified at 2 CFR part 200. Thus, grantees and identified

subrecipients awarded renewal grants under the Program must agree as part of their grant agreement to comply with all requirements of the Common Rule, as applicable.

Reporting

Progress Reports

Awardees must agree to cooperate with any VA evaluation of the program and provide required quarterly, annual, and final (at the end of the fiscal year) reports in a form prescribed by VTP. A final report consists of a summation of grant activities which include progress toward goals, financial administration of grant funds, grant administration issues and barriers. Reports are to be submitted electronically. These reports must outline how grant funds were used, describe program progress and barriers, and provide measurable outcomes.

Required quarterly and annual reports must include the following information:

• Record of time expended assisting with the provision of transportation services;

• Record of grant funds expended assisting with the provision of transportation services;

• Trips completed;

• Total distance covered;

• Veterans served;

• Locations which received transportation services; and

• Results of veteran satisfaction survey.

Program Monitoring

VTP is responsible for program monitoring. All awardees will be required to cooperate in providing the necessary data elements to the VTP. The goal of program monitoring is to ensure program requirements are met; this will be accomplished by tracking performance and identifying quality and compliance problems through early detection. Methods of program monitoring may include: Monitoring the performance of a grantee's or sub-recipient's personnel, procurements, and/or use of grant-funded property; collecting, analyzing data, and assessing program implementation and effectiveness; assessing costs and utilization; and providing technical assistance when needed. Site visit monitoring will include the above-described activities, in addition to the conduct of safety assessments and, if applicable, verification of both current driver's licenses and vehicle insurance coverage.

Federal Financial Report

Awardees are required to submit the FFR SF 425 on a quarterly basis. More details will be announced in the NoA.

Audit Requirements

Awardees must comply with the audit requirements of Office of Management and Budget Uniform Guidance 2 CFR part 200 subpart F. Information on the scope, frequency and other aspects of the audits can be found on at *www.federalregister.gov/a/2013-30465.*

Program Variations

Any changes in a grantee's program activities which result in deviations from the grant renewal agreement must be reported to VA.

Additional Reporting

Additional reporting requirements may be requested by VA to allow VA to fully assess program effectiveness.

Notice of New Post-Award Reporting Requirements

All recipients (excluding an individual recipient of Federal assistance) of awards of $25,000 or more under this solicitation, consistent with the Federal Funding Accountability and Transparency Act of 2006 (FFATA), Public Law 109–282 (Sept. 26, 2006), will be required to report award information on the subaward reporting system of any first-tier subawards totaling $25,000 or more, and, in certain cases, to report information on the names and total compensation of the five most highly compensated executives of the recipient and first-tier subrecipients. Each applicant entity must ensure that it has the necessary processes and systems in place to comply with the reporting requirements should it receive funding.

It is expected that reports regarding subawards will be made through the FFATA Subaward Reporting System (FSRS) found at *www.fsrs.gov.* The FFATA Subaward Reporting System is the reporting tool Federal prime awardees (*i.e.* prime contractors and prime grants recipients) use to capture and report subaward and executive compensation data regarding their first-tier subawards to meet the FFATA reporting requirements. Prime contract awardees will report against sub-contracts awarded and prime grant awardees will report against sub-grants awarded. Prime Contractors awarded a Federal contract or order that is subject to Federal Acquisition Regulation clause 52.204–10 (Reporting Executive Compensation and First-Tier Subcontract Awards) are required to file a FFATA subaward report by the end of the month following the month in which the prime contractor awards any subcontract greater than $25,000.

Please note also that no subaward of an award made under this solicitation may be made to a subrecipient that is subject to the terms of FFATA unless the potential subrecipient acquires and provides a DUNS number.

Other Information

Pursuant to 38 CFR 17.730(a), VA may recover from the grantee any funds that are not used in accordance with a grant agreement. If VA decides to recover funds, VA will issue to the grantee a notice of intent to recover grant funds, and the grantee will then have 30 days to submit documentation demonstrating why the grant funds should not be recovered. After review of all submitted documentation, VA will determine whether action will be taken to recover the grant funds. When VA determines action will be taken to recover grant funds from the grantee, the grantee is then prohibited under 38 CFR 17.730(b) from receiving any further grant funds.

Signing Authority

The Secretary of Veterans Affairs, or designee, approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs. Gina S. Farrisee, Deputy Chief of Staff, Department of Veterans Affairs, approved this document on July 11, 2017, for publication.

Dated: July 14, 2017.

Michael Shores,

Director, Regulation Policy & Management, Office of the Secretary, Department of Veterans Affairs.

[FR Doc. 2017–15167 Filed 7–18–17; 8:45 am]

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Part II

Bureau of Consumer Financial Protection

12 CFR Part 1040

Arbitration Agreements; Final Rule

BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Part 1040

[Docket No. CFPB–2016–0020]

RIN 3170–AA51

Arbitration Agreements

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Final rule; official interpretations.

SUMMARY: Pursuant to section 1028(b) of the Dodd-Frank Wall Street Reform and Consumer Protection Act, the Bureau of Consumer Financial Protection (Bureau) is issuing this final rule to regulate arbitration agreements in contracts for specified consumer financial product and services. First, the final rule prohibits covered providers of certain consumer financial products and services from using an agreement with a consumer that provides for arbitration of any future dispute between the parties to bar the consumer from filing or participating in a class action concerning the covered consumer financial product or service. Second, the final rule requires covered providers that are involved in an arbitration pursuant to a pre-dispute arbitration agreement to submit specified arbitral records to the Bureau and also to submit specified court records. The Bureau is also adopting official interpretations to the regulation.

DATES: *Effective date:* This regulation is effective September 18, 2017.

Compliance date: Mandatory compliance for pre-dispute arbitration agreements entered into on or after March 19, 2018.

FOR FURTHER INFORMATION CONTACT: Benjamin Cady and Lawrence Lee Counsels; Owen Bonheimer, Eric Goldberg and Nora Rigby Senior Counsels, Office of Regulations, Consumer Financial Protection Bureau, at 202–435–7700 or *cfpb_reginquiries@cfpb.gov.*

SUPPLEMENTARY INFORMATION:

I. Summary of the Final Rule

On May 24, 2016, the Bureau of Consumer Financial Protection published a proposal to establish 12 CFR part 1040 to address certain aspects of consumer finance dispute resolution.[1] Following a public comment period and review of comments received, the Bureau is now issuing a final rule governing agreements that provide for the arbitration of any future disputes between consumers and providers of certain consumer financial products and services.

Congress directed the Bureau to study these pre-dispute arbitration agreements in the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank or Dodd-Frank Act).[2] In 2015, the Bureau published and delivered to Congress a study of arbitration (Study).[3] In the Dodd-Frank Act, Congress also authorized the Bureau, after completing the Study, to issue regulations restricting or prohibiting the use of arbitration agreements if the Bureau found that such rules would be in the public interest and for the protection of consumers.[4] Congress also required that the findings in any such rule be consistent with the Bureau's Study.[5] In accordance with this authority, the final rule issued today imposes two sets of limitations on the use of pre-dispute arbitration agreements by covered providers of consumer financial products and services. First, the final rule prohibits providers from using a pre-dispute arbitration agreement to block consumer class actions in court and requires most providers to insert language into their arbitration agreements reflecting this limitation. This final rule is based on the Bureau's findings—which are consistent with the Study—that pre-dispute arbitration agreements are being widely used to prevent consumers from seeking relief from legal violations on a class basis, and that consumers rarely file individual lawsuits or arbitration cases to obtain such relief.

Second, the final rule requires providers that use pre-dispute arbitration agreements to submit certain records relating to arbitral and court proceedings to the Bureau. The Bureau will use the information it collects to continue monitoring arbitral and court proceedings to determine whether there are developments that raise consumer protection concerns that may warrant further Bureau action. The Bureau is also finalizing provisions that will require it to publish the materials it collects on its Web site with appropriate redactions as warranted, to provide greater transparency into the arbitration of consumer disputes.

The final rule applies to providers of certain consumer financial products and services in the core consumer financial markets of lending money, storing money, and moving or exchanging money, including, subject to certain exclusions specified in the rule, providers that are engaged in:

- Extending consumer credit, participating in consumer credit decisions, or referring or selecting creditors for non-incidental consumer credit, each when done by a creditor under Regulation B implementing the Equal Credit Opportunity Act (ECOA), acquiring or selling consumer credit, and servicing an extension of consumer credit;
- extending or brokering automobile leases as defined in Bureau regulation;
- providing services to assist with debt management or debt settlement, to modify the terms of any extension of consumer credit, or to avoid foreclosure, and providing products or services represented to remove derogatory information from, or to improve, a person's credit history, credit record, or credit rating;
- providing directly to a consumer a consumer report as defined in the Fair Credit Reporting Act (FCRA), a credit score, or other information specific to a consumer derived from a consumer file, except for certain exempted adverse action notices (such as those provided by employers);
- providing accounts under the Truth in Savings Act (TISA) and accounts and remittance transfers subject to the Electronic Fund Transfer Act (EFTA);
- transmitting or exchanging funds (except when necessary to another product or service not covered by this rule offered or provided by the person transmitting or exchanging funds), certain other payment processing services, and check cashing, check collection, or check guaranty services consistent with the Dodd-Frank Act; and
- collecting debt arising from any of the above products or services by a provider of any of the above products or services, their affiliates, an acquirer or purchaser of consumer credit, or a person acting on behalf of any of these persons, or by a debt collector as defined by the Fair Debt Collection Practices Act (FDCPA).

Consistent with the Dodd-Frank Act, the final rule applies only to agreements entered into after the end of the 180-day period beginning on the regulation's

[1] Arbitration Agreements, 81 FR 32830 (May 24, 2016).

[2] Public Law 111–203, 124 Stat. 1376 (2010), section 1028(a).

[3] Bureau of Consumer Fin. Prot., ''Arbitration Study: Report to Congress, Pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act § 1028(a),'' (2015), *available at http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf.* Specific portions of the Study are cited in this final rule where relevant, and the entire Study will be included in the docket for this rulemaking at *www.regulations.gov.*

[4] Dodd-Frank section 1028(b).

[5] *Id.*

effective date.[6] The Bureau is adopting an effective date of 60 days after the final rule is published in the **Federal Register**. To facilitate implementation and ensure compliance, the final rule requires providers in most cases to insert specified language into their arbitration agreements to explain the effect of the rule. The final rule also permits providers of general-purpose reloadable prepaid cards to continue selling packages that contain non-compliant arbitration agreements, if they give consumers a compliant agreement as soon as consumers register their cards and the providers comply with the final rule's requirement not to use an arbitration agreement to block a class action.

II. Background

Arbitration is a dispute resolution process in which the parties choose one or more neutral third parties to make a final and binding decision resolving the dispute.[7] Parties may include language in their contracts, before any dispute has arisen, committing to resolve future disputes between them in arbitration rather than in court or allowing either party the option to seek resolution of a future dispute in arbitration. Such pre-dispute arbitration agreements—which this final rule generally refers to as ''arbitration agreements''§ [8]—have a long history, primarily in commercial contracts, where companies historically had bargained to create agreements tailored to their needs.[9] In 1925, Congress passed what is now known as the Federal Arbitration Act (FAA) to require that courts enforce agreements to arbitrate, including those entered into both before and after a dispute has arisen.[10]

In the last few decades, companies have begun inserting arbitration agreements in a wide variety of standard-form contracts, such as in contracts between companies and consumers, employees, and investors. As is underscored by the range of comments received on the proposal, the use of arbitration agreements in such contracts has become a contentious legal and policy issue due to concerns about whether the effects of arbitration agreements are salient to consumers, whether arbitration has proved to be a fair and efficient dispute resolution mechanism, and whether arbitration agreements effectively discourage and limit the filing or resolution of certain claims in court or in arbitration.

In recent years, Congress has taken steps to restrict the use of arbitration agreements in connection with certain consumer financial products and services and other consumer and investor relationships. Most recently, in the 2010 Dodd-Frank Act, Congress prohibited the use of arbitration agreements in connection with mortgage loans,[11] authorized the Securities and Exchange Commission (SEC) to regulate arbitration agreements in contracts between consumers and securities broker-dealers and investment advisers,[12] and prohibited the use of arbitration agreements in connection with certain whistleblower proceedings.[13]

In addition, and of particular relevance here, Congress directed the Bureau to study the use of arbitration agreements in connection with other, non-mortgage consumer financial products and services and authorized the Bureau to prohibit or restrict the use of such agreements if it finds that such action is in the public interest and for the protection of consumers.[14] Congress also required that the findings in any such rule be consistent with the study.[15] The Bureau solicited input on the appropriate scope, methods, and data sources for the study in 2012[16] and released results of its three-year Study in March 2015.[17] Part III of this final rule summarizes the Bureau's process for completing the Study and its results. To place these results in greater context, this part provides a brief overview of: (1) Consumers' rights under Federal and State laws governing consumer financial products and services; (2) court mechanisms for seeking relief where those rights have been violated, and, in particular, the role of the class action device in protecting consumers; and (3) the evolution of arbitration agreements and their increasing use in markets for consumer financial products and services.

A. Consumer Rights Under Federal and State Laws Governing Consumer Financial Products and Services

Companies typically provide consumer financial products and services under the terms of a written contract. In addition to being governed by such contracts and the relevant State's contract law, the relationship between a consumer and a financial service provider is typically governed by consumer protection laws at the State level, Federal level, or both, as well as by other State laws of general applicability (such as tort law). Collectively, these laws create legal rights for consumers and impose duties on the providers of financial products and services that are subject to those laws and, depending on the contract and the product or service, a service provider to the underlying provider.

Early Consumer Protection in the Law

Prior to the twentieth century, the law generally embraced the notion of *caveat emptor,* or ''buyer beware'' in consumer affairs.[18] State common law afforded some minimal consumer protections against fraud, usury, or breach of contract, but these common law protections were limited in scope. In the first half of the twentieth century, Congress began passing legislation intended to protect consumers, such as the Wheeler-Lea Act of 1938.[19] The Wheeler-Lea Act amended the Federal Trade Commission Act of 1914 (FTC Act) to provide the FTC with the authority to pursue unfair or deceptive acts and practices.[20] These early Federal laws did not provide for private rights of action, meaning that they could only be enforced by the government.

Modern Era of Federal Consumer Financial Protections

In the late 1960s, Congress began passing consumer protection laws focused on financial products, beginning with the Consumer Credit

[6] Dodd-Frank section 1028(d).

[7] ''Arbitration,'' Black's Law Dictionary (10th ed. 2014).

[8] Section 1040.2(d) defines the phrase ''pre-dispute arbitration agreement.'' When referring to the definition, in § 1040.2(d), this final rule uses the full term or otherwise clarifies the intended usage.

[9] *See infra* Part II.C.

[10] 9 U.S.C. 1 *et seq.*

[11] Dodd-Frank section 1414(e) (codified as 15 U.S.C. 1639c(e)).

[12] Dodd-Frank sections 921(a) and 921(b) (codified as 15 U.S.C. 78o(o) and 15 U.S.C. 80b–5(f)).

[13] Dodd-Frank section 922(b) (codified as 18 U.S.C. 1514A(e)).

[14] Dodd-Frank section 1028(b).

[15] *Id.*

[16] Bureau of Consumer Fin. Prot., Request for Information Regarding Scope, Methods and Data Sources for Conducting Study of Pre-Dispute Arbitration Agreements, 77 FR 25148 (Apr. 27, 2012) (hereinafter Arbitration Study RFI).

[17] Study, *supra* note 3. The Bureau also delivered the Study to Congress. *See also* Letter from Catherine Galicia, Ass't Dir. of Legis. Aff., Bureau of Consumer Fin. Prot., to Hon. Jeb Hensarling, Chairman, Comm. on Fin. Serv. (Mar. 10, 2015) (on file with the Bureau).

[18] *Caveat emptor* assumed that buyer and seller conducted business face to face on roughly equal terms (much as English common law assumed that civil actions generally involved roughly equal parties in direct contact with each other). J.R. Franke & D.A. Ballam, ''New Application of Consumer Protection Law: Judicial Activism or Legislative Directive,'' 32 Santa Clara L. Rev. 347, at 351–55 (1992).

[19] Wheeler-Lea Act of 1938, Public Law 75–447, 52 Stat. 111 (1938).

[20] *See* FTC Act section 5. Prior to the Wheeler-Lea Act, the FTC had the authority to reach ''unfair methods of competition in commerce'' but only if they had an anticompetitive effect. *See FTC* v. *Raladam Co.,* 283 U.S. 643, 649 (1931).

Protection Act (CCPA) in 1968.[21] The CCPA included the Truth in Lending Act (TILA), which imposed disclosure and other requirements on creditors.[22] In contrast to earlier consumer protection laws such as the Wheeler-Lea Act, TILA permits private enforcement by providing consumers with a private right of action, authorizing consumers to pursue claims for actual damages and statutory damages and allowing consumers who prevail in litigation to recover their attorney's fees and costs.[23]

Congress followed the enactment of TILA with several other consumer financial protection laws, many of which provided private rights of action for at least some statutory violations. For example, in 1970, Congress passed the FCRA, which promotes the accuracy, fairness, and privacy of consumer information contained in the files of consumer reporting agencies, as well as providing consumers access to their own information.[24] In 1974, Congress passed the ECOA to prohibit creditors from discriminating against applicants with respect to credit transactions.[25] In 1977, Congress passed the FDCPA to promote the fair treatment of consumers who are subject to debt collection activities.[26]

In the 1960s, States began passing their own consumer protection statutes modeled on the FTC Act to prohibit unfair and deceptive practices. Unlike the FTC Act, however, these State statutes typically provide for private enforcement.[27] The FTC encouraged the adoption of consumer protection statutes at the State level and worked directly with the Council of State Governments to draft the Uniform Trade Practices Act and Consumer Protection Law, which served as a model for many State consumer protection statutes.[28] Currently, 49 of the 50 States and the District of Columbia have State consumer protection statutes modeled on the FTC Act that allow for private rights of action.[29]

Class Actions Pursuant to Federal Consumer Protection Laws

In 1966, shortly before Congress first began passing the wave of consumer financial protection statutes described above, the Federal Rules of Civil Procedure (Federal Rules or FRCP) were amended to make class actions substantially more available to litigants, including consumers. The class action procedure in the Federal Rules, as discussed in detail in Part II.B below, allows an individual to group his or her claims together with those of other, absent individuals in one lawsuit under certain circumstances and to obtain monetary or injunctive relief for the group. Because TILA and the other Federal consumer protection statutes discussed above permitted private rights of action, those private rights of action were enforceable through a class action, unless the statute expressly prohibited class actions.[30]

Indeed, Congress affirmatively calibrated enforcement through private class actions in several of the consumer protection statutes by specifically referring to class actions and adopting statutory damage schemes that are capped by a percentage of the defendants' net worth.[31] For example, when consumers initially sought to bring TILA class actions, a number of courts applying Federal Rule 23 denied motions to certify a class because of the prospect of extremely large damages resulting from the aggregation of a large number of claims for statutory damages.[32] Congress addressed this by amending TILA in 1974 to cap class action damages in such cases to the lesser of 1 percent of the defendant's assets or $100,000.[33] Congress has twice increased the cap on class action damages in TILA: To $500,000 in 1976 and $1,000,000 in 2010.[34] Many other statutes similarly cap damages in class actions.[35] Further, the legislative history of other statutes indicates a particular intent to permit class actions given the potential for a small recovery in many consumer finance cases for individual damages.[36] Similarly, many State legislatures contemplated consumers' filing of class actions to vindicate violations of their versions of the FTC Act.[37] A minority of States expressly prohibit class actions to enforce their FTC Acts.[38]

[21] Public Law 90–321, 82 Stat. 146 (1968).

[22] *Id.* at title I.

[23] 15 U.S.C. 1640(a).

[24] Public Law 91–508, 84 Stat. 1114–2 (1970).

[25] Congress amended that law in 1976. Public Law 94–239, 90 Stat. 251 (1976).

[26] Public Law 95–109, 91 Stat. 874 (1977). Other such Federal consumer protection laws include those enumerated in the Dodd-Frank Act and made subject to the Bureau's rulemaking, supervision, and enforcement authority: Alternative Mortgage Transaction Parity Act of 1982, 12 U.S.C. 3801; Consumer Leasing Act of 1976, 15 U.S.C. 1667; Electronic Fund Transfer Act (EFTA), 15 U.S.C. 1693 (except with respect to § 920 of that Act); Fair Credit Billing Act, 15 U.S.C. 1666; Home Mortgage Disclosure Act of 1975, 12 U.S.C. 2801; Home Owners Protection Act of 1998, 12 U.S.C. 4901; Federal Deposit Insurance Act, 12 U.S.C. 1831t (b)-(f); Gramm-Leach-Bliley Act 15 U.S.C. 6802–09 (except with respect to section 505 as it applies to section 501(b) of that Act); Home Ownership and Equity Protection Act of 1994 (HOEPA), 15 U.S.C. 1601; Interstate Land Sales Full Disclosure Act, 15 U.S.C. 1701; Real Estate Settlement Procedures Act of 1974 (RESPA), 12 U.S.C. 2601; S.A.F.E. Mortgage Licensing Act of 2008, 12 U.S.C. 5101; Truth in Savings Act (TISA), 12 U.S.C. 4301, and section 626 of the Omnibus Appropriations Act of 2009, 15 U.S.C. 1638. Federal consumer protection laws also include the Bureau's authority to take action to prevent a covered person or service provider from committing or engaging in an unfair, deceptive, and abusive acts or practices, Dodd-Frank section 1031, and its disclosure authority, Dodd-Frank section 1032.

[27] Victor E. Schwartz & Cary Silverman, ''Common Sense Construction of Consumer Protection Acts,'' 54 U. Kan. L. Rev. 1, at 15–16 (2005).

[28] *Id.*

[29] *Id.* at 16. Every State prohibits deception; some prohibit unfair practices as well. *See* Carolyn L. Carter, ''Consumer Protection in the States,'' Nat'l Consumer L. Ctr., at 5 (2009), *available at https://www.nclc.org/images/pdf/udap/report_50_states.pdf.*

[30] *See, e.g., Wilcox* v. *Commerce Bank of Kansas City,* 474 F.2d 336, 343–44 (10th Cir. 1973).

[31] A minority of Federal statutes provide private rights of action but do not cap damages in class action cases. For example, the Telephone Consumer Protection Act (47 U.S.C. 227(b)(3)), the FCRA (15 U.S.C. 1681n, 1681o), and the Credit Repair Organizations Act (15 U.S.C. 1679g) do not cap damages in class action cases.

[32] *See, e.g., Ratner* v. *Chem. Bank N.Y. Trust Co.,* 54 FRD. 412, 416 (S.D.N.Y. 1972).

[33] *See* Public Law 93–495, 88 Stat. 1518, section 408(a).

[34] Truth in Lending Act Amendments, Public Law 94–240, 90 Stat. 260 (1976); Dodd-Frank section 1416(a)(2).

[35] For example, ECOA provides for the full recovery of actual damages on a class basis and caps punitive damages to the lesser of $500,000 or 1 percent of a creditor's net worth; RESPA limits total class action damages (including actual or statutory damages) to the lesser of $1,000,000 or 1 percent of the net worth of a mortgage servicer; the FDCPA limits class action recoveries to the lesser of $500,000 or 1 percent of the net worth of the debt collector; and EFTA provides for a cap on statutory damages in class actions to the lesser of $500,000 or 1 percent of a defendant's net worth and lists factors to consider in determining the proper amount of a class award. *See* 15 U.S.C. 1691e(b) (ECOA), 12 U.S.C. 2605(f)(2) (RESPA), 15 U.S.C. 1692k(a)(2)(B) (FDCPA), and 15 U.S.C. 1693m(a)(2)(B) (EFTA).

[36] *See, e.g.,* Electronic Fund Transfer Act, H. Rept. No. 95–1315, at 15 (1978). The Report stated: ''Without a class-action suit an institution could violate the title with respect to thousands of consumers without their knowledge, if its financial impact was small enough or hard to discover. Class action suits for damages are an essential part of enforcement of the bill because all too often, although many consumers have been harmed, the actual damages in contrast to the legal costs to individuals are not enough to encourage a consumer to sue. Suits might only be brought for violations resulting in large individual losses while many small individual losses could quickly add up to thousands of dollars.''

[37] The UDAP laws of at least 14 States expressly permit class action lawsuits. *See, e.g.,* Cal. Bus. & Prof. Code 17203 (2016); Haw. Rev. Stat. Ann. sec. 480–13.3 (2015); Idaho Code Ann. sec. 48–608(1) (2015); Ind. Code Ann. sec. 24–5–0.5–4(b) (2015); Kan. Stat. Ann. sec. 50–634(c) and (d) (2012); Mass. Gen. Laws ch. 93A, sec. 9(2) (2016); Mich. Comp. Laws sec. 445.911(3) (2015); Mo. Rev. Stat. sec. 407.025(2) and (3) (2015); N.H. Rev. Stat. sec. 358–A:10-a (2015); N.M. Stat. sec. 57–12–10(E) (2015); Ohio Rev. Code sec. 1345.09(B) (2016); R.I. Gen. Laws sec. 6–13.1–5.2(b) (2015); Utah Code secs. 13–11–19 and 20 (2015); Wyo. Stat. sec. 40–12–108(b) (2015).

[38] *See, e.g.,* Ala. Code sec. 8–19–10(f) (2002); Ga. Code Ann. sec. 10–1–399 (2015); La. Rev. Stat. Ann.

B. History and Purpose of the Class Action Procedure

The default rule in United States courts, inherited from England, is that only those who appear as parties to a given case are bound by its outcome.[39] As early as the medieval period, however, English courts recognized that litigating many individual cases regarding the same issue was inefficient for all parties and thus began to permit a single person in a single case to represent a group of people with common interests.[40] English courts later developed a procedure called the ''bill of peace'' to adjudicate disputes involving common questions and multiple parties in a single action. The process allowed for judgments binding all group members—whether or not they were participants in the suit—and contained most of the basic elements of what is now called class action litigation.[41]

The bill of peace was recognized in early United States case law and ultimately adopted by several State courts and the Federal courts.[42] Nevertheless, the use and impact of that procedure remained relatively limited through the nineteenth and into the twentieth centuries. In 1938, the Federal Rules were adopted to govern civil litigation in Federal court, and Federal Rule 23 established a procedure for class actions.[43] That procedure's ability to bind absent class members was never clear, however.[44]

That changed in 1966, when Federal Rule 23 was amended to create the class action mechanism that largely persists in the same form to this day.[45] Federal Rule 23 was amended at least in part to promote efficiency in the courts and to provide for compensation of individuals when many are harmed by the same conduct.[46] The 1966 revisions to Federal Rule 23 prompted similar changes in most States. As the Supreme Court has since explained, class actions promote efficiency in that ''the . . . device saves the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion under Rule 23.'' [47] As to small harms, class actions provide a mechanism for compensating individuals where ''the amounts at stake for individuals may be so small that separate suits would be impracticable.'' [48] Class actions have been brought not only by individuals, but also by companies, including financial institutions.[49]

Class Action Procedure Pursuant to Federal Rule 23

A class action can be filed and maintained under Federal Rule 23 in any case where there is a private right to bring a civil action in Federal court, unless otherwise prohibited by law.[50] Pursuant to Federal Rule 23(a), a class action must meet all of the following requirements: (1) A class of a size such that joinder of each member as an individual litigant is impracticable; (2) questions of law or fact common to the class; (3) a class representative whose claims or defenses are typical of those of the class; and (4) that the class representative will adequately represent those interests.[51] The first two prerequisites—numerosity and commonality—focus on the absent or represented class, while the latter two tests—typicality and adequacy—address the desired qualifications of the class representative. Pursuant to Federal Rule 23(b), a class action also must meet one of the following requirements: (1) Prosecution of separate actions risks either inconsistent adjudications that would establish incompatible standards of conduct for the defendant or would, as a practical matter, be dispositive of the interests of others; (2) defendants have acted or refused to act on grounds generally applicable to the class; or (3) common questions of law or fact predominate over any individual class member's questions, and a class action is superior to other methods of adjudication.

These and other requirements of Federal Rule 23 are designed to ensure

sec. 51:1409(A) (2006); Mont. Code Ann. sec. 30–14–133(1) (2003); S.C. Code Ann. sec. 37–5–202(1) (1999).

[39] *Ortiz* v. *Fibreboard Corp.,* 527 U.S. 815, 832–33 (1999).

[40] For instance, in early English cases, a local priest might represent his parish, or a guild might be represented by its formal leadership. Samuel Issacharoff, ''Assembling Class Actions,'' 90 Wash U. L. Rev. 699, at 704 (2013) (citing Stephen C. Yeazell, From Medieval Group Litigation to the Modern Class Action 40 (1987)).

[41] 7A Charles Alan Wright & Arthur R. Miller, ''Federal Practice and Procedure: Civil § 1751'' (3d ed. 2002).

[42] *Id.* Federal Equity Rule 48, in effect from 1842 to 1912, officially recognized representative suits where parties were too numerous to be conveniently brought before the court, but did not bind absent members to the judgment. *Id.* In 1912, Federal Equity Rule 38 replaced Rule 48 and allowed absent members to be bound by a final judgment. *Id.*

[43] *See* Fed. R. Civ. P. 23 (1938).

[44] *See American Pipe & Constr. Co.* v. *Utah,* 414 U.S. 538, 545–46 (1974) (''The Rule [prior to its amendment] . . . contained no mechanism for determining at any point in advance of final judgment which of those potential members of the class claimed in the complaint were actual members and would be bound by the judgment.'').

[45] *See, e.g.,* Robert H. Klonoff, ''The Decline of Class Actions,'' 90 Wash. U. L. Rev. 729, at 746–47 (2013) (''The Rule 23(a) and (b) criteria, by their terms, have not changed in any significant way since 1966, but some courts have become increasingly skeptical in reviewing whether a particular case satisfies those requirements''). In 1966, a member of the Advisory Committee explained that the class action device was designed to bind all absent class members because ''Requiring . . . individuals affirmatively to request inclusion in the lawsuit would result in freezing out the claims of people—especially small claims held by small people—who for one reason or another, ignorance, timidity, unfamiliarity with business or legal matters, will simply not take the affirmative step. The moral justification for treating such people as null quantities is questionable. For them the class action serves something like the function of an administrative proceeding where scattered individual interests are represented by the Government.'' Benjamin Kaplan, ''Continuing the Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (i),'' 81 Harv. L. Rev. 356, at 397–98 (1967).

[46] *See American Pipe,* 414 U.S. at 553 (''A contrary rule allowing participation only by those potential members of the class who had earlier filed motions to intervene in the suit would deprive Rule 23 class actions of the efficiency and economy of litigation which is a principal purpose of the procedure.'').

[47] *Califano* v. *Yamasaki,* 442 U.S. 682, 701 (1979).

[48] *Amchem Prod., Inc.* v. *Windsor,* 521 U.S. 591, 616 (1997), *citing* Fed. R. Civ. P. 23 advisory committee's note, 28 U.S.C. app. at 698 (stating that a class action may be justified under Federal Rule 23 where ''the class may have a high degree of cohesion and prosecution of the action through representatives would be quite unobjectionable, or the amounts at stake for individuals may be so small that separate suits would be impracticable''). *See also id.* at 617 (citing *Mace* v. *Van Ru Credit Corp.,* 109 F.3d 338, 344 (7th Cir. 1997) (''The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her own rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.'').

[49] *See, e.g., Class Action Complaint, Bellwether Community Credit Union* v. *Chipotle Mexican Grill Inc.,* No.17–01102 (D.Colo. May 4, 2017), ECF No. 1 (asserting class action claims on behalf of financial institutions against Chipotle for data breach that exposed customers' names and debit and credit card numbers to hackers); Consumer Plaintiffs' Consolidated Class Action Complaint at 1, 5, In re: The Home Depot, Inc. Customer Data Breach Litig., No. 14–02583 (N.D. Ga. May 27, 2015), ECF No. 93 (complaint filed on behalf of putative class of ''similarly situated banks, credit unions, and other financial institutions'' that had ''issued and owned payment cards compromised by the Home Depot data breach''); Memorandum and Order at 2, 14, In re: Target Corp. Customer Data Security Breach Litig., No. 14–2522 (D. Minn. Sept. 15, 2015), ECF No. 589 (granting certification to plaintiff class made up of banks, credit unions, and other financial institutions that had ''issued payment cards such as credit and debit cards to consumers who, in turn, used those cards at Target stores during the period of the 2013 data breach,'' noting that ''given the number of financial institutions involved and the similarity of all class members' claims, Plaintiffs have established that the class action device is the superior method for resolving this dispute''); *In re TJX Cos. Retail Security Breach Litig.,* 246 FRD. 389 (D. Mass. 2007) (denying class certification in putative class action by financial institutions).

[50] As one commenter noted, it is a procedural right not a substantive one.

[51] Fed. R. Civ. P. 23(a)(1) through (4).

that class action lawsuits safeguard absent class members' due process rights because they may be bound by what happens in the case.[52] Further, the courts may protect the interests of absent class members through the exercise of their substantial supervisory authority over the quality of representation and specific aspects of the litigation.[53] In the typical Federal class action, an individual plaintiff (or sometimes several individual plaintiffs), represented by an attorney, files a lawsuit on behalf of that individual and others similarly situated against a defendant or defendants.[54] Those similarly situated individuals may be a small group (as few as 40 or even less) or as many as millions that are alleged to have suffered the same injury as the individual plaintiff. That individual plaintiff, typically referred to as a named or lead plaintiff, cannot properly proceed with a class action unless the court certifies that the case meets the requirements of Federal Rule 23, including the requirements of Federal Rule 23(a) and (b) discussed above. If the court does certify that the case can go forward as a class action, potential class members who do not opt out of the class are bound by the eventual outcome of the case.[55] If not certified, the case proceeds only to bind the named plaintiff.

A certified class case proceeds similarly to an individual case, except that the court has an additional responsibility in a class case, pursuant to Federal Rule 23 and the relevant case law, to actively supervise classes and class proceedings and to ensure that the lead plaintiff keeps absent class members informed.[56] Among its tasks, a court must review any attempts to settle or voluntarily dismiss the case on behalf of the class,[57] may reject any settlement agreement if it is not ''fair, reasonable and adequate,''T [58] and must ensure that the payment of attorney's fees is ''reasonable.'' [59] The court also addresses objections from class members who seek a different outcome to the case (*e.g.,* lower attorney's fees or a better settlement). These requirements are designed to ensure that all parties to class litigation have their rights protected, including defendants and absent class members.

In addition to proceedings in Federal court, every State except Virginia and Mississippi has established procedures permitting individuals to file a class action; almost all of these States have adopted class action procedures analogous to Federal Rule 23.[60]

Developments in Class Action Procedure Over Time

Since the 1966 amendments, Federal Rule 23 has generated a significant body of case law as well as significant controversy.[61] In response, Congress and the Advisory Committee on the Federal Rules of Civil Procedure (which has been delegated the authority to change Federal Rule 23 under the Rules Enabling Act) have made a series of targeted changes to Federal Rule 23 to calibrate the equities of class plaintiffs and defendants. Meanwhile, the courts have also addressed concerns about Federal Rule 23 in the course of interpreting the rule and determining its application in the context of particular types of cases.

For example, Congress passed the Private Securities Litigation Reform Act (PSLRA) in 1995. Enacted partially in response to concerns about the costs to defendants of litigating class actions, the PSLRA reduced discovery burdens in the early stages of securities class actions.[62] In 2005, Congress again adjusted the class action rules when it adopted the Class Action Fairness Act (CAFA) in response to concerns about abuses of class action procedure in some State courts.[63] Among other things, CAFA expanded the subject matter jurisdiction of Federal courts to allow them to adjudicate most large class actions.[64] The Advisory Committee also periodically reviews and updates Federal Rule 23. In 1998, the Advisory Committee amended Federal Rule 23 to permit interlocutory appeals of class certification decisions, given the unique importance of the certification decision, which can dramatically change the dynamics of a class action case.[65] In 2003, the Advisory Committee amended Federal Rule 23 to require courts to define classes that they are certifying, increase the amount of scrutiny that courts must apply to class settlement proposals, and impose additional requirements on class counsel.[66] In 2015, the Advisory Committee further identified several issues that ''warrant serious examination'' and presented ''conceptual sketches'' of possible further amendments.[67]

Federal courts have also shaped class action practice through their interpretations of Federal Rule 23. In the last five years, the Supreme Court has decided several major cases refining class action procedure. In *Wal-Mart Stores, Inc.* v. *Dukes,* the Court interpreted the commonality requirement of Federal Rule 23(a)(2), holding that in the absence of a common question among putative class members class certification is not appropriate.[68] In *Comcast Corp.* v. *Behrend,* the Court held that district courts must undertake a ''rigorous analysis'' of whether the damages model supporting a plaintiff's case is consistent with its theory of liability for purposes of satisfying the predominance requirements in Federal Rule 23(b)(3) and that that in the absence of such a model of individual damages may foreclose class certification.[69] In *Campbell-Ewald Co.* v. *Gomez,* the Court held that a defendant

[52] *See, e.g., Amchem Prod., Inc.,* 521 U.S. at 619–21.

[53] *See* Fed. R. Civ. P. 23(e).

[54] Federal Rule 23 also permits a class of defendants.

[55] In some circumstances, absent class members are not given an opportunity to opt out. *E.g.,* Fed. R. Civ. P. 23(b)(1)(B) (providing for ''limited fund'' class actions when claims are made by numerous persons against a fund insufficient to satisfy all claims); Fed. R. Civ. P. 23(b)(2) (providing for class actions in which the plaintiffs are seeking primarily injunctive or corresponding declaratory relief).

[56] Fed. R. Civ. P. 23(g).

[57] *See, e.g.,* Fed. R. Civ. P. 23(e) (''The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval.''). This does not apply to settlements with named plaintiffs reached prior to the certification of a class.

[58] Fed. R. Civ. P. 23(e)(2).

[59] Fed. R. Civ. P. 23(h).

[60] *See* Marcy Hogan Greer, ''A Practitioner's Guide to Class Actions'' at 142 (A.B.A. 2010). One State, Utah, authorizes providers of closed-end consumer credit to include in the credit contract a provision that would waive the consumer's right to participate in a class action. Utah Code 70C–3–14; ''Mississippi does not permit class actions of any kind. When Mississippi adopted civil rules modeled on the Federal Rules of Civil Procedure, it expressly omitted Rule 23.'' (footnote omitted). *Id.* at 1013.

[61] *See, e.g.,* David Marcus, ''The History of the Modern Class Action, Part I: Sturm und Drang, 1953–1980,'' 90 Wash. U. L. Rev. 587, at 610 (participants in the debate ''quickly exhausted virtually every claim for and against an invigorated Rule 23'').

[62] Private Securities Litigation Reform Act of 1995, Public Law 104–67, 109 Stat. 737 (1995).

[63] Class Action Fairness Act of 2005, Public Law 109–2, 119 Stat. 4 (2005).

[64] 28 U.S.C. 1332(d), 1453, and 1711–15.

[65] Fed. R. Civ. P. 23(f). *See also* Herbert B. Newberg, et al., ''Newberg on Class Actions,'' at § 7:41 (5th ed. Thomson Reuters 2016); Committee Notes on Rules, 1998 Amendment (''This permissive interlocutory appeal provision is adopted under the power conferred by 28 U.S.C. 1292(e). Appeal from an order granting or denying class certification is permitted in the sole discretion of the court of appeals. No other type of Rule 23 order is covered by this provision.''). *See* 28 U.S.C. app. at 163 (2014).

[66] Fed. R. Civ. P. 23(c)(2)(B). *See also* 28 U.S.C. app. at 168 (2014) (''Rule 23(c)(2)(B) is revised to require that the notice of class certification define the certified class in terms identical to the terms used in (c)(1)(B).'').

[67] *See, e.g.,* Rule 23 Subcomm. Rept., Advisory Committee on Rules of Civil Procedure, at 243–97 (2015), *available at http://www.uscourts.gov/rules-policies/archives/agenda-books/advisory-committee-rules-civil-procedure-april-2015.*

[68] 564 U.S. 338, 131 S. Ct. 2541 (2011); *see also* Klonoff, *supra* note 45, at 775.

[69] 133 S. Ct. 1426 (2013).

cannot moot a class action by offering complete relief to an individual plaintiff before class certification unless the individual plaintiff agrees to accept that relief.[70] In *Tyson Foods, Inc.* v. *Bouaphakeo,* the Court held that statistical techniques presuming that all class members are identical to the average observed in a sample can be used to establish classwide liability where each class member could have relied on that sample to establish liability had each brought an individual action.[71] Finally, in *Spokeo, Inc.* v. *Robins,* a class action alleging a violation of Federal law, the Court reiterated that to have standing in Federal court a plaintiff must allege an injury in fact—specifically, ''‘an invasion of a legally protected interest' that is ‘concrete and particularized' and ‘actual or imminent, not conjectural or hypothetical.'" [72] The case was remanded to the Ninth Circuit to determine whether the plaintiff had alleged an actual injury under the FCRA.[73]

C. Arbitration and Arbitration Agreements

As described above at the beginning of Part II, arbitration is a dispute resolution process in which the parties choose one or more neutral third parties to make a final and binding decision resolving the dispute.[74] The typical arbitration agreement provides that the parties shall submit any disputes that may arise between them to arbitration. Arbitration agreements generally give each party to the contract two distinct rights. First, either side can file claims against the other in arbitration and obtain a decision from the arbitrator.[75] Second, with some exceptions, either side can use the arbitration agreement to require that a dispute that has been filed in court instead proceed in arbitration.[76] The typical agreement also specifies an organization called an arbitration administrator. Administrators, which may be for-profit or nonprofit organizations, facilitate the selection of an arbitrator to decide the dispute, provide for basic rules of procedure and operations support, and generally administer the arbitration.[77] Parties usually have very limited rights to appeal from a decision in arbitration to a court.[78] Most arbitration also provides for limited or streamlined discovery procedures as compared to those in many court proceedings.[79]

History of Arbitration

The use of arbitration to resolve disputes between parties is not new.[80] In England, the historical roots of arbitration date to the medieval period, when merchants adopted specialized rules to resolve disputes between them.[81] English merchants began utilizing arbitration in large numbers during the nineteenth century.[82] However, English courts were hostile towards arbitration, limiting its use through doctrines that rendered certain types of arbitration agreements unenforceable.[83] Arbitration in the United States in the eighteenth and nineteenth centuries reflected both traditions: It was used primarily by merchants, and courts were hostile toward it.[84] Through the early 1920s, United States courts often refused to enforce arbitration agreements and awards.[85]

In 1920, New York enacted the first modern arbitration statute in the United States, which strictly limited courts' power to undermine arbitration decisions and arbitration agreements.[86] Under that law, if one party to an arbitration agreement refused to proceed to arbitration, the statute permitted the other party to seek a remedy in State court to enforce the arbitration agreement.[87] In 1925, Congress passed the United States Arbitration Act, which was based on the New York arbitration law and later became known as the Federal Arbitration Act (FAA).[88] The FAA remains in force today. Among other things, the FAA makes agreements to arbitrate ''valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.'' [89]

Expansion of Consumer Arbitration and Arbitration Agreements

From the passage of the FAA through the 1970s, arbitration continued to be used in commercial disputes between companies.[90] Beginning in the 1980s, however, companies began to use arbitration agreements in form contracts with consumers, investors, employees, and franchisees that were not the result of individually negotiated terms.[91] By the 1990s, this trend began to spread more broadly within the consumer financial services industry.[92]

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[70] *Campbell-Ewald Co.* v. *Gomez,* 136 S. Ct. 663, 670 (2016).

[71] *Tyson Foods, Inc.* v. *Bouaphakeo,* 136 S. Ct. 1036, 1046–48 (2016).

[72] *Spokeo, Inc.* v. *Robins,* 135 S. Ct. 1892 (2015).

[73] *Id.* Following remand, the *Spokeo* case remains pending in the Ninth Circuit. *See Robins* v. *Spokeo Inc.,* No. 11–56843 (9th Cir).

[74] *See* ''Arbitration,'' *supra* note 7.

[75] *Id.*

[76] As described in the Study, however, most arbitration agreements in consumer financial contracts contain a ''small claims court carve-out'' that provides the parties with a contractual right to pursue a claim in small claims court. Study, *supra* note 3, section 2 at 33–34.

[77] *See id.* section 2 at 34–40.

[78] *See* 9 U.S.C. 9. *See also Hall Street Assocs., L.L.C.* v. *Mattel, Inc.,* 552 U.S. 576, 584 (2008) (holding that parties cannot expand the grounds for vacating arbitration awards in Federal court by contract); Preliminary Results, *infra* note 150, at 6 n.4.

[79] *See* Study, *supra* note 3, section 4 at 16–17.

[80] The use of arbitration appears to date back at least as far as the Roman Empire. *See, e.g.,* Amy J. Schmitz, ''Ending a Mud Bowl: Defining Arbitration's Finality Through Functional Analysis,'' 37 Ga. L. Rev. 123, at 134–36 (2002); Derek Roebuck, ''Roman Arbitration'' (Holo. Books 2004).

[81] *See, e.g.,* Jeffrey W. Stempel, ''Pitfalls of Public Policy: The Case of Arbitration Agreements,'' 22 St. Mary's L. J. 259, at 269–70 (1990).

[82] *Id.*

[83] *See, e.g.,* Schmitz, *supra* note 80, at 137–39.

[84] *See, e.g.,* Stempel, *supra* note 81, at 273–74.

[85] David S. Clancy & Matthew M.K. Stein, ''An Uninvited Guest: Class Arbitration and the Federal Arbitration Act's Legislative History,'' 63(1) Bus. L. 55, at 58 and n.11 (2007) (*citing, inter alia, Haskell* v. *McClintic-Marshall Co.,* 289 F. 405, 409 (9th Cir. 1923) (refusing to enforce an arbitration agreement because of a ''settled rule of the common law that a general agreement to submit to arbitration did not oust the courts of jurisdiction, and that rule has been consistently adhered to by the Federal courts''); *Dickson Manufacturing Co.* v. *Am. Locomotive Co.,* 119 F. 488, 490 (C.C.M.D. Pa. 1902) (refusing to enforce an arbitration agreement where plaintiff revoked its consent to arbitration).

[86] 43 N.Y. Stat. 833 (1925).

[87] *Id.*

[88] 9 U.S.C. 1, *et seq.* The FAA was codified in 1947. Public Law 282, 61 Stat. 669 (July 30, 1947). James E. Berger & Charlene Sun, ''The Evolution of Judicial Review Under the Federal Arbitration Act,'' 5 N.Y.U. J. L. & Bus. 745, at 754 n.45 (2009).

[89] 9 U.S.C. 2.

[90] *See, e.g.,* Soia Mentschikoff, ''Commercial Arbitration,'' 61 Colum. L. Rev. 846, at 850 (1961) (noting that, as of 1950, nearly one-third of trade associations used a mechanism like the American Arbitration Association as a means of dispute resolution between trade association members, and that over one-third of other trade associations saw members make their own individual arrangements for arbitrations); *see also id.* at 858 (noting that AAA heard about 240 commercial arbitrations a year from 1947 to 1950, comparable to the volume of like cases before the U.S. District Court of the Southern District of New York in the same time period). Arbitration was also used in the labor context where unions had bargained with employers to create specialized dispute resolution mechanisms pursuant to the Labor Management Relations Act. 29 U.S.C. 401–531.

[91] Stephen J. Ware, ''Arbitration Clauses, Jury-Waiver Clauses and Other Contractual Waivers of Constitutional Rights,'' 67 L. & Contemp. Probs. 179 (2004).

[92] *See* Sallie Hofmeister, ''Bank of America is Upheld on Consumer Arbitration,'' N.Y. Times, Aug. 20, 1994 ('''The class action cases is where the real money will be saved [by arbitration agreements],' Peter Magnani, a spokesman for the bank, said.''); John P. Roberts, ''Mandatory Arbitration by Financial Institutions,'' 50 Consumer Fin. L. Q. Rep. 365, at 367 (1996) (identifying an anonymous bank ''ABC'' as having adopted arbitration provisions in its contracts for consumer credit cards, deposit accounts, and safety deposit boxes); Hossam M. Fahmy, ''Arbitration: Wiping Out Consumers Rights?,'' 64 Tex. Bus. J. 917, at 917 (2001) (citing Barry Meier, ''In Fine Print, Customers Lose Ability to Sue,'' N.Y. Times, Mar.

Continued

One notable feature of these agreements is that they could be used to block class action litigation and often class arbitration as well.[93] The agreements could block class actions filed in court because when sued in a class action, companies could use the arbitration agreement to dismiss or stay the class action in favor of arbitration. Yet the agreements often prohibited class arbitration as well, rendering plaintiffs unable to pursue class claims in either litigation or arbitration.[94] More recently, some consumer financial providers themselves have disclosed in their filings with the SEC that they rely on arbitration agreements for the express purpose of shielding themselves from class action liability.[95]

Since the early 1990s, the use of arbitration agreements in consumer financial contracts has become widespread, as shown by Section 2 of the Study (which is discussed in detail in Part III.D below). By the early 2000s, a few consumer financial companies had become heavy users of arbitration proceedings to obtain debt collection judgments against consumers. For example, in 2006 alone, the National Arbitration Forum (NAF) administered 214,000 arbitrations, most of which were consumer debt collection proceedings brought by companies.[96]

Legal Challenges to Arbitration Agreements

The increase in the prevalence of arbitration agreements coincided with various legal challenges to their use in consumer contracts. One set of challenges focused on the use of arbitration agreements in connection with debt collection disputes. In the late 2000s, consumer groups began to criticize the fairness of debt collection arbitration proceedings administered by NAF, which was the most widely used arbitration administrator for debt collection.[97] In 2008, the San Francisco City Attorney's office filed a civil action against NAF alleging that NAF was biased in favor of debt collectors.[98] In 2009, the Minnesota Attorney General sued NAF, alleging an institutional conflict of interest because a group of investors with a 40 percent ownership stake in an affiliate of NAF also had a majority ownership stake in a debt collection firm that brought a number of cases before NAF.[99] A few days after the filing of the lawsuit, NAF reached a settlement with the Minnesota Attorney General pursuant to which it agreed to stop administering consumer arbitrations completely, although NAF did not admit liability.[100] Further, a series of class actions filed against NAF were consolidated in a multidistrict litigation, and NAF settled those in 2011 by agreeing to suspend $1 billion in pending debt collection arbitrations.[101]

The American Arbitration Association (AAA) likewise announced a moratorium on administering company-filed debt collection arbitrations, articulating significant concerns about due process and fairness to consumers subject to such arbitrations.[102] Specifically, shortly after the NAF settlement, the AAA offered testimony to Congress that—independent of the NAF settlement—AAA ''had independently reviewed areas of the process and concluded that it had some weaknesses'' in its own debt collection arbitration program, and noted that generally that ''areas needing attention . . . include[d] consumer notification, arbitrator neutrality, pleading and evidentiary standards, respondents' defenses and counterclaims, and arbitrator training and recruitment.'' [103]

A second group of challenges asserted that the invocation of arbitration agreements to block class actions was unlawful. Because the FAA permits challenges to the validity of arbitration agreements on grounds that exist at law or in equity for the revocation of any contract,[104] challengers argued that

10, 1997, at A1 (noting in 2001 that ''[t]he use of consumer arbitration expanded eight years ago when Bank of America initiated its current policy,'' when ''notices of the new arbitration requirements were sent along with monthly statements to 12 million customers, encouraging thousands of other companies to follow the same policy'').

[93] *See, e.g.,* Alan S. Kaplinsky & Mark J. Levin, ''Excuse Me, But Who's the Predator? Banks Can Use Arbitration Clauses as a Defense,'' 7 Bus. L. Today 24 (1998) (''Lenders that have not yet implemented arbitration programs should promptly consider doing so, since each day that passes brings with it the risk of additional multimillion-dollar class action lawsuits that might have been avoided had arbitration procedures been in place.''); *see also* Bennet S. Koren, ''Our Mini Theme: Class Actions,'' 7 Bus. L. Today 18 (1998) (industry attorney recommends adopting arbitration agreements because ''[t]he absence of a class remedy ensures that there will be no formal notification and most claims will therefore remain unasserted.'').

[94] Even if a pre-dispute arbitration agreement does not prohibit class arbitration, an arbitrator may not permit arbitration to go forward on a class basis unless the arbitration agreement itself shows the parties agreed to do so. *See Stolt-Nielsen S.A.* v. *AnimalFeeds Int'l Corp.,* 559 U.S. 662, 684 (2010) (''[A] party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so.'') (emphasis in original). Both the AAA and JAMS class arbitration procedures reflect the law; both require an initial determination as to whether the arbitration agreement at issue provides for class arbitration before a putative class arbitration can move forward. *See* AAA, ''Supplementary Rules for Class Arbitrations,'' at Rule 3 (effective Oct. 8, 2003) (''Upon appointment, the arbitrator shall determine as a threshold matter, in a reasoned, partial final award on the construction of the arbitration clause, whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class (the ''Clause Construction Award.''); JAMS, ''Class Action Procedures,'' at Rule 2: Construction of the Arbitration Clause (effective May 1, 2009) (''[O]nce appointed, the Arbitrator, following the law applicable to the validity of the arbitration clause as a whole, or the validity of any of its terms, or any court order applicable to the matter, shall determine as a threshold matter whether the arbitration can proceed on behalf of or against a class.'').

[95] *See, e.g.,* Discover Financial Services, Annual Report (Form 10–K) (Feb. 25, 2015) at 43 (''[W]e have historically relied on our arbitration clause in agreements with customers to limit our exposure to consumer class action litigation . . .''); Synchrony Financial, Annual Report (Form 10–K) (Feb. 23, 2015) at 45 (''[H]istorically the arbitration provision in our customer agreements generally has limited our exposure to consumer class action litigation. . . .'').

[96] Carrick Mollenkamp, et al., ''Turmoil in Arbitration Empire Upends Credit-Card Disputes,'' Wall St. J., Oct. 16, 2009. *See also* Public Citizen, ''The Arbitration Trap: How Credit Card Companies Ensnare Consumers,'' (2007), *available athttps://www.citizen.org/our-work/access-justice/arbitration-trap.*

[97] *See* Mollenkamp, *supra* note 96. In addition to cases relating to debt collection arbitrations, NAF was later added as a defendant to the *Ross* v. *Bank of America* case, a putative class action pertaining to non-disclosure of foreign currency conversion fees; NAF was alleged to have facilitated an antitrust conspiracy among credit card companies to adopt arbitration agreements. NAF settled those allegations. *See* Order Preliminarily Approving Class Action Settlement as to Defendant National Arbitration Forum Inc., In re Currency Conversion Fee Antitrust Litig., No. 1409 (S.D.N.Y. Dec. 13, 2011).

[98] *California* v. *National Arbitration Forum, Inc.,* No. 473–569 (S.F. Sup. Ct. Mar. 2009).

[99] *See* Complaint at 2, *State of Minnesota* v. *National Arbitration Forum, Inc.,* No. 09–18550 (4th Jud. Dist. Minn. July 14, 2009), *available at https://www.nclc.org/images/pdf/unreported/naf_complaint.pdf.*

[100] Press Release, State of Minnesota, Office of the Attorney General, ''National Arbitration Forum Barred from Credit Card and Consumer Arbitrations Under Agreement with Attorney General Swanson,'' (July 19, 2009), *available at http://pubcit.typepad.com/files/nafconsentdecree.pdf.* NAF settled the City of San Francisco's claims in 2011 by agreeing to cease administering consumer arbitrations in California in perpetuity and to pay a $1 million penalty. Press Release, City Attorney Dennis Herrera, ''Herrera Secures $5 Million Settlement, Consumer Safeguards Against BofA Credit Card Subsidiary,'' (Aug. 22, 2011), *available at https://www.sfcityattorney.org/2011/08/22/herrera-secures-5-million-settlement-consumer-safeguards-against-bofa-credit-card-subsidiary/.*

[101] Memorandum and Order, In re National Arbitration Forum Trade Practices Litig., No. 10–02122 (D. Minn. Aug. 8, 2011), ECF 120.

[102] *See* Press Release, AAA, ''The American Arbitration Association Calls for Reform of Debt Collection Arbitration,'' (July 23, 2009), *available at https://www.nclc.org/images/pdf/arbitration/testimonysept09-exhibit3.pdf. See also* AAA, ''Consumer Debt Collection Due Process Protocol Statement of Principles,'' (2010), *available at https://www.adr.org/aaa/ShowProperty?nodeId=%2FUCM%2FADRSTG_003865.* JAMS has reported to the Bureau that it only handles a small number of debt collection claims and often those arbitrations are initiated by consumers. 81 FR 32830, 32836 n.97 (May 24, 2016).

[103] *See* Press Release, AAA, *supra* note 102.

[104] 9 U.S.C. 2 (providing that agreements to arbitrate ''shall be valid, irrevocable, and

provisions prohibiting arbitration from proceeding on a class basis—as well as other features of particular arbitration agreements—were unconscionable under State law or otherwise unenforceable.[105] Initially, these challenges yielded conflicting results. Some courts held that class arbitration waivers were not unconscionable.[106] Other courts held that such waivers were unenforceable on unconscionability grounds.[107] Some of these decisions also held that the FAA did not preempt application of a State's unconscionability doctrine.[108]

Before 2011, courts were divided on whether arbitration agreements that bar class proceedings were unenforceable because they violated a particular State's laws. Then, in 2011, the Supreme Court held in *AT&T Mobility* v. *Concepcion* that the FAA preempted application of California's unconscionability doctrine to the extent it would have precluded enforcement of a consumer arbitration agreement with a provision prohibiting the filing of arbitration on a class basis. The Court concluded that any State law—even one that serves as a general contract law defense—that ''[r]equir[es] the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.'' [109] The Court reasoned that class arbitration eliminates the principal advantage of arbitration—its informality—and increases risks to defendants (due to the high stakes of mass resolution combined with the absence of multilayered review).[110] As a result of the Court's holding, parties to litigation could no longer prevent the use of an arbitration agreement to block a class action in court on the ground that a prohibition on class arbitration in the agreement was unconscionable under the relevant State law.[111] The Court further held, in a 2013 decision, that a court may not use the ''effective vindication'' doctrine—under which a court may invalidate an arbitration agreement that operates to waive a party's right to pursue statutory remedies—to invalidate a class arbitration waiver on the grounds that the plaintiff's cost of individually arbitrating the claim exceeds the potential recovery.[112]

Regulatory and Legislative Activity

As arbitration agreements in consumer contracts became more common, Federal regulators, Congress, and State legislatures began to take notice of their impact on the ability of consumers to resolve disputes. One of the first entities to regulate arbitration agreements was the National Association of Securities Dealers—now known as the Financial Industry Regulatory Authority (FINRA)—the self-regulating body for the securities industry that also administers arbitrations between member companies and their customers.[113] Under FINRA's Code of Arbitration for customer disputes, FINRA members have been prohibited since 1992 from enforcing an arbitration agreement against any member of a certified or putative class unless and until the class treatment is denied (or a certified class is decertified) or the class member has opted out of the class or class relief.[114] FINRA's code also requires this limitation to be set out in any member company's arbitration agreement. The SEC approved this rule in 1992.[115] In addition, since 1976, the regulations of the Commodity Futures Trading Commission (CFTC) implementing the Commodity Exchange Act (CEA) have required that arbitration agreements in commodities contracts be voluntary.[116] In 2004, the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac)—government-sponsored enterprises that purchase a large share of mortgages—ceased purchasing mortgages that contained arbitration agreements.[117]

Since 1975, FTC regulations implementing the Magnuson-Moss Warranty Act (MMWA) have barred the use, in consumer warranty agreements, of arbitration agreements that would result in binding decisions.[118] Some courts in the late 1990s disagreed with

enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.'').

[105] *See, e.g.,* Opening Brief on the Merits at 5, *Discover Bank* v. *Superior Court,* No. S113725, 2003 WL 26111906, (Cal. 2005) (''[A] ban on class actions in an adhesive consumer contract such as the one at issue here is unconscionable because it is one-sided and effectively non-mutual—that is, it benefits only the corporate defendant, and could never operate to the benefit of the consumer.'').

[106] *See, e.g., Strand* v. *U.S. Bank N.A.,* 693 NW.2d 918 (N.D. 2005); *Edelist* v. *MBNA America Bank,* 790 A.2d 1249 (Sup. Ct. of Del., New Castle Cty. 2001).

[107] *See, e.g., Brewer* v. *Missouri Title Loans, Inc.,* 323 SW.3d 18 (Mo. 2010) (en banc); *Feeney* v. *Dell, Inc.,* 908 NE.2d 753 (Mass. 2009); *Fiser* v. *Dell Computer Corp.,* 188 P.3d 1215 (N.M. 2008); *Tillman* v. *Commercial Credit Loans, Inc.,* 655 SE.2d 362 (N.C. 2008); *Dale* v. *Comcast Corp.,* 498 F.3d 1216 (11th Cir. 2007) (holding that class action ban in arbitration agreement substantively unconscionable under Georgia law); *Scott* v. *Cingular Wireless,* 161 P.3d 1000 (Wash. 2007) (en banc); *Kinkel* v. *Cingular Wireless LLC,* 857 NE.2d 250 (Ill. 2006); *Muhammad* v. *Cnty. Bank of Rehoboth Beach, Del.,* 912 A.2d 88 (N.J. 2006); *Discover Bank* v. *Superior Court,* 113 P.3d 1100 (Cal. 2005).

[108] *See, e.g., Feeney,* 908 NE.2d at 767–69; *Scott,* 161 P.3d at 1008–09; *Discover Bank,* 113 P.3d at 1110–17.

[109] *AT&T Mobility LLC* v. *Concepcion,* 563 U.S. 333, 344 (2011).

[110] *Id.* at 348–51.

[111] *See* Robert Buchanan Jr., ''The U.S. Supreme Court's Landmark Decision in AT&T Mobility v. Concepcion: One Year Later,'' Bloomberg Legal News, May 8, 2012, *available at http://www.bna.com/att-v-concepcion-one-year-later/* (noting that 45 out of 61 cases involving a class waiver in an arbitration agreement were sent to arbitration). The Court did not preempt all State law contract defenses under all circumstances; rather, these doctrines remain available provided that they are not applied in a manner that disfavors arbitration.

[112] *American Express Co.* v. *Italian Colors Restaurant,* 133 S. Ct. 2304, 2309 (2013).

[113] *See* FINRA, ''Arbitration and Mediation,'' *https://www.finra.org/arbitration-and-mediation* (last visited Feb. 8, 2017).

[114] FINRA, ''Class Action Claims,'' at Rule 12204(d). For individual disputes between brokers and customers, FINRA requires individual arbitration.

[115] *See* Self-Regulatory Organizations; National Ass'n of Securities Dealers, Inc.; Order Approving Proposed Rule Change Relating to the Exclusion of Class Actions from Arbitration Proceedings, Exchange Act Release No. 31371, 1992 WL 324491, (Oct. 28, 1992) (citing Securities and Exchange Act, section 19(b)(1) and Rule 19b–4). In a separate context, the SEC has opposed attempts by companies to include arbitration agreements in their securities filings in order to force shareholders to arbitrate disputes rather than litigate them in court. *See, e.g.,* Carl Schneider, ''Arbitration Provisions in Corporate Governance Documents,'' Harv. L. Sch. Forum on Corp. Governance and Fin. Reg. (Apr. 27, 2012), *available at https://corpgov.law.harvard.edu/2012/04/27/arbitration-provisions-in-corporate-governance-documents/* (''According to published reports, the SEC advised Carlyle that it would not grant an acceleration order permitting the registration statement to become effective unless the arbitration provision was withdrawn.''). Carlyle subsequently withdrew its arbitration provision.

[116] Arbitration or Other Dispute Settlement Procedures, 41 FR 42942, 42946 (Sept. 29, 1976); 17 CFR 166.5(b).

[117] *See* Kenneth Harney, ''Fannie Follows Freddie in Banning Mandatory Arbitration,'' Wash. Post, Oct. 9, 2004, *available at http://www.washingtonpost.com/wp-dyn/articles/A18052–2004Oct8.html.*

[118] 16 CFR 703.5(j). The FTC's rules do permit warranties that require consumers to resort to an informal dispute resolution mechanism before proceeding in a court, but decisions from such informal proceedings are not binding and may be challenged in court. (By contrast, most arbitration awards are binding and may only be challenged on very limited grounds as provided by the FAA.) The FTC's rulemaking was based on authority expressly delegated by Congress in its passage of the MMWA pertaining to informal dispute settlement procedures. 15 U.S.C. 2310(a)(2). Until 1999, courts upheld the validity of the rule. *See* 80 FR 42719; *see also* Jonathan D. Grossberg, ''The Magnuson-Moss Warranty Act, the Federal Arbitration Act, and the Future of Consumer Protection,'' 93 Cornell L. Rev. 659, at 667 (2008). After 1999, two appellate courts questioned whether the MMWA was intended to reach arbitration agreements. *See* Final Action Concerning Review of the Interpretations of Magnuson-Moss Warranty Act, 80 FR 42710, 42719 and nn.115–116 (July 20, 2015) (citing *Davis* v. *Southern Energy Homes, Inc.,* 305 F.3d 1268 (11th Cir. 2002); *Walton* v. *Rose Mobile Homes, LLC,* 298 F.3d 470 (5th Cir. 2002).

the FTC's interpretation, but the FTC promulgated a final rule in 2015 that ''reaffirm[ed] its long-held view'' that the MMWA ''disfavors, and authorizes the Commission to prohibit, mandatory binding arbitration in warranties.''[119] In doing so, the FTC noted that the language of the MMWA presupposed that the kinds of informal dispute settlement mechanisms the FTC would permit would not foreclose the filing of a civil action in court.[120]

More recently, the Department of Labor finalized a rule addressing conflicts of interest in retirement advice.[121] To be eligible for an exemption from part of that rule, a covered entity cannot employ an arbitration agreement that can be used to block a class action, although agreements mandating arbitration of individual disputes will continue to be permitted.[122] Other agencies are reevaluating their arbitration initiatives. The Department of Education recently sought to postpone implementation of a rule that was intended to limit the impact of arbitration agreements in certain college enrollment agreements by addressing the use of arbitration agreements to bar students from bringing group claims.[123] The Centers for Medicare and Medicaid Services (CMS) have proposed revisions to a rule finalized in late 2016 regarding the requirements that long-term health care facilities must meet to participate in the Medicare and Medicaid programs.[124]

Congress has also taken several steps to address the use of arbitration agreements in different contexts. In 2002, Congress amended Federal law to require that, whenever a motor vehicle franchise contract contains an arbitration agreement, arbitration may be used to resolve the dispute only if, after a dispute arises, all parties to the dispute consent in writing to the use of arbitration.[125] In 2006, Congress passed the Military Lending Act (MLA), which, among other things, prohibited the use of arbitration provisions in extensions of credit to active servicemembers, their spouses, and certain dependents.[126] As first implemented by Department of Defense (DoD) regulations in 2007, the MLA applied to ''[c]losed-end credit with a term of 91 days or fewer in which the amount financed does not exceed $2,000.'' [127] In July 2015, DoD promulgated a final rule that significantly expanded that definition of ''consumer credit'' to cover closed-end loans that exceeded $2,000 or had terms longer than 91 days as well as various forms of open-end credit, including credit cards.[128] In 2008, Congress amended Federal agriculture law to require, among other things, that livestock or poultry contracts containing arbitration agreements disclose the right of the producer or grower to decline the arbitration agreement; the Department of Agriculture issued a final rule implementing the statute in 2011.[129]

As previously noted, Congress again addressed arbitration agreements in the 2010 Dodd-Frank Act. Dodd-Frank section 1414(a) prohibited the use of arbitration agreements in mortgage contracts, which the Bureau implemented in its Regulation Z.[130] Section 921 of the Act authorized the SEC to issue rules to prohibit or impose conditions or limitations on the use of arbitration agreements by investment advisers.[131] Section 922 of the Act invalidated the use of arbitration agreements in connection with certain whistleblower proceedings.[132] Finally, and as discussed in greater detail below, section 1028 of the Act required the Bureau to study the use of arbitration agreements in contracts for consumer financial products and services and authorized this rulemaking.[133] The authority of the Bureau and the SEC are similar under the Dodd-Frank Act except that the SEC does not have to complete a study before promulgating a rule.

State legislatures have also taken steps to regulate the arbitration process. Several States, most notably California, require arbitration administrators to disclose basic data about consumer arbitrations that take place in the State.[134] However, States are constrained in their ability to regulate arbitration because the FAA preempts conflicting State law.[135]

Arbitration Today

Today, the AAA is the primary administrator of consumer financial arbitrations.[136] The AAA's consumer financial arbitrations are governed by the AAA Consumer Arbitration Rules, which includes provisions that, among other things, limit filing and administrative costs for consumers.[137] The AAA also has adopted the AAA Consumer Due Process Protocol, which creates a floor of procedural and substantive protections and affirms that ''[a]ll parties are entitled to a fundamentally-fair arbitration

[119] *See* 80 FR 42710, 42719 (July 20, 2015).

[120] *See id.*

[121] Best Interest Contract Exemption, 81 FR 21002 (Apr. 8, 2016).

[122] 81 FR 21002, 21020 (Apr. 8, 2016).

[123] *See* Student Assistance General Provisions, 82 FR 27621 (June 16, 2017); *see also* Student Assistance General Provisions, 81 FR 75926, 76021–31 (Nov. 1, 2016).

[124] The recent proposal seeks to amend the 2016 rule's required terms for the use of arbitration agreements between long-term care facilities and residents of those facilities. 82 FR 26649 (June 5, 2017); *see also* Centers for Medicare & Medicaid Services, Medicare and Medicaid Programs, Reform of Requirements for Long-Term Care Facilities, 81 FR 68688 (Oct. 4, 2016).

[125] 21st Century Department of Justice Appropriations Authorization Act, Public Law 107–273, section 11028(a)(2), 116 Stat. 1835 (2002), codified at 15 U.S.C. 1226(a)(2). The statute defines ''motor vehicle franchise contract'' as ''a contract under which a motor vehicle manufacturer, importer, or distributor sells motor vehicles to any other person for resale to an ultimate purchaser and authorizes such other person to repair and service the manufacturer's motor vehicles.'' *Id.* at section 11028(a)(1)(B), 116 Stat. 1835, codified at 15 U.S.C. 1226(a)(1)(B).

[126] John Warner National Defense Authorization Act for Fiscal Year 2007, Public Law 109–364, 120 Stat. 2083 (2006).

[127] Limitations on Terms of Consumer Credit Extended to Service Members and Dependents, 72 FR 50580 (Aug. 31, 2007) (codified at 32 CFR 232).

[128] *See* 32 CFR 232.8(c). Creditors must comply with the requirements of the rule for transactions or accounts established or consummated on or after October 3, 2016, subject to certain exemptions. 32 CFR 232.13(a). The rule applies to credit card accounts under an open-end consumer credit plan only on October 3, 2017. 32 CFR 232.13(c)(2). Earlier, Congress passed an appropriations provision prohibiting Federal contractors and subcontractors receiving Department of Defense funds from requiring employees or independent contractors to arbitrate certain kinds of employment claims. *See* Department of Defense Appropriations Act of 2010, Public Law 111–118, 123 Stat. 3454 (2010), section 8116.

[129] Food, Conservation, and Energy Act of 2008, Public Law 110–234, section 11005, 122 Stat. 1356–58 (2008), codified at 7 U.S.C. 197c; Implementation of Regulations Required Under Title XI of the Food,

Conservation and Energy Act of 2008; Suspension of Delivery of Birds, Additional Capital Investment Criteria, Breach of Contract, and Arbitration, 76 FR 76874, 76890 (Dec. 9, 2011).

[130] *See* Dodd-Frank section 1414(a) (codified as 15 U.S.C. 1639c(e)(1)) (''No residential mortgage loan and no extension of credit under an open end consumer credit plan secured by the principal dwelling of the consumer may include terms which require arbitration or any other nonjudicial procedure as the method for resolving any controversy or settling any claims arising out of the transaction.''); 12 CFR 1026.36(h)(1).

[131] Dodd-Frank section 921(b).

[132] Dodd-Frank section 922(c)(2).

[133] Dodd-Frank section 1028(a).

[134] Cal. Civ. Proc. Code sec. 1281.96 (amended effective Jan. 1, 2015); DC Code sec. 16–4430; Md. Comm. L. Code, secs. 14–3901–05; 10 M.R.S.A. sec. 1394 (Maine).

[135] *See Doctor's Assocs., Inc.* v. *Casarotto,* 517 U.S. 681, 687 (1996) (''Courts may not, however, invalidate arbitration agreements under state laws applicable only to arbitration provisions.''); *Perry* v. *Thomas,* 482 U.S. 483, 492 n.9 (1987) (''[S]tate law, whether of legislative or judicial origin, is applicable *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally. A state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with this requirement of [FAA] sec. 2.'').

[136] *See infra* Part III.D.

[137] AAA, ''Consumer Arbitration Rules,'' (effective Sept. 1, 2014), *available at https://adr.org/sites/default/files/Consumer%20Rules.pdf.*

process.'' [138] A second entity, JAMS, administers consumer financial arbitrations pursuant to the JAMS Streamlined Arbitration Rules & Procedures [139] and the JAMS Consumer Minimum Standards.[140] These administrators' procedures for arbitration both differ in several respects from the procedures found in court, as discussed in Section 4 of the Study and summarized below at Part III.D.

Further, although virtually all arbitration agreements in the consumer financial context expressly preclude arbitration from proceeding on a class basis, the major arbitration administrators do provide procedures for administering class arbitrations and have occasionally administered them in class arbitrations involving providers of consumer financial products and services.[141] These procedures, which are derived from class action litigation procedures used in court, are described in Section 4.8 of the Study. These class arbitration procedures will only be used by the AAA or JAMS if the arbitration administrator first determines that the arbitration agreement can be construed as permitting class arbitration. These class arbitration procedures are not widely used in consumer financial services disputes: Reviewing consumer financial arbitrations pertaining to six product types filed over a period of three years, the Study found only three.[142] Industry has criticized class arbitration on the ground that it lacks procedural safeguards. For example, class arbitration generally has limited judicial review of arbitrator decisions, for example, on a decision to certify a class or an award of substantial damages.[143]

III. The Arbitration Study

Section 1028(a) of the Dodd-Frank Act directed the Bureau to study and provide a report to Congress on ''the use of agreements providing for arbitration of any future dispute between covered persons and consumers in connection with the offering or providing of consumer financial products or services.'' Pursuant to section 1028(a), the Bureau conducted a study of the use of pre-dispute arbitration agreements in contracts for consumer financial products and services and, in March 2015, delivered to Congress its *Arbitration Study: Report to Congress, Pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act § 1028(a).*[144]

This Part describes the process the Bureau used to carry out the Study and summarizes the Study's results. Where relevant, this Part then sets forth comments received in response to the proposal that were specific to the Study and its results. The Bureau generally addresses the outcome of its Study, including analyses of the results of the Study, in Part VI, Findings, below. In some instances, the Bureau has elected to address issues related to both the Study and the Findings in Part VI.

A. April 2012 Request for Information

At the outset of its work, on April 27, 2012, the Bureau published a Request for Information (RFI) in the **Federal Register** concerning the Study.[145] The RFI sought public comment on the appropriate scope, methods, and data sources for the Study. Specifically, the Bureau asked for input on how it should address three topics: (1) The prevalence of arbitration agreements in contracts for consumer financial products and services; (2) arbitration claims involving consumers and companies; and (3) other impacts of arbitration agreements on consumers and companies, such as impacts on the incidence of consumer claims against companies, prices of consumer financial products and services, and the development of legal precedent. The Bureau also requested comment on whether and how the Study should address additional topics. In response to the RFI, the Bureau received and reviewed 60 comment letters. The Bureau also met with numerous commenters and other stakeholders to obtain additional feedback on the RFI.

The feedback received through this process substantially affected the scope of the Study the Bureau undertook. For example, several industry trade association commenters suggested that the Bureau study not only consumer financial arbitration but also consumer financial litigation in court. The Study incorporated an extensive analysis of consumer financial litigation—both individual litigation and class actions.[146] Commenters also advised the Bureau to compare the relationship between public enforcement actions and private class actions. The Study included extensive research into this subject, including an analysis of public enforcement actions filed over a period of five years by State and Federal regulators and the relationship, or lack of relationship of these cases to private class litigation.[147] Commenters also recommended that the Bureau study whether arbitration reduces companies' dispute resolution costs and the relationship between any such cost savings and the cost and availability of consumer financial products and services. To investigate this, the Study included a ''difference-in-differences'' regression analysis using a representative random sample of the Bureau's Credit Card Database, to look for price impacts associated with changes relating to arbitration agreements for credit cards, an analysis that had never before been conducted.[148]

In some cases, commenters to the RFI encouraged the Bureau to study a topic, but the Bureau did not do so because certain effects did not appear

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[138] AAA, ''Consumer Due Process Protocol Statement of Principles,'' at Principle 1, *available at http://info.adr.org/consumer-arbitration/.* Other principles include that all parties are entitled to a neutral arbitrator and administrator (Principle 3), that all parties retain the right to pursue small claims (Principle 5), and that face-to-face arbitration should be conducted at a ''reasonably convenient'' location (Principle 6). The AAA explained that it adopted these principles because, in its view, ''consumer contracts often do not involve arm's length negotiation of terms, and frequently consist of boilerplate language.'' The AAA further explained that ''there are legitimate concerns regarding the fairness of consumer conflict resolution mechanisms required by suppliers. This is particularly true in the realm of binding arbitration, where the courts are displaced by private adjudication systems.'' *Id.* at 4.

[139] JAMS, ''Streamline Arbitration Rules & Procedures,'' (effective July 1, 2014), *available at http://www.jamsadr.com/rules-streamlined-arbitration/.* If a claim or counterclaim exceeds $250,000, the JAMS Comprehensive Arbitration Procedures, not the Streamlined Rules & Procedures, apply. *Id.* at Rule 1(a).

[140] *See* JAMS, ''JAMS Policy on Consumer Arbitrations Pursuant to Pre-Dispute Clauses: Minimum Standards on Procedural Fairness,'' (effective July 15, 2009), *available at https://www.jamsadr.com/consumer-minimum-standards/* (setting forth 10 standards). This policy explains that ''JAMS will administer arbitrations pursuant to mandatory pre-dispute arbitration clauses between companies and consumers1 only if the contract arbitration clause and specified applicable rules comply with the following minimum standards of fairness.'' *Id.*

[141] *See* AAA, ''Class Arbitration Case Docket,'' *https://www.adr.org/casedockets* (last visited Feb. 9, 2017).

[142] Study, *supra* note 3, section 5 at 86–87. The review of class action filings in five of these markets also identified one of these two class arbitrations, as well as an additional class action arbitration filed with JAMS following the dismissal or stay of a class litigation. *Id.* section 6 at 59.

[143] In a recent amicus curiae filing, the U.S. Chamber of Commerce argued that ''[c]lass arbitration is a worst-of-all-worlds Frankenstein's monster: It combines the enormous stakes, formality and expense of litigation that are inimical to bilateral arbitration with exceedingly limited judicial review of the arbitrators' decisions.'' Brief of the Chamber of Commerce of the United States of America as Amicus Curiae in Support of Plaintiff-Appellants at 9, *Marriott Ownership Resorts, Inc.* v. *Sterman*, No. 15–10627 (11th Cir. Apr. 1, 2015).

[144] Study, *supra* note 3.

[145] Arbitration Study RFI, *supra* note 16.

[146] *See generally* Study, *supra* note 3, sections 6 and 8.

[147] *Id.* at section 9.

[148] *Id.* section 10 at 7–14.

measurable. For example, some commenters suggested that the Bureau study the effect of arbitration agreements on the development, interpretation, and application of the rule of law. The Bureau did not identify a robust data set that would allow empirical analysis of this phenomenon. Nonetheless, legal scholars have subsequently attempted to quantify this effect in relation to consumer law.[149]

B. December 2013 Preliminary Results

In December 2013, the Bureau issued a 168-page report summarizing its preliminary results on a number of topics (Preliminary Results).[150] One purpose of releasing the Preliminary Results was to solicit additional input from the public about the Bureau's work on the Study to date. In the Preliminary Results, the Bureau also included a section that set out a detailed roadmap of the Bureau's plans for future work, including the Bureau's plans to address topics that had been suggested in response to the RFI.[151]

In February 2014, the Bureau invited stakeholders for in-person discussions with staff regarding the Preliminary Results, as well as the Bureau's future work plan. Several external stakeholders, including industry associations and consumer advocates, took that opportunity and provided additional input regarding the Study.

C. Comments on Survey Design Pursuant to the Paperwork Reduction Act

In the Preliminary Results, the Bureau indicated that it planned to conduct a survey of consumers. The purpose of the survey was to assess consumer awareness of arbitration agreements, as well as consumer perceptions of, and expectations about, dispute resolution with respect to disputes between consumers and financial services providers.[152] Pursuant to the Paperwork Reduction Act (PRA), the Bureau also undertook an extensive public outreach and engagement process in connection with its consumer survey (the results of which are published in Section 3 of the Study). The Bureau obtained approval for the consumer survey from the Office of Management and Budget (OMB), and each version of the materials submitted to OMB during this process included draft versions of the survey instrument.[153] In June 2013, the Bureau published a **Federal Register** notice that solicited public comment on its proposed approach to the survey and received 17 comments in response. In July 2013, the Bureau hosted two roundtable meetings to consult with various stakeholders including industry groups, banking trade associations, and consumer advocates. After considering the comments and conducting two focus groups to help refine the survey, but before undertaking the survey, the Bureau published a second **Federal Register** notice in May 2014, which generated an additional seven comments.

D. The March 2015 Arbitration Study

The Bureau ultimately focused on nine empirical topics in the Study:

1. The prevalence of arbitration agreements in contracts for consumer financial products and services and their main features (Section 2 of the Study);
2. Consumers' understanding of dispute resolution systems, including arbitration and the extent to which dispute resolution clauses affect consumer's purchasing decisions (Section 3 of the Study);
3. How arbitration procedures differ from procedures in court (Section 4 of the Study);
4. The volume of individual consumer financial arbitrations, the types of claims, and how they are resolved (Section 5 of the Study);
5. The volume of individual and class consumer financial litigation, the types of claims, and how they are resolved (Section 6 of the Study);
6. The extent to which consumers sue companies in small claims court with respect to disputes involving consumer financial services (Section 7 of the Study);
7. The size, terms, and beneficiaries of consumer financial class action settlements (Section 8 of the Study);
8. The relationship between public enforcement and consumer financial class actions (Section 9 of the Study); and
9. The extent to which arbitration agreements lead to lower prices for consumers (Section 10 of the Study).

As described further in each subsection below, the Bureau's research on several of these topics drew in part upon data sources previously unavailable to researchers. For example, the AAA voluntarily provided the Bureau with case files for consumer arbitrations filed from the beginning of 2010, approximately when the AAA began maintaining electronic records, to the end of 2012. Compared to data sets previously available to researchers, the AAA case files covered a much longer period and were not limited to case files for cases resulting in an award. Using this data set, the Bureau conducted the first analysis of arbitration frequency and outcomes specific to consumer financial products and services.[154] Similarly, the Bureau submitted orders to financial service providers in the checking account and payday loan markets, pursuant to its market monitoring authority under Dodd-Frank section 1022(c)(4), to obtain a sample set of agreements of those institutions. Using these agreements, among others gathered from other sources, the Bureau conducted the most comprehensive analysis to date of the arbitration content of contracts for consumer financial products and services.[155]

The results of the Study also broke new ground because the Study, compared to prior research, generally considered larger data sets than had been reviewed by other researchers while also narrowing its analysis to consumer financial products and services. In total, the Study included the review of over 850 agreements for certain consumer financial products and services; 1,800 consumer financial services arbitrations filed over a three-year period; a random sample of the nearly 3,500 individual consumer finance cases identified as having been filed over a period of three years in Federal and selected State courts; and all of the 562 consumer finance class actions identified in Federal and selected State courts of the same time period. The Study also included over 40,000 filings in State small claims courts over the course of a single year. The Bureau supplemented this research by assembling and analyzing all of the more than 400 consumer financial class action settlements in Federal courts over a five-year period and more than 1,100 State and Federal public enforcement actions in the consumer finance area.[156]

[149] *See* Myriam Gilles, ''The End of Doctrine: Private Arbitration Public Law and the Anti-Lawsuit Movement,'' (Benjamin N. Cardozo Sch. of L. Faculty Res. Paper No. 436, 2014) (analyzing cases under ''counterfactual scenarios'' as to ''what doctrinal developments in antitrust and consumer law . . . would not have occurred over the past decade if arbitration clauses had been deployed to the full extent now authorized by the Supreme Court'').

[150] Bureau of Consumer Fin. Prot., ''Arbitration Study Preliminary Results,'' (Dec. 12, 2013), *available at http://files.consumerfinance.gov/f/201312_cfpb_arbitration-study-preliminary-results.pdf.*

[151] *Id.* at 129–131.

[152] *Id.* at 129.

[153] The survey was assigned OMB control number 3170–0046.

[154] Study, *supra* note 3, section 5 at 19–68.

[155] *See generally id.* section 2.

[156] Since the publication of the Study, the Bureau determined that 41 FDIC enforcement actions were inadvertently omitted from the results published in Section 9 of the Study. The corrected total number of enforcement actions reviewed in Section 9 was 1,191. Other figures, including the identification of

The Study also included the findings of the Bureau's survey of over 1,000 credit card consumers, focused on exploring their knowledge and understanding of arbitration and other dispute resolution mechanisms. The sections below describe in detail the process the Bureau followed in undertaking each section of the Study, summarize the main results of each section, and then summarizes and addresses criticisms of the Study results.[157]

Before doing so, one preliminary observation is in order. With rare exception, the commenters did not criticize the methodologies the Bureau used to assemble the various data sets used in the Study or the analyses the Bureau conducted of these data. Rather, to the extent commenters addressed the Study itself—as distinguished from the interpretation or significance of the Study's findings—in the main the commenters suggested that the Bureau should have engaged in additional analyses.

As explained in more detail below, in many instances the analyses that commenters suggested were not feasible given the limitations on the data available to the Bureau. For example, as discussed below, the Bureau did not have a feasible way of studying the actual costs that financial service providers incur in defending class actions or studying the outcomes of arbitration or individual litigation cases that were settled (or resolved in a manner consistent with a settlement) unless the case records reflected the settlement terms. In other instances, the analyses the commenters suggested—such as studying the satisfaction of the small number of consumers who file arbitration cases—were not, in the Bureau's judgment, relevant to determining whether limitations on arbitration agreements are in the public interest and for the protection of consumers. And, in other instances, resource limitations required the Bureau to deploy random sampling techniques or to limit the number of years under study while still obtaining representative data.

Beyond that, it is worth noting that it is the case with any research—even research as extensive and painstaking as the Study—that it is always possible, ex post, to think of additional questions that could have been asked, additional data that could have been procured, or additional analyses that could have been performed. The Bureau does not interpret section 1028's direction to study the use of arbitration agreements in consumer finance to require the Bureau to research every conceivably relevant question or to exhaust every conceivable data source as a precondition to exercising the regulatory authority contained in that section. As discussed in substantial detail below in Part VI, the Bureau believes that its extensive research provides ample evidence that the restrictions on the use of arbitration agreements contained in this Rule are in the public interest and for the protection of consumers.

1. Prevalence and Features of Arbitration Agreements (Section 2 of Study)

Section 2 of the Study addressed two central issues relating to the use of arbitration agreements: How frequently such agreements appear in contracts for consumer financial products and services and what features such agreements contain. Among other findings, the Study determined that arbitration agreements are commonly used in contracts for consumer financial products and services and that the AAA is the primary administrator of consumer financial arbitrations.

To conduct this analysis, the Bureau reviewed contracts for six product markets: Credit cards, checking accounts, general purpose reloadable (GPR) prepaid cards, payday loans, private student loans, and mobile wireless contracts governing third-party billing services.[158] Previous studies that analyzed the prevalence and features of arbitration agreements in contracts for consumer financial products and services either relied on small samples or limited their study to one market.[159] As a result, the Bureau's inquiry in Section 2 of the Study represents the most comprehensive analysis to date of the arbitration content of contracts for consumer financial products and services.

The Bureau's sample of credit card contracts consisted of contracts filed by 423 issuers with the Bureau as required by the Credit Card Accountability, Responsibility and Disclosure Act (CARD Act) as implemented by Regulation Z.[160] Taken together, these contracts covered nearly all consumers in the credit card market. For deposit accounts, the Bureau identified the 100 largest banks and the 50 largest credit unions, and constructed a random sample of 150 small and mid-sized banks. The Bureau obtained the deposit account agreements for these institutions by downloading them from the institutions' Web sites and through orders sent to institutions using the Bureau's market monitoring authority.

For GPR prepaid cards, the Bureau's sample included agreements from two sources. The Bureau gathered agreements for 52 GPR prepaid cards that were listed on the Web sites of two major card networks and a Web site that provided consolidated card information as of August 2013. The Bureau also obtained agreements from GPR prepaid card providers that had been included in several recent studies of the terms of GPR prepaid cards and that continued to be available as of August 2014.[161] For the storefront payday loan market, the Bureau again used its market monitoring authority to obtain a sample of 80 payday loan contracts from storefront payday lenders in California, Texas, and Florida.[162] For the private student loan market, the Bureau sampled seven private student loan contracts plus the form contract used by 250 credit unions that use a leading credit union service organization.[163] For the mobile wireless market, the Bureau reviewed the wireless contracts of the eight largest facilities-based providers of mobile wireless services[164] which also govern third-party billing services.[165]

public enforcement cases with overlapping private actions, were not affected by this omission.

[157] Overall, the markets assessed in the Study represent lending money (*e.g.,* small-dollar open-ended credit, small-dollar closed-ended credit, large-dollar unsecured credit, large-dollar secured credit), storing money (*i.e.,* consumer deposits), and moving or exchanging money. The Study also included debt relief and debt collection disputes arising from these consumer financial products and services. Study, *supra* note 3, section 1 at 7–9. While credit scoring and credit monitoring were not included in these product categories, settlements regarding such products were included in the Study's analysis of class action settlements, as well as the Study's analysis of the overlap between public enforcement actions and private class action litigation.

[158] *Id.* section 2 at 3.

[159] *Id.* section 2 at 4–6.

[160] 12 CFR 1026.58(c) (requiring credit card issuers to submit their currently-offered credit card agreements to the Bureau to be posted on the Bureau's Web site).

[161] Study, *supra* note 3, section 2 at 18.

[162] *Id.* section 2 at 21–22. This data was supplemented with a smaller, non-random sample of payday loan contracts from Tribal, offshore, and other online payday lenders, which is reported in Appendix C of the Study.

[163] *Id.* section 2 at 24.

[164] Facilities-based mobile wireless service providers are wireless providers that "offer mobile voice, messaging, and/or data services using their own network facilities," in contrast to providers that purchase mobile services wholesale from facilities-based providers and resell the services to consumers, among other types of providers. Federal Communications Commission, "Annual Report and Analysis of Competitive Market Conditions with Respect to Mobile Wireless," at 37–39 (2013), *available at https://www.fcc.gov/document/16th-mobile-competition-report.*

[165] Study, *supra* note 3, section 2 at 25–26. In mobile wireless third-party billing, a mobile wireless provider authorizes third parties to charge

Continued

The analysis of the agreements that the Bureau collected found that tens of millions of consumers use consumer financial products or services that are subject to arbitration agreements, and that, in some markets such as checking accounts and credit cards, large providers are more likely to have the agreements than small providers.[166] In the credit card market, the Study found that small bank issuers were less likely to include arbitration agreements than large bank issuers.[167] Likewise, only 3.3 percent of credit unions in the credit card sample used arbitration agreements.[168] As a result, while 15.8 percent of credit card issuers included such agreements in their contracts, 53 percent of credit card loans outstanding were subject to such agreements.[169] In the checking account market, the Study again found that larger banks tended to include arbitration agreements in their consumer checking contracts (45.6 percent of the largest 103 banks, representing 58.8 percent of insured deposits).[170] In contrast, only 7.1 percent of small-and mid-sized banks and 8.2 percent of credit unions used arbitration agreements.[171] In the GPR prepaid card and payday loan markets, the Study found that the substantial majority of contracts—92.3 percent of GPR prepaid card contracts and 83.7 percent of the storefront payday loan contracts—included such agreements.[172] In the private student loan and mobile wireless markets, the Study found that most of the large companies—85.7 percent of the private student loan contracts and 87.5 percent of the mobile wireless contracts—used arbitration agreements.[173]

In addition to examining the prevalence of arbitration agreements, Section 2 of the Study reviewed 13 features sometimes included in such agreements.[174] One feature the Bureau studied was which entity or entities were designated by the contract to administer the arbitration. The Study found that the AAA was the predominant arbitration administrator for all the consumer financial products the Bureau examined in the Study. The contracts studied specified the AAA as at least one of the possible arbitration administrators in 98.5 percent of the credit card contracts with arbitration agreements; 98.9 percent of the checking account contracts with arbitration agreements; 100 percent of the GPR prepaid card contracts with arbitration agreements; 85.5 percent of the storefront payday loan contracts with arbitration agreements; and 66.7 percent of private student loan contracts with arbitration agreements.[175] The contracts specified the AAA as the sole option in 17.9 percent of the credit card contracts with arbitration agreements; 44.6 percent of the checking account contracts with arbitration agreements; 63.0 percent to 72.7 percent of the GPR prepaid card contracts with arbitration agreements; 27.4 percent of the payday loan contracts with arbitration agreements; and one of the private student loan contracts the Bureau reviewed.[176]

In contrast, JAMS is specified in relatively fewer arbitration agreements. The Study found that the contracts specified JAMS as at least one of the possible arbitration administrators in 40.9 percent of the credit card contracts with arbitration agreements; 34.4 percent of the checking account contracts with arbitration agreements; 52.9 percent of the GPR prepaid card contracts with arbitration agreements; 59.2 percent of the storefront payday loan contracts with arbitration agreements; and 66.7 percent of private student loan contracts with arbitration agreements. JAMS was specified as the sole option in 1.5 percent of the credit card contracts with arbitration agreements (one contract); 1.6 percent of the checking account contracts with arbitration agreements (one contract); 63.0 percent to 72.7 percent of the GPR prepaid card contracts with arbitration agreements; and none of the payday loan or private student loan contracts the Bureau reviewed.[177]

The Bureau's analysis also found, among other things, that nearly all the arbitration agreements studied included provisions stating that arbitration may not proceed on a class basis. Across each product market, 85 percent to 100 percent of the contracts with arbitration agreements—covering over 99 percent of market share subject to arbitration in the six product markets studied—included such no-class-arbitration provisions.[178] Most of the arbitration agreements that included such provisions also contained an ''anti-severability'' provision stating that, if the no-class-arbitration provision were to be held unenforceable, the entire arbitration agreement would become unenforceable as a result.[179]

The Study found that most of the arbitration agreements contained a small claims court ''carve-out,'' permitting either the consumer or both parties to file suit in small claims court.[180] The Study similarly explored the number of arbitration provisions that allowed consumers to ''opt out'' or otherwise reject an arbitration agreement. To exercise the opt-out right, consumers must follow stated procedures, which usually requires all authorized users on an account to physically mail a signed written document to the issuer (electronic submission is permitted only rarely), within a stated time limit. With the exception of storefront payday loans and private student loans, the substantial majority of arbitration agreements in each market studied generally did not include opt-out provisions.[181]

The Study analyzed three different types of cost provisions: Provisions addressing the initial payment of arbitration fees; provisions that addressed the reallocation of arbitration fees in an award; and provisions addressing the award of attorney's fees.[182] Most arbitration agreements reviewed in the Study contained provisions that had the effect of capping consumers' upfront arbitration costs at or below the AAA's maximum consumer fee thresholds. These same arbitration agreements took noticeably different approaches to the reallocation

consumers, on their wireless bill, for services provided by the third parties.

[166] *Id.* section 1 at 9.

[167] *Id.* section 2 at 10.

[168] *Id.*

[169] *Id.* As the Study noted, the *Ross* settlement—a 2009 settlement of an antitrust case in which four of the 10 largest credit card issuers agreed to remove their arbitration agreements—likely impacted these results. Had the settling defendants in *Ross* continued to use arbitration agreements, 93.6 percent of credit card loans outstanding would be subject to arbitration agreements. *Id.* section 2 at 11.

[170] *Id.* section 2 at 14.

[171] *Id.*

[172] *Id.* section 2 at 19, 22.

[173] *Id.* section 2 at 24, 26.

[174] *Id.* section 2 at 30.

[175] *Id.* section 2 at 38.

[176] *Id.* section 2 at 36. The prevalence of GPR prepaid cards with arbitration agreements specifying AAA as the sole option is presented as a range because two GPR prepaid firms studied each used two different form cardholder agreements, with different agreements pertaining to different features. Because of this, it was unclear precisely how much of the prepaid market share represented by each provider was covered by a particular cardholder agreement. As such, for GPR prepaid cards, prevalence by market share is presented as a range rather than a single figure.

[177] *Id.*

[178] *Id.* section 2 at 44–47.

[179] *Id.* section 2 at 46–47.

[180] *Id.* section 2 at 33–34.

[181] *Id.* section 2 at 31–32.

[182] *Id.* section 2 at 58. Many contracts—particularly checking account contracts—included general provisions about the allocation of costs and expenses arising out of disputes that were *not* specific to arbitration costs. Indeed, such provisions were commonly included in contracts without arbitration agreements as well. While such provisions could be relevant to the allocation of expenses in an arbitration proceeding, the Study did not address such provisions because they were not specific to arbitration agreements.

of arbitration fees in the arbitrator's award, with approximately one-fifth of the arbitration agreements in credit card, checking account, and storefront payday loan markets permitting shifting company fees to consumers.[183] The Study also found that only a small number of agreements representing negligible shares of the relevant markets directed or permitted arbitrators to award attorney's fees to prevailing companies.[184] A significant share of arbitration agreements across almost all markets did not address attorney's fees.[185]

Aside from costs more generally, the Study found that many arbitration agreements permit the arbitrator to reallocate arbitration fees from one party to the other. About one-third of credit card arbitration agreements, one-fourth of checking account arbitration agreements, and half of payday loan arbitration agreements expressly permitted the arbitrator to shift attorney's fees to the consumer.[186] However, as the Study pointed out, the AAA's consumer arbitration fee schedule, which became effective March 1, 2013, restricts such reallocation.[187] With respect to another type of provision that affects consumers' costs in arbitration—where the arbitration must take place—the Study noted that most, although not all, arbitration agreements contained provisions requiring or permitting hearings to take place in locations close to the consumer's place of residence.[188]

Further, most of the arbitration agreements the Bureau studied contained disclosures describing the differences between arbitration and litigation in court. Most agreements disclosed expressly that the consumer would not have a right to a jury trial, and most disclosed expressly that the consumer could not be a party to a class action in court.[189] Depending on the product market, between one-quarter and two-thirds of the agreements disclosed four key differences between arbitration and litigation in court: No jury trial is available in arbitration; parties cannot participate in class actions in court; discovery is typically more limited in arbitration; and appeal rights are more limited in arbitration.[190] The Study found that this language was often capitalized or in boldfaced type.[191]

The Study also examined whether arbitration agreements limited recovery of damages—including punitive or consequential damages—or specified the time period in which a claim had to be brought. The Study determined that most agreements in the credit card, payday loan, and private student loan markets did not include damages limitations. However, the opposite was true of agreements in checking account contracts, where more than three-fourths of the market included damages limitations; GPR prepaid card contracts, almost all of which included such limitations; and mobile wireless contracts, all of which included such limitations. A review of consumer agreements *without* arbitration agreements revealed a similar pattern, albeit with damages limitations being somewhat less common.[192]

The Study also found that a minority of arbitration agreements in two markets set time limits other than the statute of limitations that would apply in a court proceeding for consumers to file claims in arbitration. Specifically, these types of provisions appeared in 28.4 percent and 15.8 percent of the checking account and mobile wireless agreements by market share, respectively.[193] Again, a review of consumer agreements without arbitration agreements showed that 10.7 percent of checking account agreements imposed a one-year time limit for consumer claims.[194] No storefront payday loan, private student loan, or mobile wireless contracts in the sample without arbitration agreements had such time limits.[195]

The Study assessed the extent to which arbitration agreements included contingent minimum recovery provisions, which provide that consumers would receive a specified minimum recovery if an arbitrator awards the consumer more than the amount of the company's last settlement offer. The Study found that such provisions were uncommon; they appeared in three out of the six private student loan agreements the Bureau reviewed, but, in markets other than student loans, they appeared in 28.6 percent or less of the agreements the Bureau studied.[196]

Comments received regarding the scope of Section 2 are addressed in Part III.E below.

2. Consumer Understanding of Dispute Resolution Systems, Including Arbitration (Section 3 of Study)

Section 3 of the Study presented the results of the Bureau's telephone survey of a nationally representative sample of credit card holders.[197] The survey examined two main topics: (1) The extent to which dispute resolution clauses affected consumer's decisions to acquire credit cards; and (2) consumers' awareness, understanding, and knowledge of their rights in disputes against their credit card issuers. In late 2014, the Bureau's contractor completed telephone surveys with 1,007 respondents who had credit cards.[198]

The consumer survey found that when presented with a hypothetical situation in which the respondents' credit card issuer charged them a fee they knew to be wrongly assessed and in which they exhausted efforts to obtain relief from the company through customer service, only 2.1 percent of respondents stated that they would seek legal advice or consider legal proceedings.[199] Almost the same proportion of respondents stated that they would simply pay for the improperly assessed fee (1.7 percent).[200] A majority of respondents (57.2 percent) said that they would cancel their cards.[201]

[183] *Id.* section 2 at 62–66.

[184] *Id.* section 2 at 67.

[185] *Id.* section 2 at 66–76. As described *supra* when the arbitration agreement did not address the issue, the arbitrator is able to award attorney's fees when permitted elsewhere in the agreement or by applicable law.

[186] *Id.* section 2 at 62–66.

[187] *Id.* section 2 at 61–62.

[188] *Id.* section 2 at 53.

[189] *Id.* section 2 at 72.

[190] *Id.* section 2 at 72–79.

[191] *Id.* section 2 at 72 and n.144.

[192] *Id.* section 2 at 49. More than one-third (35 percent) of large bank checking account contracts without arbitration agreements included either a consequential damages waiver or a consequential damages waiver together with a punitive damages waiver. Similarly, one-third of GPR prepaid card contracts without arbitration agreements included a consequential damages waiver, a punitive damages waiver, or both. The only mobile wireless contract without an arbitration agreement limited any damages recovery to the amount of the subscriber's bill. *Id.*

[193] *Id.* section 2 at 50.

[194] *Id.* section 2 at 51.

[195] *Id.*

[196] *Id.* section 2 at 70–71 (albeit covering 43.0 percent of the storefront payday loan market subject to arbitration agreements and 68.4 percent of the mobile wireless market subject to arbitration agreements).

[197] The Bureau focused its survey on credit cards because credit cards offer strong market penetration with consumers across the nation. Further, because major credit card issuers are required to file their agreements with the Bureau (12 CFR 1026.58(c)), limiting the survey to credit cards permitted the Bureau to verify the accuracy of many of the respondents' default assumptions about their dispute resolution rights by examining the actual credit card agreements to which the consumers were subject to at the time of the survey. *Id.* section 3 at 2.

[198] Based on the size of the Bureau's sample, its results were representative of the national population, with a sampling error of plus or minus 3.1 percent, though the sampling error is larger in connection with sample sets of fewer than the 1,007 respondents. *Id.* section 3 at 10.

[199] *Id.* section 3 at 18.

[200] *Id.*

[201] *Id.*

Respondents also reported that factors relating to dispute resolution—such as the presence of an arbitration agreement—played little to no role when they were choosing a credit card. When asked an open-ended question about all the factors that affected their decision to obtain the credit card that they use most often for personal use, no respondents volunteered an answer that referenced dispute resolution procedures.[202] When presented with a list of nine features of credit cards—features such as interest rates, customer service, rewards, and dispute resolution procedures—and asked to identify those features that factored into their decision, respondents identified dispute resolution procedures as being relevant less often than any other option.[203]

As for consumers' knowledge and default assumptions as to the means by which disputes between consumers and financial service providers can be resolved, the survey found that consumers generally lacked awareness regarding the effects of arbitration agreements. Of the survey's 1,007 respondents, 570 respondents were able to identify their credit card issuer with sufficient specificity to enable the Bureau to find the issuer's standard credit card agreement and thus to compare the respondents' beliefs with respect to the terms of their agreements with the agreements' actual terms.[204] Among the respondents whose credit card contracts did not contain an arbitration agreement, when asked if they could sue their credit card issuer in court, 43.7 percent answered ''Yes,'' 7.7 percent answered ''No,'' and 47.8 percent answered ''Don't Know.''[205] At the same time, among the respondents whose credit card agreements *did* contain arbitration requirements, 38.6 percent of respondents answered ''Yes,'' while 6.8 percent answered ''No,'' and 54.4 percent answered ''Don't Know.''[206] Even the 6.8 percent of respondents who stated that they could not sue their credit card issuers in court may not have had knowledge of the arbitration agreement: As noted above, a similar proportion of respondents *without* an arbitration agreement in their contract—7.7 percent compared to 6.8 percent—reported that they could not sue their issuers in court.[207] When asked if they could participate in class action lawsuits against their credit card issuer, more than half of the respondents whose contracts had pre-dispute arbitration agreements thought they could participate (56.7 percent).[208]

Respondents were also generally unaware of any opt-out opportunities afforded by their issuer. Only one respondent whose current credit card contract permitted opting out of the arbitration agreement recalled being offered such an opportunity.[209]

Comments Received on Section 3 of the Study

An industry commenter suggested that the Bureau should conduct further analyses to gain a better understanding of consumer comprehension with respect to arbitration agreements. The commenter asserted that this was appropriate given statements from the Bureau that many consumers do not even know that they are bound by an arbitration agreement. A different industry commenter thought the Bureau should have asked consumers if they would decline to file a class action against their credit card issuer because the presence of an arbitration agreement would substantially lower their likelihood of classwide relief. This commenter also said that, rather than asking consumers hypothetical questions about what they would do if an improper charge appeared on their account in the future, the Bureau should have asked whether such a charge had appeared on a consumer's account in the past and, if so, what the consumer did about it. Relatedly, an industry commenter suggested that the Bureau should have surveyed consumers about their baseline level of understanding of other key provisions of their card agreements. With such a baseline, the commenter said that the Bureau could have evaluated whether consumers pay greater, less, or the same attention to dispute resolution clauses as to other clauses important to them—and why that might be so. Absent such data, the commenter said that the survey is meaningless.

A law firm commenter writing on behalf of an industry participant suggested that the Study's consumer survey was flawed because the Bureau only surveyed credit card consumers and that the Bureau should not draw general conclusions about consumers' understanding of dispute resolution systems from survey results in a single market in part because credit card agreements are often provided simultaneously with an access device rather than when a consumer applies for a card. This is because, the commenter suggested, that credit card contracts are unique, because consumers do not receive the complete loan agreement until they receive the card itself.

Response to Comments Received on Section 3

The Bureau disagrees with the commenter that suggested that the Bureau should have conducted further analyses of consumer comprehension. The Bureau, in Section 3 of the Study, explored in detail consumer comprehension issues with respect to arbitration agreements using a nationally representative telephone survey. As is discussed in the Study, among other findings, the Bureau determined that a majority of respondents whose credit cards include pre-dispute arbitration agreements did not know if they could sue their issuers in court. Nor does the Bureau agree that asking consumers about their likelihood to file a class action given an arbitration agreement would result in useful information. As the Study showed, the proposal and this final rule discuss, and several industry commenters acknowledged, regardless of the level of individual consumer awareness, arbitration agreements do in fact have the effect of blocking class actions that are filed and suppressing the filing of many more cases, consumers' awareness of this fact does not seem relevant. Insofar as cases are blocked, further focus on consumers' comprehension of this fact is unnecessary.

The Bureau acknowledges it did not develop a baseline of understanding of other key credit card agreement terms. However, the Bureau disagrees that the failure to do so renders the survey ''meaningless.'' The survey found that consumers do not shop for credit cards based on the type of dispute resolution process provided in the credit card agreement and that consumers do not understand the consequences of choosing a card with an arbitration provision. Whether consumers have greater or lesser understanding of other

[202] *Id.* section 3 at 15.

[203] *Id.*

[204] *Id.* section 3 at 18.

[205] *Id.* section 3 at 18–20.

[206] *Id.* These respondents were asked additional questions to account for the possibility that respondents who answered ''Yes'' meant suing their issuers in small claims court; that meant they could bring a lawsuit even though they are subject to an arbitration agreement; or that they had previously ''opted out'' of their arbitration agreements with their issuers. With those caveats in mind and after accounting for demographic weighting, the Study found that the consumers whose credit cards included arbitration requirements were wrong at least 79.8 percent of the time. *Id.* section 3 at 20–21.

[207] *Id.* section 3 at 18–20.

[208] *Id.* section 3 at 25.

[209] *Id.* section 3 at 21 and n.44. Eighteen other respondents recalled being offered an opportunity to opt out of their arbitration requirements. But, for the respondents whose credit card agreements the Bureau could identify, none of their 2013 agreements actually contained opt-out provisions. In fact, four of the agreements did not even contain pre-dispute arbitration provisions.

provisions of credit card agreements does not seem to the Bureau to be relevant in assessing whether limitations on the use of arbitration agreements is for the protection of consumers and in the public interest.[210]

Regarding the commenter that suggested that the survey of credit card customers cannot be extrapolated to other markets because credit card agreements are often provided simultaneously with an access device (and not at the time of application), the Bureau disagrees that this is a relevant reason not to extrapolate the results of the survey. Even if consumers do not receive the terms at the time of application, they do receive them before they activate a credit card. At that point, they are free to reject the credit card and its terms. The survey showed that few make that choice; the Bureau has no reason to believe that such a decision is different in other markets. Nor has this or any other commenter provided evidence to the contrary.

3. Comparison of Procedures in Arbitration and in Court (Section 4 of Study)

While the Study generally focused on empirical analysis of dispute resolution, Section 4 of the Study provided a brief qualitative comparison between the procedural rules that apply in court and in arbitration. Particularly given changes to the AAA consumer fee schedule that took effect March 1, 2013, the procedural rules are relevant to understanding the context from which the Study's empirical findings arise.

The Study's procedural overview described court litigation as reflected in the Federal Rules and, as an example of a small claims court process, the Philadelphia Municipal Court Rules of Civil Practice. It compared those procedures to arbitration procedures as set out in the rules governing consumer arbitrations administered by the two leading arbitration administrators in the United States, the AAA and JAMS. The Study compared arbitration and court procedures according to eleven factors: The process for filing a claim, fees, legal representation, the process for selecting the decision maker, discovery, dispositive motions, class proceedings, privacy and confidentiality, hearings, judgments and awards, and appeals.

Filing a Claim and Fees. The Study described the processes for filing a claim in court and in arbitration. With respect to fees, the Study noted that the fee for filing a case in Federal court is $350 plus a $50 administrative fee—paid by the party filing suit, regardless of the amount being sought—and the fee for a small claims filing in Philadelphia Municipal Court ranges from $63 to $112.38.[211] In arbitration, under the AAA consumer fee schedule that took effect March 1, 2013, the consumer pays a $200 administrative fee, regardless of the amount of the claim and regardless of the party that filed the claim; in JAMS arbitrations, when a consumer initiates arbitration against the company, the consumer is required to pay a $250 fee.[212] Prior to March 1, 2013, arbitrators in AAA consumer arbitrations had discretion to reallocate fees in the final award. After March 1, 2013, arbitrators can only reallocate arbitration fees in the award if required by applicable law or if the claim ''was filed for purposes of harassment or is patently frivolous.'' [213]

Parties in court generally bear their own attorney's fees, unless a statute or contract provision provides otherwise or a party is shown to have acted in bad faith. However, under several consumer protection statutes, providers may be liable for attorney's fees.[214] For example, under the AAA's Consumer Rules, ''[t]he arbitrator may grant any remedy, relief, or outcome that the parties could have received in court, including awards of attorney's fees and costs, in accordance with the law(s) that applies to the case.'' [215]

Representation. The Study noted that in most courts, individuals can either represent themselves or hire an attorney as their representative.[216] In arbitration, the rules are more flexible than in many courts about the identity of party representatives. For example, the AAA Consumer Rules permit a party to be represented ''by counsel or other authorized representative, unless such choice is prohibited by applicable law.'' [217] Some States, however, prohibit non-attorneys to represent parties in arbitration.[218]

Selecting the Decisionmaker. The Study noted that court rules generally do not permit parties to reject the judge assigned to hear their case.[219] In arbitration, if the parties agree on the individual they want to serve as arbitrator, they can choose that person to decide their dispute; if the parties cannot agree on the arbitrator, the arbitrator is selected following the procedure specified in their contract or in the governing arbitration rules.[220]

Discovery. The Study stated that the Federal Rules provide a variety of means by which a party can discover evidence in the possession of the opposing party or a third party, while the right to discovery in arbitration is more limited.[221]

Dispositive Motions. The Study noted that the Federal Rules provide for a variety of motions by which a party can seek to dispose of the case, either in whole or in part, while arbitration rules typically do not expressly authorize dispositive motions.[222]

Class Proceedings. The Study described the procedural rules for class actions under Federal Rule 23 and noted that the Bureau was unaware of a class action procedure for small claims court.[223] The Study further noted that the AAA and JAMS have adopted rules, derived from Federal Rule 23, for administering arbitrations on a class basis.[224]

Privacy and Confidentiality. The Study stated that court litigation (including small claims court) is a public process, with proceedings conducted in public courtrooms and the record generally available for public review; by comparison, arbitration is a private process in that there is no particular mechanism for public transparency. Absent an agreement by the parties, however, it is not by law required to be confidential.[225]

[210] As is noted in Section 2 at 72 of the Study, many arbitration agreements are already printed in bolded text or with all capital letters.

[211] Study, *supra* note 3, section 4 at 10. As the Study noted, a Federal statute permits indigent plaintiffs filing in Federal court to seek to have the court waive the required filing fees. *Id.* (citing 28 U.S.C. 1915(a)).

[212] *Id.* section 4 at 11–12.

[213] *Id.*

[214] *See, e.g.,* 15 U.S.C. 1640(a)(3) (TILA).

[215] Study, *supra* note 3, section 4 at 12.

[216] *Id.* section 4 at 13.

[217] *Id.* section 4 at 13–14.

[218] *Id.* section 4 at 14.

[219] *Id.*

[220] *Id.* section 4 at 15.

[221] Arbitration rules on discovery give the arbitrator authority to manage discovery ''with a view to achieving an efficient and economical resolution of the dispute, while at the same time promoting equality of treatment and safeguarding each party's opportunity to present its claims and defenses.'' AAA Commercial Rules, Rule R–22, *cited in* Study, *supra* note 3, section 4 at 16–17. Arbitration rules do not allow for broad discovery from third parties, which were not parties to the underlying agreement to arbitrate disputes. Section 7 of the FAA, however, grants arbitrators the power to subpoena witnesses to appear before them (and bring documents). 9 U.S.C. 7. Appellate courts are split on whether section 7 of the FAA authorizes subpoenas for discovery *before* an arbitral hearing. Study, *supra* note 3, section 4 at 17 n.78. As described above, many arbitration agreements highlighted the difference in discovery practices in arbitration proceedings as compared to litigation. *See id.*

[222] Study, *supra* note 3, section 4 at 18.

[223] *Id.* section 4 at 18–20.

[224] *Id.* section 4 at 20.

[225] *Id.* section 4 at 21–22. A small minority of arbitration agreements, primarily in the checking account market, included provisions requiring that the proceedings remain confidential. *Id.* section 2 at 51–53.

Hearings. The Study stated that if a case in court does not settle before trial or get resolved on a dispositive motion, it will proceed to trial in the court in which the case was filed. A jury may be available for these claims. On the other hand, if an arbitration filing does not settle, the arbitrator can resolve the parties' dispute based on the parties' submission of documents alone, by a telephone hearing, or by an in-person hearing.[226]

Judgments/Awards. The Study further noted that the outcome of a case in court is reflected in a judgment, which the prevailing party can enforce through various means of post-judgment relief, and that the outcome of a case in arbitration is reflected in an award, which, once turned into a court judgment, can be enforced the same as any other court judgment.[227]

Appeals. The Study stated that parties in court can appeal a judgment against them to an appellate court; by comparison, parties can challenge arbitration awards in court only on the more limited grounds set out in the FAA.[228]

Comments Received on Section 4 of the Study

A nonprofit commenter criticized the Bureau's analysis of arbitration procedures by noting that it is the shortest section of the Study and that the Bureau did not attempt to estimate the actual transaction cost for consumers in pursuing claims in court as compared to arbitration. A research center commenter suggested that the Bureau should have performed a more detailed analysis of how judges supervise arbitration and how many businesses have adopted provisions similar to that at issue in the *Concepcion* case [229] because this information would aid the Bureau's analysis of the effectiveness of arbitration clauses for consumers.

Response to Comments Received on Section 4

While the review of arbitration procedures was shorter than other chapters that report on the results of empirical analyses undertaken for the Study, the Bureau believes its analysis to be fulsome; the commenter—other than offering the transaction cost criticism as discussed in the rest of this paragraph—did not explain what more the Bureau's analysis could have done nor did it identify other specific topics for analysis. With regard to the comparison of costs, the Bureau notes that the Study provided a detailed discussion of the fees a consumer would need to pay in (a) Federal court; (b) small claims court, using Philadelphia Municipal Court as an example; and (c) arbitration, using the AAA and JAMS as examples.[230] The Bureau notes that the Study included a discussion regarding available fee waivers for indigent plaintiffs, as well as the ability of the arbitrator to reallocate the initial fee distribution.[231] The Study also assessed the frequency with which consumers proceeded without counsel in arbitration proceedings and in court proceedings.

As for the commenter that suggested that the Bureau should have looked at how judges supervise arbitration, the commenter did not explain what additional insights could be gained from such an analysis. As for the commenter's contentions regarding *Concepcion*-like clauses, the Bureau notes that Section 2 found such clauses to be rare in consumer finance.[232]

4. Consumer Financial Arbitrations: Frequency and Outcomes (Section 5 of Study)

Section 5 of the Study analyzed arbitrations of consumer finance disputes between consumers and consumer financial services providers. This section tallied the frequency of such arbitrations, including the number of claims brought and a classification of which claims were brought. It also examined outcomes, including how cases were resolved and how consumers and companies fared in the relatively small share of cases that an arbitrator resolved on the merits. The Study performed this analysis for arbitrations concerning credit cards, checking accounts, payday loans, GPR prepaid cards, private student loans, and automobile purchase loans. To conduct this analysis, the Bureau used electronic case files from the AAA.[233] Pursuant to a non-disclosure agreement, the AAA voluntarily provided the Bureau its electronic case records for consumer disputes filed during the years 2010, 2011, and 2012.[234] Because the AAA provided the Bureau with case records for all disputes filed in arbitration during this period, Section 5 of the Study provided a reasonably complete picture of the frequency and typology of claims that consumers and companies file in arbitration.[235]

The Study identified about 1,847 filings in total—about 616 per year—with the AAA for the six product markets combined.[236] According to the standard AAA claim forms, about 411 arbitrations per year were designated as having been filed by consumers alone; the remaining filings were designated as having been filed by companies or filed as mutual submissions by both the consumer and the company.[237] Forty percent of the arbitration filings involved a dispute over the amount of debt a consumer allegedly owed to a

[226] *Id.* section 4 at 22–24.

[227] *Id.* section 4 at 24.

[228] Courts may vacate arbitration awards under the FAA only in limited circumstances. 9 U.S.C. 10 (arbitration awards can be vacated (1) where the award was procured by corruption; the arbitrator is partial or corrupt, the arbitrator was guilty of misconduct in certain specified ways, the arbitrator exceeded his powers or the arbitrator so imperfectly executed his powers that an award was not made). *Cf. supra* notes 104–112 and accompanying text (identifying the narrow grounds upon which a court may determine an arbitration agreement to be unenforceable).

[229] The arbitration provision at issue in *Concepcion* provided that the company would pay all costs of the arbitration for the consumer; that the arbitration would take place in the county where the consumer resided or could take place by telephone or document submission; that the arbitrator was not limited in the damages it could award the consumer; that if the consumer received an award that was higher than the company's last written settlement offer, the company would have to pay $7,500 in addition to the award; and that if the consumer prevailed he could seek double the amount of his attorney's fees. *AT&T Mobility LLC* v. *Concepcion,* 563 U.S. 333, 337 (2011).

[230] *See* Study, *supra* note 3, section 4 at 10.

[231] *See id.* section 4 at 10 n.40 (citing 28 U.S.C. 1915(a)).

[232] Study, *supra* note 3, section 2 at 70–71 and tbl. 15.

[233] *See* Christopher R. Drahozal & Samantha Zyontz, ''An Empirical Study of AAA Consumer Arbitrations,'' 25 Ohio St. J. on Disp. Res. 843, 845 (2010) (reviewing 301 AAA consumer disputes covering a nine-month period in 2007, but limiting analysis to disputes actually resolved by arbitrators); Christopher R. Drahozal & Samantha Zyontz, ''Creditor Claims in Arbitration and in Court,'' 7 Hastings Bus. L. J. 77 (2011) (follow-on study that compared debt collection claims by companies in AAA consumer arbitrations with debt collection claims in Federal court and in State court proceedings in jurisdictions in Virginia and Oklahoma).

[234] Study, *supra* note 3, section 5 at 17.

[235] While the analysis did not provide a window into how arbitrations are resolved in other arbitral fora, the AAA is the predominant administrator of consumer financial arbitrations. *Id.* section 2 at 35.

[236] *Id.* section 5 at 9.

[237] *Id.* section 1 at 11. Under the AAA policies that applied during the period studied, a company could unilaterally file a debt collection dispute against a consumer in arbitration only if a preceding debt collection litigation had been dismissed or stayed in favor of arbitration. Companies could file disputes mutually with consumers; they could also file counterclaims in dispute filed by consumers against them. *Id.* section 5 at 27 n.56. As noted in the Study, the Bureau did not attempt to verify whether the representation on the claim forms as to the party filing the case was accurate. For example, in a number of cases that were designated as having been filed by a consumer, the record indicates that the consumer failed to prosecute the action and that the company actually paid the fees and obtained a quasi-default judgment. In other cases, a law firm representing consumers filed a number of student loan disputes but indicated on the checkbox that the action was being filed by the company. *Id.* section 5 at 19 n.38.

company, with no additional affirmative claim by either party; in 31 percent of the filings, parties brought affirmative claims with no formal dispute about the amount of debt owed; in another 29 percent of the filings, consumers disputed alleged debts but also brought affirmative claims against companies.[238]

Although claim amounts varied by product, in disputes involving affirmative claims by consumers, the average amount of such claims was approximately $27,000 and the median amount of such claims was $11,500.[239] In debt disputes, the average disputed debt amount was approximately $15,700; the median was approximately $11,000.[240] Across all six product markets, about 25 cases per year involved affirmative claims of $1,000 or less.[241]

Overall, consumers were represented by counsel in 63.2 percent of arbitration cases.[242] The rate of representation, however, varied widely based on the product at issue; in payday and student loan disputes, for example, consumers had counsel in about 95 percent of all cases filed.[243]

To analyze the outcomes in arbitration, the Bureau confined its analysis to claims filed in 2010 and 2011 in order to limit the number of cases that were pending at the close of the period for which the Bureau had data. The Bureau's analysis of arbitration outcomes was limited by a number of factors that are unavoidable in any review of dispute resolution.[244] Among other issues, settlement terms were rarely known in cases in which the parties settled their disputes. Indeed, in many cases, even the fact that a settlement occurred was difficult to discern because the parties were not required to notify the AAA of a settlement.[245] Accordingly, on the one hand, an incomplete file could indicate a settlement, or, on the other hand, that the proceeding was still in progress but relatively dormant. Because parties settled claims strategically, disputes that *did* reach an arbitrator's decision on the merits were not a representative sample of the disputes that were filed.[246] For example, if parties settled all strong consumer (or company) claims, then consumers (or companies) may appear to do poorly before arbitrators because only weak claims are heard at hearings. As the Study explained, these limitations are inherent in a review of this nature and unavoidable.

With those significant caveats noted, the Study determined that in 32.2 percent of the 1,060 disputes filed during the first two years of the Study period (341 disputes) arbitrators resolved the dispute on the merits. In 23.2 percent of the disputes (246 disputes), the record showed that the parties settled. In 34.2 percent of disputes (362 disputes), the available AAA case record ended in a manner that was consistent with settlement—for example, a voluntary dismissal of the action—but the Bureau could not definitively determine that settlement occurred. In the remaining 10.5 percent of disputes (111 disputes), the available AAA case record ended in a manner that suggested the dispute is unlikely to have settled; for example, the AAA may have refused to administer the dispute because it determined that the arbitration agreement at issue was inconsistent with the AAA's Consumer Due Process Protocol.[247]

As noted above, only a small portion of filed arbitrations reached a decision. The Study identified 341 cases filed in 2010 and 2011 that were resolved by an arbitrator and for which the outcome was ascertainable.[248] Of these 341 cases, 161 disputes involved an arbitrator decision on a consumer's affirmative claim. Of the cases in which the Bureau determined the results, consumers obtained relief on their affirmative claims in 32 disputes (20.3 percent).[249] Consumers obtained debt forbearance in 19.2 percent of the cases in which an arbitrator could have provided some form of debt forbearance (46 cases).[250] The total amount of affirmative relief awarded in all cases was $172,433 and total debt forbearance was $189,107.[251] Of the 52 cases filed in 2010 and 2011 that involved consumer affirmative claims of $1,000 or less, arbitrators resolved 19, granting affirmative relief to consumers in four such cases.[252]

With respect to disputes that involved company claims in 2010 and 2011, the Bureau determined the terms of arbitrator awards relating to company claims in 244 of the 421 disputes.[253] Arbitrators provided companies some type of relief in 227, or 93.0 percent, of those disputes. In those 227 disputes, companies won a total of $2,806,662.[254]

The Study found that consumers appealed very few arbitration decisions and companies appealed none. Specifically, it found four arbitral appeals filed between 2010 and 2012. Consumers without counsel filed all four. Three of the four were closed after the parties failed to pay the required administrator fees and arbitrator deposits. In the fourth, a three-arbitrator panel upheld an arbitration award in favor of the company after a 15-month appeal process.[255]

The Study also found that very few class arbitrations were filed. The Study identified only two filed with AAA between 2010 and 2012. One was still pending on a motion to dismiss as of September 2014. The other file contained no information other than the arbitration demand that followed a State court decision granting the company's motion seeking arbitration.[256]

The Study also found that, when there was a decision on the merits by an arbitrator, the average time to resolution was 179 days, and the median time to resolution was 150 days. When the record definitively indicated that a case had settled, the median time to settlement was 155 days from the filing of the initial claim.[257] Further, the Study found that more than half of the filings that reached a decision were resolved by "desk arbitrations," meaning that the proceedings were resolved solely on the basis of documents submitted by the parties (57.8 percent). Approximately one-third (34.0 percent) of proceedings were resolved by an in-person hearing, 8.2 percent by telephonic hearings, and 2.4

[238] *Id.* section 1 at 11.

[239] *Id.* section 5 at 10.

[240] *Id.*

[241] *Id.*

[242] *Id.* section 5 at 29.

[243] *Id.* section 5 at 28–32.

[244] *Id.* section 5 at 4–7. As a result, the Bureau was only able to determine a substantive outcome in 341 cases.

[245] *Id.* section 5 at 6.

[246] *Id.* section 5 at 7 (noted that it is "quite challenging to attempt to answer even the simple question of how well do consumers (or companies) fare in arbitration"). The Study noted further that the same selection bias concerns apply to disputes filed in litigation and that "[t]hese various considerations warrant caution in drawing conclusions as to how well consumers or companies fare in arbitration as compared to litigation." *Id.* For example, the Study found that the disputes that parties filed in arbitration differ from the disputes filed in litigation. *Id.*

[247] *Id.* section 5 at 11.

[248] *Id.* section 5 at 13.

[249] *Id.*

[250] *Id.*

[251] *Id.* section 5 at 41, 43.

[252] *Id.* section 5 at 13.

[253] This includes cases filed by companies as well as cases in which companies asserted counterclaims in consumer-initiated disputes. *Id.* section 5 at 14.

[254] Of the 244 cases in which companies made claims or counterclaims that the Bureau determined were resolved by arbitrators, companies obtained relief in 227 disputes. The total amount of relief in those cases was $2,806,662. These totals included 60 cases in which the company advanced fees for the consumer and obtained an award without participation by the consumer. Excluding those 60 cases, the total amount of relief awarded by arbitrators to companies was $2,017,486. *Id.* section 5 at 43–44.

[255] *Id.* section 5 at 85.

[256] *Id.* section 5 at 86–87. The Study's analysis of class action filings identified a third class action arbitration filed with JAMS following the dismissal or stay of a class litigation. *Id.* section 6 at 59.

[257] *Id.* section 5 at 71–73.

percent through a dispositive motion with no hearing.[258] When there was an in-person hearing, the Study estimated that consumers travelled an average of 30 miles and a median of 15 miles to attend the hearing.[259]

Comments Received on Section 5 of the Study

An industry commenter criticized the Study's review of arbitration processes for its failure to assess whether the AAA due process protocol was effective in ensuring arbitrator neutrality. The commenter suggested that the Bureau could have reviewed decisions of individual arbitrators to see if they had a pattern of favoring the companies over consumers. This commenter further criticized the Bureau for making no effort to evaluate whether arbitrators' decisions were properly decided.

Similarly, a Congressional commenter expressed concern that the Study failed to thoroughly analyze and compare arbitration programs and program features. The commenter suggested that the Bureau should have reviewed whether certain features of arbitration programs produce better consumer outcomes and enhance the consumer experience as compared to others, but did not identify specifically which features warranted additional analysis.

An industry commenter took issue with the Bureau's assertion that the disputes it reviewed involving AAA represent substantially all consumer finance arbitration disputes that were filed during the Study period, noting that JAMS was named as the administrator at least 50 percent as often as AAA in the agreements reviewed by the Bureau.

Another industry commenter suggested that the Study's data regarding disputes reached on the merits were not representative of the sample because only 32 percent of cases had a judgment on the merits, while the rest remained dormant or settled on unknown terms.

Response to Comments on Section 5 of the Study

With respect to the commenter that criticized the Bureau for not evaluating whether certain arbitration programs (such as those that limit consumer costs, allow for ''bonus'' awards,[260] or other benefits) provide better consumer outcomes, the Bureau notes that the case records available for the Study did not necessarily include the terms of the arbitration agreement and that, except for the cases that were decided by an arbitrator, the case records also did not include the terms of the outcomes. Thus, the analysis of arbitration programs (as expressed in arbitration agreements) suggested by this commenter was not feasible and, in any event, would not have impacted the central finding, discussed below, that an extremely small number of consumers avail themselves of any arbitration process under any scheme.

As to the commenter that criticized the Bureau for not evaluating whether arbitrators deciding AAA consumer cases were biased, the Bureau notes that, for those cases that were resolved with a written opinion, the Study reported whether the decision favored the consumer or the financial institution and the amount of the award, if any. The Study also explored whether arbitrators favored parties that were repeat players before them.[261] As the Study noted, commentators have long raised concerns that such a repeat player bias may occur given incentives some arbitrators may have to curry favor while seeking future appointments.[262] The Bureau could not evaluate outcomes in cases that settled or cases that were resolved in a manner consistent with a settlement. The Bureau also did not evaluate whether arbitrators' decisions were ''properly decided'' as the Bureau does not believe it would have a basis for making such a determination. As discussed in Part VI below, this rulemaking does not rely on a finding that arbitration proceedings are fair (or not) but rather that consumers do not use arbitration to resolve disputes in any meaningful volume.

With respect to the industry commenter that suggested the Study undercounted individual arbitration because it studied only those filed with the AAA and not JAMS, the Bureau noted in the Study and the proposal that JAMS appears to handle a relatively small number of consumer finance arbitrations per year. For example, it reported to the Bureau that it handled 115 consumer finance arbitrations in 2015 (an unknown number of which were filed by consumers as opposed to providers),[263] significantly fewer than the approximately 600 per year the Bureau found filed with the AAA in the Study. Thus, the Bureau believes that the relevant data supports a conclusion that the AAA cases represent a substantial majority of consumer finance arbitrations that occur. Further, even if the Bureau were to assume that JAMS handled a consumer finance caseload equal to half of the AAA caseload (based on the fact that JAMS was named as an administrator about 50 percent as often as AAA), that would still suggest that there are fewer than 900 consumer financial services cases per year as between the two largest administrators.

As for the commenter that contended that the decisions reached on the merits are not representative of the whole, the Bureau notes that it does not contend otherwise. It noted in the Study that a merits-decision occurred less frequently than other forms of resolution, such as settlement.[264]

5. Consumer Financial Litigation: Frequency and Outcomes (Section 6 of Study)

The Study's review of consumer financial litigation in court represented, the Bureau believes, the only analysis of the frequency and outcomes of consumer finance cases to date. While there is a large body of research regarding cases filed in court generally, preexisting studies of consumer finance cases either assessed only the number of filings—not typologies and outcomes, as the Study did—or focused on the frequency of cases filed under individual statutes.[265] The Study performed this analysis for individual court litigation concerning five of the same six product markets as those covered by its analysis of consumer financial arbitration: Credit cards, checking accounts and debit cards; payday loans; GPR prepaid cards; and private student loans.[266] In addition, the Study analyzed class cases filed in these five markets and also with respect to automobile loans. This analysis focused on cases filed from 2010 to 2012, as an analogue to the years for which electronic AAA records were available,

[258] *Id.* section 5 at 69–70.

[259] *Id.* section 5 at 70–71.

[260] An example ''bonus'' provision in an arbitration agreement would require a company to pay a consumer double or triple the company's highest settlement offer if the consumer wins on his or her arbitration claim in an amount that exceeds that settlement offer.

[261] *Id.* section 5 at 56–68.

[262] *Id.*

[263] *See* 81 FR 32830, 32856 (May 24, 2016); Study, *supra* note 3, section 5 at 9.

[264] Study, *supra* note 3, section 5 at 11–12.

[265] *See, e.g.,* Thomas E. Willging et al., ''Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules,'' (Fed. Jud. Ctr., 1996), *available at http://www.uscourts.gov/file/document/empirical-study-class-actions-four-federal-district-courts-final-report-advisory*; ACA International, ''FDCPA Lawsuits Decline While FCRA and TCPA Filings Increase,'' (reporting on January 2014 case filings under FDCPA as reported by WebRecon), *cited in* Study, *supra* note 3, section 6 at 19 n.19.

[266] Due to resource constraints, the Bureau did not examine individual automobile purchase loans. *See* Study, *supra* note 3, section 6 at 11 n.22.

and captured outcomes reflected on dockets through February 28, 2014.

The Bureau's class action litigation analysis extended to all Federal district courts. To conduct this analysis, the Bureau collected complaints concerning these six products using an electronic database of pleadings in Federal district courts.[267] The Bureau also reviewed Federal multi-district litigation (MDL) proceedings to identify additional consumer financial complaints filed in Federal court. After the Bureau identified its set of Federal class complaints concerning the six products and individual complaints concerning the five products, it collected the docket sheet from the Federal district court in which the complaint was filed in order to analyze relevant case events. The Bureau also collected State court class action complaints from three States (Utah, Oklahoma, and New York) and seven large counties that had a public electronic database in which complaints were regularly available.[268] The Bureau determined that it was feasible to collect class action complaints from the State and county databases, but not complaints in individual cases from those databases.[269] Collectively, this State court sample accounted for 18.1 percent of the U.S. population as of 2010.[270]

The Study's analysis of putative class action filings identified 562 cases filed by consumers from 2010 through 2012 in Federal courts and selected State courts concerning the six products, or about 187 per year.[271] Of these 562 putative class cases, 470 were filed in Federal court, and the remaining 92 were filed in the State courts in the Bureau's State court sample set.[272] In Federal court class cases, the most common claims were under the FDCPA and State statutes prohibiting unfair and deceptive acts and practices.[273] In State court class cases, State law claims predominated.[274] All Federal and State class cases sought monetary relief. Unlike the AAA arbitration rules, court rules of procedure generally do not require plaintiffs to identify specific claim amounts in their pleadings. Accordingly, the Bureau had limited ability to ascertain the number of ''small'' claims asserted in class action litigation for purposes of comparison to the 25 arbitration disputes each year in the markets analyzed in the AAA case set that included consumer affirmative claims of $1,000 or less.[275] The Bureau was able to determine, however, that more than one-third of the 562 class cases sought statutory damages only under Federal statutes that cap damages available in class proceedings (sometimes accompanied by claims for actual damages). Only about 10 percent of the 562 class cases sought statutory damages under Federal statutes that do not cap damages available in class proceedings.[276]

As with the Study's analysis of the arbitration proceedings noted above, the Study set out a number of explicit and inherent limitations to its analysis of litigation outcomes.[277] While the available data indicated that most court cases were resolved by settlement or in a manner consistent with a settlement, the terms of any settlement were typically unavailable from the court record unless the settlement was on a class basis. The bulk of cases, therefore, including individual cases and cases filed as a class action but that settled on an individual basis only, resulted in unknown substantive outcomes.[278] Other limitations, however, were unique to the review of litigation filings. For instance, the lack of specific information about claim amounts in court filings meant that the Study was unable to offer a meaningful analysis of recovery rates.[279] Further, some cases in court often could not be reduced to a single result because plaintiffs in those cases may have alleged multiple claims against multiple defendants, and one case can have multiple outcomes across the different claims and parties. For this reason, the Study reported on several types of outcomes, more than one of which may have occurred in any single case.[280] In addition, while the Bureau believed that its data set of State court complaints is the most robust available, the Bureau noted the dataset's limitations. For example, the three States and seven additional counties from which the Bureau collected complaints filed in State court may not be representative of the consumer financial litigation filed in State courts nationwide.[281]

In addition to the limitations on comparing case outcomes, the Study also noted that even comparing frequency or process across litigation and arbitration proceedings was of limited utility.[282] The Study noted that differences in data may result from decisions consumers and companies make pertaining to arbitration and litigation, including but not limited to whether a relationship would be governed by a pre-dispute arbitration agreement; whether a case is filed and if so on a class or individual basis; and whether to seek arbitration of cases filed in court.[283] With those caveats noted, the Study indicated that class filings result in myriad outcomes. Of the 562 class cases the Study identified, 12.3 percent (69 cases) had final class settlements approved by February 28, 2014.[284] As of April 2016, 18.1 percent of the filings (102 cases) featured final class settlements or class settlement agreements pending approval.

An additional 24.4 percent of the class cases (137 cases) involved a non-class settlement and 36.7 percent (206 cases) involved a potential non-class settlement.[285] In 10 percent of the class cases (56 cases), the action against at least one company defendant was dismissed as the result of a dispositive

[267] LexisNexis, ''Courtlink,'' *http://www.lexisnexis.com/en-us/products/courtlink-for-corporate-or-professionals.page* (last visited Feb. 10, 2017).

[268] To determine what counties to include in the data set, the Bureau started with the Census Bureau's list of the 10 most populous U.S. counties. The Bureau then excluded the two counties on that list that were already included in the State court sample (two in New York City) and one additional county that did not have a public electronic database in which complaints were regularly available. The remaining seven counties were the counties in the Bureau's data set.

[269] Study, *supra* note 3, appendix L at 71.

[270] *Id.* section 6 at 15; *see generally id.* appendix L.

[271] *Id.* section 6 at 6. Due to limitations of the electronic database coverage and searchability of State court pleadings, the Bureau does not believe the electronic search of U.S. District Court pleadings identified a meaningful set of complaints filed in State court and subsequently removed to Federal court. *Id.* section 6 at 13.

[272] *Id.* section 6 at 6. Because the Bureau's State sample accounted for about one-fifth of the U.S. population, the actual number of State class filings would have been higher, but the Bureau cannot say by how much. *Id.* section 6 at 14–15.

[273] *Id.* section 6 at 6.

[274] *Id.*

[275] *Id.* section 5 at 10.

[276] *Id.* section 6 at 22–26. The ''capped'' claims arose from five statutory schemes: the Expedited Funds Availability Act, the EFTA, the FDCPA, the TILA (including the Consumer Leasing Act and the Fair Credit Billing Act), and the ECOA (which provides for punitive and actual damages but not statutory damages). *Id.* section 6 at 23 n.45 (describing damages limitations). In over half of the cases in which Federal statutory damages were sought, the consumers also sought actual damages. *Id.* section 6 at 25 n.48.

[277] *Id.* section 6 at 2–5.

[278] *Id.* section 6 at 3.

[279] *Id.*

[280] *Id.* section 6 at 3–4.

[281] *Id.* section 6 at 15 n.34. *See also id.* appendix L.

[282] *Id.* section 6 at 4.

[283] *Id.*

[284] *Id.* section 6 at 7.

[285] *Id.* The Bureau deemed cases to be potential non-class settlements where a named plaintiff withdrew claims or the court dismissed claims for failure to serve or failure to prosecute, which could have occurred due to a non-class settlement; but the record did not disclose that such a settlement occurred. Litigants generally do not have an obligation to disclose non-class settlements. In addition, they have certain incentives not to do so.

motion unrelated to arbitration.[286] In 8 percent of the 562 class cases (45 cases), all claims against a company were stayed or dismissed based on a company filing an arbitration motion.[287]

The Study also identified 3,462 individual cases filed in Federal court concerning the five product markets studied during the period, or 1,154 per year.[288] As with putative class filings, individual pleadings provide minimal information about the overall claim amounts sought by plaintiffs. Less than 6 percent of the overall individual litigation disputes were filed without counsel.[289]

The Bureau reviewed outcomes in all of the individual cases from four of the five markets studied and a random sample of the cases filed in the fifth market, resulting in an analysis of 1,205 cases.[290] In 48.2 percent of those 1,205 cases (581 cases), the record reflected that a settlement had occurred, though the record only rarely (in around 5 percent of those 581 cases) reflected the monetary or other relief afforded by the settlement. In 41.8 percent of the 1,205 cases (504 cases), the record reflected a withdrawal by at least one consumer or another outcome potentially consistent with settlement, such as a dismissal for failure to prosecute or failure to serve (but where the plaintiff also might have withdrawn with no relief). In 6.8 percent of the cases (82 cases), a consumer obtained a judgment against a company party through a summary judgment motion, a default judgment (most common), or, in two cases, a trial. In 3.7 percent of cases (44 cases), the action against at least one company was dismissed via a dispositive motion unrelated to arbitration.[291]

Individual cases generally resolved more quickly than class cases. Aside from cases that were transferred to MDLs, Federal class cases closed in a median of approximately 218 days for cases filed in 2010 and 211 days for cases filed in 2011. Class cases in MDLs were markedly slower, closing in a median of approximately 758 days for cases filed in 2010 and 538 days for cases filed in 2011. State class cases closed in a median of approximately 407 days for cases filed in 2010 and 255 days for cases filed in 2011.[292] Aside from a handful of individual cases transferred to MDL proceedings, individual Federal cases closed in a median of approximately 127 days.[293]

Notwithstanding the inherent limitations noted above, the Bureau's large set of individual and class action litigations allowed the Study to explore whether motions seeking to compel arbitration were more likely to be asserted in individual filings or in putative class action filings. Across its entire set of court filings, the Study found that motions seeking to compel arbitration were much more likely to be asserted in cases filed as class actions. For most of the cases analyzed in the Study, it was not apparent whether the defendants in the proceedings had the option of moving to seek arbitration proceedings (*i.e.,* the Bureau was unable to determine definitively whether the contracts between the consumers and defendants contained arbitration agreements). The Bureau, however, was able to limit its focus to complaints against companies that it knew to use arbitration agreements in their consumer contracts in the year in which the cases were filed by limiting its sample set to disputes regarding credit cards. In the 40 class cases where the Study was able to ascertain that the case was subject to an arbitration agreement, motions seeking arbitration were filed 65 percent of the time.[294] In a comparable set of 140 individual disputes, motions seeking arbitration were filed one-tenth as often, in only 5.7 percent of proceedings.[295] Overall, the Study identified nearly 100 Federal and State class action filings that were dismissed or stayed because companies invoked arbitration agreements by filing a motion to compel and citing an arbitration agreement in support.[296]

Comments Received on Section 6 of the Study

One industry lawyer commenter criticized the Bureau's review of class action filings for failing to evaluate the underlying merits of the class actions and whether they asserted substantive claims or instead alleged what the commenter considered technical violations, such as improperly worded disclosures. This commenter similarly suggested that the Bureau should have evaluated whether class action claims were meritorious or whether plaintiffs made frivolous claims to attract nuisance value settlements.

An industry commenter took issue with the fact that the Bureau studied 1,800 arbitrations but only a sample of the individual litigation cases and asserted that extrapolating from the latter but not the former provided an inaccurate picture of the individual litigation landscape. The commenter similarly opined that the State court class actions studied by the Bureau cannot be relied upon to be representative of such litigation nationwide because the Bureau, in the Study, acknowledged that they may not be representative of the entire country.

An industry commenter took issue with the small number of instances documented in the Study (12) where a dismissed class claim was re-filed in arbitration, contending that the Bureau did not research whether claims were filed in any arbitration forum other than the AAA.

Relatedly, an industry commenter expressed concern that the number of individual Federal court lawsuits reported in the Study was too low. Specifically, the commenter cited records of the Transactional Records Access Clearinghouse (TRAC), which is a data gathering and research organization at Syracuse University. The commenter asserted, based on the TRAC data, that there were 890 consumer credit lawsuits filed in Federal district court in May 2012 and 723 such suits filed in September 2012.[297] The commenter also referenced data from a commercial litigation monitoring Web site called WebRecon that similarly stated that more than 1,000 consumers per month filed suits in Federal courts in the years 2010, 2011, and 2012 for violations of the TCPA, FCRA, or the FDCPA.[298] Taken together, the commenter asserted these figures as a

[286] *Id.*

[287] *Id.*

[288] *Id.* section 6 at 27–28. As noted above, the Study did not include data on individual cases in State courts, and the Study evaluated Federal cases in five product markets.

[289] *Id.* section 6 at 7.

[290] Because the 3,462 cases the Study identified contained a high proportion of credit card cases, the Bureau reviewed outcomes in a 13.3 percent sample of the credit card cases. *Id.* section 6 at 27–28.

[291] *Id.* section 6 at 48.

[292] *Id.* section 6 at 9.

[293] *Id.*

[294] *Id.* section 6 at 60–61. The court granted motions seeking arbitration in 61.5 percent of these disputes.

[295] *Id.* section 6 at 61. The court granted motions seeking arbitration in five of the eight individual disputes in which motions seeking arbitration were filed (62.5 percent).

[296] *Id.* section 6 at 58 (noting that companies moved to compel arbitration in 94 of the 562 class action cases in the Bureau's dataset, and that the motion was granted in full or in part in 46 cases); *id.* section 6 at 58–59 (noting that the Bureau confirmed that motions to compel arbitration were granted in at least 50 additional class cases using a methodology described in Appendix P).

[297] TRAC Reports Inc., ''Consumer Credit Civil Findings For May 2012,'' (July 12, 2012), *available at http://trac.syr.edu/tracreports/civil/285/*; TRAC Reports Inc., ''Consumer Credit Card Civil Lawsuits Starting to Fall,'' (Nov. 6, 2012), *available at http://trac.syr.edu/tracreports/civil/298/*. According to TRAC, there were 890 new ''consumer credit'' lawsuits filed during May 2012, most of which asserted claims under FDCPA or FCRA.

[298] WebRecon LLC, ''Out Like a Lion. . .Debt Collection Litigation and CFPB Complaint Statistics, Dec. 2015 and Year in Review,'' *available at https://webrecon.com/out-like-a-lion-debtcollection-litigation-cfpb-complaint-statistics-dec-2015-year-in-review/*.

basis to question the accuracy of the Bureau's data.

Response to Comments Received on Section 6

Regarding the industry lawyer commenter that criticized the Study's failure to explore whether class actions assert substantive or technical claims, the Bureau notes that the Study did report on the types of claims asserted in Federal class actions by statute.[299] The Bureau does not believe that it would be appropriate for it to classify claims alleging violations of Federal or State law as ''technical'' or not ''substantive.'' Nor does the Bureau believe that it would be feasible, given notice pleading requirements, or appropriate for the Bureau to assess the merits of the claims asserted in these complaints. The Bureau notes that the Federal Rules of Civil Procedure provide means of securing dismissal of complaints which, on their face, fail to state a valid cause of action and of obtaining summary judgments for cases in which there are no genuine issues of material fact and the defendant is entitled to judgment as a matter of law. As discussed below in connection with Section 8 of the Study, the Bureau reported statistics on such dispositive motions in the context of Federal class action settlements. The Bureau discusses further judicial safeguards on such cases in Part VI Findings below, including by noting legislative and judicial safeguards that limit frivolous litigation. The Bureau also disagrees with the commenter that said the Study only looked for claims re-filed in arbitration in its AAA data. As is explained in Section 6 of the Study, the Bureau located nine of the 12 re-filings in its review of court filings.[300] Four of these cases were filed with JAMS and five with AAA. The remaining three cases that the Bureau identified came from its review of AAA data.[301]

As for the assertions that the Bureau's analysis undercounted the number of individual cases filed in Federal court, the Bureau does not believe that the figures cited by the commenters provide a basis on which to question the accuracy of the Bureau's data. As is explained in detail in Appendix L of the Study, the Bureau completed its analysis by first crafting a deliberately overbroad text search in the Courtlink database and then manually sorting through that data for cases that fit the relevant parameters. The Bureau filtered this data so that it could analyze individual claims filed in Federal court with respect to five consumer financial products (credit cards, GPR prepaid cards, checking accounts/debit cards, payday loans, and private student loans) and found approximately 1,200 per year. The TRAC and WebRecon sources referenced by the commenter did not, as the Bureau did, analyze each case to see whether it fell into one of the five product categories analyzed in that part of Section 6. Both databases appear to be based on initial case designations made upon filing by a plaintiff. Thus, many cases designated as ''consumer credit'' fall outside both the parameters of Section 6 and the Bureau's proposed rulemaking. For example, not every case filed under the FCRA or the FDCPA and reported by TRAC as a consumer credit case concerns a consumer financial product or service, and thus TRAC overstates the number of Federal individual claims concerning such products. Similarly and as the Bureau noted in the proposal, an unknown number of the cases reported by WebRecon also would not be covered by the Study or by the proposal rule because that database similarly includes all claims under FDCPA, FCRA and TCPA and have not been analyzed further. As evidence of the overbroad nature of these results, a separate study explained that more than 3,000 TCPA claims were filed in 2015 but many of these concerned marketing communications unrelated to consumer finance, such as those against a merchant or a company with whom the consumer has no relationship (contractual or otherwise).

As for the commenter concerned about the Bureau having extrapolating data on individual litigation, the Bureau notes that the Study did not purport to analyze all claims about consumer financial products filed in Federal court. Thus it agrees that the number of individual Federal lawsuits about all of the consumer financial products that would be covered by this rule is necessarily higher than 1,200. The Bureau knows of no reason to view the studied markets as materially different than other financial services markets, however, with regard to the level of Federal litigation overall, nor does the commenter suggest otherwise. As for extrapolating from Federal individual lawsuits, the Bureau disagrees that extrapolating data is inappropriate. Extrapolation is standard technique used in studies like the Bureau's and is typically only inappropriate if there is a reason that the data collected is unique. The Bureau does not believe such a reason exists regarding its Federal individual court records, nor did the commenter identify one.[302] As for the State court class action data, which was drawn from courts representing 18.1 percent of the population, the Bureau stated in the Study that the data from the State courts analyzed may not be representative of the consumer financial litigation filed in State courts nationwide.[303] Despite the cautious language in the Study, the Bureau is not aware of any reason why this data are not representative of parts of the country not studied. Below, in Part VI, the Bureau discusses the extent to which it relies on this data.

6. Small Claims Court (Section 7 of Study)

As described above, Section 2 of the Study found that most arbitration agreements in the six markets the Bureau studied contained a small claims court ''carve-out'' that typically afforded either the consumer or both parties the right to file suit in small claims court as an alternative to arbitration. Commenters on the RFI urged the Bureau to study the use of small claims courts with respect to consumer financial disputes. The Bureau undertook this analysis, published the results of this inquiry in the Preliminary Results, and also included these results in Section 7 of the Study.

The Bureau believes that the Study's review of small claims court filings is the only study of the incidence and typology of consumer financial disputes in small claims court to date. Prior research suggests that companies make greater use of small claims court than consumers and that most company-filed suits in small claims court are debt collection cases.[304] The Study, however,

[299] Study, *supra* note 3, section 6 at 20 fig. 1 (which shows the various legal claims, including Federal statutory, State common law, and State statutory claims, asserted in 562 class cases filed in Federal and State Court); *id.* section 6 at 21 fig. 2 (which shows the legal claims asserted in the 470 Federal class cases).

[300] *Id.* section 6 at 59.

[301] *Id.*

[302] The Bureau collected State court data from parts of New York, California, Florida, Utah, Oregon, and Oklahoma. *See* Study, *supra* note 3, section 6 at 14–15.

[303] Study, supra note 3, section 6 at 15 n.34.

[304] As described in the Study, for example, a 1990 analysis of the Iowa small claims court system found that many more businesses sued individuals than individuals sued businesses. Suzanne E. Elwell & Christopher D. Carlson, ''The Iowa Small Claims Court: An Empirical Analysis,'' 75 Iowa L. Rev. 433 (1990). In 2007, a working group of Massachusetts trial court judges and administrators ''recognized that a significant portion of small claims cases involve the collection of commercial debts from defendants who are not represented by counsel.'' Commonwealth of Mass., Dist. Ct. Dep't of the Trial Ct., ''Report of the Small Claims Working Group,'' at 3 (Aug. 1, 2007), *available at http://www.mass.gov/courts/docs/lawlib/docs/smallclaimreport.pdf.*

was the first that the Bureau has been able to identify to assess the frequency of small claims court filings concerning consumer financial disputes across multiple jurisdictions.

The Bureau obtained the data for this analysis from online small claims court databases operated by States and counties. No centralized repository of small claims court filings exists.[305] The Bureau identified 12 State databases that purport to provide Statewide data and that can be searched by year and party name, plus a comparable database for the District of Columbia and a database for New York State that did not include New York City. This ''State-level sample'' covered approximately 52 million people. The Bureau also identified 17 counties with small claims court databases that met the same criteria (purporting to provide countywide data and being searchable by year and party name), including small claims courts for three of five counties in New York City. This ''county-level sample'' covered approximately 35 million people and largely avoided overlap with the State-level sample.[306] The Bureau searched each of these 31 jurisdictions' databases for cases involving a set of 10 large credit card issuers that the Bureau estimated to cover approximately 80 percent of credit card balances outstanding nationwide.[307] The Bureau cross-referenced the issuers' advertising patterns to confirm that the issuers offered credit on a widespread basis to consumers in the jurisdictions the Bureau studied.[308]

The Study estimated that, in the jurisdictions the Bureau studied—with a combined population of approximately 87 million people—consumers filed no more than 870 disputes in 2012 against these 10 institutions[309] (including the three largest retail banks in the United States).[310] This figure included all cases in which an individual sued an issuer or a party with a name that a consumer might use to mean the issuer, without regard to whether the claim was consumer financial in nature.

As the Study noted, the number of claims brought by consumers that were consumer financial in nature was likely much lower. Out of the 31 jurisdictions studied, the Bureau was able to obtain underlying case documents on a systematic basis for only two jurisdictions: Alameda County and Philadelphia County. The Bureau's analysis of all cases filed by consumers against the credit card issuers in its sample found 39 such cases in Alameda County and four such cases in Philadelphia County. When the Bureau reviewed the actual pleadings, however, only four of the 39 Alameda cases were clearly individuals filing credit card claims against one of the 10 issuers, and none of the four Philadelphia cases were situations where individuals were filing credit card claims against one of the 10 issuers. This additional analysis shows that the Bureau's broad methodology likely significantly overstated the actual number of small claims court cases filed by consumers against credit card issuers.[311]

The Study also found that in small claims court credit card issuers were more likely to sue consumers than consumers were to sue issuers. The Study estimated that, in these same jurisdictions, issuers in the Bureau's sample filed over 41,000 cases against individuals.[312] Based on the available data, it is likely that nearly all these cases were debt collection claims.[313]

Comments Received on Section 7 of the Study

One industry commenter asserted that the Bureau had only evaluated whether arbitration agreements contained small claims court carve-outs and requested that the Bureau re-conduct its Study to, among other things, critically analyze the use of small claims court as compared to arbitration or class action litigation. The commenter did not specifically address the Bureau's analysis in Section 7 of the Study or otherwise specify what further type of critical analysis would have been appropriate.

Another industry commenter asserted that the sample size used by the Bureau in its analysis of small claims court was too small and that this demonstrates a weakness of the Study that undermines the credibility of any assertion that consumers rarely proceed individually to obtain relief from legal violations. This commenter focused on the fact that the Bureau's review was limited to what it considered a small number of jurisdictions and only looked at claims against 10 large credit card issuers in 2012, asserting that the Bureau thus understated the total number of small claims cases. Relatedly, another industry commenter expressed concern about the Bureau's limited analysis of small claims court cases, emphasizing that the Bureau was able to review case documents in only two jurisdictions out of the thousands of counties in the United States. However, unlike the prior commenter, this commenter was concerned that the data reflected by the Bureau's methodology may overstate the number of small claims cases filed by consumers against credit card issuers.

Response to Comments on Section 7 of the Study

The Bureau disagrees that its Study of small claims court was limited to an analysis of whether arbitration agreements contain class action carve-outs. As is discussed in detail above, the Bureau conducted the most fulsome analysis it could practicably conduct of consumers' use of small claims court to resolve disputes with their providers.[314] As stated above, the Bureau believes that this is the only Study with such a broad scope of jurisdictional coverage that analyzes the incidence and typology of consumer financial disputes in small claims court to date. This was in addition to—and distinct from—Section 2's analysis of companies' use of small-claims court carve-outs in their arbitration agreements.

The Bureau disagrees with the commenter that asserted that the size of the sample and the nature of its review of small claims court data undermine the Bureau's conclusion that consumers rarely proceed in this venue. The commenter did not explain why, given that the Bureau analyzed small claims courts in jurisdictions with a combined population of approximately 87 million people and found only 870 suits in 2012 against these 10 largest credit card issuers, it should be expected to find a substantially higher incidence of suits in the other portions of the country or against other providers. As is explained in the Study's Appendix Q,[315] no one had previously conducted a sample as large as the Bureau's, and the 10 credit card issuers studied accounted for 84 percent of credit card outstandings in the Bureau's credit card contract

[305] Study, *supra* note 3, section 7 at 5.

[306] *Id.* section 7 at 6.

[307] *Id.*

[308] Preliminary Results, *supra* note 150, at 155 and 156 tbl. 10.

[309] Study, *supra* note 3, section 7 at 9. Due to a typographical error in the Study, the combined population of these jurisdictions was incorrectly reported as 85 million.

[310] *Id.* appendix Q at 120–21.

[311] *Id.* section 7 at 8–9.

[312] *Id.* section 1 at 16.

[313] *Id.*

[314] *See id.* section 7 at 5–7. Specifically, the Bureau analyzed the small claims court cases involving credit card issuers with a number of different contractual provisions; some issuers analyzed had no arbitration clauses, some had arbitration clauses with mutual small claims carve-outs (meaning that both the consumer and company had the right to maintain a case in small claims court), some had arbitration clauses with a non-mutual small claims carve-out (meaning that only the consumer had the right to maintain an action in small claims court), and one had arbitration provisions with no small claims carve-outs. *Id.*

[315] *Id.* appendix Q at 117–18.

sample.[316] Given the modest number of consumer-filed claims found, the Bureau does not believe that it is likely that a large number of cases were filed in regular State courts or small claims courts against providers of consumer financial products or services.[317]

With regard to the other commenter's concern that the Bureau has overstated the number of small claims court cases in the jurisdictions it studied, the Bureau pointed out that the 870 cases identified in Section 7 constituted a likely upper limit to the number of consumer-filed small claims court cases against the identified credit card issuers.[318] Indeed, as the Bureau notes in Part VI Findings below, the commenter expressed concern at the potential over-counting of consumer claims tends to support the Bureau's belief that the number of small claims court cases involving credit cards indicates that these claims may go unaddressed but for class actions.

7. Class Action Settlements (Section 8 of Study)

Section 8 of the Study contained the results of the Bureau's quantitative assessment of consumer financial class action settlements. As described above, Section 6 of the Study, which analyzed consumer financial litigation, included findings about the frequency with which consumer financial class actions are filed and the types of outcomes reached in such cases. The dataset used for that analysis consisted of cases filed between 2010 and 2012 and outcomes of those cases through February 28, 2014.

To better understand the results of consumer financial class actions that result in settlements, for Section 8, the Bureau conducted a search of class action settlements through an online database for Federal district court dockets. The Bureau searched this database using terms designed to identify final settlement orders finalized from 2008 to 2012 in consumer financial cases. The selection criteria for this data set differed from many other sections in the Study, in that it was not restricted to a discrete number of consumer financial products and services.[319] Rather, the Bureau reviewed these dockets and identified settlements where either: (1) The complaint alleged a violation of one of the enumerated consumer protection statutes under title X of the Dodd-Frank Act; or (2) the plaintiffs were primarily consumers and the defendants were institutions selling consumer financial products or engaged in providing consumer financial services (other than consumer investment products and services), regardless of the basis of the claim. To the extent that the case involved *any* such consumer financial product or service—not only the six main product areas identified in the AAA and litigation sets—it was included in the data set.[320]

The set of consumer financial class action settlements overlapped with the data set used for the analysis of the frequency and outcomes of consumer financial litigation (Section 6 of the Study) insofar as cases filed in 2010 through 2012 had settled by the end of 2012. The analysis of class action settlements was larger because it encompassed a wider time period (settlements finalized from 2008 through 2012), which, among other benefits, decreased the variance across years that could be created by unusually large settlements and allowed the Bureau to account for the impact of such events as the April 2011 Supreme Court decision in *Concepcion,* which is discussed above.[321] The Bureau used this data set to perform a more detailed analysis of class settlement outcomes, including issues such as the number of class members eligible for relief in these settlements; the amount and types of relief available to class members; the number of class members who had received relief and the amount of that relief; and the extent to which relief went to attorneys. While several previous studies of class action settlements have been published, the Study was the first to comprehensively catalogue and analyze class action settlements specific to consumer financial markets.[322]

As the Study noted, there were limitations to the Bureau's analysis. The Study understated the number of class action settlements finalized, and the amount of relief provided, during the period under study because the Bureau could not identify class settlements in State court class action litigation. (The Bureau determined it was not feasible to do so in a systematic way.[323]) Further, the claims data on the settlements the Bureau identified is incomplete, as dockets are often closed when the final approved settlement order is issued even if claims numbers are not yet final.[324] In addition, not every settlement document contained information on every data point or metric that the Bureau sought to analyze; the Study accounted for this by referencing, for every metric reported on, the number of settlements that provided the relevant number or estimate.[325]

The Bureau identified 422 Federal consumer financial class settlements that were approved between 2008 and 2012, resulting in an average of approximately 85 approved settlements per year.[326] The bulk of these settlements (89 percent) concerned debt collection, credit cards, checking accounts, or credit reporting.[327] Of these 422 settlements, the Bureau was able to analyze 419.[328] The Bureau identified the class size or a class size estimate in 78.5 percent of these settlements (329 settlements). There were 350 million total class members in these settlements. Excluding one large settlement with 190 million class members (*In re TransUnion Privacy Litigation*),[329] these settlements included 160 million class members.[330]

These 419 settlements included cash relief, in-kind relief, and other expenses

[316] *See id.* section 3 and section 7 at 6 n.19.

[317] For example, in collecting data for Section 6 of the Study concerning litigation in court, the Bureau's preliminary research suggested that the number of consumer-filed consumer finance cases in State court would not be high. *Id.* appendix L at 70–71 (explaining that the Bureau considered searching for State cases using a contract ''nature of suit'' but ultimately determined that the total number of cases in this category would be high while the number of consumer-filed cases concerning the products we covered would not be).

[318] *Id.* section 7 at 9 (noting that the detailed analysis of consumer-filed cases in two jurisdictions led the Bureau to the conclusion that ''our broad methodology may well overstate the actual number of small claims court cases filed by credit card consumers against our sample of issuers.'').

[319] Because Section 8 of the Study focused on settled class action disputes, the Bureau could begin its search with a relatively limited set of documents: all Federal class action settlements available on the Westlaw docket database, resulting in over 4,400 disputes settled between January 1, 2008 and December 31, 2012. *Id.*at appendix R. In contrast, in exploring filings in Federal and State court in Section 6 of the Study, described above, the volume of court filings required the Bureau to rely on word searches that helped limit the set of documents that the Bureau manually reviewed to the six product groups mentioned previously. *Id.* at appendix L.

[320] *Id.* section 8 at 8–11. The Study did, however, exclude disputes involving residential mortgage lenders, where arbitration provisions are not prevalent, and another subset of disputes involving claims against defendants that are not ''covered persons'' regulated by the Bureau, such as claims against merchants under the Fair and Accurate Credit Transaction Act. *Id.* section 8 at 9 n.25 and appendix S.

[321] *Concepcion,* 563 U.S. at 344.

[322] *See* Study, *supra* note 3, section 8 at 8–9.

[323] *Id.* section 8 at 10.

[324] *Id.* section 8 at 11.

[325] *Id.* section 8 at 10.

[326] *Id.* section 8 at 9.

[327] *Id.* section 8 at 11.

[328] *Id.* section 8 at 3 n.4. For the purposes of uniformity in analyzing data, the Bureau excluded three cases for which it was unable to find data on attorney's fees. These three cases would not have affected the results materially. *Id.*

[329] *Id.* section 8 at 3.

[330] *Id.*

that companies paid. The total amount of gross relief in these 419 settlements—that is, aggregate amounts promised to be made available to or for the benefit of damages classes as a whole, calculated before any fees or other costs were deducted—was about $2.7 billion.[331] This estimate included cash relief of about $2.05 billion and in-kind relief of about $644 million.[332] These figures represent a floor, as the Bureau did not include the value, or cost to the defendant, of making agreed behavioral changes to business practices.[333] The Study showed that there were 53 settlements covering 106 million class members that mandated behavioral relief that required changes in the settling companies' business practices beyond simply to comply with the law.

Sixty percent of the 419 settlements (251 settlements) contained enough data for the Bureau to calculate the value of cash relief that, as of the last document in the case files, either had been or was scheduled to be paid to class members. Based on these cases alone, the value of cash payments to class members was $1.1 billion. Again, this excludes payment of in-kind relief and any valuation of behavioral relief.[334]

For 56 percent of the 419 settlements (236 settlements), the docket contained enough data for the Bureau to estimate, as of the date of the last filing in the case, the number of class members who were guaranteed cash payment because either they had submitted a claim or they were part of a class to which payments were to be made automatically. In these settlements, 34 million class members were guaranteed recovery as of the time of the last document available for review, having made claims or participated in an automatic distribution.[335] Of 382 settlements that offered cash relief, the Bureau determined that 36.6 percent included automatic cash distribution that did not require individual consumers to submit a claim form or claim request.[336]

The Study also sought to calculate the rate at which consumers claimed relief when such a process was required to obtain relief. The Bureau was able to calculate the claims rate in 25.1 percent of the 419 settlements that contained enough data for the Bureau to calculate the value of cash relief that had been or was scheduled to be paid to class members (105 cases). In these cases, the average claims rate was 21 percent and the median claims rate was 8 percent.[337] Rates for these cases should be viewed as a floor, given that the claims numbers used to calculate these rates may not have been final for many of these settlements as of the date of the last document in the docket and available for review by the Bureau. The weighted average claims rate, excluding the cases providing for automatic relief, was 4 percent including the large *TransUnion* settlement, and 11 percent excluding that settlement.[338]

The Study also examined attorney's fee awards. Across all settlements that reported both fees and gross cash and in-kind relief, fee rates were 21 percent of cash relief and 16 percent of cash and in-kind relief. Here, too, the Study did not include any valuation for behavioral relief, even when courts relied on such valuations to support fee awards. The Bureau was able to compare fees to cash payments in 251 cases (or 60 percent of the data set). In these cases, of the total amount paid out in cash by defendants (both to class members and in attorney's fees), 24 percent was paid in fees.[339]

In addition, the Study included a case study of *In re Checking Account Overdraft Litigation,* MDL No. 2036 (the Overdraft MDL)—a multi-district proceeding involving class actions against a number of banks—to shed further light on the impact of arbitration agreements on the resolution of individual and class claims. As of the Study's publication, 23 cases had been resolved in the Overdraft MDL. In 11 cases, the banks' deposit agreements did not include arbitration provisions; in those cases, 6.5 million consumers obtained $377 million in relief. In three cases, the defendants' deposit agreements had arbitration provisions, but the defendants did not seek arbitration; in those cases, 13.7 million consumers obtained $458 million in relief.[340] Another four defendants moved to seek arbitration, but ultimately settled; in those cases 8.8 million consumers obtained $180.5 million in relief.[341] Five companies, in contrast, successfully invoked arbitration agreements, resulting in the dismissal of the cases against them.[342]

The Overdraft MDL cases also provided useful insight into the extent to which consumers were able to obtain relief via informal dispute resolution—such as telephone calls to customer service representatives. As the Study noted, in 17 of the 18 Overdraft MDL settlements, the amount of the settlement relief was finalized, and the number of class members determined, after specific calculations by an expert witness who took into account the number and amount of fees that had already been reversed based on informal consumer complaints to customer service. The expert witness used data provided by the banks to calculate the amount of consumer harm on a per-consumer basis; the data showed, and the calculations reflected, informal reversals of overdraft charges. Even after controlling for these informal reversals, nearly $1 billion in relief was made available to more than 28 million class members in these MDL cases.[343]

[331] *Id.* section 8 at 4. The Study defined gross relief as the total amount the defendants offered to provide in cash relief (including debt forbearance) or in-kind relief and offered to pay in fees and other expenses. *Id.*

[332] *Id.*

[333] *Id.* Accordingly, where cases did provide values for behavioral relief, such values were not included in the Study's calculations regarding attorney's fees as a proportion of consumer recovery. *Id.* section 8 at 5 n.10.

[334] *Id.* section 8 at 28.

[335] *Id.* section 8 at 27. The value of cash payments to class members in the 251 settlements described above ($1.1 billion), divided by the number of class members in the 236 settlements described above (34 million), yields an average recovery figure of approximately $32 per class member. Since the publication of the Study, some stakeholders have reported on this $32 figure. *See, e.g.,* Todd Zywicki & Jason Johnston, ''A Ban that Will Only Help Class Action Lawyers,'' Mercatus Ctr., Geo. Mason U. (Dec. 9, 2015). The Bureau notes that this figure represents an approximation, because the set of 251 settlements for which the Bureau had payee information was not completely congruent with the set of 236 settlements for which the Bureau had payment information. However, the Bureau believes that this $32-per-class-member recovery figure is a reasonable estimate.

[336] This set of 382 settlements represents the 410 settlements in which some form of cash relief was available, excluding 28 cases in which cash relief consisted solely of a *cy pres* payment or reward payment to the lead plaintiff(s) because for class members, these cases involve neither automatic nor claims-made distributions. Study, *supra* note 3, section 8 at 19.

[337] *Id.* section 8 at 30.

[338] *Id.* Compared with the ''average claims rate,'' which is merely the average of the claims rates in the relevant class actions, the ''weighted average claims rate'' factors in the relative size of the classes.

[339] *Id.* section 8 at 36 tbl. 13. These percentages likely represent ceilings on attorney's fee awards as a percentage of class payments, as they will fall as class members may have filed additional claims in the settlements after the Bureau's Study period ended.

[340] *Id.* section 8 at 44 tbl. 20. One of these three defendants, Bank of America, had an arbitration agreement in the applicable checking account contract, but, in 2009, began to issue checking account agreements without an arbitration agreement. Prior to the transfer of the litigation to the MDL, Bank of America moved to seek individual arbitration of the dispute; but once the litigation was transferred, Bank of America did not renew its motion seeking arbitration, instead listing arbitration as an affirmative defense. *See, e.g., id.* section 8 at 41 n.59.

[341] *Id.* section 8 at 45 tbl. 21.

[342] *Id.* section 8 at 42 tbl. 18.

[343] *Id.* section 8 at 39–46. The case record did not reveal how many consumers received informal relief of some form. It is likely that many other class action settlements account for similar set-offs for consumers that received relief in informal dispute resolution, as settling defendants would have economic incentives to avoid double-compensating such plaintiffs.

Comments Received on Section 8 of the Study

Several commenters, including industry commenters and a nonprofit commenter, criticized the Bureau's analysis of class action settlements. These commenters cited a working paper by one research center that critiqued use of what it called ''aggregate averages'' to evaluate the effectiveness of class action cases.[344] The result, according to the nonprofit commenter, was that the Study tended to overweight data from a handful of very large settlements in a way that overstates the importance of class actions. Relatedly, an industry commenter contended that the Study gave undue weight to a few large class action settlements. This commenter, several industry commenters, and a research center commenter also took issue with the Bureau's decision to exclude certain settlements from the Study because the settlements did not involve contractual relationships and thus could not be blocked by invoking an arbitration agreement (*e.g.,* cases involving out-of-network ATM notices) while including debt collection class actions which, according to the commenters, also do not typically involve a contractual relationship between the debt collector and the consumer. Along similar lines, an industry trade association commenter took issue with the Bureau's use and analysis of the Overdraft MDL case study. According to the commenter, the overdraft cases were atypical because, among other things, they settled, they involved automatic payouts to class members rather than requiring the submission of claims, and they resulted in abnormally large settlements. The commenter stated that the Bureau should therefore have excluded the cases from its analysis. Furthermore, the commenter asserted that the Bureau failed to address critical questions about the overdraft cases, including the time spent in litigation before settlement, the net present value to consumers of the settlements, and the plaintiff's attorney fees. Finally, the research center commenter also contended that the Bureau's approach biased the Study by skewing data on attorney's fees.

A nonprofit commenter, a research center commenter and several industry commenters also criticized the Study for not attempting to assess the underlying merit of consumer class actions that result in settlements and one of these industry commenters criticized the Bureau for not also analyzing the merits of all class actions, not just those that settled. The nonprofit commenter noted that the Study did not present data regarding which companies were more likely to settle nor did the Bureau offer details on what the commenter identified as key measures of class action performance. Without this information, contended the commenter, readers are unable to know if allowing more class actions would actually resolve a societal problem or instead would be used to extort settlements from companies for minor violations that do not harm anyone. One industry commenter focused on the fact that the Bureau did not calculate any actual injury to consumers belonging to a class and instead assumed that settlements reflect redress for legal violations even though most settlements do not include a finding of wrongdoing and some may be settlements to resolve nuisance suits. This commenter further expressed concern for, in its view, the Bureau's failure to determine if class action claims were meritless or frivolous. Relatedly, one of the industry commenters said that the Bureau should have evaluated whether class actions were brought to address consumer harm as opposed to being motivated by attorneys' desire to earn fees (and thus benefits to consumers were secondary).

An industry commenter suggested that Section 8 exceeded the Bureau's authority, noting that section 1028(a) required the Bureau to study pre-dispute arbitration agreements and did not expressly require the Bureau to study class actions and the use of arbitration agreements to block class actions.

Another industry commenter noted that the data set considered in this section was for a five-year period and not three years as was used in some of the other sections and asserted that this distorted the relative importance of class actions. The commenter further noted that the data was not restricted to specific consumer financial products and services. The commenter also stated that it was difficult to analyze unequal or dissimilar data sets and come to an accurate portrait of how they compare.

A research center commenter and an industry trade association both expressed concern that the analysis in this section of the Study excluded the sums that companies paid attorneys to defend class action claims and class actions that did not report payments to class members; in other words, they asserted that the Bureau did not present the ''net cost'' of class actions in the Study. The commenters argued that the Study accordingly substantially underestimated costs incurred by companies in connection with class actions. The research center commenter further asserted that the Bureau either systematically excluded or overstated the benefit of many claims-made settlements.[345]

Finally, an industry commenter suggested that the Bureau's method for calculating attorney's fees artificially deflated the average amount of attorney's fees reported per case.

Response to Comments Received on Section 8

In response to the commenters that were concerned with the Bureau's use of aggregate averages, the Bureau notes that it did present Section 8's analyses of class action settlements in a number of different segments. This allows the public to avoid any confusion that could be caused by aggregating the entire set, and commenters to focus on whatever segments they believe to be most relevant. The Study also directly addressed potential confusion on aggregate averages by providing data on the number of settlements within various ranges of gross relief.[346] Further, the Study included tables that provided specific information for, among other variables: Year and type of relief (table 7) and 11 different product types (table 8). Regarding the comment that suggested that the Study overweights large settlements such as the Overdraft MDL, the Bureau believes that rather than indicating a problem with the Study, this simply reflects the fact that the distribution of class action settlement amounts is right-skewed. Commenters suggest no reason why this distribution is unusual. As is noted below in Part VI.B.3, there continue to be large class action settlements in consumer finance.

As for the related concern about the Bureau's inclusion of certain class actions that commenters thought should have been excluded, the Bureau

[344] By aggregate averages, the academic paper suggests that the Bureau had computed these averages by counting the number of class members paid, and the total amount paid in attorney's fees, and dividing those numbers by, respectively, the total number of class members and the class payment.

[345] Relatedly, an industry commenter argued that the Bureau's methodology for calculating the percentage of settlement payments going to attorney's fees artificially deflated the average amount of attorney's fees by lumping large settlements with smaller ones. Insofar as the commenter was primarily disputing the Bureau's characterization of this data in its analysis, this argument is addressed in Part VI.B.3 below.

[346] Study, *supra* note 3, section 8 at 26 fig. 4 (noting that 7 settlements provided over $100 million in gross relief; 23 settlements provided between $10 million and $100 million in gross relief; 58 settlements provided between $1 million and $10 million in gross relief; 127 settlements provided between $100,000 and $1 million; and 204 settlements provided less than $100,000 in relief).

similarly provided data in different forms to allow interested persons to tally the figures and omit cases as they see fit.[347] In other words, if an interested person was concerned about the Bureau's inclusion of a particular category, such as the overdraft or debt collection cases, the data were presented in a way that allowed that person to consider the data without those cases. Also, as suggested in Part VI.B.3, below, the Bureau believes that even if these categories of class action settlements were excluded from the data, the Bureau's conclusion as to the efficacy of class settlements generally would not change. In any event, the Bureau chose to include debt collection cases because a debt collector normally seeks to collect a debt based on a contract and may be able to invoke an arbitration clause if one is contained in the original credit agreement.[348] By contrast, the cases involving ATM disclosures involved no contract between the merchant and consumer, and thus no arbitration agreement could be used to block cases filed by customers.

In response to the commenter that took issue with the Bureau's use and analysis of the Overdraft MDL case study, the Bureau believes that overdraft cases were not atypical in offering automatic payouts to class members.[349] Nor were the overdraft settlements abnormally large—just two of the seven largest settlements identified in the Study were Overdraft MDL cases.[350] The Bureau also believes that the commenter did not explain why its litany of other questions on the overdraft cases warranted these cases' exclusion from the Study. In any event, the data the commenter sought for the overdraft cases are within the normal range of values set out in the Study.[351]

As for the commenters that asserted that the Bureau did not review the merits of all class actions or just those that resulted in settlements, as noted above in connection with Section 6 of the Study, the Bureau notes that the Study analyzed the closest proxies for merit possible—the filing and disposition of summary judgment motions and motions to dismiss preceding final class action settlements.[352] The commenters were correct to the extent that the Bureau did not attempt to evaluate the merits of claims resolved in class action settlements. The Bureau did not believe it possessed any greater ability to do so than the parties that had agreed to settlements or the courts that reviewed them. In any event, as with all litigation settlements, parties made their own judgments about the case in assessing and agreeing to a settlement. The relationship between merit and settlements is discussed further in Part VI, below.

With respect to the industry commenter concerned that the Bureau's Study was too expansive and exceeded its section 1028(a) authority—by studying class actions in addition to arbitration—the Bureau believes that its analysis is relevant to performance of its charge under section 1028(a) and notes that a number of responses by industry and consumer commenters alike to the Bureau's initial request for information strongly urged the Bureau to study class action litigation.[353] One of the commenters that responded to the original request for information, a coalition of industry trade associations, specifically requested that the Bureau study whether class actions provided meaningful benefit to individual consumers as compared with individual arbitration. The Bureau agreed with this commenter because, in its view, the only way to assess whether arbitration agreements adequately protect consumers is to evaluate others means of consumer protection. This includes class actions, the blocking of which is a motivator for and key result of companies' use of arbitration agreements.

Regarding the Bureau's selection of a five-year period review of class actions, the Bureau studied the longest time periods practicable for the various individual components of the Study consistent with electronic data availability and other Bureau resource limitations. As it explained in the Study and the proposal, the fact that it was practicable to study a broader time range for Section 8 of the Study had a number of advantages, including the ability to account for significant background shocks such as the financial crisis and the Supreme Court's decision in *Concepcion* in 2011, as well as for the fact that the results of settlements may not be reported to courts for some time.[354] Also, a longer time period decreased the variance across years that could be created by unusually large settlements. Further, the Study set forth data by year and by claim in numerous tables and figures, so that outside parties could analyze specific data sets, particularly if they wanted to focus on or exclude specific financial products and services.[355]

With regard to concerns raised by the research center commenter, as discussed further below in Part III.E, the Bureau notes that data about defense attorney costs is not publicly available. The Bureau further determined that it would be too difficult or impossible to gather additional information on any uniform basis about defense costs, given that at least some of this information may be considered subject to attorney-client privilege. The Bureau made clear that it was seeking to study ''transaction costs in consumer class actions,'' and firms that had been involved in defending class actions could have produced data on their transaction costs during the Bureau's Study process but did not. Nor has any such data been provided to the Bureau in response to the notice of proposed rulemaking.[356] As for not studying class actions for which data was unavailable, this limitation was noted in the Study; the Bureau was only able to study cases for which data could be located.[357] For cases the Bureau could find, the data gathered, at minimum, establishes a floor for the amount of money recovered by consumers in class actions.

Finally, with regard to the concern related to the method used to report attorney's fees, the Bureau notes that the

[347] For example, if this commenter wanted to analyze consumers' recovery without including debt collection cases, the Study makes that possible. *See* Study, *supra* note 3, section 8 at 25 tbl. 8 (noting that debt collection cases resulted in $96.82 million in total relief). Doing so would reduce the total payout to consumers by $97 million to $2.6 billion. *Id.*

[348] *See id.,* section 6 at 56 n.96; SBREFA Report, *infra* note 419, at 17 n.23 (noting that debt collector small entity representatives informed the Bureau that, in certain cases, if the underlying credit agreement contains an arbitration clause, a debt collector may be able to compel arbitration).

[349] Study, *supra* note 3, section 8 at 20 (identifying 140 settlements that provided automatic relief, or 37 percent of settlements); *id.* section 8 at 22 (noting that nearly 24 million class members received automatic relief); *id.* section 8 at 28 n.46 (noting that $709 million was paid out to class members in automatic cash distribution cases).

[350] *Id.* section 8 at 28 n.47 (*citing* Order of Final Approval of Settlement, Tornes v. Bank of America NA (In re Checking Account Overdraft Litig.), No. 08–23323 (S.D. Fla. Nov. 22, 2011) and Order of Final Approval of Settlement, Lopez v. JP Morgan Chase NA (In re Checking Account Overdraft Litig.), No. 09–23127 (S.D. Fla. Dec. 19, 2012).

[351] *Id.* section 8 at 36–37 (measuring days elapsed from complaint to final settlement); *Id.* section 8 at 32–35 (providing a range of attorneys fee percentages by settlement relief size and product type).

[352] *See id.* section 8 at 38 tbls. 15 and 16.

[353] *See supra* Part III.A.

[354] *See* Study, *supra* note 3, section 8 at 37 tbl. 14 (reporting that average time to final settlement after initial filing was 690 days and median time was 560 days).

[355] *See, e.g., id.* section 8 at 12 tbl. 1 (setting forth settlement incidence by product and by year).

[356] The Bureau's Section 1022(b)(2) Analysis attempts to address this issue, below. *See also* Study, *supra* note 3, section 8 at 24 tbl. 7.

[357] Study, *supra* note 3, section 8 at 10–11; *see generally id.* appendices R and S.

Study reported data regarding attorney's fees in a number of different ways—including by comparing them to cash relief, to gross relief, and by product type. To the extent that the commenter suggested that the Bureau is drawing the wrong conclusion from this data, the Bureau addresses that argument below in Part VI.

8. Consumer Financial Class Actions and Public Enforcement (Section 9 of Study)

Section 9 of the Study explored the relationship between private consumer financial class actions and public (governmental) enforcement actions. As Section 9 noted, some industry trade association commenters (commenting on the RFI) urged the Bureau to study whether class actions are an efficient and cost-effective mechanism to ensure compliance with the law given the authority of public enforcement agencies. Specifically, these commenters suggested that the Bureau explore the percentage of class actions that are follow-on proceedings to government enforcement actions. Other stakeholders have argued that private class actions are needed to supplement public enforcement, given the limited resources of government agencies, and that private class actions may precede public enforcement and, in some cases, spur the government to action. To better understand the relationship between private class actions and public enforcement, Section 9 analyzed the extent to which private class actions overlapped with government enforcement activity and, when they did overlap, which types of actions came first.

The Bureau obtained data for this analysis in two steps. First, it assembled a sample of public enforcement actions and searched for ''overlapping'' private class actions, meaning that the cases sought relief against the same defendants for the same conduct, regardless of the legal theory employed in the complaint at issue.[358] The Bureau did this by reviewing Web sites for all Federal regulatory agencies with jurisdiction over consumer finance matters, for the State regulatory and enforcement agencies in the 10 largest and 10 smallest States, and for four county agencies in those States to identify reports on public enforcement activity over a period of five years from 2008 through 2012.[359] The Bureau used this sample because it wanted to capture enforcement activity by both large and small States and because it wanted to capture enforcement activity by city attorneys in light of the increasing work by city attorneys in this regard. The Bureau then searched an online database to identify overlapping private cases (including cases filed before 2008 and after 2012) and searched the pleadings in those cases.[360]

Second, the Bureau essentially performed a similar search over the same period, but in reverse: The Bureau assembled a sample of private class actions and then searched for overlapping public enforcement actions. This sample of private class actions was derived from a sample of the class settlements used for Section 8 and a review of the Web sites of leading plaintiff's class action law firms. To find overlapping public enforcement actions (typically posted on government agencies' Web sites), the Bureau searched online using keywords specific to the underlying private action.[361]

The Study found that, where the government brings an enforcement action, there is rarely an overlapping private class action. For 88 percent of the public enforcement actions the Bureau identified, the Bureau did not find an overlapping private class action.[362] The Study similarly found that, where private parties brought a class action, an overlapping government enforcement action existed in only a minority of cases, and rarely existed when the class action settlement is relatively small. For 68 percent of the private class actions the Bureau identified, the Bureau did not find an overlapping public enforcement action. For class action settlements of less than $10 million, the Bureau did not identify an overlapping public enforcement action 82 percent of the time.[363]

Finally, the Study found that, when public enforcement actions and class actions overlapped, private class actions tended to precede public enforcement actions instead of the reverse. When the Study began with government enforcement activity and identified overlapping private class actions, public enforcement activity was preceded by private activity 71 percent of the time. Likewise, when the Bureau began with private class actions and identified overlapping public enforcement activity, private class action complaints were preceded by public enforcement activity 36 percent of the time.[364]

Comments Received on Section 9 of the Study

Several industry commenters stated that, in their view, the Study was flawed because the Bureau did not properly consider the impacts its own enforcement activities have on providers. For example, one of these commenters stated that the Bureau only reviewed AAA arbitrations resolved during what it termed the Bureau's ''formative stage'' and asserted that the Study was therefore skewed because it did not take into account the Bureau's enforcement actions in later years. Another commenter criticized the Bureau for failing to account for the impact that other Bureau activities—interim final and other finalized rulemakings, amicus briefs, etc.—would have on providers, and asserted that further study of these impacts is warranted.

An industry commenter took issue with what it believed to be an overly narrow focus in this Section 9 of the Study that overlooked several key points. For example, this commenter said that the Bureau should have evaluated how many class actions are a result of other disclosures of wrongdoing (*e.g.,* news reports) and thus the filing of a class action did not function as a disclosure mechanism informing the company of its potential wrongdoing. In addition, the commenter said the Bureau should have evaluated how many class actions followed government investigations or other disclosures of claimed wrongdoing, rather than focusing only on how many class actions overlapped with public enforcement actions. The commenter

[358] *Id.* section 9 at 5 and appendix U at 141.

[359] The analysis included review of enforcement activity conducted by the Bureau, the Federal Trade Commission, the Department of Justice (specifically the Civil Division and the Civil Rights Division), the Department of Housing and Urban Development, the Office of the Comptroller of the Currency, the former Office of Thrift Supervision, the Federal Deposit Insurance Corporation, the Federal Reserve Board of Governors, the National Credit Union Administration. It also included review of proceedings brought by State banking regulators, to the extent that they had independent enforcement authority, from Alaska, California, the District of Columbia, Florida, Georgia, Michigan, New York, Ohio, Pennsylvania, Rhode Island, Texas, and Vermont. And the review included State attorney general actions brought by California, Texas, New York, Florida, Illinois, Pennsylvania, Ohio, Georgia, Michigan, North Carolina, New Hampshire, Rhode Island, Montana, Delaware, South Dakota, Alaska, North Dakota, the District of Columbia, Vermont, and Wyoming. Finally, the analysis included consumer enforcement activity from city attorneys from Los Angeles, San Francisco, San Diego, and Santa Clara County. Study, *supra* note 3, appendix U at 141–142. *See supra* note 156 (noting that 41 FDIC enforcement actions were inadvertently omitted from the results published in Section 9 of the Study; that the corrected total number of enforcement actions reviewed in Section 9 was 1,191; and that other figures, including the identification of public enforcement cases with overlapping private actions, were not affected by this omission).

[360] Study, *supra* note 3, section 9 at 7.

[361] *Id.* section 9 at 8–10.

[362] *Id.* section 9 at 4.

[363] *Id.*

[364] *Id.*

noted that in some instances government enforcement agencies declined to bring an action even where they identified wrongdoing.

Response to Comments on Section 9 of the Study

As to the comments that criticized the scope of the Bureau's analysis of its own enforcement actions, noting that the Bureau increased its enforcement activity after 2012, such comments assume that the purpose of the analysis was to assess the overall level of public enforcement and compare it to the volume of class action activity. To the extent that there has been, and will continue to be, an increase in Bureau enforcement actions relative to the Study period, the Bureau knows of no reason to believe that the relationship between public and private enforcement will change, nor did any commenter suggest a basis for so believing.[365] As is discussed in greater detail in Part VI below, Section 9 demonstrated that there was generally little overlap between these two spheres, and to the extent there is, private activity generally precedes public activity. As was discussed in that section, the Bureau believes that these data indicated—as supported by the comments from a group of State attorneys general and the Bureau's experience and expertise—that private class actions are a useful complement to public enforcement actions, especially given the resource limitations faced by regulators or that may be faced by regulators in the future. With respect to whether the Bureau considered other of its undertakings, the Bureau does not believe that there is an adequate means to do so and, more importantly, that such an undertaking would not be relevant to this rulemaking.[366]

9. Arbitration Agreements and Pricing (Section 10 of Study)

Section 10 of the Study contained the results of a quantitative analysis which explored whether arbitration agreements affected the price and availability of credit to consumers. Commenters on the Bureau's RFI suggested that the Bureau explore whether arbitration agreements lower the prices of financial services to consumers. In academic literature, some hypothesize that arbitration agreements reduce companies' dispute resolution costs and that companies ''pass through'' at least some cost savings to consumers in the form of lower prices, while others reject this notion.[367] However, as the Study noted, there is little empirical evidence to support either position.[368]

To address this gap in scholarship, the Study explored the effects of arbitration agreements on the price and availability of credit in the credit card marketplace following a series of settlements in *Ross* v. *Bank of America,* an antitrust case in which, among other things, several credit card issuers were alleged to have colluded to introduce arbitration agreements into their credit card contracts.[369] In these *Ross* settlements, which were negotiated separately from settlements in the case pertaining to the non-disclosure of currency conversion fees, certain credit card issuers agreed to remove arbitration agreements from their consumer credit card contracts for at least three and a half years.[370] Using data from the Bureau's Credit Card Database,[371] the Bureau examined whether it could find statistically significant evidence, at a standard confidence level (95 percent), that companies that removed their arbitration agreements raised their prices as measured by total cost of credit in a manner that was different from that of comparable companies that did not remove their agreements. The Bureau was unable to identify any such evidence from the data.[372]

The Bureau performed a similar inquiry into whether the affected companies altered the amount of credit they offered consumers, all else being equal, in a manner that was statistically different from that of comparable companies. The Study noted that this inquiry was subject to limitations not applicable to the price inquiry, such as the lack of a single metric to define credit availability.[373] Using two measures of credit offered, the Study did not find any statistically significant evidence that companies that eliminated arbitration provisions reduced the credit they offered.[374]

Comments Received on Section 10 of the Study

An industry commenter and a trade association dismissed the Bureau's findings in Section 10, asserting that the *Ross* case did not provide an appropriate case study because changes in bank pricing are slow to occur and because credit cards issuers would not be expected to shift their pricing in response to a temporary ban on arbitration agreements in any event. The trade association commenter contended that the Bureau understated the problems with its difference-in-difference analysis of pricing changes. For example, the commenter questioned the Bureau's selection of a control group due to its admission that it did not know if all members of the control group used arbitration agreements. Also, citing two academics, the commenter stated that the lack of evidence of a price change was unsurprising given the temporary nature of the moratorium and, as noted above, that large institutions like the *Ross* settlers typically change prices slowly. A research center commenter expressed a similar concern.

A nonprofit commenter, citing to an academic working paper, contended that the Study failed to indicate whether the Bureau checked to ensure the validity of the econometric technique it used in evaluating price changes. This commenter also criticized the Bureau's method as valid only if prices had been

[365] The Bureau notes that it did not in fact limit its data to public enforcement cases announced or filed prior to December 31, 2012. As the methodology to the Study set out, the public enforcement data started with two different sets of cases as a starting point to analyze overlap. The Bureau analyzed a set of public enforcement cases between 2008 and 2012 for overlapping private cases that may have occurred before or after 2012. The Bureau also analyzed a set of private class actions from 2008 through 2012 for overlapping public enforcement cases that may have been filed or announced before 2008 or after 2012. As such, in this second set, any public enforcement cases filed or announced after December 31, 2012 would have been included in the data. *See* Study *supra* note 3, appendix U at 145–146.

[366] To the extent the commenter asserted that the Bureau should have looked at the magnitude of its enforcement efforts in later years after the Bureau was more established as opposed to earlier years in support of an argument that class actions are superfluous given the Bureau's activities, that argument is addressed below in Part VI.

[367] *Compare, e.g.,* Amy J. Schmitz, ''Building Bridges to Remedies for Consumers in International eConflicts,'' 34 U. Ark. L. Rev. 779, at 779 (2012) (''[C]ompanies often include arbitration clauses in their contracts to cut dispute resolution costs and produce savings that they may pass on to consumers through lower prices.'') *with* Jeffrey W. Stempel, ''Arbitration, Unconscionablility, and Equilibrium, The Return of Unconscionability Analysis as a Counterweight to Arbitration,'' 19 Ohio St. J. on Disp. Resol. 757, at 851 (2004) (''[T]here is nothing to suggest that vendors imposing arbitration clauses actually lower their prices in conjunction with using arbitration clauses in their contracts.'').

[368] Study, *supra* note 3, section 10 at 5.

[369] *See* First Amended Class Action Complaint, In re Currency Conversion Antitrust Litig., No. 1409 (S.D.N.Y. June 4, 2009).

[370] Study, *supra* note 3, section 10 at 6.

[371] The Bureau's Credit Card Database provides loan-level information, stripped of direct personal identifiers, regarding consumer and small business credit card portfolios for a sample of large issuers, representing 85 to 90 percent of credit card industry balances. *Id.* section 10 at 7–8.

[372] *See id.* section 10 at 5–6. In the Study, the Bureau described several limitations of its model. For example, it is theoretically possible that the *Ross* settlers had characteristics that would make their pricing different after removal of the arbitration agreement, as compared to non-settlers. *See id.* section 10 at 15–16.

[373] *Id.* section 10 at 17.

[374] *Id.* section 10 at 6.

changing at the same rate prior to the settlement in *Ross.*

An individual commenter criticized the conclusions that the Bureau drew from its analysis, and asserted that footnote 34 in Section 10 of the Study demonstrated that the *Ross* settlement did in fact prompt differential pricing responses from the banks involved and that such a result comports with economic expectation. The commenter further asserted that the Bureau improperly dismissed this result as statistical noise that disappeared once costs were collapsed into a single total cost of credit (TCC) variable. In reality, the commenter asserted, the Bureau's analysis implied that the banks increased other costs charged to consumers as evidenced by the separate regression analyses with respect to APR and fees. This commenter also suggested that a number of other events that happened around the same time as the *Ross* settlement—*e.g.,* the enactment of the CARD Act and the Dodd-Frank Act, Supreme Court litigation regarding the applicability of the FAA, and other ongoing class action lawsuits—may have also had varying effects on companies' use of arbitration agreements and pricing decisions. The commenter asserted that consumers who did not trigger the currency conversion fees that were specifically at issue in *Ross* suffered as a result of these differential changes, and that such consumers were more likely to be low-income, unmarried, and members of racial and ethnic minorities. Accordingly, the commenter asserted that the Bureau's analysis in fact suggested that dropping the arbitration agreements led to more expensive credit for certain groups of consumers.

An industry commenter noted that the Bureau's analysis in this section focused only on large banks and did not account for small institutions' practices, which the commenter suggested may be different. The commenter noted that the Study more generally found that larger institutions were more likely to use arbitration agreements and asserted that there may be a relationship between using arbitration and providing credit to many more consumers, especially those with poor credit (as large institutions may be more likely to do). The commenter concluded that this might mean that the class proposal could harm credit access for poorer consumers. A research center made a similar point, stating that empirical evidence shows that consumer finance companies do pass on changes in their costs but that banks are unlikely to adjust their deposit and loan rates quickly or fully to reflect only temporary changes in market interest rates. This commenter also suggested that firms in the consumer services sector adjust prices much more slowly in response to cost changes than do firms in the manufacturing sector, and large firms adjust prices more slowly than do small firms.

Another industry commenter stated that, in its view, there was not statistically significant empirical support to generalize the findings in this section beyond the specific *Ross* case. This commenter accused the Bureau of using what it labeled as a bizarre methodology and of inappropriately extrapolating results from the behavior of an arbitrary and small group of providers. The commenter concluded that the results in Section 10 were overly handicapped by caveats and other uncertainties that did not extend across all providers in all markets. Relatedly, an industry commenter suggested that the conclusions of this section ignored case study evidence that shows consumers would choose a lower priced product that includes an arbitration clause as opposed to a higher priced one that lacked an arbitration clause.

Response to Comments on Section 10 of the Study

The purpose of Section 10 was to explore the suggestion by some that companies' use of arbitration agreements lowers prices for consumers. The analysis then conducted found no evidence to support that claim. As the Bureau explained in the Study, analyzing whether pre-dispute arbitration agreements lower the price of consumer financial products or services is extremely difficult. The Bureau continues to believe that it made sense to analyze the *Ross* case as a potential natural experiment, although it could not provide a complete answer to the underlying question. The Bureau continues to believe that it used an appropriate methodology in analyzing those results and concluding that it did not demonstrate statistically significant evidence that the issuers increased prices or reduced access to credit. Nevertheless, the Bureau notes that Section 10 does not form the basis for any of the Bureau's significant findings, which are discussed in greater detail in Part VI below. Instead, the Bureau finds that there is some amount (although the specific amount is unknown) of costs from the class rule that will be passed on to consumers. *See also* Section 1022(b)(2) Analysis, below.

With regard to criticism of the methodology, the Bureau notes that its regression analysis was designed to control for effects that could have impacted pricing if the credit card companies had changed their prices for any number of external factors.[375] This is because the analysis did not just evaluate whether there was a change in pricing, but rather looked instead to see if the change in pricing of the *Ross* settlers sample differed from the change in pricing of the other banks that were subject to the same external background factors. The Bureau's analysis also looked at multiple time periods spanning 2008 through 2011, in part to account for the possibility that any price adjustments by the *Ross* settlers may have taken place over a relatively long period of time.[376] The Bureau acknowledged in both the Study and the proposal that the *Ross* settlement was time limited and that it is possible that the banks who were subjected to the settlement might have taken that fact into account in deciding their pricing strategy going forward.[377] This is an inherent limitation in the data.

As to the commenter that expressed concern that the Bureau had never ensured the validity of its econometric technique, the Bureau believes that the commenter misunderstood the nature of the difference-in-difference analysis used. In the analysis, the control group was neither companies with arbitration clauses nor was it companies that did not have arbitration clauses. Rather, the control group was companies that did not change their use of arbitration provisions, either because they used arbitration provisions through the entire period or they did not use arbitration provisions through the entire period. The treatment group was the *Ross* settlers who did change their use of arbitration provisions. The Bureau believes that this comparison was effective because it was not comparing the absolute pricing of the different issuers but instead was comparing the rate at which they changed their pricing during the time period. The Bureau further notes that nothing indicated that the treatment group—the issuers that changed their use of arbitration provisions—changed their pricing in a statistically significant way vis-a-vis the control group.[378] Consequently, the Study did not find evidence that the

[375] *See id.* section 10 at 12.

[376] *Id.* section 10 at 14 (setting forth the time frames used in the analysis). The Bureau does not necessarily agree, however, that credit card pricing is slow moving; to the contrary, in the Bureau's experience the pricing offered in credit card solicitations is quite dynamic and at least some large card issuers make frequent adjustments of their fees to the extent permitted by law.

[377] *See id.* section 10 at 15–16.

[378] *See id.* section 10 at 15.

companies that had to stop using arbitration provisions changed their pricing in any meaningful way as compared to people that did not have to do so.

As to the nonprofit commenter's point that the Bureau's technique in this analysis was valid only if prices had been changing at the same rate prior to the settlement in *Ross,* the Bureau notes that the technique used does assume that the two groups of companies changed pricing at the same rate before the imposition of the moratorium (controlling for a number of variables).[379] Thus, the Bureau's analysis assumed that banks changed pricing at the same rate notwithstanding the items controlled for.

As to the individual commenter that expressed concern about other impacts on pricing and arbitration agreements beyond the *Ross* settlement, the Bureau's analysis attempted to control for a number of variables. Specifically, the benefit of conducting a difference-in-differences analysis is that it should account for background effects like the CARD Act, the Dodd-Frank Act, the development of law over time, and pending litigation. The Bureau notes that it did not state that the analysis was ''problematic,'' but simply set out limitations of the analysis, as it did with regard to each section of the Study.[380]

In response to this commenter's assertion that the Bureau did find a difference and buried it in footnote 34, the Bureau believes that the commenter was really disagreeing with the use of TCC as the appropriate metric.[381] As the Bureau explained, pricing involves numerous components that work together to represent total cost. For example, a provider can raise interest rates but lower fees and still have the same TCC. All that footnote 34 stated was that given the number of regressions run, it was likely that at least one of the trials would produce statistically significant coefficients on the various dependent variables simply by chance. Nevertheless, the Bureau continues to believe that TCC was the appropriate metric because it represents everything that consumers pay to keep and use their credit cards.[382] Finally, as to the individual commenter concerned that the Study did not account for higher interest rates that disproportionately impact, among others, low-income households, the Bureau notes that its analysis in Section 10 controlled for credit score and refreshed credit score (both square and log terms for each) as well as for borrower income but did not find statistically significant results for TCC overall.[383] Similarly, when the Bureau studied whether there were limitations on credit issuance, it used two measures—initial credit line and subprime account issuance—and still did not find any statistically significant changes.[384]

The Bureau agrees, as an industry commenter noted, that its analysis in this section was limited to very large banks. The Bureau addresses cost concerns specific to small entities below. Regarding the commenter's theory regarding access to credit for those with poor credit, the Bureau reiterates, as is noted above, that it had a number of controls for consumer credit that would have detected a particular effect on subprime consumers. The Bureau also acknowledges that there are a number of factors, as one commenter identified, that impact when and how banks decide to adjust pricing mechanisms.

The Bureau disagrees with the contention that its definition of the control group was invalid. As was explained in the Study, the control group contained entities that had no change in their use of arbitration agreements; whether they did or did not use such an agreement was not relevant. This group was then compared to those entities required to withdraw arbitration agreements as a result of the *Ross* settlement in order to diagnose whether this required change resulted in a price shock. The Bureau disagrees with the industry commenter regarding extrapolation from the results of Section 10; the Bureau did not engage in such extrapolation. In any event, the Bureau acknowledges the caveats it made in the Study and, notwithstanding those caveats, stands by the results.

Finally, regarding the commenter that said that the conclusion of this section was at odds with other available evidence, the Bureau explains below in Part VI the relevance of this part of the Study to its overall findings in this rulemaking.

E. Additional Comments Received Regarding the Study and Responses Regarding the Study

The Bureau notes that it received numerous comments from members of Congress, consumers, consumer advocates, academics, nonprofits, consumer lawyers and law firms, public-interest consumer lawyers, State legislators, State attorneys general, and others that expressed confidence in the Study and the Bureau's methods. Many of these commenters noted the Study's comprehensiveness; a few noted that it appeared to be the most comprehensive study of dispute resolution in connection with consumer financial services completed to date.

One nonprofit commenter challenged the Bureau's Study for its alleged failure to comply with the requirements of the Information Quality Act[385] and a related OMB bulletin,[386] asserting that the Study should have undergone a rigorous, transparent peer review process to ensure the quality of the disseminated information. Similarly this commenter and a trade association representing credit unions, expressed concern about the Bureau's lack of a peer review process and about the fact that no entity other than the Bureau attempted to replicate the Study. The trade association commenter also expressed concern that the Bureau had not conducted a study of general consumer satisfaction with consumer financial products and services.

Several other industry commenters criticized the Bureau for not soliciting public comments during the course of the Study process. In the view of one commenter, such a process could have enabled the Bureau to address defects and other problems with the Study before its conclusion. The industry commenters stated that the Bureau had never informed the public of the topics it had decided to study, never sought public comment on them, and never convened a public roundtable discussion on key issues. These

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[379] *See* list of factors set out in Appendix V of the Study at page 148.

[380] *Id.* section 10 at 18–19. The latter analysis accounts for the possibility that initial changes in credit output would begin with subprime accounts.

[381] As was stated in the Study, the TCC ''metric incorporates all fees and interest charges the consumer pays to the issuer. It excludes revenue generated through separate agreements between other businesses and the issuer, such as interchange fees paid by merchants and marketing fees or commissions paid by companies offering add-on products to an issuer's customer base. This TCC metric thus capture all of the component costs that consumers pay.'' *Id.* section 10 at 9 (quoting ''CARD Act Report,'' (2013)), *available at http://files.consumerfinance.gov/f/201309_cfpb_card-act-report.pdf.*

[382] *See* Study, *supra* note 3, section 10 at 9.

[383] *See generally id.* at appendix V. The Bureau did find some differences for subcomponents of TCC, but none were found to contradict the overall price effect. *See id.* section 10 at 15 n.34.

[384] *Id.* section 10 at 18–19.

[385] Information Quality Act, Public Law 106–554, § 515, 114 Stat. 2763, 2763A–153–154 (2000); *see* Office of Mgmt. & Budget, ''Information Management: Information Quality Guidelines,'' *available at https://www.opm.gov/information-management/information-quality-guidelines/.*

[386] Memorandum from Joshua B. Bolten, Dir., Office of Mgmt. & Budget, to Heads of Departments and Agencies concerning Issuance of OMB's ''Final Information Quality Bulletin for Peer Review,'' *OMB Bulletin* No. M–05–03 (Dec. 16, 2004), *available at https://obamawhitehouse.archives.gov/omb/memoranda_fy2005_m05-03/.*

commenters concluded that having not undertaken these steps, the Study was flawed and does not support the proposal.

Several industry commenters stated that the Bureau should have studied consumer satisfaction with the arbitration process through, for example, interviews of consumers who have arbitrated claims and who had been involved in class actions. One of these commenters also stated that the Bureau should have evaluated consumer experience with arbitration in other areas, such as employment, where it has existed longer.[387] Several industry commenters asserted that the Bureau's intentional refusal to study consumers' experience with arbitration was perplexing because both logic and common sense dictated that understanding consumer satisfaction with arbitration is essential to a complete understanding of whether mandating consumer arbitration was in the public interest. In support of this viewpoint, one commenter cited a 2005 Harris Interactive online poll that found that consumers found arbitration to be faster, simpler and cheaper than proceeding in court and that they would use arbitration again.

One industry commenter suggested that the Bureau should have also studied the impact on consumers and society if companies abandon arbitration as well as the costs to consumers and society of the additional 6,042 class actions that the proposal's Section 1022(b)(2) Analysis projected would be filed every five years. This commenter further noted that the Bureau did not study whether class actions are necessary as a deterrent given the impact of modern social media, explaining that in modern society providers have enormous incentive to ensure that their customers are satisfied and any disputes resolved fairly because dissatisfaction can be amplified on social media.

Another industry commenter challenged the Bureau's failure to survey market participants regarding their views on the deterrent effect of class action litigation.

A letter from some members of Congress urged the Bureau to gather more data on consumer outcomes.[388] Other comments expressed similar concerns. For example, one industry lawyer commenter suggested that the Study should have evaluated arbitration as a dispute resolution mechanism as compared to litigation for individual claims that are inappropriate for class action treatment. This commenter noted that the Bureau did not appear to consider the FTC's 2010 Study entitled ''Repairing a Broken System: Protecting Consumers in Debt Collection Litigation and Arbitration.'' [389] The FTC's 2010 Study, suggested the commenter, criticized litigation as a dispute resolution mechanism and suggested that the Bureau consider this criticism in any regulatory effort that results in an increase in litigation. This same commenter also suggested that the Bureau should have examined a number of other items. Specifically, this commenter (along with another industry commenter) suggested that the Bureau should have studied whether there is any difference in the level of compliance between financial services companies with and without provisions in their contracts that can block class actions. The industry commenter suggested that the Bureau should have studied the effectiveness of its complaint process as a means of resolving consumers' issues. The industry lawyer commenter suggested that data to evaluate this might be reflected in the number or type of complaints received by the Bureau regarding each type of company. Similarly, the commenter also suggested that the Bureau should have studied whether class actions are the most efficient method of enforcing the law as compared to enforcement actions, although the commenter did not address how the Bureau should have gone farther than it did in Section 9.

Another industry commenter stated that, in its view, the Study could have been more comprehensive. This commenter listed a number of additional items that it contended the Bureau should have studied, including the evaluation of what it said were the advantages of arbitration in handling the most typical types of consumer complaints (which the commenter asserted were overcharges, duplicative charges, and other errors); in providing a less formal and more accessible forum to consumers; in the speedy resolution of claims; in actual monetary awards to claimants; and in aggregate cost to participants and related cost-savings; resolution of arbitrations without the involvement of counsel; and in consumer satisfaction. This commenter further criticized the Bureau for not making similar inquiries regarding class actions.

Several commenters, including an industry lawyer, a nonprofit, a group of State attorneys general, and two industry trade associations, criticized the Study (and the proposal) for drawing comparisons between *settlements* of class actions and *decisions* in arbitrations. These commenters all suggested that the Bureau could have drawn a more accurate comparison by comparing arbitration settlements with class action settlements. One of these commenters, a group of State attorneys general, noted that the Bureau had acknowledged that 57.4 percent of arbitrations were known or likely to have settled and asserted that it was reasonable to assume that the cases that settled were stronger claims. Some of these commenters also suggested that the Bureau should have evaluated class arbitration. The group of State attorneys general also noted that the Bureau's data on arbitration outcomes and class actions settlements was incomplete because the Bureau only had data for 20.3 percent of arbitrations and 60 percent of settlements. Relatedly, an industry commenter criticized the Bureau for focusing only on filed and adjudicated arbitrations, rather than those that settled or that were never filed in the first instance because a consumer achieved relief as a result of informal dispute resolution. A Congressional commenter also asked why the Bureau had not considered arbitration settlements in its Study.

Several industry commenters criticized the Study for comparing data regarding arbitration awards for a two-year period (2010 through 2011) to class action settlements over a five-year period (2008 through 2012). One commenter noted that the Bureau compared the fact that 34 million consumer class members received $1.1 billion in compensation over those five years to only 32 arbitration awards to consumers (that the Bureau could verify) for a total of only $172,433. This comparison is misleading, suggested the commenter, because it omitted arbitrations that resulted in a confidential settlement. This commenter further asserted that the Study was misleading because it reported the

[387] Relatedly, an industry commenter expressed concern that the Bureau did not explain in the proposal why contracts for consumer financial products and services differed from other markets where arbitration would still be permitted to block class actions. The Bureau expresses no opinion on the role of arbitration agreements in markets beyond the scope of its authority.

[388] In explaining this request, the authors of this letter referred to a June 2015 letter that stated that, in the authors' view, the Bureau did not study transaction costs associated with pursuing a claim in Federal court as compared to arbitration or the ability of a consumer to pursue a claim in Federal court or arbitration without an attorney.

[389] Fed. Trade Comm'n, ''Repairing a Broken System: Protection Consumers in Debt Collection Litigation,'' (July 2010), *available at https://www.ftc.gov/reports/repairing-broken-system-protecting-consumers-debt-collection-litigation.*

percentage recovery received by consumers who succeeded in arbitration (57 cents for every dollar), but did not report similar figures for payouts to consumers in class actions.

The Bureau received comments from several specific industry groups that variously asserted that the Study had omitted a fulsome analysis of their particular market or provider type. For example, a trade association commenter representing credit unions asserted that the Bureau studied only a small number of credit unions and criticized it for not engaging in more fulsome analyses of small entities more generally in its Study. A credit union commenter also expressed concern that most of the Bureau's analysis in Section 2 (prevalence) did not adequately represent products offered by credit unions and that there was limited evidence that credit unions use arbitration agreements. Relatedly, a trade association representing online lenders noted that its members were excluded from Section 2, although it acknowledged that its members almost uniformly used arbitration agreements and several installment lenders noted that both online and installment lenders were missing from Section 2.

A Tribal commenter asserted that the Bureau should have consulted with Tribal entities in order to understand how the Tribal governments resolve disputes and that the Bureau should have focused on Tribal businesses in various sections of the Study. Relatedly, a different Tribal commenter asserted that the Bureau did not examine Tribal dispute resolution and procedures or Tribal regulations that protect consumers.

Additionally, an industry trade association representing companies that are consumer reporting agencies (CRAs) said that the Bureau should have more fulsomely included CRAs in the Study in general and credit monitoring cases against CRAs and litigation pursuant to the Credit Repair Organizations Act (CROA) in particular. Although the commenter noted that the Bureau's analyses of class actions (in Section 8) included CRAs, it focused on the Bureau's failure to analyze individual disputes involving CRAs. The commenter further noted that credit reporting constituted one of the four largest product areas for class action relief but the Bureau did not define the scope of credit reporting class actions, and the Bureau only mentioned credit monitoring twice in its Study.

An industry trade association representing automobile dealers, asserted that the Bureau's Study contained virtually no information on automotive financing, and that what little evidence there was suggested that the Bureau did not understand the automotive finance industry. The commenter concluded that the Study's findings as to the automotive finance market were, at best, ''murky.''

An industry commenter suggested that the Bureau should have, but did not, conduct an analysis of how arbitration and class actions operate in the ''real world'' and what the relative trade-offs are for consumers between each dispute resolution mechanism. Relatedly, the commenter expressed concern that the Study failed to balance adequately the actual benefits of the arbitration process against the costs of class-action lawsuits and the likely impacts of the proposal. An industry commenter criticized the Bureau for failing to study the impact of the proposal on online dispute resolution services and other methods of informal dispute resolution.[390] This commenter said that the Bureau overlooked what is potentially a large universe of consumer disputes that are addressed outside the courtroom, a universe far broader than what was addressed in the Study. Relatedly, an industry commenter suggested that the Bureau should have studied informal dispute resolution in addition to formal dispute resolution and a research center suggested that the Bureau's survey should have asked questions about informal dispute resolution. An industry commenter took issue with the Bureau's failure to study defense costs incurred by companies in defending class actions. The commenter asserted that the Dodd-Frank Act requires such an analysis. The commenter further asserted that the Bureau's assumptions in the Study regarding defense costs—that they are about 75 percent of the amounts awarded to plaintiff's attorneys in settled class actions and 40 percent in other cases—were ill-conceived.

An industry commenter asserted that the Study did not adequately assess the role of consumer choice—presumably for products with or without arbitration agreements. This commenter also stated that the Study should be re-conducted to evaluate the economic impact on providers and consumers of regulations that prohibit the use of class action waivers.

[390] This commenter specifically referenced Modria. Modria is a company that offers online customer response and dispute resolution services and purports to handle more than 60 million disputes a year. *See* Modria, ''The Modria Platform,'' *http://modria.com/product/* (last visited March 13, 2017).

Response to General Comments on Study

In response to concerns about the Bureau's compliance with the Information Quality Act, the Bureau did comply with the IQA's standards for quality, utility, and integrity under the IQA Guidelines.[391] Moreover, the Study did not fall within the requirements of the OMB's bulletin on peer review, contrary to what the commenter suggested. The bulletin applies to scientific information, not the ''financial'' or ''statistical'' information contained in the Study.[392] The Federal financial regulators, including the Bureau, have consistently stated that the information they produce is not subject to the bulletin.[393]

Although the Bureau did not engage in formal peer review, it did include with its report detailed descriptions of its methodology for assembling the data sets and its methodology for analyzing and coding the data so that the Study could be replicated by outside parties. The Bureau is not aware of any entity that has attempted to replicate elements of the Study; to the extent that the Bureau's analysis has been reviewed by academics and stakeholders those individual critiques are addressed above. The Bureau has monitored academic commentary in addition to the comments submitted and continues to do so.

With respect to the claim that the Bureau did not provide notice of the scope of the Study, the Bureau notes that, although not required to do so by Dodd-Frank section 1028(a), the Bureau did, in fact, issue a request for information before commencing the Study to solicit public input with respect to its scope and the sources of data to which the Bureau should look.[394] Moreover, the Bureau released the Preliminary Results in late 2013, and at that time the Bureau listed the remaining topics it intended to study, thus providing clear public visibility into the Study's eventual scope. Furthermore, the Bureau held periodic meetings with stakeholders before, during, and after the Study (as discussed further in Part IV below) and

[391] *See* Bureau of Consumer Fin. Prot., ''(Bureau) Information Quality Guidelines are Issued in Accordance with the Provisions of the Treasury and General Government Appropriations Act for Fiscal Year 2001, Public Law 106–554 (the ''Act'') and OMB Government-wide Guidance,'' *https://www.consumerfinance.gov/open-government/information-quality-guidelines/* (last visited May 19, 2017).

[392] *See* OMB Bulletin, *supra* note 386.

[393] *See* Bureau Information Quality Guidelines, *supra* note 385.

[394] *See* Arbitration Study RFI, *supra* note 16.

received ongoing input regarding the appropriate Study scope.

As for the commenters concerned that the Bureau did not conduct a study of consumer satisfaction with their consumer financial products and services, the Bureau believes that even if it were to find very high levels of satisfaction, that would not affect the assessment of the various alternative dispute resolution mechanisms, especially given the potential for claims to go undiscovered by consumers. With respect to the concern that the Bureau did not evaluate consumer satisfaction with the arbitration process, the Bureau notes that it did not do so for several reasons. First, given the small number of consumers who participated in arbitration proceedings, it would have been difficult and costly to construct a sample of such consumers and obtain statistically reliable results. Second, it would have been difficult to distinguish consumer satisfaction with the process from consumer satisfaction with the outcome in particular cases. Thus, if a consumer received a poor or no settlement or award in an arbitration, he or she might view the process unfavorably even if the underlying claim was objectively poor and merited little relief. The opposite would also be true.[395] Third, given the finding that so few consumers brought individual claims in arbitration, the satisfaction of that small number of consumers who ultimately did use the process (assuming enough could be located to make a study of their satisfaction reliable) would not answer the question of whether all consumers should be limited to using arbitration to resolve disputes.

With respect to the related argument that the Bureau should have conducted a survey comparing consumers' experiences in arbitration as compared to class actions, the Bureau believes that it would have been exceedingly difficult to find consumers who had experienced arbitration, and any comparison in consumer experiences with arbitration and a class action would have suffered from selection bias (*i.e.,* consumers who prevailed using one of the dispute resolution mechanisms would be more likely to express satisfaction with that mechanism). In any event, as is discussed further below in Part VI, the Bureau does not believe that consumers' relative satisfaction with a dispute resolution mechanism that they use quite infrequently should be afforded as much weight as the fact that the Study showed, and many commenters agreed, that arbitration agreements can preemptively limit consumers' ability to resolve disputes in class actions. Nor does the Bureau believe that other things that commenters suggested the Bureau should have studied were relevant or feasible (or both). As for studying the impacts on society of additional class actions and the potential loss of arbitration as a means of dispute resolution, these impacts are addressed in the Bureau's Section 1022(b)(2) Analysis.

As to those comments that criticized the Study for failing to compare dispute resolution outcomes, the Bureau carefully explained why such a comparison was neither feasible (because of the large volume of settlements or potential settlements where the outcome could not be determined) nor meaningful (because of potential selection bias in the choice of forum and in the cases that did not settle.)

In response to the industry lawyer commenter's criticism that the Bureau did not consider the FTC's 2010 Study of debt collectors' use of arbitration and litigation, the Bureau did review the FTC's 2010 Study in the course of analyzing materials for the 2015 Arbitration Study and, in any case, the Bureau believes the FTC's 2010 Study to be relevant to this rulemaking in offering background information on the use of arbitration in debt collection disputes brought against consumers.[396] The focus of the Bureau's Study and subsequent rulemaking, in contrast, is on the ability of consumers to seek affirmative relief for claims relating to consumer products and services—in other words, claims brought by consumers against their providers.

With respect to the claim that the Bureau should have further studied the value or necessity of class actions in deterring misconduct, the Bureau does not believe that a survey of companies or their representatives on this issue would have produced reliable information.

The Bureau believes that the review it undertook of how companies and their representatives respond to the filing and settlement of class actions, as discussed further below in Part VI, is much more probative than self-serving survey results. And, as set out below in Part VI.B, the Bureau believes that social media are insufficient to force companies to change company practices—because, among other reasons, many consumers do not know that they have valid complaints or how to raise their claims through social media. Further, in at least one study, companies ignored nearly half of the social media complaints consumers submitted, and when companies did respond, consumers were dissatisfied in roughly 60 percent of the cases.[397]

Regarding the commenter that suggested that the Bureau should have evaluated whether there is a different level of compliance for companies that use arbitration versus those that can be sued in a class action and that such an analysis can be conducted by review of the Bureau's complaint database, the Bureau disagrees with the premise of the comment; simple comparisons across companies that use arbitration versus those that do not, cannot be made using complaint data. The Bureau also notes that the largest volume of complaints concerns debt collectors, whose ability to invoke arbitration agreements is derivative of the clients they serve; credit reporting companies, which may not have contracts or arbitration agreements with consumers; and mortgage lenders and servicers, who generally are not covered by arbitration agreements. Additionally, the Study found that in certain markets—including GPR prepaid cards, payday loans, private student lending, and mobile wireless third-party billing—arbitration agreements are so common that it would be all but impossible to make the comparisons suggested. In response to the dual suggestions that the Bureau's consumer complaints database could be used to benchmark the compliance of providers with consumer laws or that the Bureau's complaints mechanism itself could be used as a form of dispute resolution instead of class actions, the Bureau observes that some industry commenters had opposed the Bureau's publication of consumer complaint narratives on the grounds that the

[395] The Bureau also finds the Harris Interactive poll cited by this commenter to be irrelevant because over 80 percent of respondents were individuals who chose to arbitrate claims rather than being compelled to litigate. *See* Study, *supra* note 3, section 3 at 5 n.5. *See* Harris Interactive Mkt Res., ''Arbitration: Simpler, Cheaper, and Faster than Litigation, A Harris Interactive Survey,'' (Apr. 2005) (conducted for U.S. Chamber Institute for Legal Reform), *available at HarrisInteractiveSurveyforUSChamberofCommerce.pdf.* Nor did this survey ask respondents their opinions about being blocked from filing or participating in a class action.

[396] Fed. Trade Comm'n, ''Repairing a Broken System: Protection Consumers in Debt Collection Litigation,'' (July 2010), *available at https://www.ftc.gov/reports/repairing-broken-system-protecting-consumers-debt-collection-litigation.*

[397] Sabine A. Einwiller & Sarah Steilen, ''Handling Complaints on Social Network Sites—An Analysis of Complaints and Complaint Responses on Facebook and Twitter Pages of Large US Companies,'' 41 Pub. Rel. Rev. 195, at 197–200 (2015).

Bureau's consumer complaint database contained unrepresentative data.[398]

As to whether class actions are superior methods of enforcing the law as compared to government enforcement, the Bureau does not believe this is a necessary subject of study. The more relevant question is the relative overlap between the two mechanisms and the extent to which class action cases pursue harms not otherwise addressed by government enforcement. Moreover, regardless of the outcome of this rulemaking, government enforcement will continue. The Bureau believes it more appropriate to compare, as the Study did, consumers' ability to achieve relief individually and as part of a class action. The question, analyzed in detail below, is whether government enforcement remedies all harms in the relevant markets or if class actions supplement government enforcement.[399]

In response to comments that criticized the Bureau for comparing outcomes in arbitration obtained through arbitral decisions (but not settlements) to class action settlements, the Bureau notes that the Study specifically cautioned that the two types of data were derived from different sources and should not be compared as apples to apples.[400] The Bureau conducted a fulsome analysis of all data that it could obtain but had no way to measure settlements of arbitrations that were not reported to the administrator. The Bureau notes that commenters did not suggest any way to overcome this limitation in the underlying record. Regarding the State attorneys general that commented on the incomplete nature of the Bureau's data on arbitration and class action outcomes, the Bureau notes that it expressly acknowledged the limitations of these data in the Study.[401]

The Bureau also disagrees that it overlooked the role of online dispute resolution. The Bureau had no direct way of studying the extent to which consumers were able to resolve disputes informally, and the Study specifically acknowledged that this is a means by which consumers may seek relief.[402] The Bureau did, however, use its case study of the Overdraft MDL to evaluate the extent to which informal dispute resolution obviated the need for a class action mechanism.[403] As this case study showed, even after deductions were made for previously-provided informal relief, there was still nearly $1 billion in relief provided to more than 28 million consumers in the class. This indicated that even if every consumer who sought informal relief was successful, most consumers were still without a remedy until they received a share of the class action settlement. For further discussion of individualized resolution of consumer disputes, see Part VI.B below.

As to the commenters that said that the Bureau should not have compared two years of arbitration data to five years of class action data, the Bureau studied arbitration records for the longest period practical given electronic data limitations. Although the Bureau could have similarly confined its study of class actions, the Bureau believed that studying settlements over a longer time period would provide more robust data to support firmer findings. The differences between the number of consumers involved in arbitration actions and individual actions of any type as compared to the number of consumers that benefited from class actions and the damages awarded in each were so stark as to mitigate any concerns about the difference in the time periods studied.[404] As a more technical point, the Bureau also notes that the commenter was not correct that the Bureau looked at only two years of arbitration data. The Bureau studied three years of arbitration filings, from 2010 to 2012, and two years of available arbitration outcomes for cases that were filed in 2010 and 2011 (*i.e.,* the cases may not have been resolved in those years). As is explained in the Study, that window was chosen because 2010 was the first year that electronic records were available from the AAA.[405] As is further explained, when the Bureau conducted an analysis of the arbitration records (in 2013) complete records for many of the disputes that had been filed in 2012 were unavailable because those cases had not yet been resolved.[406]

Regarding the commenter that said that the Bureau was misleading by reporting percentage recovery in arbitration but not in class actions, the Bureau notes that it was only able to do the former because the AAA requires that the filing party specify the dollar amount of his or her claim in an arbitration.[407] Similar disclosures are typically not required by Federal or State court rules and are rarely included in class action complaints.[408] Accordingly, the Bureau was unable to calculate recovery rates for court proceedings.[409]

Regarding the focus of the Bureau on providers in specific categories, such as Tribal lenders, credit unions, online lenders, providers of automobile financing, and CRAs (including credit monitoring), the Bureau included in the Study those products and services offered by these providers to the extent that data was available and that these providers were relevant to each section of the Study. For example, to the extent a credit monitoring class action settlement occurred during the Study period, it is included in the analysis in Section 8. With respect to the Study's approach to credit unions, the Bureau notes that its review of credit cards in Section 2 included agreements offered by credit unions to the extent that credit unions are represented in the credit card agreement database mandated under the CARD Act.[410] The Bureau's review of deposit account agreements included agreements from the 50 largest credit unions. As is discussed in the Section 1022(b)(2) Analysis below, the Bureau notes that to the extent that the commenter was correct in its assertion that credit unions do not offer many products with arbitration agreements, the impact of this rule will be

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[398] Bureau of Consumer Fin. Prot., Disclosure of Consumer Complaint Narrative Data, Final Policy Statement, 80 FR 15572, 15576 (Mar. 24, 2015) (''Industry commenters, by contrast, asserted that the publication of narratives in the Database would mislead consumers because the data is, in the commenters' words, unverified and unrepresentative.''). While the Bureau did not agree that such data was unverified, the Bureau in response focused on the impact the Bureau's complaints database would have on customer service and helping companies improve their compliance mechanisms generally. *See id.* (''In general, the Bureau believes that greater transparency of information does tend to improve customer service and identify patterns in the treatment of consumers, leading to stronger compliance mechanisms and customer service. . . . In addition, disclosure of consumer narratives will provide companies with greater insight into issues and challenges occurring across their markets, which can supplement their own company-specific perspectives and lend more insight into appropriate practices.'').

[399] See Consumer Financial Class Actions and Public Enforcement (Sections 8 and 9 of Study) discussion above.

[400] *See* Study, *supra* note 3, section 5 at 6–7.

[401] *See, e.g., id.* section 5 at 4–8.

[402] The online dispute resolution service referenced by the commenter purports to offer services to ''ecommerce'' companies, *i.e.,* merchants, which are excluded from the Bureau's authority. *See* Modria.com, Inc., ''About Us,'' *http://modria.com/about-us/* (last visited March 10, 2017).

[403] *See* Study, *supra* note 3, section 8 at 39–46

[404] Doubling the number of consumers successful in AAA arbitrations filed in 2010 and 2011 would raise the number of successful consumers 32 to 64.

[405] Study, *supra* note 3, section 5 at 17 n.30.

[406] *Id.* section 5 at 11 n.17.

[407] *Id.* section 5 at 20–28.

[408] *Id.* section 6 at 3, 33–54.

[409] The Bureau did attempt to do this analysis. Of 78 Federal individual cases where there was a result for the consumer, we could identify information about a monetary award in 75 cases. Of those 75 cases, the complaint included an allegation with a claim amount in only four cases. *See id.* section 6 at 49.

[410] *Id.* section 5 at 13.

minimal.[411] As for online lenders, while the Bureau agrees that it did not specifically analyze this category in Section 2, it notes that the trade association commenter acknowledged in its letter that its members have arbitration agreements that can be used to block class actions. To state this another way, the Bureau did not specifically exclude any products or services because of the entity that offered it—whether Tribal, governmental or otherwise—although in some cases data were not specifically available for specific types of providers. As for Tribal regulations concerning dispute resolution, the Bureau focused its description on AAA and JAMS standards as the two largest arbitration administrators. As for the suggestion that the Bureau should have studied Tribal consumer protection laws, the Bureau did not study any particular jurisdiction's consumer protection laws and in any case, the commenter did not suggest the specific ways in which such Tribal laws would be meaningfully different from laws in other jurisdictions.

Regarding the comment that the Bureau should have conducted a ''real world'' analysis of arbitration and class actions and tradeoffs of each, the Bureau believes that the Study did attempt such an analysis. Specifically, it attempted to catalogue the cost, benefits, and efficacy (in terms of consumers involved) of each mechanism. Further, as is discussed in greater detail in the Section 1022(b)(2) Analysis below, the Bureau has considered the impacts on consumers and providers of the final rule it is adopting. To the extent that the commenter was concerned that the Study did not evaluate the relative merits of each mechanism, the Bureau believes that such an evaluation is better suited to the rulemaking process where it can consider the impacts of potential policy options. *See* Part VI Findings, below.

The Bureau does not agree, as one industry commenter suggested, that Dodd-Frank section 1028(a) required it to study defense costs. In any event, as set out above in Section III.D, above, the Bureau determined that it would be too difficult to gather additional information on any uniform basis about defense costs, given that at least some of this information may be considered privileged by companies. Further, as set out above, the Bureau made clear that it sought ''transaction costs in consumer class actions,'' but the Bureau received no such data from firms during the Bureau's Study process or in response to the proposal.

The Bureau did attempt to project such costs based on the best data available to it, and discussed their significance in the sections of the proposal analyzing whether it was in the public interest and for the protection of consumers and the proposal's potential impacts on covered persons and consumers under section 1022 of the Dodd-Frank Act. To the extent that the commenter's primary objection was to the significance that the Bureau accorded defense costs in its analyses, those are discussed in Part VI.C below.[412]

As to the commenter that urged the Bureau to study class arbitration, the Bureau notes that the Study addressed class arbitration in several ways. First, Section 2 addressed the percentage of arbitration agreements that allowed for class arbitration in the six product markets studied (the vast majority prohibit it).[413] Second, Section 4 reviewed AAA's and JAMS' class arbitration procedures.[414] Third, Section 5 reviewed the few consumer finance class arbitrations that did occur.[415]

As for the commenters that suggested that the Bureau should have studied informal dispute resolution, the Bureau notes that the Study did address informal dispute resolution in a number of contexts. For example, as noted above in the discussion of Section 8, the Bureau noted the impact of previously-resolved informal disputes on the overall amount paid out by the settling banks in the MDL overdraft litigation. The Bureau also considered the significance of the availability of informal dispute resolution mechanisms in both the proposal's Section 1028 proposed findings and Section 1022(b)(2) Analysis, and in their counterparts for the final rule below. In any event, the commenters did not specify what about informal dispute resolution the Bureau should have studied.

As for the commenter that asserted that the Bureau should have studied the role of consumer choice, the Bureau notes that the Study's consumer survey *did* address this question. Whether this should impact the rulemaking is addressed below in Part VI. Regarding the commenter's contention that the Bureau should have studied the economic impact of its proposal, the Bureau notes that Section 10 did attempt to analyze the likelihood that class action costs would be passed on to consumers. The Bureau also refers the commenter to the proposal's and this rule's Section 1022(b)(2) Analysis.

IV. The Rulemaking Process

A. Stakeholder Outreach Following the Study

As noted, the Bureau released the Study in March 2015. After doing so, the Bureau held roundtables with key stakeholders and invited them to provide feedback on the Study and how the Bureau should interpret its results.[416] Stakeholders also provided feedback to the Bureau or published their own articles commenting on and responding to the Study. The Bureau has reviewed all of this correspondence and many of these articles in preparing this final rule.

B. Small Business Review Panel

In October 2015, the Bureau convened a Small Business Review Panel (SBREFA Panel) with the Chief Counsel for Advocacy of the Small Business Administration (SBA) and the Administrator of the Office of Information and Regulatory Affairs with the Office of Management and Budget (OMB).[417] As part of this process, the Bureau prepared an outline of proposals under consideration and the alternatives considered (SBREFA Outline), which the Bureau posted on its Web site for review by the small financial institutions participating in the panel process, as well as the general public.[418]

[411] The SBREFA Report further details the potential impact of this rule on small entities, including credit unions that are small. *See* SBREFA Report, *infra* note 419, at 23–32.

[412] During the Study process, the Bureau sought comment on whether a study of defense costs could be undertaken, but the Bureau received no useful comment on this point. Arbitration Study RFI, *supra* note 16.

[413] *See* Study, *supra* note 3, section 2 at 46 tbl. 7.

[414] *See id.* section 4 at 20.

[415] *See id.* section 5 at 86.

[416] As noted above, the Bureau similarly invited feedback from stakeholders on the Preliminary Results published in December 2013. In early 2014, the Bureau also held roundtables with stakeholders to discuss the Preliminary Results. *See supra* Parts III.A–III.C (summarizing the Bureau's outreach efforts in connection with the Study).

[417] The Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), as amended by section 1100G(a) of the Dodd-Frank Act, requires the Bureau to convene a Small Business Review Panel before proposing a rule that may have a substantial economic impact on a significant number of small entities. *See* 5 U.S.C. 609(d).

[418] Bureau of Consumer Fin. Prot., ''Small Business Advisory Review Panel for Potential Rulemaking on Arbitration Agreements: Outline of Proposals Under Consideration and Alternatives Considered,'' (Oct. 7, 2015), *available at http://files.consumerfinance.gov/f/201510_cfpb_small-business-review-panel-packet-explaining-the-proposal-under-consideration.pdf*; Press Release, Bureau of Consumer Fin. Prot., ''CFPB Considers Proposal to Ban Arbitration Clauses that Allow Companies to Avoid Accountability to Their Customers,'' (Oct. 7, 2015), *available at http://*

Continued

Working with stakeholders and the agencies, the Bureau identified 18 Small Entity Representatives (SERs) to provide input to the SBREFA Panel on the proposals under consideration. With respect to some markets, the relevant industry trade associations reported significant difficulty in identifying any small financial services companies that would be impacted by the approach described in the Bureau's SBREFA Outline.

Prior to formally meeting with the SERs, the Bureau held conference calls to introduce the SERs to the materials and to answer their questions. The SBREFA Panel then conducted a full-day outreach meeting with the small entity representatives in October 2015 in Washington, DC. The SBREFA Panel gathered information from the SERs at the meeting. Following the meeting, nine SERs submitted written comments to the Bureau. The SBREFA Panel then made findings and recommendations regarding the potential compliance costs and other impacts of the proposal on those entities. Those findings and recommendations are set forth in the Small Business Review Panel Report (SBREFA Report), which is being made part of the administrative record in this rulemaking.[419] The Bureau has carefully considered these findings and recommendations in preparing this proposal and addresses certain specific issues that concerned the Panel below.

C. Additional Stakeholder Outreach

At the same time that the Bureau conducted the SBREFA Panel, it met with other stakeholders to discuss the SBREFA Outline and the impacts analysis discussed in that outline. The Bureau convened several roundtable meetings with a variety of industry representatives—including national trade associations for depository banks and non-bank providers—and consumer advocates. Bureau staff also presented an overview of the SBREFA Outline at a public meeting of the Bureau's Consumer Advisory Board (CAB) and solicited feedback from the CAB on the proposals under consideration.[420]

D. The Bureau's Proposal

In May 2016, in accordance with its authority u section 1028 and consistent with its Study, the Bureau proposed regulations that would govern agreements that provide for the arbitration of any future disputes between consumers and providers of certain consumer financial products and services. The comment period on the proposal ended on August 22, 2016.

The proposal would have imposed two sets of limitations on the use of pre-dispute arbitration agreements by covered providers of consumer financial products and services. First, it would have prohibited providers from using a pre-dispute arbitration agreement to block consumer class actions in court and would have required providers to insert language into their arbitration agreements reflecting this limitation. This proposal was based on the Bureau's preliminary findings—which the Bureau stated were consistent with the Study—that pre-dispute arbitration agreements are being widely used to prevent consumers from seeking relief from legal violations on a class basis, that consumers rarely file individual lawsuits or arbitration cases to obtain such relief, and that as a result pre-dispute arbitration agreements lowered incentives for financial service providers to assure that their conduct comported with legal requirements and interfered with the ability of consumers to obtain relief where violations of law occurred.

Second, the proposal would have required providers that use pre-dispute arbitration agreements to submit certain records relating to arbitral proceedings to the Bureau. The Bureau stated that it intended to use the information it would have collected to continue monitoring arbitral proceedings to determine whether there are developments that raise consumer protection concerns that would warrant further Bureau action. The Bureau stated that it intended to publish these materials on its Web site in some form, with appropriate redactions or aggregation as warranted, to provide greater transparency into the arbitration of consumer disputes.

The proposal would have applied to providers of certain consumer financial products and services in the core consumer financial markets of lending money, storing money, and moving or exchanging money. Consistent with the Dodd-Frank Act, the proposal would have applied only to agreements entered into after the end of the 180-day period beginning on the regulation's effective date. The Bureau proposed an effective date of 30 days after a final rule is published in the **Federal Register**. To facilitate implementation and ensure compliance, the Bureau proposed language that providers would be required to insert into such arbitration agreements to explain the effect of the rule. The proposal would have also permitted providers of general-purpose reloadable prepaid cards to continue selling packages that contain non-compliant arbitration agreements, if they gave consumers a compliant agreement as soon as consumers register their cards and the providers complied with the proposal's requirement not to use arbitration agreements to block class actions.

E. Feedback Provided to the Bureau

The Bureau received over 110,000 comments on the proposal during the comment period. These commenters included consumer advocates; consumer lawyers and law firms; public-interest consumer lawyers; national and regional industry trade associations; industry members including issuing banks and credit unions, and non-bank providers of consumer financial products and services; nonprofit research and advocacy organizations; members of Congress and State legislatures; Federal, State, local, and Tribal government entities and agencies; Tribal governments; academics; State attorneys general; and individual consumers. In addition to letters addressing particular points raised by the Bureau in its preliminary findings, the Bureau received tens of thousands of form letters and signatures on petitions from individuals both supporting and disapproving of the proposal. As is discussed in greater detail in Part VI below, many thousands of consumers submitted comments generally disapproving of the Bureau's proposal (many of these comments were form comments) while many consumers submitted comments generally approving of the Bureau's proposal and, in many instances, urging a broader rule that prohibited arbitration agreements altogether in contracts for consumer financial products and services (many of these comments were form comments or petition signatures as well).

Since the issuance of the proposal, the Bureau has engaged in additional outreach. The Bureau held a field hearing to discuss the proposal and its potential impact on consumers and providers in Albuquerque, New

www.consumerfinance.gov/newsroom/cfpb-considers-proposal-to-ban-arbitration-clauses-that-allow-companies-to-avoid-accountability-to-their-customers/.

[419] Bureau of Consumer Fin. Prot., U.S. Small Bus. Admin., & Office of Mgmt. & Budget, ''Final Report of the Small Business Review Panel on CFPB's Potential Rulemaking on Pre-Dispute Arbitration Agreements,'' (2015), *available at http://files.consumerfinance.gov/f/documents/CFPB_SBREFA_Panel_Report_on_Pre-Dispute_Arbitration_Agreements_FINAL.pdf*.

[420] *See* Bureau of Consumer Fin. Prot., ''Advisory Groups,'' *http://www.consumerfinance.gov/advisory-groups/advisory-groups-meeting-details/* (last visited May 17, 2017); *see also* Bureau of Consumer Fin. Prot., ''Washington, DC: CAB Meeting,'' YouTube (Oct. 23, 2015), *https://www.youtube.com/watch?v=V11Xbp9z2KQ*.

Mexico.[421] The Bureau engaged in an in-person consultation with Indian Tribes in Phoenix, Arizona in August 2016 pursuant to its Policy for Consultation with Tribal Governments after the release of this notice of proposed rulemaking.[422] In addition, the Bureau received input on its proposal from its Consumer Advisory Board and its Credit Union Advisory Council. Finally, interested parties also made *ex parte* presentations to Bureau staff, summaries of which can be found on the docket for this rulemaking.[423]

V. Legal Authority

As discussed more fully below, there are two components to this final rule: a rule prohibiting providers from the use of arbitration agreements to block class actions (as set forth in § 1040.4(a)) and a rule requiring the submission to the Bureau of certain arbitral records and arbitration-related court records (as set forth in § 1040.4(b)). The Bureau is issuing the first component of this rule pursuant to its authority under section 1028(b) of the Dodd-Frank Act and is issuing the second component of this rule pursuant to its authority both under section 1028(b) and section 1022(b) and (c).

A. Section 1028

Section 1028(b) of the Dodd-Frank Act authorizes the Bureau to issue regulations that would ''prohibit or impose conditions or limitations on the use of an agreement between a covered person and a consumer for a consumer financial product or service providing for arbitration of any future dispute between the parties,'' if doing so is ''in the public interest and for the protection of consumers.'' Section 1028(b) also requires that ''[t]he findings in such rule shall be consistent with the study.''

Section 1028(c) further instructs that the Bureau's authority under section 1028(b) may not be construed to prohibit or restrict a consumer from entering into a voluntary arbitration agreement with a covered person after a dispute has arisen. Finally, section 1028(d) provides that, notwithstanding any other provision of law, any regulation prescribed by the Bureau under section 1028(b) shall apply, consistent with the terms of the regulation, to any agreement between a consumer and a covered person entered into after the end of the 180-day period beginning on the effective date of the regulation, as established by the Bureau. As is discussed below in Part VI, the Bureau finds that its rule relating to pre-dispute arbitration agreements fulfills all these statutory requirements and is in the public interest, for the protection of consumers, and consistent with the Bureau's Study.

B. Section 1022(b) and (c)

Section 1022(b)(1) of the Dodd-Frank Act authorizes the Bureau to prescribe rules ''as may be necessary or appropriate to enable the Bureau to administer and carry out the purposes and objectives of the Federal consumer financial laws, and to prevent evasions thereof.'' Among other statutes, title X of the Dodd-Frank Act is a Federal consumer financial law.[424] Accordingly, in issuing this, the Bureau is exercising its authority under Dodd-Frank Act section 1022(b) to prescribe rules under title X that carry out the purposes and objectives and prevent evasion of those laws. Section 1022(b)(2) of the Dodd-Frank Act prescribes certain standards for rulemaking that the Bureau must follow in exercising its authority under section 1022(b)(1).[425]

Dodd-Frank section 1022(c)(1) provides that, to support its rulemaking and other functions, the Bureau shall monitor for risks to consumers in the offering or provision of consumer financial products or services, including developments in markets for such products or services. The Bureau may make public such information obtained by the Bureau under this section as is in the public interest.[426] Moreover, section 1022(c)(4) of the Act provides that, in conducting such monitoring or assessments, the Bureau shall have the authority to gather information from time to time regarding the organization, business conduct, markets, and activities of covered persons and service providers. The Bureau finalizes § 1040.4(b) pursuant to the Bureau's authority under Dodd-Frank section 1022(c), as well as its authority under Dodd-Frank section 1028(b).

VI. The Bureau's Findings That the Final Rule Is in the Public Interest and for the Protection of Consumers

The Bureau notes that commenters on the proposal made extensive comments on the Bureau's preliminary findings related to Dodd-Frank Act Section 1028(b), including its factual findings, its findings that the proposal would be for the protection of consumers, and its findings that the proposal would be for the protection of consumers. The bulk of these commenters did not identify whether their comments on particular topics were related to the preliminary factual findings (discussed below in Part VI.B), to the preliminary findings that the proposed rule would be for the protection of consumers (discussed below in Parts VI.C.1 and VI.D.1), or to the preliminary findings that it would be in the public interest (discussed below in Parts VI.C.2 and VI.D.2). Accordingly, for this final rule, the Bureau addresses each comment in the context of the finding it believes the comment was most likely addressing. There is significant overlap between the topics addressed in the final factual findings, the findings that the rule would be for the protection of consumers, and the finding that the rule would be in the public interest. The Bureau therefore incorporates each of its findings into the others, to the extent that commenters may have intended their comments to respond to a different preliminary finding or to more than one.

A. Relevant Legal Standard

As discussed above in Part V, Dodd-Frank section 1028(b) authorizes the Bureau to ''prohibit or impose conditions or limitations on the use of'' a pre-dispute arbitration agreement between covered persons and consumers if the Bureau finds that doing so ''is in the public interest and for the protection of consumers.'' This Part sets forth the Bureau's interpretation of this standard including a summary of its proposed standard and a review of comments received on it.

The Bureau's Proposal

As noted in the proposal, the Bureau can read this requirement as either a single integrated standard or as two separate tests (that a rule be both ''in the public interest'' and ''for the protection of consumers''), and in order to determine which reading best effectuates the purposes of the statute, the Bureau exercises its expertise. The Bureau proposed to interpret the two

[421] Bureau of Consumer Fin. Prot., ''Field Hearing on Arbitration in Albuquerque, NM,'' (May 5, 2016), (video, transcript, and remarks by Director Cordray), *available at https://www.consumerfinance.gov/about-us/events/archive-past-events/field-hearing-arbitration-albuquerque-nm/*.

[422] Bureau of Consumer Fin. Prot., ''Policy for Consultation with Tribal Governments,'' (Apr. 22, 2013), *available at http://files.consumerfinance.gov/f/201304_cfpb_consultations.pdf*.

[423] *Regulations.gov*, ''Arbitration Agreements,'' No. CFPB–2016–0020, *https://www.regulations.gov/docket?D=CFPB-2016-0020* (last visited June 21, 2017)

[424] *See* Dodd-Frank section 1002(14) (defining ''Federal consumer financial law'' to include the provisions of title X of the Dodd-Frank Act).

[425] *See* Section 1022(b)(2) Analysis, *infra* Part VIII.B. (discussing the Bureau's standards for rulemaking under section 1022(b)(2) of the Dodd-Frank Act).

[426] Dodd-Frank section 1022(c)(3)(B).

phrases as related but conceptually distinct.

As discussed in the proposal, the Dodd-Frank section 1028(b) statutory standard parallels the standard set forth in Dodd-Frank section 921(b), which authorizes the SEC to ''prohibit or impose conditions or limitations on the use of'' a pre-dispute arbitration agreement between investment advisers and their customers or clients if the SEC finds that doing so ''is in the public interest and for the protection of investors.'' That language in turn parallels the Securities Act and the Securities Exchange Act, which, for over 80 years have authorized the SEC to adopt certain regulations or take certain actions if doing so is ''in the public interest and for the protection of investors.'' [427] The SEC has routinely applied this language without delineating separate tests or definitions for the two phrases.[428] There is an underlying logic to such an approach since investors make up a substantial portion of ''the public'' whose interests the SEC is charged with advancing. This is even more the case for section 1028, since nearly every member of the public is a consumer of financial products and services under Dodd-Frank. Furthermore, in exercising its roles and responsibilities as the Consumer Financial Protection Bureau, the Bureau ordinarily approaches consumer protection holistically. In other words, the Bureau approaches consumer protection in accordance with the broad range of factors it generally analyzes under title X of Dodd-Frank, which include systemic impacts and other public concerns as discussed further below. Therefore, the proposal explained that if the Bureau were to treat the standard as a single, unitary test, the Bureau's analysis would encompass the public interest, as defined by the purposes and objectives of the Bureau, and would be informed by the Bureau's particular expertise in the protection of consumers.

But the proposal further explained that the Bureau believed that treating the two phrases as separate tests would ensure a fuller consideration of relevant factors. This approach would also be consistent with canons of construction that counsel in favor of giving the two statutory phrases discrete meaning notwithstanding the fact that the two phrases in section 1028(b)—''in the public interest'' and ''for the protection of consumers''—are inherently interrelated for the reasons discussed above.[429] Under this framework, the proposal explained, the Bureau would be required to exercise its expertise to outline a standard for each phrase because both phrases are ambiguous. In doing so, and as described in more detail below, the Bureau would look to, using its expertise, the purposes and objectives of title X to inform the ''public interest'' prong,[430] and rely on its expertise in consumer protection to define the ''consumer protection'' prong.

The proposal explained that under this approach the Bureau believed that ''for the protection of consumers'' in the context of section 1028 should be read to focus specifically on the effects of a regulation in promoting compliance with laws applicable to consumer financial products and services and avoiding or preventing harm to the consumers who use or seek to use those products. In contrast, the proposal explained, under this approach the Bureau would read section 1028(b)'s ''in the public interest'' prong, consistent with the purposes and objectives of title X, to require consideration of the entire range of impacts on consumers and other relevant elements of the public. These interests encompass not just the elements of consumer protection described above, but also secondary impacts on consumers such as effects on pricing, accessibility, and the availability of innovative products. The other relevant elements of the public interest include impacts on providers, markets, and the rule of law, in the form of accountability and transparent application of the law to providers, as well as other related general systemic considerations.[431] The Bureau proposed to adopt this interpretation, giving the two phrases independent meaning.[432]

The proposal also explained that the Bureau's proposed interpretations of each phrase standing alone were informed by several considerations. As noted above, for instance, the Bureau would look to the purposes and objectives of title X to inform the ''public interest'' prong. The Bureau's starting point in defining the public interest therefore would be section 1021(a) of the Act, which describes the Bureau's purpose as follows: ''The Bureau shall seek to implement and, where applicable, enforce Federal consumer financial law consistently for the purpose of ensuring that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive.'' [433] Similarly, section 1022 of the Act authorizes the Bureau to prescribe rules to ''carry out the purposes and objectives of the Federal consumer financial laws and to prevent evasions thereof'' and provides that in doing so the Bureau shall consider ''the potential benefits and costs'' of a rule both ''to consumers and covered persons, including the potential reduction of access by consumers to consumer financial products or services.'' Section 1022 also directs the Bureau to consult with the appropriate Federal prudential regulators or other Federal agencies ''regarding consistency with prudential, market, or systemic objectives administered by such agencies,'' and to respond in the course of rulemaking to any written objections filed by such

[427] *See, e.g.,* Securities Act of 1933, Public Law 73 22, section 3(b)(1) (1933) 15 U.S.C. 77c(b)(1); Securities Exchange Act of 1934, Public Law 73 291, section 12(k)(1) (1934) 15 U.S.C. 78(k)(1).

[428] *See, e.g., Bravo Enterprises Ltd.,* Securities Exchange Act Release No. 75775, Admin. Proc. No. 3–16292 at 6 (Aug. 27, 2015) (applying ''the 'public interest' and 'protection of investors' standards'' in light ''of their breadth [and] supported by the structure of the Exchange Act and Section 12(k)(1)'s legislative history''). *See also* Notice of Commission Conclusions and Rule-Making Proposals, Securities Act Release No. 5627 [1975–1976 Transfer Binder] Fed. Sec. L. Rep. (CCH) at 7 (Oct. 14, 1975) (''Whether particular disclosure requirements are necessary to permit the Commission to discharge its obligations under the Securities Act and the Securities Exchange Act or are necessary or appropriate in the public interest or for the protection of investors involves a balancing of competing factors.'').

[429] *See Hibbs* v. *Winn,* 542 U.S. 88, 101 (2004); *Bailey* v. *United States,* 516 U.S. 137, 146 (1995).

[430] This approach is also consistent with precedent holding that the statutory criterion of ''public interest'' should be interpreted in light of the purposes of the statute in which the standard is embedded. *See Nat'l Ass'n for Advancement of Colored People* v. *FPC,* 425 U.S. 662, 669 (1976).

[431] Treating consumer protection and public interest as two separate but overlapping criteria is consistent with the FCC's approach to a similar statutory requirement. *See Verizon* v. *FCC,* 770 F.3d 961, 964 (D.C. Cir. 2014).

[432] The proposal explained that the Bureau believes that findings sufficient to meet the two tests explained in the proposal would also be sufficient to meet a unitary interpretation of the phrase ''in the public interest and for the protection of consumers,'' because any set of findings that meets each of two independent criteria would necessarily meet a single test combining them.

[433] Section 1021(b) goes on to authorize the Bureau to exercise its authorities for the purposes of ensuring that, with respect to consumer financial products and services: (1) Consumers are provided with timely and understandable information to make responsible decisions about financial transactions; (2) consumers are protected from unfair, deceptive, or abusive acts and practices and from discrimination; (3) outdated, unnecessary, or unduly burdensome regulations are regularly identified and addressed in order to reduce unwarranted regulatory burdens; (4) Federal consumer financial law is enforced consistently, without regard to the status of a person as a depository institution, in order to promote fair competition; and (5) markets for consumer financial products and services operate transparently and efficiently to facilitate access and innovation.

agencies.[434] In light of these purposes and requirements, as set forth in the proposal, the Bureau understands its responsibilities with respect to the administration of Federal consumer financial laws to be integrated with the advancement of a range of other public goals such as fair competition, innovation, financial stability, and the rule of law.

Accordingly, the Bureau proposed to interpret the phrase ''in the public interest'' to condition any regulation on a finding that such regulation serves the public good based on an inquiry into the regulation's implications for the Bureau's purposes and objectives. This inquiry would require the Bureau to consider benefits and costs to consumers and firms, including the more direct consumer protection factors noted above, and general or systemic concerns with respect to the functioning of markets for consumer financial products or services, as well as the impact of any change in those markets on the broader economy, and the promotion of the rule of law.[435]

With respect to ''the protection of consumers,'' as explained above and in the proposal, the Bureau ordinarily considers its roles and responsibilities as the Consumer Financial Protection Bureau to encompass attention to the full range of considerations relevant under title X without separately delineating some as ''in the public interest'' and others as ''for the protection of consumers.'' However, given that section 1028(b) pairs ''the protection of consumers'' with the ''public interest,'' the latter of which the Bureau proposed to interpret to include the full range of considerations encompassed in title X, the proposal explained that the Bureau believed, based on its expertise, that ''for the protection of consumers'' should not be interpreted in the broad manner in which it is ordinarily understood in the Bureau's work.

The Bureau instead proposed to interpret the phrase ''for the protection of consumers'' as used in section 1028(b) to condition any regulation on a finding that such regulation would serve to deter and redress violations of the rights of consumers who are using or seek to use a consumer financial product or service. The focus under this prong of the test, as the Bureau proposed to interpret it, would be exclusively on the impacts of a proposed regulation on the level of compliance with relevant laws, including deterring violations of those laws, and on consumers' ability to obtain redress or relief. For instance, a regulation would be ''for the protection of consumers'' if it adopted direct requirements or augmented the impact of existing requirements to ensure that consumers receive ''timely and understandable information'' in the course of financial decision making, or to guard them from ''unfair, deceptive, or abusive acts and practices and from discrimination.''[436] Under this proposed interpretation, the Bureau would not consider more general or systemic concerns with respect to the functioning of the markets for consumer financial products or services or the broader economy as part of section 1028's requirement that the rule be ''for the protection of consumers.''[437] Rather, the Bureau would consider these factors under the public interest prong.

The proposal stated that the Bureau provisionally believed that giving separate meaning and consideration to the two prongs would best ensure effectuation of the purpose of the statute. This proposed interpretation would prevent the Bureau from acting solely based on more diffuse public interest benefits, absent a meaningful direct impact on consumer protection as described above. Likewise, the proposed interpretation would prevent the Bureau from issuing arbitration regulations that would undermine the public interest as defined by the full range of factors discussed above, despite some advancement of the protection of consumers.[438]

Comments Received

Several commenters—a nonprofit, an industry trade association, two industry commenters, and an individual—supported the Bureau's proposal to interpret the legal standard as including two separate but related tests. A trade association of consumer lawyers argued for treating the legal standard as a single test given that other similar standards have traditionally been treated as unitary and that the Bureau's two proposed tests would have significant overlap.

One nonprofit commenter acknowledged that the phrase ''public interest'' is susceptible to multiple interpretations, but also stated that the Bureau's proposed interpretation of the legal standard includes factors that should not be considered. This commenter explained that, in its view, the Bureau should interpret the phrase in the context of the FAA and the longstanding Federal policy that encourages use of arbitration as an efficient means of resolving disputes. The commenter further suggested that section 1028 requires the Bureau to find that a regulation is in the public interest for reasons uniquely applicable to consumer financial products or services rather than for reasons that could apply to other types of products or services. Furthermore, this commenter contended that in enacting section 1028, Congress was not concerned with under-enforcement of laws because there is no specific reference to such considerations in that section of the statute or its brief legislative history. The commenter therefore asserted that the Bureau should not consider increased deterrence or enforcement in determining whether a regulation is ''in the public interest and for the protection of consumers.''

Several commenters identified additional specific factors that, in their view, the Bureau should consider in its determination of whether the rule is in the public interest and for the protection of consumers. A group of State attorneys general and an industry commenter suggested that the legal standard should include the public's interest in the freedom of contract. The industry commenter also stated that the public interest standard should consider individuals' ability to choose whether to participate in class action litigation or to be bound by class action judgments. A group of State legislators argued that the Bureau should consider States' rights as a factor in its determination of whether the rule is in the public interest. The group stated that class waivers in arbitration clauses undermine States' ability to pass laws that will be privately enforced, measure the efficacy of those laws, or observe their development, and that the legal standard should account for such effects.

A group of State attorneys general argued that the proposed ''protection of consumers'' standard is incomplete because it is limited to providers' compliance with the law and consumers' ability to obtain relief. The commenters maintained that the Bureau should also consider consumers'

[434] Dodd-Frank section 1022(b)(2)(B) and (C).

[435] The Bureau uses its expertise to balance competing interests, including how much weight to assign each policy factor or outcome.

[436] Dodd-Frank section 1021(b)(1) and (2).

[437] *See Whitman* v. *Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 465 (2001).

[438] As noted above, the proposal explained that if the Bureau were to treat the standard as a single, unitary test, the test would involve the same considerations as described above, while allowing for a more flexible balancing of the various considerations. The Bureau accordingly believed that findings sufficient to meet the two tests explained in the proposal would also be sufficient to meet a unitary test, because any set of findings that met each of two independent criteria would necessarily meet a more flexible single test combining them.

interest in a ''vibrant and flourishing financial market'' as part of the standard.

Response to Comments

The Bureau is not persuaded by the nonprofit commenter that the standard should be treated as a single test on the ground that other similar standards have been treated as unitary and the Bureau's two proposed tests will have significant overlap. As explained in the proposal, the statutory standard is ambiguous, and while it is useful and relevant for the Bureau to consider how other similar standards have been applied, there are persuasive reasons, as set forth in the proposal, for the Bureau to adopt a different interpretation here in the context of section 1028.[439] The Bureau recognizes that the two tests will have significant overlap, but that in and of itself is not a reason to adopt a unitary test. Instead, the Bureau continues to believe that treating the two phrases as separate tests is more consistent with canons of statutory construction and may ensure a fuller consideration of relevant factors.[440]

The Bureau also disagrees with the nonprofit commenter that stated that the proposed interpretation includes factors that should not be considered. With regard to the commenter's contention that section 1028 requires the Bureau to find that a regulation is in the public interest for reasons uniquely applicable to consumer financial products or services rather than for reasons that could apply to other types of products or services, the Bureau notes that section 1028 contains no such limitation. As explained above, the proposed interpretation of the legal standard is guided by the Bureau's purposes and objectives as laid out in title X of the Dodd-Frank Act. The commenter did not identify a basis in the text of title X or the statute's underlying purposes for excluding factors derived from title X simply because they could apply to other products and services. In any event, the Bureau's findings are specific to consumer financial products and services and are based on an empirical study required by Congress that is specific to consumer financial products and services.[441]

Further, as noted above, the Bureau looks to the purposes and objectives of title X to inform the section 1028 standard, and the FAA is not referenced in those purposes and objectives. To the extent that Federal law encourages arbitration through the FAA, the Bureau notes that, as Congress has limited pre-dispute arbitration agreements in other contexts, Congress, through Section 1028, has granted the Bureau express authority to prohibit or otherwise limit the use of such agreements.[442] Thus, rather than incorporate the FAA per se into its public interest analysis, the Bureau conducted a robust analysis of the advantages and disadvantages of pre-dispute arbitration agreements as currently enforced (under the FAA) in markets for consumer financial products and services. This included whether consumers are able to meaningfully pursue their rights and obtain redress or relief in light of pre-dispute arbitration agreements with class waivers enforceable under the FAA, as discussed in Section VI.B.

The Bureau also disagrees with the commenter's contention that increased deterrence or enforcement should not be considered because section 1028 and its brief legislative history[443] do not specifically mention deterrence. As explained above, the Bureau looks to the purposes and objectives of title X to inform the ''public interest'' inquiry, and these statutory purposes and objectives evince a goal of enforcing the law and deterring illegal behavior as well as a mandate for the Bureau to do so.[444] Similarly, based on its expertise in consumer protection, the Bureau believes that deterring illegal behavior and enforcing the law are core aspects of the ''protection of consumers.'' The absence of a specific mention of deterrence or enforcement in section 1028 or its legislative history does nothing to undercut these conclusions. In fact, the Bureau believes that while the phrase ''in the public interest and for the protection of consumers'' is ambiguous it would be unreasonable not to consider deterrence as part of the standard.

A variety of commenters identified additional factors that they thought should be considered in the legal standard. The Bureau notes that the standard already encompasses the types of considerations suggested by these commenters, and thus, disagrees that it should specifically list these factors as a part of the legal standard. As the Bureau explained in the proposal, it interprets the public interest standard to include consideration of ''benefits and costs to consumers and firms.'' The standard thus accounts for impacts that a rule may have on consumers' ''freedom of contract'' and their ability to determine whether or not to participate in class actions. Likewise, both the public interest standard and the protection of consumers standard account for the extent to which laws are actually enforced. This includes the extent to which State laws that States intend to be privately enforced are actually enforced in this manner.

Finally, the Bureau also disagrees with the State attorneys general that suggested that the ''protection of consumers'' specifically (as opposed to the section 1028 standard generally or ''the public interest'' prong) should include consideration of a rule's impact on the general flourishing of the economy. As explained in the proposal, the Bureau generally views consumer protection holistically in its approach to fulfilling its mandate in accordance with the broad range of factors it considers under title X of Dodd-Frank. But in the context of section 1028, which pairs ''the protection of consumers'' with ''the public interest,'' the Bureau continues to believe that systemic impacts should be considered under the public interest standard rather than the protection of consumers standard. As such, the Bureau considers a variety of factors related to competition and the flourishing of the economy under the public interest

[439] Note that similar standards have not been exclusively applied as unitary. *See Verizon* v. *FCC,* 770 F.3d 961, 964 (D.C. Cir. 2014) (''protection of consumers'' and ''public interest'' separate ''conjunctive'' factors). And while other agencies have applied similar, but not identical language, as a unitary standard in some contexts, they have for the most part done so without discussion as to their reasons for doing so.

[440] Furthermore, the Bureau continues to believe that if it were to treat the standard as a single, unitary test, the test would involve the same considerations, while allowing for a more flexible balancing of the various considerations. Therefore findings sufficient to meet the two tests would also be sufficient to meet a unitary test, because any set of findings that met each of two independent criteria would necessarily meet a more flexible single test combining them.

[441] The Bureau notes that its Study and this rulemaking focused almost exclusively on the use of arbitration agreements on contracts for consumer financial products and services. Whether the findings of this rulemaking may apply in other markets is not relevant and beyond the scope of this process.

[442] *See CompuCredit Corp.* v. *Greenwood,* 565 U.S. 95, 103–04 (2012) (listing statutes where Congress has ''restricted the use of arbitration'' as well as section 1028); *see also* Dodd-Frank section 1414(a) (''No residential mortgage loan . . . may include terms which require arbitration . . . as the method for resolving any controversy or settling any claims arising out of the transaction.'').

[443] *See* S. Rept. 111–176, at 171 (2010).

[444] *See, e.g.,* Dodd-Frank sections 1021(a) (''The Bureau shall seek to implement and, where applicable, enforce Federal consumer financial law consistently for the purpose of ensuring that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive.''); 1021(b)(2) (''. . . consumers are protected from unfair, deceptive, or abuse acts and practices and from discrimination''); 1021(b)(3) (''. . . Federal consumer financial law is enforced consistently . . . .'').

standard rather than the protection of consumers standard. Such systemic impacts implicate benefits to consumers, including consumers' interests in ''access to a vibrant and flourishing financial market'' as noted by the commenter, and the Bureau considers those benefits in its public interest analysis.

The Final Legal Standard

For these reasons and those stated in the proposal, the Bureau is adopting the interpretation of the section 1028 standard largely as proposed, with minor wording changes for clarification, as restated below.

The phrase ''in the public interest and for the protection of consumers'' in section 1028 is ambiguous. The Bureau interprets it as comprising two separate but related standards.

The Bureau interprets the phrase ''in the public interest'' to condition any regulation under section 1028 on a finding that such regulation serves the public good based on an inquiry into the regulation's implications for the Bureau's purposes and objectives. This inquiry requires the Bureau to consider the benefits and costs to consumers and firms, including the more direct factors considered under the protection of consumers standard, and general or systemic concerns with respect to the functioning of markets for consumer financial products or services, as well as the impact of any changes in those markets on the broader economy and the promotion of the rule of law, in the form of accountability and transparent application of the law to providers.[445]

The Bureau interprets the phrase ''for the protection of consumers'' as used in section 1028 to condition any regulation on a finding that such regulation will serve to deter and redress violations of the rights of consumers who are using or seek to use a consumer financial product or service. The focus under this prong of the test is exclusively on the impacts of a regulation on the level of compliance with relevant laws, including deterring violations of those laws, and on consumers' ability to obtain redress or relief. Under the Bureau's interpretation, the Bureau does not consider more general or systemic concerns with respect to the functioning of the markets for consumer financial products or services or the broader economy as part of section 1028's requirement that the rule be ''for the protection of consumers.'' Rather, the Bureau considers these factors under the public interest prong.

B. The Bureau's Factual Findings Consistent With the Study and Further Analysis

The Study provides a factual predicate for assessing whether particular proposals would be in the public interest and for the protection of consumers. This part sets forth the factual findings that the Bureau has drawn from the Study and from the Bureau's additional analysis of arbitration agreements and their role in the resolution of disputes involving consumer financial products and services. The Bureau finds that all of the factual findings in this Part VI.B are consistent with the Study.

As noted in Part IV.E, above, the Bureau received many comments on the class proposal. In addition to letters addressing particular points raised by the Bureau in its preliminary findings, the Bureau received tens of thousands of letters and signatures on petitions from individuals both supporting and disapproving of the class proposal.[446]

The Bureau received letters from industry, including banks, credit unions, non-bank providers of consumer financial product and services, trade associations, academics, members of Congress, nonprofits, consumers, and others expressing disapproval of the Bureau's class proposal. The specifics of these letters are discussed in relevant part below. The majority of the letters criticizing the proposal expressed general disapproval rather than specific concerns with provisions of the proposed regulation. Many of these letters recited facts derived from the Study, such as the amount of payments received per consumer in class action settlements, the amount of relief received by consumers who obtained arbitral awards in their favor, the amount of fees paid to plaintiff's attorneys in class actions, and the proportion of class cases that do not result in classwide relief. Many of these comments expressed concerns that the proposal would raise the cost to consumers of financial services and that only plaintiff's attorneys would benefit from the class proposal because of the large fees that plaintiff's attorneys often receive when class action cases are settled. These urged the Bureau not to adopt the proposal.

The Bureau also received many comments from consumers, consumer advocates, nonprofits, public-interest consumer lawyers, consumer lawyers and law firms, academics, members of Congress, State attorneys general, State legislators, local government representatives, and others that expressed broad support for the class proposal. The specifics of these letters are also discussed in relevant part below. These commenters explained that, in their view, the proposal is in the public interest, for the protection of consumers and, if finalized, would be consistent with the Study. Many of these letters recited facts derived from the Study and cited by the Bureau in the proposal that support these findings. For example, many emphasized the need for class actions by comparing the benefits provided to consumers in individual arbitration and litigation with those provided in class actions. These letters also stated that forcing arbitration on consumers by means of form contracts is not in the public interest. Many asserted that consumers should never have to give up constitutional protections, such as the right to bring a case in court. A petition signed by many thousands of consumers asked the Bureau to restore consumers' right to join together to take companies to court. Other commenters urged the Bureau to adopt the class proposal because it would generally enhance consumer rights vis-à-vis financial institutions.

1. A Comparison of the Relative Fairness and Efficiency of Individual Arbitration and Individual Litigation Is Inconclusive

As explained in the proposal, the benefits and drawbacks of arbitration as a means of resolving consumer disputes have long been contested. The Bureau stated there that it did not believe that, based on the evidence currently available to the Bureau as of the time of the proposal, it could determine whether the mechanisms for the arbitration of individual disputes between consumers and providers of consumer financial products and services that existed during the Study period are more or less fair or efficient in resolving these disputes than leaving these disputes to the courts.[447] Accordingly, the Bureau preliminarily found that a comparison of the relative fairness and efficiency of individual

[445] The Bureau uses its expertise to balance competing interests, including how much weight to assign each policy factor or outcome.

[446] The Bureau received a number of letters that did not appear to address the proposal at all and instead expressed general favor or displeasure with the Bureau or the Federal government. The Bureau views these comments as beyond the scope of the proposed rule.

[447] *See* Study, *supra* note 3, section 6 at 4 (explaining why ''[c]omparing frequency, processes, or outcomes across litigation and arbitration is especially treacherous''). The Bureau did not study and is not evaluating post-dispute agreements to arbitrate between consumers and companies.

arbitration and individual litigation was inconclusive and thus that a total ban on the use of pre-dispute arbitration agreements in consumer finance contracts was not warranted at that time.

Comments Received

Numerous industry, research center, and State attorneys general commenters disagreed with the Bureau's preliminary assessment that a comparison of the relative fairness and efficiency of individual arbitration and individual litigation is inconclusive. Instead, many of these commenters stated their belief that arbitration is a superior form of dispute resolution than individual litigation for consumers because it is less expensive, faster, and does not require the consumer to retain an attorney. For example, commenters stated that the informal nature of arbitration allows for a more streamlined process; that overburdened courts slow resolution of individual litigation; that arbitration hearings can be held via telephone or other convenient means, and that the lack of procedural complexity in arbitration minimizes the need for a consumer to have an attorney.[448] These commenters further stated that the class rule would cause providers to remove arbitration agreements from their consumer contracts altogether, thereby depriving consumers of arbitration as a forum for hearing their individual disputes and forcing them to proceed in court; the Bureau's response to these comments is addressed below in Part VI.C.1, because they relate to whether the class rule protects consumers and not these factual findings regarding a comparison of the relative fairness and efficiency of individual arbitration and individual litigation.

A group of State attorneys general commenters, a nonprofit commenter, many individual commenters, and Congressional, consumer advocate, academic, and consumer law firm commenters also disagreed with the Bureau's preliminary findings about the relative fairness of individual arbitration and individual litigation, but for reasons opposite those described above. Instead, these commenters stated that individual arbitration was so unfair relative to individual litigation that the Bureau should have protected individual consumers by banning outright the use of pre-dispute arbitration agreements. For example, several consumer advocate commenters and many individual commenters (including thousands of individuals who had signed petitions) argued that any arbitration proceeding that occurs pursuant to a pre-dispute arbitration agreement is ''forced'' and therefore unfair, and that arbitration agreements are contracts of adhesion that should not be permitted in any context. Other commenters argued that consumer arbitration cannot be neutral because it naturally favors repeat players—the providers who repeatedly hire arbitrators and select administrators—over consumers, who may only be involved in an arbitration once. One public-interest consumer lawyer commenter argued that only a complete ban on pre-dispute arbitration agreements would help consumers because consumers cannot find legal representation for arbitrations and few consumers file arbitrations in any case. Academic commenters stated that consumers should never be deprived of the right to go to court. A Congressional commenter noted that arbitral filing fees can be tens of thousands of dollars and thus are unaffordable to many consumers, particularly when compared to filing fees in court which vary but in some courts are as low as a few hundred dollars. Finally, another public-interest consumer lawyer commenter observed that many resources exist to help individual litigants use the court system—such as volunteer attorneys, offices that offer legal advice, publications, standardized pro se forms, videos, etc.—but that comparable resources do not exist to help individuals navigate arbitration proceedings.

Response to Comments and Findings

As noted in the proposal and explained in the Study, the Bureau believes that the predominant administrator of consumer arbitration agreements is the AAA, which has adopted standards of conduct that govern the handling of disputes involving consumer financial products and services. Commenters did not disagree with this preliminary finding. The Study showed that AAA arbitrations proceeded relatively expeditiously relative to litigation, that companies often advance consumer filing fees in arbitration, which does not occur in litigation, and that at least some consumers proceeded without an attorney. The Study also showed that those consumers who did prevail in arbitration obtained substantial individual awards—the average recovery by the 32 consumers who won judgments on their affirmative claims was nearly $5,400.[449]

At the same time, the Study showed that a large percentage of the relatively small number of AAA individual arbitration cases were initiated by the consumer financial product or service companies or jointly by companies and consumers in an effort to resolve debt disputes. The Study also showed that companies prevailed more frequently on their claims than consumers[450] and that companies were almost always represented by attorneys (90 percent of the claims analyzed) while consumers were represented significantly less (60 percent).[451] Finally, the Study showed that companies were awarded payment of their attorney's fees by consumers in 14.1 percent of 341 disputes resolved by arbitrators in companies favor' and consumers were awarded payment of their attorney's fees in 14.6 percent of the 341 disputes in which consumers prevailed and were represented by an attorney.[452]

In light of these results and in consideration of the comments received, the Bureau continues to believe that the results of the Study were inconclusive as to the benefits to consumers of individual arbitration versus individual litigation during the Study period. Nevertheless, because arbitration procedures are privately determined, the Bureau finds that they can under certain circumstances pose risks to consumers. For example, as discussed above in Part II.C and in the proposal, until it was effectively shut down by the Minnesota Attorney General, the National Arbitration Forum (NAF) was the predominant administrator for certain types of arbitrations. NAF stopped conducting consumer arbitrations in response to allegations that its ownership structure gave rise to an institutional conflict of interest. The

[448] Among commenters that favored arbitration in consumer contracts were a number of automobile dealers and their advocates. In response, a consumer lawyer commenter noted that the automobile dealers' opinion might be hypocritical insofar as they advocate for including arbitration agreements in their contracts with consumers while advocating for their removal in dealers' contracts with manufacturers.

[449] *See* Study, *supra* note 3, section 5 at 13.

[450] *Id.* section 5 at 13–14 (finding that consumers prevailed on 25 of 92 claims in which a consumer asserted affirmative claims only and an arbitrator reached a decision on the merits in seven of 69 claims in which a consumer brought an affirmative claim and also disputed debts they were alleged to owe (finding that companies prevailed in 227 out of 250 cases in which companies asserted counterclaims against consumers). The Study did not explain why companies prevailed more often than consumers. While some stakeholders have suggested that arbitrators are biased—citing, for example, that companies were repeat players or often the party effectively chose the arbitrator—other stakeholders and research suggested that companies prevailed more often than consumers because of a difference in the relative merits of such cases.

[451] *Id.* section 5 at 29.

[452] *Id.* section 5 at 12. Note that the number of attorney's fee requests was not recorded.

Study also showed isolated instances of arbitration agreements containing provisions that, on their face, raised significant concerns about fairness to consumers similar to those raised by NAF, such as an agreement that designated a Tribal administrator that does not appear to exist and agreements that specified NAF as a provider even though NAF no longer handled consumer finance arbitration, making it difficult for consumers to resolve their claims.[453]

As first stated in the proposal, the Bureau remains concerned about the potential for consumer harm in the use of arbitration agreements in the resolution of individual disputes. Among these concerns is that arbitrations could be administered by biased administrators (as was alleged in the case of NAF), that harmful arbitration provisions could be enforced, or that individual arbitrations could otherwise be conducted in an unfair manner. The Bureau is therefore, as set out below at length in Part VI.D and the section-by-section analysis of section 1040.4(b), adopting a system that will allow it and the public, to review certain arbitration materials in order to monitor the fairness of such proceedings over time.

However, the Bureau disagrees with the consumer advocate and individual commenters that any arbitration proceeding pursuant to a pre-dispute arbitration agreement is necessarily ''forced'' and unfair, and that arbitration is not neutral. The Bureau recognizes that, with rare exception, contracts for consumer financial services are contracts of adhesion offered on a take-it-or-leave-it basis. In some markets, consumers may, in theory, be able to choose a provider that does not require pre-dispute arbitration but the Study found that credit card consumers generally do not understand the consequences of entering into a pre-dispute agreement or shop on that basis and the Bureau has no reason to believe that consumers in other markets are any different.[454] Furthermore, the Study found that there are markets for certain consumer financial services where pre-dispute arbitration agreements are nearly ubiquitous; consumers in those markets have little choice.[455] Thus, the Bureau generally agrees that consumers rarely affirmatively and knowingly elect to enter into pre-dispute arbitration agreements.

Nonetheless, the Bureau does not agree that the fact that consumers are largely unaware of these agreements means that the resulting arbitration proceedings are inherently unfair. As is discussed above, the Bureau finds that the Study did not provide any basis for evaluating whether individual arbitration proceedings resulted in demonstrably worse outcomes than individual litigation proceedings in a manner that warrants a more substantial intervention. The Bureau also disagrees with the comment that the Study identified a clear-cut repeat-player effect favoring of industry participants over consumer participants. As noted above, the Study showed that arbitration cases proceeded relatively expeditiously relative to individual litigation because companies often advance filing fees, the cost to consumers of arbitral filing fees was modest relative to individual litigation and at least some consumers proceeded without an attorney. The Study also showed that those 32 consumers who did prevail in arbitration obtained substantial individual awards.[456] For all of these reasons, the Bureau disagrees, at this time, with those commenters that recommended that it should completely ban the use of pre-dispute arbitration agreements.

The Bureau acknowledges that an arbitration agreement, by definition, deprives consumers of the right to bring disputes to court since an arbitration agreement permits a company to force any dispute it does not wish to litigate in court to an arbitral forum. On the other hand, an arbitration agreement gives consumers a new right—the right to force a company to resolve a dispute in arbitration. Absent such an agreement, consumers could proceed to arbitration only if the company is willing to arbitrate a particular dispute. Given the inconclusive nature of the evidence concerning the relative fairness or efficacy of individual litigation and arbitration in resolving consumer disputes, the Bureau is not prepared at this time to ban arbitration agreements.

2. Individual Dispute Resolution Is Insufficient in Enforcing Laws Applicable to Consumer Financial Products and Services and Contracts

Whatever the relative merits of individual proceedings pursuant to an arbitration agreement compared to individual litigation, the Bureau preliminarily concluded in the proposal, based upon the results of the Study, that individual dispute resolution mechanisms are an insufficient means of ensuring that consumer financial protection laws and consumer financial product or service contracts are enforced.

The Study showed that consumers rarely pursued individual claims against companies they dealt with based on its survey of the frequency of consumer claims, collectively across venues, in Federal courts, small claims courts, and arbitration. First, the Study showed that consumer-filed Federal court lawsuits are quite rare compared to the total number of consumers of financial products and services. As noted above, from 2010 to 2012, the Study showed that only 3,462 individual cases were filed in Federal court concerning the five product markets studied during the period, or 1,154 per year.[457] Second, the Study showed that relatively few consumers filed claims against companies in small claims courts even though most arbitration agreements contained carve-outs permitting such court claims. In particular, as noted above, the Study estimated that, in the jurisdictions that the Bureau studied, which cover approximately 87 million people, there were only 870 small claims disputes in 2012 filed by an individual against any of the 10 largest credit card issuers, several of which are also among the largest banks in the United States.[458] Extrapolating those results to the population of the United States suggests that, at most, a few thousand cases are filed per year in small claims court by consumers concerning consumer financial products or services.[459]

[453] *Id.* section 2 at 37 tbl. 4. On the issue of NAF, *see Wert* v. *ManorCare of Carlisle PA, LLC,* 124 A.2d 1248, 1250 (Pa. 2015) (affirming denial of motion to compel arbitration after finding arbitration agreement provision that named NAF as administrator as ''integral and non-severable''); *but see Wright* v. *GGNSC Holdings LLC,* 808 N.W.2d 114, 123 (S.D. 2011) (designation of NAF as administrator was ancillary and arbitration could proceed before a substitute). On the issue of Tribal administrators, *see Jackson* v. *Payday Financial, LLC,* 764 F.3d 765 (7th Cir. 2014) (refusing to compel arbitration because Tribal arbitration procedure was ''illusory'').

[454] *See generally* Study, *supra* note 3, section 3.

[455] *See generally id.* section 2.

[456] *Id.* section 5 at 13–15.

[457] *Id.* section 6 at 28 tbl. 6.

[458] The figure of 870 claims included all cases in which an individual sued a credit card issuer, without regard to whether the claim itself was consumer financial in nature. As the Study noted, the number of claims brought by consumers that were consumer financial in nature was likely much lower. Additionally, the Study cross-referenced its sample of small claims court filings with estimated annual volume for credit card direct mail using data from a commercial provider. The volume numbers showed that issuers collectively had a significant presence in each jurisdiction, at least from a marketing perspective. *See id.* appendix Q at 113–114.

[459] As explained in the Study and above at Part III.D.5, other than its sample of filings in small

Continued

As discussed in the proposal's preliminary findings, a similarly small number of consumers filed consumer financial claims in arbitration. The Study showed that from the beginning of 2010 to the end of 2012, consumers filed 1,234 individual arbitrations with the AAA, or about 400 per year across the six markets studied.[460] Given that the AAA was the predominant administrator identified in the arbitration agreements studied, the Bureau believes that this represents most consumer finance arbitration disputes that were filed during the Study period. Indeed, as noted in the proposal, JAMS (the second largest provider of consumer finance arbitration) reported to Bureau staff that it handled about 115 consumer finance arbitrations in 2015.[461]

Collectively, as set out in the Study, the number of all individual claims filed by consumers in individual arbitration, individual litigation in Federal court, or small claims court was relatively low in the markets analyzed in the Study compared to the hundreds of millions of consumers of various types of financial products and services.[462] As stated in the proposal's preliminary findings, the Bureau believes that the relatively low numbers of formal individual claims (either in judicial or arbitral fora) may be explained, at least in part, by the fact that legal harms are often difficult for consumers to detect without the assistance of an attorney who understands the relevant laws and whether to pursue facts unknown to the consumer that may support a claim. For example, some harms, by their nature, such as discrimination or non-disclosure of fees, can only be discovered and proved by reference to how a company treats many individuals or by reference to information possessed only by the company, not the consumer.[463] Individual dispute resolution therefore generally requires a consumer to recognize his or her own right to seek redress for any harm the consumer has suffered or otherwise to seek a dispensation from the company.

The Bureau also preliminarily concluded that the relatively low number of formally filed individual claims may be explained by the low monetary value of the claims that are often at issue.[464] Claims involving products and services that would be covered by the proposed rule often involve small amounts. When claims are for small amounts, there may not be significant incentives to pursue them on an individual basis. As one prominent jurist has noted, ''Only a lunatic or a fanatic sues for $30.'' [465] In other words, it is impractical for the typical consumer to incur the time and expense of bringing a formal claim over a relatively small amount of money, even without an attorney. Congress and the Federal courts developed procedures for class litigation in part because ''the amounts at stake for individuals may be so small that separate suits would be impracticable.'' [466] Indeed, the Supreme Court has explained that:

> [t]he policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her own rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.[467]

The Study's survey of consumers in the credit card market reflected this dynamic. Very few consumers said they would pursue a legal claim if they could not get what they believed were unjustified or unexplained fees reversed by contacting a company's customer service department.[468]

As stated in the proposal, even when consumers are inclined to pursue individual claims, finding attorneys to represent them can be challenging. Attorney's fees for an individual claim can easily exceed expected individual recovery.[469] A consumer must pay his or her attorney in advance or as the work is performed unless the attorney is willing to take a case on contingency—

claims court, the Bureau did not collect individual claims filed in State courts of general jurisdiction because doing so was infeasible. *Id.* appendix L at 71.

[460] *See id.* appendix Q at 113–114 and section 5 at 19–20. Of the 1,234 consumer-initiated arbitrations, 565 involved affirmative claims only by the consumer with no dispute of alleged debt; another 539 consumer filings involved a combination of an affirmative consumer claim and disputed debt. *Id.* section 5 at 31 tbl. 6. This equates to 1,104 filings (out of 1,234), or 368 per year, in which the consumer asserted an affirmative claim at all. *Id.* section 5 at 21–22 tbl. 2. In 737 claims filed by either party (or just 124 consumer filings), the only action taken by the consumer was to dispute the alleged debt. *Id.* section 5 at 31 n.64. Another 175 were mutually filed by consumers and companies. *Id.* section 5 at 19.

[461] *Id.* section 4 at 2; 81 FR 32830, 32836 n.97 (May 24, 2016).

[462] For instance, at the end of 2015, there were 600 million consumer credit card accounts, based on the total number of loans outstanding from Experian & Oliver Wyman Market Intelligence Reports. Experian & Oliver Wyman, ''2015 Q4 Experian—Oliver Wyman Market Intelligence Report: Bank Cards Report,'' at 1–2 (2015) and Experian & Oliver Wyman, ''2015 Q4 Experian—Oliver Wyman Market Intelligence Report: Retail Lines,'' at 1–2 (2015). In the market for consumer deposits, one of the top checking account issuers serviced 30 million customer accounts (JPMorgan Chase Co., Inc., 2010 Annual Report, at 36) and in the Overdraft MDL settlements, 29 million consumers with checking accounts were eligible for relief. Study, *supra* note 3, section 8 at 40 and 41–42 tbl. 17.

[463] For example, proving a claim of lending discrimination in violation of ECOA typically requires a showing of disparate treatment or disparate impact, which require comparative proof that members of a protected group were treated or impacted worse than members of another group. U.S. Dep't of Housing & Urban Dev., Policy Statement on Discrimination in Lending, 59 FR 18266, 18268 (Apr. 15, 1994). Evidence of overt discrimination can also prove a claim of discrimination under ECOA but such proof is very rare and thus such claims are typically proven through showing disparate treatment or impact. *See Cherry* v. *Amoco Oil Co.,* 490 F. Supp. 1026, 1030 (N.D. Ga. 1980). Systemic overcharges may also be difficult to resolve on an individual basis. *See, e.g.,* Stipulation and Agreement of Settlement at 30, In re Currency Conversion Fee Multidistrict Litigation, MDL 1409 (S.D.N.Y. July 20, 2006) (noting that the plaintiffs' class allegations that the network and bank defendants ''inter alia . . . have conspired, have market power, and/or have engaged in Embedding, otherwise concealed and/or not adequately disclosed the pricing and nature of their Foreign Transaction procedures; and, as a result, holders of Credit Cards and Debit Cards have been overcharged and are threatened with future harm.'').

[464] One indicator of the relative size of consumer injuries in consumer finance cases is the amount of relief provided by financial institutions in connection with complaints submitted through the Bureau's complaint process. In 2015, approximately 6 percent of company responses to complaints for which the company reported providing monetary relief (approximately 9,730 complaints) were closed ''with monetary relief'' for a median amount of $134 provided per consumer complaint. *See* Bureau of Consumer Fin. Prot., ''Consumer Response Annual Report,'' (2016), *http://files.consumerfinance.gov/f/201604_cfpb_consumer-response-annual-report-2015.pdf*. The Bureau's complaint process and informal dispute resolution mechanisms at other agencies do not adjudicate claims; instead, they provide an avenue through which a consumer can complain to a provider. Complaints submitted to the Bureau benefit the public and the financial marketplace by informing the Bureau's work; however, the Bureau's complaint system is not a substitute for consumers' rights to bring formal disputes, and relief is not guaranteed.

[465] *Carnegie* v. *Household Int'l, Inc.,* 376 F.3d 656, 661 (7th Cir. 2004).

[466] 28 U.S.C. App. 161 (1966).

[467] *Amchem Prod.,* 521 U.S. at 617 (*citing Mace* v. *Van Ru Credit Corp.,* 109 F.3d 338, 344 (7th Cir. 1997)).

[468] Just 2.1 percent of respondents said that they would have sought legal advice or would have sued with or without an attorney for unrecognized fees on a credit card statement. Study, *supra* note 3, section 3 at 18. Similarly, many financial services companies opt not to pursue small claims against consumers; for example, these providers do not actively collect on small debts because it was not worth their time and expense given the small amounts at issue and their low likelihood of recovery.

[469] For instance, in the Study's analysis of individual arbitrations, the average and median recoveries by consumers who won awards on their affirmative claims were $5,505 and $2,578, respectively. *Id.* section 5 at 39. By way of comparison (attorney's fees data limited to successful affirmative consumer claims was not reported in the Study), the average and median consumer attorney's fee awards were $8,148 and $4,800, respectively, across cases involving judgments favoring consumers involving affirmative relief or disputed debt relief. *Id.* section 5 at 79. Note that the Study did not address the number of cases in which attorney's fees were requested by the consumer. *Id.*

a fee arrangement where an attorney is paid as a percentage of recovery, if any—or rely on an award of defendant-paid attorney's fees, which are available under many consumer financial statutes. Attorneys for consumers often are unwilling to rely on either contingency-based fees or statutory attorney's fees because in each instance the attorney's fee is only available if the consumer prevails on his or her claim (which always is at least somewhat uncertain). Consumers may receive free or reduced-fee legal services from legal services organizations, but these organizations frequently are unable to provide assistance to many consumers because of the high demand for their services and limited resources.[470]

For all of these reasons, the Bureau preliminarily found that the relatively small number of arbitration, small claims, and individual Federal court cases reflects the insufficiency of individual dispute resolution mechanisms alone to enforce effectively the relevant laws, including the Federal consumer financial laws and consumer finance contracts, for all consumers of a particular provider.

As discussed in the proposal, some stakeholders claimed that the low total volume of individual claims found by the Study in litigation or arbitration was attributable not to inherent deficiencies in the individual formal dispute resolution systems but rather to the success of informal dispute resolution mechanisms in resolving consumers' complaints. Under this theory, the cases that actually are litigated or arbitrated are outliers—consumer disputes in which the consumer either bypassed the informal dispute resolution system or the system somehow failed to produce a resolution. The Bureau preliminarily explained why it did not find this argument persuasive. As stated in the proposal, the Bureau preliminarily found that informal dispute resolution was not sufficient because—as with pursuing claims through more formal mechanisms—consumers may not know that their provider is acting in a way that harms them or that violates the law. Moreover, even when consumers recognize problematic behavior and decide to complain to their providers informally, companies exercise their discretion about whether they provide relief to particular consumers. The Bureau pointed out, for example, that a company could decide whether to provide relief to a consumer based on the customer's profitability, rather than based on the merit of the complaint. And in the Bureau's experience, even if companies resolve some disputes in favor of customers who complain, companies do not generally volunteer to provide relief to other affected customers who do not themselves complain.

Comments Received

Number of individual claims. Numerous industry, research center, and State attorneys general commenters challenged the Bureau's preliminary finding that consumers rarely pursued individual claims against their providers of consumer financial products or services. To the extent these comments relate primarily to the Study's data regarding this preliminary finding, they are summarized above in Part III.D. Various consumer advocate, public-interest consumer lawyers, nonprofit, and consumer lawyer commenters agreed with the Bureau's preliminary finding that consumers rarely pursued individual claims against providers of consumer financial products or services with whom they dealt. These commenters generally cited to the Bureau's Study and how it confirmed their own experiences concerning the relative rarity of individual cases across both arbitration and litigation. For example, a consumer advocate commenter highlighted data from the Study that indicated that borrowers of payday loans are particularly unlikely to pursue individual claims despite what the commenter asserted was evidence of broad misconduct by payday lenders. A law professor noted that there are also low numbers of consumer arbitrations in the cellular telephone industry, noting that one large company averaged less than 30 arbitrations a year despite having over 85 million customers.[471] An industry commenter asserted that the Bureau has no data on individual lawsuits filed in State court and, therefore, the Bureau has no basis for finding that consumers rarely file individual lawsuits.

Explanations for low number of individual claims. Few industry commenters addressed the Bureau's preliminary finding that consumers often are not aware that they are injured or do not fully understand their potential claims without legal advice. However, many industry, State attorneys general, and research center commenters disputed the relevance of the Study's consumer survey, which found that only 2 percent of respondents were likely to seek an attorney or file formal claims if they found an unexplained fee on their credit card bill.

On the other hand, numerous consumer advocate, public-interest consumer lawyer, and consumer lawyer and law firm commenters validated the Bureau's preliminary finding in this regard. Among the reasons given, one consumer advocate explained that consumers often do not know they are injured in the first place given the complexity of consumer finance products and the Federal and State laws and regulations governing those products. Similarly, a consumer law firm explained that their clients were often unaware of claims that they might be able to bring. Even when they are harmed, the commenter stated that consumers may not know that they may be entitled to a remedy, particularly when statutory damages are available. For example, a consumer may be frustrated by telephone calls from a debt collector but not know that the calls violate the Telephone Consumer Protection Act and that he or she is entitled to statutory damages. On the other hand, some industry commenters suggested that there are few individual consumer finance claims because public enforcement sufficiently remedies all violations of consumer finance laws.[472]

With respect to the Bureau's preliminary findings that consumers may not pursue individual claims because they are small, at least one industry commenter and one research center commenter agreed with the Bureau that consumer finance claims are often for small amounts and that it would not be rational for a consumer to pursue a very small claim, such as one for less than $200. Consumer advocates and other nonprofits commenters similarly agreed. However, other industry and research center commenters disagreed, asserting that consumer finance claims under laws

[470] There is a large unmet need for legal services for low-income individuals who want legal help in consumer cases. By one estimate, roughly 130,000 consumers (for all goods, not just financial products or services) were turned away because the legal aid service providers serving low-income individuals did not have enough staff or capacity to help. *See* Legal Services Corp., ''Documenting the Justice Gap in America,'' at 7 (2007), *available at http://www.lsc.gov/sites/default/files/LSC/images/justicegap.pdf. See also* Helynn Stephens, ''Price of Pro Bono Representations: Examining Lawyers' Duties and Responsibilities,'' 71 Def. Counsel J. 71 (2004) (''Legal services programs are able to assist less than a fifth of those in need.'').

[471] A recent media report similarly found, regarding a different cellular telephone company, ''that—out of nearly 150 million customers—only 18 went through arbitration for small claims in the past two years.'' CBS Evening News, ''AT&T and DirecTV Face Thousands of Complaints Linked to Overcharging Promotions,'' (May 16, 2017), *available at http://www.cbsnews.com/news/complaints-att-directv-bundled-services-directv-customers-promotions-overcharging/.*

[472] For example, commenters cited enforcement activities by the Bureau and State attorneys general.

that provide for statutory damages (sometimes as much as $1,000 or $1,500 per violation) or double or treble actual damages are not small. In one industry commenter's view, when consumers can receive statutory damages or double or treble damages, these damages create sufficient incentives for consumers to bring such claims. The commenter also suggested there may be some particular barrier to bringing small consumer finance claims in arbitration as compared to other types of small claims, because other types of small claims are more commonly filed in arbitration based on publicly available data. This commenter noted that claims under $1,000 amounted to approximately 2 percent of the consumer finance arbitrations in the Study, but that small claims generally amounted to 3.5 percent of all AAA consumer arbitrations (not limited to consumer finance) between 2009 and 2014. Another industry commenter asserted that consumers are particularly incentivized in California to pursue individual remedies because of the availability of rescission, restitution, injunctive relief, actual damages and attorney's fees under many California consumer protection statutes.

Numerous consumer advocate, individual consumer, consumer protection clinic law professors, academic, nonprofit, public-interest consumer lawyer, and consumer lawyer and law firm commenters agreed with the Bureau's preliminary finding that consumers do not pursue individual claims for many reasons, including their relative size and the difficulties inherent in bringing such claims on an individual basis. In support of the Bureau's findings in this regard, many consumer lawyers, individual consumers, and public-interest consumer lawyer commenters cited to specific examples from their own experiences with clients who were unable to pursue claims against providers of consumer financial products and services because of lack of time relative to the potential size of the claim. Similarly, a group of academic commenters concluded, based on their experience and expertise, that individual arbitrations are not and realistically never will be a sufficient substitute for consumer class actions because individual claims are worth small amounts of money and it is not worth consumers' time (or an attorney's time) to pursue them. In these commenters' view, even when consumers are motivated to do so it is hard to find legal representation, and individual consumers are often unaware of the claim in any event.

The same group of academic commenters further cited to a study looking at a broader array of consumer arbitration claims that found less than 4 percent of the claims were brought for $1,000 or less, which in their view confirms that consumers rarely bring small claims in arbitration.[473] A consumer lawyer noted that circumstances in consumers' lives can make bringing a claim difficult. This commenter explained that, in his view, consumers are busy working and providing for their families. Even assuming that arbitration is a streamlined process as compared to litigation in court, it can still involve time in drafting and filing a claim, researching and gathering documents, and other activities. In this commenter's opinion, lower-income people are less likely to make such an investment of time and resources.

An organization of public-interest lawyers also commented that in its experience, low-income consumers often have claims of no more than a few hundred dollars. While that money may be critical for low-income consumers, they are unable to invest the time and money necessary to pursue an uncertain recovery (*e.g.,* taking time off of work, finding child care, etc.). A public-interest consumer lawyer relatedly commented that arbitration rules (citing AAA's 44-page consumer rules document) are incomprehensible to the average consumer. Similarly, a nonprofit commenter representing servicemembers commented that servicemembers and their families might find it particularly difficult to pursue individual claims against providers due to deployment, frequent moves, and other logistical challenges.

One consumer advocate commenter noted that the threat of extensive litigation prior to receiving a hearing on the merits of a claim discourages legitimate claims. This same commenter also noted that filing fees could discourage some claims. Relatedly, a consumer law firm commenter stated that, in its view, most consumers find the prospect of litigating (in small claims court or arbitration) pro se against a well-represented corporate entity to be far too intimidating and risky to be considered a legitimate avenue.[474] This commenter cited the small number of claims documented by the Bureau in the Study as evidence of these dynamics. A law professor commenter stated that, in her opinion, consumers rarely use arbitration because of the minimal oversight of arbitration's fairness and lawfulness, the failure to require a comprehensive system of fee waivers, and the limited access accorded third parties.

One public-interest consumer law firm commenter explained that, in its experience, it is hard to bring claims of fraud, unfair, or deceptive practices in individual consumer financial services cases because the value of such claims is small. A consumer law firm commenter stated that, in its experience, individual actions are inefficient because damages can be low or hard to quantify and that these challenges impact consumers' and attorneys' risk-reward calculus. Another consumer lawyer commented that the laws underlying consumer finance are complicated and often impenetrable to laypersons. As an example, this commenter cited to complicated judicial interpretations of New York's usury law that are based on precedents over one hundred years old.[475] A consumer advocate commenter explained that, in its opinion, consumers will take lower settlements when they do not have an attorney or if they fear not getting a fair decision from an arbitrator due to the arbitrator's potential bias.

A nonprofit commenter provided the Bureau with data from its own survey of consumers that found that most consumers know it is not practical to take legal action when the harm against them is relatively small.[476] A different nonprofit commenter suggested that the

[473] *See* David Horton & Andrea Cann Chandrasekher, ''After the Revolution: An Empirical Study of Consumer Arbitration,'' 104 Geo. L. J. 57, at 117 (2015).

[474] An industry commenter made a similar point, but limited it to pro se representation in court. A consumer law firm commenter disagreed that court is harder for pro se litigants. It asserted that arbitration rules are complex for pro se litigants, that courts are more accustomed to working with those who proceed pro se and that more resources are available for these litigants in court.

[475] *See, e.g., Ford Motor Credit Co. LLC* v. *Black,* 910 N.Y.S.2d 404 (N.Y. Civ. Ct. Apr. 14, 2010) (noting the long, complex history of New York's usury law). The commenter noted that the Third Circuit made a similar observation. *Homa* v. *American Express Co.,* 494 Fed Appx 191 (3d Cir. 2012) (''Furthermore, in view of the complexity of the issues pertaining to the merits of [the plaintiff's] claim, it would be very difficult for him to prosecute the case without the aid of an attorney whether in a judicial proceeding or in arbitration.'').

[476] Pew Charitable Trusts, ''Consumers Want the Right to Resolve Bank Disputes in Court: An Update to the Arbitration Findings in 2015 Checks and Balances,'' (Aug. 17, 2016), *available at http://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2016/08/consumers-want-the-right-to-resolve-bank-disputes-in-court.* An industry commenter noted that the Bureau should not conclude that this survey supports a finding that consumers prefer court to arbitration because survey participants were not asked about arbitration. This commenter also noted that only 23 percent of respondents would take legal action.

reason the Bureau's Study showed that most individual claims that reach a judgment in arbitration were of relatively high value was that these were the only cases most consumers wanted to pursue. A consumer advocate commenter agreed that individuals are likely to pursue only relatively high-dollar claims. On the other hand, a comment letter from a group of academics noted that while consumers may be discouraged from pursuing claims on an individual basis, consumers are motivated to pursue actions that can protect other consumers from being similarly injured; put another way, they are emboldened to pursue actions that will force providers to change their conduct.

With respect to the Bureau's preliminary finding that it is difficult for consumers to find attorneys to file small claims, few commenters disagreed. However, an industry commenter and a research center commenter stated their belief that consumers should be able to find attorneys for small claims asserting violations of statutes that provide for recovery of attorney's fees. On the other hand, several industry, consumer advocate, public-interest consumer lawyer, and consumer lawyer and law firm commenters agreed with the Bureau's preliminary findings that it is difficult for consumers to find attorneys for small individual claims. One industry commenter cited a study that showed that attorneys are unlikely to accept contingency fee cases for claims below $60,000.[477] The consumer lawyer and law firm commenters stated that only in rare cases did they find it economically sensible to bring individual small dollar claims regardless of the availability of statutory attorney's fees or contingent recoveries. For example, several public-interest consumer lawyer commenters explained that they lacked resources to handle all of the small-dollar claims that are brought to them by consumers on an individual basis and that, as a result, these consumers frequently abandoned these claims because they could not find other legal help. These commenters also noted that a typical attorney's hourly rate—were a consumer to decide on a fee-based arrangement with an attorney—would quickly eclipse the value of any such claim. In addition, even when attorney's fees are available under a statute (*e.g.,* ECOA and TILA[478]), commenters asserted that the uncertainty behind any legal claim and the ability to actually recover fees made both consumers and attorneys unwilling, in most cases, to bear that risk. A consumer lawyer discussed a particular case that the court sent to arbitration on an individual basis after it had been originally filed as a class action. The lawyer explained that it quickly became apparent that the client would not recover a fraction of the amount necessary to cover the time the lawyer had invested in the case by proceeding individually in arbitration, and the case was thus abandoned. Another public-interest consumer lawyer commenter suggested that, based on its experience, there are not enough legal services programs or private attorneys to pursue individually the claims of all victims.

Consumer attitudes regarding arbitration. Industry, research center, and government commenters suggested alternative reasons for why the Bureau found relatively few individual arbitration claims. Instead of the Bureau's explanations, these commenters stated that consumers are either unaware of arbitration or do not understand it which discourages them from bringing individual claims, and that such factors could be mitigated either by the Bureau or by the market. For example, one industry commenter suggested that consumers would file more claims in arbitration if they were more educated about the benefits of arbitration or if arbitration agreements were required to include consumer-friendly provisions, such as no-cost filing or ''bonuses'' for consumers who win claims in certain circumstances.[479] Another industry commenter suggested that consumers might not use arbitration because it is relatively new to consumer finance and that consumers may not yet know about how it can help them achieve relief for their claims. This commenter, who appeared to acknowledge that the number of consumers using arbitration is quite low, predicted that consumers would become more accustomed to using arbitration to resolve disputes given time. This same commenter suggested that the opponents of arbitration and the Bureau itself have helped create a negative public perception of arbitration that has discouraged consumers from pursuing it.

Informal dispute resolution. Many industry and research center commenters and a group of State attorneys general commenters suggested that there were relatively few individual claims because consumer harms were sufficiently remedied through informal dispute resolution. In so doing, these commenters disagreed with the Bureau's preliminary finding that informal dispute resolution is not sufficient to enforce the relevant laws, pointing to evidence in some court cases that large numbers of consumer complaints are resolved by informal dispute resolution. Some credit union commenters stated that there were particularly strong informal dispute resolution procedures in that market. One such commenter contended that the Study was flawed in failing to analyze informal resolution of disputes between companies and consumers. This commenter stated that the evidentiary record in *AT&T* v. *Concepcion* established that AT&T had awarded more than $1.3 billion to consumers in informal relief during a 12-month period. The same industry commenter noted that the Bureau's consumer complaint process facilitates informal resolution of consumer claims; the commenter emphasized in particular that over four years of the existence of the process, consumers had submitted more than 500,000 complaints and consumers had not disputed the company's response in more than two-thirds of the cases in which companies filed such a response.[480] One research center commenter asserted that in the Overdraft MDL case at least $15 million was refunded to consumers through informal dispute resolution, supporting the claim that consumers received significant relief from that process.

This research center commenter also cited studies showing that companies do provide informal relief to some consumers who complain. For example, the commenter cited a 2014 survey of 983 credit card users, in which 86 percent of consumers who asked their credit card company to reverse a late fee were successful and further asserted that success is likely not correlated to socioeconomic status because unemployed customers had about the same rate of success as those who were employed.[481] That commenter cited

[477] Elizabeth Hill, ''Due Process at Low Cost: An Empirical Study of Employment Arbitration Under the Auspices of the American Arbitration Association,'' 18 Ohio St. J. on Disp. Resol. 777, at 783 (2003).

[478] ECOA, 15 U.S.C. 1691e(d); TILA, 15 U.S.C. 1640(a)(3).

[479] An example ''bonus'' provision included in an arbitration agreement would require a company to pay a consumer double or triple the company's highest settlement offer if the consumer wins on his or her arbitration claim in an amount that exceeds that settlement offer.

[480] Consumer Response Annual Report, *supra* note 464, at 46–47 (stating that 65 percent of consumers ''did not dispute the response during the feedback period'' and another 14 percent were pending review of the company response).

[481] Keri Anne Renzulli, ''The Crazy Easy Trick to Getting a Credit Card Fee Waived or Your Rate

Continued

another study—referenced by the Bureau in the proposal—showing that almost two-thirds of consumer complaints to a mid-sized regional bank in Texas were voluntarily resolved in favor of the customer in the form of a full refund.[482] The commenter stated that that study further showed that the number of consumers who received full refunds varied based on the city in which the consumer lived or the type of complaint the consumer raised, but ranged from 56 percent to 94 percent.[483] Other commenters asserted that consumers can close their accounts and move to new financial service providers if they do not like how their providers handle informal disputes. Relatedly, an industry commenter asserted that the Bureau had overlooked complaints that consumers file with State attorneys general or other State agencies.

In contrast, many commenters agreed with the Bureau's preliminary findings as to the role of informal dispute resolution. A consumer advocate and a public-interest consumer lawyer commenter both explained that low-income consumers are significantly less likely to raise concerns directly with a company because they have limited time, resources, or confidence in their rights. Relatedly, a public-interest consumer lawyer commenter stated that it is much easier for low-income consumers to access justice through the courts than it is arbitration because arbitration lacks many of the procedural safeguards available in court. A different public-interest consumer lawyer commenter asserted that profitability models impact companies' treatment of consumers and thus low-income consumers who may be less profitable are less likely to be treated favorably.

Like the public-interest consumer lawyer commenter referred to above, a consumer law firm commenter agreed with the Bureau's preliminary finding that consumers may experience varied amounts of success through informal dispute resolution even when similarly situated. This commenter suggested that a particular consumer's sophistication, language skills, socioeconomic status, and tenacity all play important roles in determining whether the company will remedy the problem. Several commenters suggested that low-income consumers particularly benefit from class actions because these consumers are less likely than others to pursue relief individually. According to one consumer advocate, limited time, resources, or confidence may explain why low-income consumers are substantially less likely to advocate for their interests by complaining informally to a company or by pursuing formal relief. A public-interest consumer lawyer commenter suggested that low-income and vulnerable consumers may not realize that they have been the victim of unlawful predatory practices. Thus, the commenter asserted, class actions represent the only reasonable, private means for such consumers to obtain relief. Two commenters suggested that the specific characteristics of consumer financial services class action settlements make them favorably structured to provide consumers with meaningful relief. For example, one of these commenters noted that damages usually can be calculated with precision (*e.g.,* if based on an improperly charged fee) and that classes are often readily ascertainable because providers typically have accurate records of their customers.[484]

With respect to the Bureau's preliminary finding that informal dispute resolution is not sufficient because a company can choose to respond (or not) to any consumer complaint, industry, research center, and a group of State attorneys general commenters asserted that companies with arbitration agreements have stronger incentives to provide relief to consumers who complain. For example, an industry and a research center commenter both asserted that companies have strong incentives to resolve complaints informally because companies' arbitration agreements typically require them to pay all of the filing fees for arbitration, which can be as high as $1,500, plus all expenses, and that this is a feature unique to arbitration. Therefore, these commenters contended that companies would rationally settle any claim raised by a consumer that was under $5,000, which the commenters asserted is the approximate cost to the company of any single arbitration. These commenters further noted that there is even greater incentive for companies to resolve claims informally when the arbitration agreements include ''bonus provisions'' requiring companies to pay consumers double or triple the company's highest settlement offer if the consumer wins on his or her arbitration claim in an amount that exceeds that settlement offer.

At least one research center commenter agreed with the Bureau's assertion that a consumer's profitability could factor into the provider's decision on how to resolve a dispute with that consumer, citing data that credit scores can influence whether providers decide to waive fees for particular consumers while also asserting that the Bureau cited faulty or incomplete data to support the theory that providers decide how to handle complaints based on consumer profitability.[485] This commenter contended, however, that profitability would be an appropriate standard for a provider to use in determining whether to resolve a dispute with a consumer because it is in the interest of consumers for the provider to keep only profitable customers. To the extent that providers retain unprofitable customers, the commenter asserted that fees become higher for all customers.

Other industry commenters and a research center commenter stated that there is sufficient incentive for providers to change general practices in response to informal complaints because it is time-consuming for providers to respond to complaints one by one, and thus they would prefer to change their practices wholesale with respect to all consumers for the sake of efficiency. For this reason, these commenters disagreed with the Bureau's assertion that companies are unlikely to globally change practices for all consumers when only a fraction of consumers complain. Offering a different opinion, a consumer law firm commenter stated that, in its experience, only hard-fought litigation can get a company to change its underlying practices; piecemeal, informal, individual complaints are too small and too easily ignored by most companies.

Additionally, several commenters, including industry, research center, and State attorneys general commenters, contended that consumers do not file formal individual claims because they prefer instead to move their business to other companies. The State attorneys general commenters and an industry commenter cited data from the Bureau's consumer survey that they contend shows a small number of consumers

Lowered,'' Money (Sept. 25, 2014), *available at http://time.com/money/3425668/how-to-get-credit-card-fee-waived-rate-lowered/.* The Study did not appear to examine whether the disputed fees were in fact improper.

[482] Jason S. Johnston & Todd Zywicki, ''Arbitration Study: A Summary and Critique,'' at 31 (Mercatus Ctr. at Geo. Mason U., Working Paper, 2015).

[483] *Id.*

[484] To support these claims, this commenter cited a paper that says that in consumer financial services cases, most consumers were compensated. Brian T. Fitzpatrick & Robert C. Gilbert, ''An Empirical Look at Compensation in Consumer Class Actions,'' 11 N.Y.U. J. of L. & Bus. 767, at 788 (2011).

[485] The commenter further asserted that an article that the Bureau relied upon in its preliminary finding in this regard was an editorial. *See* 81 FR 32830, 32857 n.370 (May 24, 2016) (citation omitted).

would pursue a legal remedy as opposed to a market-based one. Thus, to keep customers happy, companies maintain positive policies and comply with the law regardless of the availability of private enforcement. Similarly, a few industry commenters suggested that there was no need for consumers to file claims in arbitration or litigation or to pursue informal dispute resolution because consumers can use social media to address business practices that consumers believe to harm them. In one commenter's view, a consumer's social media complaint about their provider can quickly attract support from many other consumers and cause a company to change its practices.

Response to Comments and Findings

Number of individual claims. Comments that asserted that the Study methodology undercounted the number of individual claims filed in court or arbitration are addressed above in Part III.D. Beyond the debates about specific sources and counting methodologies, the Bureau emphasizes that it did not purport to provide a comprehensive report of the entire universe of individual consumer financial claims but instead offered data that is indicative of the larger market. Taken together, the total number of individual consumer financial claims identified in the Study was approximately 2,400 per year.[486] Even multiplying those 2,400 claims by 10 or 100 to account for the markets and jurisdictions the Study did not analyze would amount to less than 250,000 individual claims. The result would still be a low number of individual claims in relation to the hundreds of millions of individual consumer financial products and services. The Bureau believes this supports the finding that a small number of consumers seek individual redress either through arbitration or the courts.[487] Accordingly, the Bureau finds, in accordance with the preliminary findings, that the number of individual filings is low in comparison to the relative size of the market for consumer financial products and services.

Explanations for number of individual claims. Many industry commenters disagreed with the Bureau's preliminary findings as to why consumers do not file many individual claims. For example, one research center commenter stated that claims under certain of the consumer financial laws that provide for statutory damages or double or treble actual damages if the consumer prevails are necessarily large enough to incentivize consumers and attorneys to pursue the claims. The Bureau disagrees. First, as a matter of logic and as supported by examples provided by several public-interest consumer lawyer and consumer lawyer and law firm commenters, statutory damages cannot incentivize a consumer to bring a claim about which he or she is unaware. For example, consumers who do not receive the disclosures to which they are entitled may not know that something was missing. Consumers who are subject to discrimination may not know that others are being treated more favorably. Consumers who are charged a fee disallowed by State law or contract may not know that the fee was impermissible. In some cases, consumers may not even be aware that any action has been taken with respect to them. For example, the Bureau recently settled an enforcement action with a large bank related to its widespread practice of opening consumer accounts without their knowledge.[488] Because most of the victims of this conduct were unaware that the accounts were being opened, those customers could not have complained about those accounts to the bank through either formal or informal mechanisms.

Second, even if a consumer is aware that he or she was harmed, the availability of statutory damages and attorney's fees (or even particularized types of relief like restitution and rescission available under certain State's laws, as one commenter suggested) could only incentivize filing a claim over a small harm if the consumer were aware of those statutory provisions. While there may be some well-informed consumers who are aware and thus seek out an attorney to pursue such claims, the Bureau believes—based on its expertise and experience with consumer financial markets and as was noted by several commenters—that those consumers are likely in the minority. Indeed, the consumer survey conducted as part of the Study, as well as the nonprofit's survey noted above, is indicative of how unlikely consumers are to pursue claims even when they are confident they have been wronged and contradicts industry comments suggesting otherwise.[489]

Third, even if a consumer is both aware of a wrong and aware of the availability of statutory damages and attorney's fees, the statutory damages or attorney's fees may be insufficient motivation for the consumer or his or her attorney given the uncertainty of recovery and the potential size of such recovery relative to the time required to pursue the claim even if the potential value of that claim is larger than the consumer's actual damages.[490] Notably, most industry commenters did not disagree with the Bureau's preliminary finding that it is difficult for consumers to find attorneys for small claims; indeed, one industry commenter cited a study finding that attorneys will not take a claim valued at less than $60,000—much higher than the $1,000 or $1,500 in statutory damages provided by many of the consumer financial statutes. Thus, even if, as one commenter suggests, most claims are above $1,000, they may still be too small to be worth the time for most consumers to find an attorney to pursue them. And as discussed further below, even if individual arbitration reduces the amount of time and need for attorney representation relative to individual litigation, the Bureau believes that the time required to pursue small claims is still sufficient to discourage many consumers from doing so. Moreover, there are many claims concerning consumer financial products or services for which statutory damages are not available, including common law tort and contract claims.

A research center commenter also suggested that small claims are more commonly filed in arbitration with respect to non-consumer financial

[486] 1,200 in Federal court, 800 in small claims court, and 400 in arbitration.

[487] For instance, at the end of 2015, there were 600 million consumer credit card accounts, based on the total number of loans outstanding from Experian & Oliver Wyman Market Intelligence Reports. Experian & Oliver Wyman, ''2015 Q4 Experian—Oliver Wyman Market Intelligence Report: Bank Cards Report,'' at 1–2 (2015) and Experian & Oliver Wyman, ''2015 Q4 Experian—Oliver Wyman Market Intelligence Report: Retail Lines,'' at 1–2 (2015). In the market for consumer deposits, one of the top checking account issuers serviced 30 million customer accounts (JPMorgan Chase Co., Inc., 2010 Annual Report, at 36) and in the Overdraft MDL settlements, 29 million consumers with checking accounts were eligible for relief. Study, *supra* note 3, section 8 at 40.

[488] Press Release, Bureau of Consumer Fin. Prot., ''Consumer Financial Protection Bureau Fines Wells Fargo $100 Million for Widespread Illegal Practice of Secretly Opening Unauthorized Accounts,'' (Sept. 8, 2016), *available at http://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-fines-wells-fargo-100-million-widespread-illegal-practice-secretly-opening-unauthorized-accounts/*.

[489] *See* Pew study, *supra* note 476. As an industry commenter noted, 23 percent of wronged consumers in the nonprofit's survey would pursue a legal remedy.

[490] In other words, an attorney considering a TILA case that allows for recovery of attorney's fees must discount his or her fee by the likelihood that the consumer will not prevail or will accept a settlement that compensates that attorney for less than all of the attorney's incurred fees and costs in the case. It is this calculus that makes many such cases undesirable for plaintiff's attorneys.

products and services than for consumer finance claims, which the commenter believes may reflect something particular about consumer finance claims. While a small claims filing rate of 3.5 percent for all types of claims is higher than a small claims filing rate of 2 percent for consumer finance claims, both are low rates of filing. Indeed, even if the number of consumer finance arbitration cases involving small claims were to double, to 4 percent, that would mean only an additional 25 cases per year, still a very low figure.[491] With respect to commenters that suggested that consumers do not file individual claims because their disputes are adequately resolved through public enforcement, the Bureau will respond to that argument in depth below in Part VI.B.5.

Consumer attitudes regarding arbitration. With respect to the comments that suggested that consumers' current attitudes and awareness levels about arbitration tend to suppress the number of individual arbitrations but could be shifted over time, the Bureau views those suggestions as speculative and not persuasive. Arbitration agreements have existed in consumer finance contracts since the early 1990s, meaning consumer have had more than 20 years to become aware of arbitration and yet the Study found that consumers file only a few hundred arbitrations a year. Thus, arbitration is hardly novel and the Bureau doubts that novelty is depressing consumer filings in arbitration. Indeed, the availability of individual litigation is not novel, yet consumers rarely bring individual cases in court either.

Even assuming for the sake of argument that the low use of arbitration were attributable to awareness levels, the Bureau is skeptical as to whether it is realistic to believe that all or most consumers could be educated about the terms of arbitration agreements to significantly improve consumer attitudes or awareness. Indeed, even if every consumer subject to an arbitration agreement received education about arbitration, understood the agreement's terms and had a positive attitude toward arbitration—and even if every arbitration agreement provided for company-paid filing fees and minimum award amounts—it still would be the case that use of the arbitration system would be limited by consumers' lack of awareness of potential legal violations, reluctance to pursue formal claims, and the low value of their claims relative to the time required to pursue their claims.

For all these reasons, the Bureau finds that there are structural and behavioral factors that prevent individual dispute resolution systems—including both arbitration and litigation—from providing an adequate or effective means of assuring that harms to consumers are redressed.

Informal dispute resolution. As for the industry commenters that disagreed with the Bureau's preliminary finding that informal dispute resolution cannot explain the low volume of individual cases observed, the Bureau is not persuaded. The Bureau acknowledges that informal dispute resolution provides at least some relief to some consumers who are harmed by and complain to their consumer financial service providers. The Bureau stated in the proposal that it understands that when an individual consumer complains about a particular charge or other practice, it is often in the financial institution's interest to provide the individual with a response explaining that charge and, in some cases, a full or partial refund or reversal of the practice, in order to preserve the customer relationship. Indeed, the Bureau cited such evidence in the proposal arising out of the Overdraft MDL (approximately $15 million in informal relief had been provided by defendants in those cases), and commenters provided evidence of studies reflecting that companies sometimes provide informal relief to consumers.[492] The Bureau's consumer complaint function is specifically designed to facilitate informal dispute resolution and has been successful in doing so for many thousands of consumers. The Bureau's concern, however, is not with those complaints that are resolved, but with those situations in which consumers are unaware of harm in the first instance or are aware of harm but do not advocate for informal resolution as effectively as other complainants, as well as with those complaints that are resolved in ways that do not affect the financial institution's future behavior.

As noted in the proposal and discussed further above, for a variety of reasons, many consumers may not be aware of whether a company they deal with is complying with the law or not. Furthermore, consumers may not even think about a company's customer service function as a way of seeking redress for certain types of wrongs. For example, the Bureau believes, based on its experience and expertise, that consumers are unlikely to know when they have received inadequate disclosures and, even if they do, they are unlikely to call a customer service department over such an issue. Similarly, the Bureau is not aware of informal dispute resolution successfully resolving complaints of discrimination, systematic miscalculations of interest rates, certain types of deceptive advertising,[493] improper furnishing of credit information about which the consumer was unaware, and other common harms that are largely imperceptible to the average consumer. Consumers are more likely to use a customer service function, for example, to question charges that appear on their bill, including fees assessed by the financial institution. Even in those cases, the consumer first must notice the charge and, in some instances, further recognize that there is some basis to challenge or question the charge if the initial request is rebuffed. Based on its experience, the Bureau does not believe that even a majority of consumers have such an awareness. Thus, an informal dispute resolution system is unlikely to be used by most or all consumers who are adversely affected by a particular illegal practice. For example, one survey cited by a commenter showed that only 28 percent of consumers surveyed had ever asked to have such fees waived and not all of these were successful.[494] In other words, most consumers simply do not seek informal resolution of wrongful

[491] Study, *supra* note 3, section 5 at 10 (finding 25 AAA disputes per year which involved consumer affirmative claims under $1,000 across six markets studied).

[492] With respect to the commenter that cited $1.3 billion in consumer relief provided by AT&T as established by the record in the *Concepcion* litigation, the record in that case is not fully developed and does not provide enough detail for the Bureau to be able to establish that all of the $1.3 billion in manual credits reflects relief provided to customers who complained to AT&T. *See Berinhout Declaration at ¶ 17, Trujillo* v. *Apple Computer, Inc.,* No. 07–4946 (N.D. Ill. Oct. 16, 2007), ECF No. 40. The record does not explain, for example, how the $1.3 billion was calculated, how the $1.3 billion compares to the amount actually requested by consumers, nor how much of the consumer relief was necessarily the result of a consumer complaint or the resolution of such complaint. *Laster* v. *T-Mobile USA, Inc.,* 2008 WL 5216255, *15 (S.D. Cal. Aug. 11, 2008). Furthermore, assuming this figure is accurate, the Bureau cannot evaluate the revenue generated by AT&T from other consumers who did not complain or whose complaints were rejected by AT&T and received no part of the amount that AT&T refunded.

[493] For example, the Bureau entered into a settlement in 2014 with a mortgage company for deceptive advertising about which most individual consumers likely were not aware. Press Release, Bureau of Consumer Fin. Prot., ''CFPB Orders Amerisave to Pay $19.3 Million for Bait-And-Switch Mortgage Scheme,'' (Aug. 12, 2014), *available at https://www.consumerfinance.gov/about-us/newsroom/cfpb-orders-amerisave-to-pay-19-3-million-for-bait-and-switch-mortgage-scheme/*.

[494] Martin Merzer, ''Poll: Asking for Better Credit Card Terms Pays Off,'' CreditCards.com (Sept. 24, 2014), *available at http://www.creditcards.com/credit-card-news/poll-ask-better-terms.php*.

actions. Moreover, commenters noted and studies have found that poorer and less educated consumers are less likely to seek resolution of disputes through informal means because they lack sufficient information to pursue claims informally, are unfamiliar with the process, or do not have the time to pursue it.[495] As to commenters who suggested that the Bureau overlooked that consumers can pursue claims informally by contacting their State attorneys general or other regulators, the Bureau does not believe that it overlooked a substantial number of complaints that consumers file with State attorneys general or other State regulators. To the extent that they do, the Bureau addresses the ability of State enforcement agencies to remedy harms in section VI.B.5 below.

Further, none of the evidence cited by commenters refuted the Bureau's preliminary finding that companies can and do choose—for any reason—*not* to resolve complaints informally, and that the outcome of these disputes may be unrelated to the underlying merits of the complaint.[496] As noted in the proposal, nothing requires a company to resolve a dispute in a particular consumer's favor, to award complete relief to that consumer, to decide the same dispute in the same way for all consumers, or to reimburse consumers who had not raised their dispute to a company. Regardless of the merits or similarities between the complaints, the company retains discretion to decide how to resolve them. This is true even with respect to providers that are member-owned, like credit unions. For example, if two consumers bring the same dispute to a company, the company might resolve the dispute in favor of a consumer who is a source of significant profit while it might reach a different resolution for a less profitable consumer.[497] Indeed, as the Bureau stated in the proposal, in the Bureau's experience it is quite common for financial institutions (especially the larger ones that interact with the greatest number of consumers) to maintain profitability scores on each customer and to cabin the discretion of customer service representatives to make adjustments for complaining consumers based on such scores.[498] For example, in the study of a midsize bank in Texas cited by some commenters, 44 percent of consumers who complained about one type of fee were not offered a refund in one city in which the bank operated.[499] While there is no way to know whether the complaints that consumers made in that study reflect violations of the law, it shows the differential treatment that can occur. Furthermore, in some markets, consumers have no choice as to their provider, and thus companies need not worry about losing the consumer's business if complaints are left unresolved. This is most obviously true with respect to servicing markets, such as student loan servicing and debt collection.

One research center commenter agreed with the Bureau's preliminary findings in this regard and stated its belief that a company should deny informal relief to less profitable consumers in order to maintain reasonable fees for other more profitable consumers. The Bureau agrees that in the context of informal complaint handling systems—which do not adjudicate the merits of claims but rather exist to enhance a company's business interests—it is rational for a company to forgive a fee charged to a profitable consumer and not to do so for an unprofitable consumer. But that is precisely the point: in the eyes of the law, wrongful fees should be reimbursed without regard to the profitability of the customer incurring the fee. This commenter's argument thus illustrated one of the limitations of informal dispute resolution as a method of enforcing the consumer protection laws. In this realm, a company can choose which complaints it wishes to resolve for which consumers, and that choice is likely to be very different than the decision made by a neutral judge after a consumer has filed a claim alleging violations of the law.

As noted in the proposal, the Study's discussion of the Overdraft MDL provided an example of the limitations of informal dispute resolution and the important role of class litigation in more effectively resolving consumers' disputes.[500] In the cases included in the Overdraft MDL, certain customers lodged informal complaints with banks about the overdraft fees. The subsequent litigation revealed that banks had been ordering transactions based on the size of the transaction from highest to lowest amount to maximize the number of overdraft fees. As far as the Bureau is aware, these informal complaints, while resulting in some refunds to the relatively small number of consumers who complained, produced no changes in the bank practices in dispute. Ultimately, after taking into account the relief that consumers had obtained informally, nearly 29 million bank customers received cash relief in court settlements over and above relief through informal dispute resolution

[495] Rory Van Loo, ''The Corporation as Courthouse,'' 33 Yale J. Reg. 547, at 579 (2016) (''Studies have shown for decades that wealthy and better educated consumers are more likely to complain to corporations and more successful than are low-income consumers.''); Amy J. Schmitz, ''Remedy Realities in Business-To-Consumer Contracting,'' 58 Ariz. L. Rev. 213, at 231 (2016) (''the proactive consumers who obtain remedies tend to be of higher income and education'').

[496] Some commentators have advised that concerns other than whether a violation occurred should be considered when resolving complaints. *See, e.g.,* Claes Fornell & Birger Wernerfelt, ''Defensive Marketing Strategy by Customer Complaint Management: A Theoretical Analysis,'' 24 J. of Mktg. Res. 337, at 339 (1987) (''[W]e show that by attracting and resolving complaints, the firm can defend against competitive advertising and lower the cost of offensive marketing without losing market share.''); Mike George et al., ''Complaint Handling: Principles and Best Practice,'' at 6 (Univ. of Leicester, Centre for Util. Consumer L. April 2007) (discussing research that shows that customers who complain are more likely to re-purchase the good or service than those who do not and noting that additional research that shows that good complaints culture and processes may well lead to improved financial performance), *available at https://www2.le.ac.uk/departments/law/research/cces/documents/Complainthandling-PrinciplesandBestPractice-April2007_000.pdf.*

[497] One study showed that one bank refunded the same fee at varying rates depending on the branch location that a consumer visited. Jason S. Johnston & Todd Zywicki, ''Arbitration Study: A Summary and Critique,'' at 31 (Mercatus Ctr. at Geo. Mason U., Working Paper, 2015) (explaining that the process undertaken by one bank in 2014 ''resulted in its refunding 94 percent of wire transfer fees that customers complained about at its San Antonio office and 75 percent of wire transfer fees that customers complained about at its Brownsville office. During that same period, the bank responded to complaints about inactive account fees by making refunds 74 percent of the time in San Antonio but only 56 percent of the time in Houston.''). The study did not provide information on how many of the bank's customers complained or why some customers were successful in receiving refunds while others were not.

[498] *See, e.g.,* Rick Brooks, ''Banks and Others Base Their Service On Their Most-Profitable Customers,'' Wall St. J. (Jan. 7, 1999), *available at http://www.wsj.com/articles/SB915601737138299000* (explaining how some banks will treat profitable customers differently from unprofitable ones and citing examples of banks using systems to routinely allow customer service representatives to deny fee refund and other requests from unprofitable customers while granting those from profitable customers). The Bureau notes that this article is not an editorial as suggested by one industry commenter. *See also* Amy J. Schmitz, ''Remedy Realities in Business-To-Consumer Contracting,'' 58 Ariz. L. Rev. 213, at 230 (2016) (explaining why various groups, such as minorities, women and low-income consumers are less likely to complain and to achieve a positive resolution).

[499] In a preliminary draft of his research paper, one commenter addressed this issue and suggested that banks look at whether the investment in resolving a consumer's concern is worth it when compared to the likelihood that the bank will make a profit off of that customer in the future. *See* Jason Scott Johnston, ''Preliminary Report: Class Actions and the Economics of Internal Dispute Resolution and Financial Fee Forgiveness,'' (Manhattan Inst. Rept. 2016), *available at https://www.manhattan-institute.org/html/class-actions-and-economics-internal-dispute-resolution-and-financial-fee.*

[500] Study, *supra* note 3, section 8 at 39–46.

processes.[501] Furthermore, the litigation resulted in fundamental changes in the banks' transaction ordering processes that had not previously occurred as a result of the informal complaints and informal relief. While industry commenters cited this example as an instance where informal dispute resolution provided significant relief, it also supports the Bureau's conclusion that informal dispute resolution does not provide systemic relief of consumer harms.

As to commenters' arguments that companies with arbitration agreements have strong incentives to resolve complaints in consumers' favor in order to avoid the cost of arbitral fees and the risk of paying a ''bonus'' award, the Bureau acknowledges that companies with arbitration agreements have at least some incentive to resolve informal disputes with consumers especially when the company suspects that the consumer, if unsatisfied, will file an arbitration case and cause the company to incur filing fees. It is also true that companies without arbitration agreements have an incentive to resolve informal disputes with consumers when they suspect that litigation will otherwise result, since litigation can result in defense costs which exceed the costs of arbitral fees or of arbitral defense. It is unclear, at best, whether arbitration agreements create greater incentives to resolve a complaint informally than the risk of litigation and commenters did not provide data or evidence to show otherwise.[502] Indeed, one recent news article about AT&T—a company that includes a ''bonus'' provision in its arbitration agreements—reports that only 18 of its approximately 150 million customers filed claims in arbitration against the company over a two-year period.[503] In any event, whatever the source of the incentives that might encourage a company to settle a consumer dispute informally, these incentives only go so far, particularly when the company knows that the vast majority of consumers who complain will not formally pursue the matter and that individual complaints can be resolved informally without systemic change. For example, as discussed above in this Part VI.B.2 with respect to the explanation for the low number of individual claims consumers file, the Bureau recently settled an enforcement action with a large bank concerning its employees' practices of opening unauthorized accounts on behalf of customers that had pre-existing accounts with the bank.[504] During the Bureau's investigation of that bank, it uncovered that some individual consumers had discovered the unauthorized accounts and complained about them; but the bank's employees nevertheless continued the widespread practice with respect to many other customers. Similarly, the Bureau settled another enforcement case with a buy-here, pay-here automobile dealer concerning violations of the FDCPA and the FCRA in which the Bureau discovered that several customers had disputed the improper credit reporting information with the dealer without the dealer taking any corrective action.[505] In some instances, the dealer informed the customers in writing that the account information had been corrected when it had not been.[506]

With respect to the comments that suggested that there were few individual claims because companies will change practices that harm consumers when consumers complain on social media, the Bureau believes that social media are insufficient to force companies to change company practices and, by extension, to enforce the consumer protection laws for the same primary reason that informal dispute resolution is insufficient—because many consumers do not know that they have valid complaints or how to raise their claims through social media. Further, companies can choose either to ignore or resolve such complaints at their own option especially in markets where consumers cannot take their business elsewhere; and companies can resolve complaints on a one-off basis with the individual complainant. Indeed, as discussed above in Part II.E, at least one study of social media complaints found that companies ignored nearly half of the complaints consumers submitted and that when companies did respond, consumers were dissatisfied in roughly 60 percent of the cases.[507]

Thus, while informal dispute resolution systems may provide some relief to some consumers, the Bureau finds that these systems alone are inadequate mechanisms to resolve potential violations of the law that broadly apply to many customers of a particular company for a given product or service. The Bureau further finds that the prevalence of these systems cannot and does not explain the low volume of individual cases pursued through arbitration, small claims courts, and in Federal court.

3. Class Actions Provide a More Effective Means of Securing Significant Consumer Relief for Large Numbers of Consumers and Changing Companies' Illegal and Potentially Illegal Behavior

The Bureau preliminarily found, based on the results of the Study and its further analysis, that the class action procedure provides an important mechanism to remedy consumer harm. More specifically, the Bureau preliminarily found, consistent with the Study, that class action settlements are a more effective means than individual arbitration (or litigation) for assuring that large numbers of consumers are able to obtain monetary and injunctive relief for wrongful conduct, especially for claims over small amounts.

As noted in the preliminary findings, in the five-year period studied, the Bureau was able to analyze the results of 419 Federal consumer finance class actions that reached final class settlements. These settlements involved, conservatively, about 160 million consumers and about $2.7 billion in

[501] In total, 18 banks paid $1 billion in settlement relief to nearly 29 million consumers. *Id.* (explaining how the settlements were distributed). These settlement figures were net of any payments made to consumers via informal dispute resolution; an expert witness calculated the sum of fees attributable to the overdraft reordering practice and subtracted all refunds paid to complaining consumers. The net amount was the baseline from which settlement payments were negotiated. *See id.* section 8 at 45 n.61 and 46 n.63.

[502] One commenter, a research center, suggested that the Bureau should have analyzed the historical evolution of such bonus provisions. The Preliminary Results did analyze their prevalence and found them to be rarely used. *See* Preliminary Results, *supra* note 150, at 51.

[503] Anna Werner and Megan Towey, ''AT&T and DirecTV Face Thousands of Complaints Linked to Overcharging, Promotions,'' CBS Evening News (May 16, 2017), *available at http://www.cbsnews.com/news/complaints-att-directv-bundled-services-directv-customers-promotions-overcharging/. See also Concepcion,* 563 U.S. at 337 (describing AT&T's ''bonus'' provision which, in the event that a customer receives an arbitration award greater than the company's last written settlement offer, requires it to pay a $7,500 minimum recovery and twice the amount of the claimant's attorney's fees.).

[504] *See* Press Release, Bureau of Consumer Fin. Prot., ''Consumer Financial Protection Bureau Fines Wells Fargo $100 Million for Widespread Illegal Practice of Secretly Opening Unauthorized Accounts,'' (Sept. 8, 2016), *available at http://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-fines-wells-fargo-100-million-widespread-illegal-practice-secretly-opening-unauthorized-accounts/.*

[505] Press Release, Bureau of Consumer Fin. Prot., ''CFPB Takes First Action Against 'Buy-Here, Pay-Here' Auto Dealer,'' (Nov. 9, 2014), *available at https://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-first-action-against-buy-here-pay-here-auto-dealer/.*

[506] DriveTime Automotive Group, Inc., CFPB No. 2014–CFPB–0017, Consent Order at ¶¶ 42, 43 (Nov. 19, 2014), *available at http://files.consumerfinance.gov/f/201411_cfpb_consent-order_drivetime.pdf.*

[507] Sabine A. Einwiller & Sarah Steilen, ''Handling Complaints on Social Network Sites—An Analysis of Complaints and Complaint Responses on Facebook and Twitter Pages of Large US Companies,'' 41 Pub. Rel. Rev. 195, at 197–200 (2015).

gross relief of which, after subtracting fees and costs, made $2.2 billion available to be paid to consumers in cash relief or in-kind relief.[508] Further, as set out in the Study, nearly 24 million class members in 137 settlements received automatic distributions, meaning they received payments without having to file claims.[509] In the five years of class settlements studied, at least 34 million consumers received $1.1 billion in payments.[510] In addition to the monetary relief awarded in class settlements, consumers also received non-monetary relief from those settlements. Specifically, the Study showed that there were 53 settlements covering 106 million class members that mandated behavioral relief that required changes in the settling companies' business practices beyond simply to comply with the law. The Bureau further preliminarily found that the fact that many cases filed as putative class cases do not result in class relief does not change the significance of that relief in the cases that do provide it, both because putative class members may still be able to obtain relief on a classwide basis after those individual outcomes and because the cost of defending a putative class case that ends in this manner is relatively low in comparison to the cases that provide class relief.

Based on its experience and expertise—including its review and monitoring of these settlements and its enforcement of Federal consumer financial law through both enforcement and supervisory actions—the Bureau also preliminarily found that behavioral relief could be, when provided, at least as important for consumers as monetary relief. Indeed, prospective relief can provide more relief to more affected consumers, and for a longer period, than retrospective relief because a settlement period is limited (and provides a fixed amount of cash relief to a fixed number of consumers), whereas injunctive relief lasts for years or may be permanent and may apply to more than just the defined class.

In the discussion that follows, the Bureau reviews comments on these two preliminary findings, addresses concerns raised in those comments, and makes its final findings on these issues. At the outset, the Bureau notes that the bulk of the critical comments it received on these preliminary findings concern the actual cash compensation to consumers in class action settlements and other related concerns commenters have about class actions, with far fewer commenters addressing behavioral relief despite its relative importance to the Bureau's preliminary findings. Thus, while the bulk of the discussion focuses on the former preliminary finding, the Bureau emphasizes below the non-monetary benefits of class actions.[511]

Comments Received

Monetary Relief Provided by Class Actions. Many industry and research center commenters disagreed with the Bureau's preliminary finding that class actions provide significant monetary relief to consumers who have been harmed; instead, these commenters highlighted the fact that the Study showed that individuals received, on average, only $32 per person from the class action settlements studied.[512] Some of these industry and research center commenters further pointed out that the average recovery of $32 is particularly low if compared to the Study's finding that consumers who win claims in arbitration recover an average of nearly $5,000 per claim. One commenter provided examples of specific cases involving low payouts. A group of automobile dealers and a law firm representing automobile dealers in California similarly commented that in the class actions studied concerning automobile loans, the average relief provided was $337 per consumer, less than a typical consumer's monthly car payment. In this commenter's view, that average recovery is very low in light of the value of the claims asserted in a typical case concerning automobile loans. Relatedly, the same group of automobile dealers and another group of trade associations representing automobile dealers criticized class action settlements as unnecessary for cases in which consumers have claims worth higher dollar amounts, such as, in the commenter's view, claims concerning automobile purchase loans. These commenters asserted that individual consumers have sufficient incentive to bring individual claims concerning these products, which the commenter asserted were typically for $1,000 or more (though it cited no data in support of this figure).[513]

Numerous consumer advocates, academics, consumer law firms and research center commenters agreed with the Bureau's preliminary finding that class actions provide substantial monetary relief to consumers. Many of these commenters highlighted the sums reported by the Bureau in the Study—that at least 160 million class members were eligible for relief via class action settlements over the five-year period studied; that those settlements totaled $2.7 billion in cash, in-kind relief, and attorney's fees and expenses; and that consumers actually received at least $1.1 billion in those cases. The commenters stated that, in their view, these are substantial sums and that if many providers had not used pre-dispute arbitration agreements, these sums would have been substantially higher. The academic commenters, citing the Study, concluded that class actions are a powerful tool that can help consumers vindicate their rights under Federal and State law. They cited both funds returned to consumer and the deterrent effect of class actions.

Numerous consumer advocates, public-interest consumer lawyer, and

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[508] These figures exclude *cy pres* relief that is distributed to a third party (often a charity) on behalf of consumers, instead of to consumers directly, in cases where making payments to consumers directly is difficult or impossible. The number of consumers (160 million) obtaining relief in class settlements excludes a single settlement that involved a class of 190 million consumers. Study, *supra* note 3, section 8 at 15. Section 8 of the Study, on Federal class action settlements, covered a wider range of products than the analysis of individual arbitrations in Section 5 of the Study, which was limited to credit cards, checking/debit cards, payday and similar loans, general purpose reloadable prepaid cards, private student loans, and automobile purchase loans. *Id.* section 5 at 17–18. If the class settlement results were narrowed to the six product markets covered in Section 5, the Study would have identified $1.8 billion in total relief ($1.79 billion in cash and $9.4 million of in-kind relief), or $360 million per year, covering 78.8 million total class members, or 15.8 million members per year.

[509] *Id.* section 8 at 27.

[510] As noted above, *see* Johnston & Zywicki, *supra* note 335 and accompanying text, researchers have calculated that, on average, each consumer that received monetary relief during the period studied received $32. Because the settlements providing data on payments (a figure defined in the Study, *supra* note 3, section 8 at 4–5 n.9, to include relief provided by automatic distributions or actually claimed by class members in claims made processes) to class members did not overlap completely with the settlements providing data on the number of class members receiving payments, this calculation is incorrect. Nonetheless, the Bureau believes that it is a roughly accurate approximation.

[511] An additional important benefit of the rule is the general deterrent effect of class actions. That is addressed below in Part VI.C.1, insofar as this part focuses on the benefits of class actions as documented in the Study and Part VI.C.1 focuses on the benefits the Bureau expects consumers to derive from the rule.

[512] The Bureau notes that $32 is an approximation derived from data in the Study, *supra* note 3, section 8. The Bureau believes that this $32-per-class-member recovery figure is a reasonable estimate.

[513] Another automobile dealer commenter pointed out that arbitration agreements between automobile dealers and consumers are different than arbitration agreements concerning other products or services because the automobile dealers provide their arbitration agreements as a separate document, rather than as part of the purchase contract.

consumer lawyers and law firms provided specific examples from their own experiences where class actions caused defendants to stop harmful practices and consumers received substantial monetary amounts as a result of class action settlements. One of the consumer law firms reported that it had obtained millions in relief for consumers via class actions. Another consumer law firm commenter noted that, in its experience, these cases frequently involved automatic payouts to class members, who did not need to submit a form or other documentation to receive the benefit of the settlement. Another commenter noted that class actions provide a practical and efficient way to allow consumers to recover for relatively low-value abuses. Similarly, several commenters suggested that by allowing class actions, the Bureau would make it possible for consumers to achieve relief when they largely would be unable to do so if arbitration agreements continue to be used as they are now. A public-interest consumer lawyer and a consumer advocate commenter each stated that the very nature of class action claims—that they are often low value—emphasizes their overall importance because consumers will not otherwise receive relief for those claims. The commenter further asserted that, when multiplied out, the practices at issue in those cases often generate substantial profits to providers. A consumer law firm commenter noted that class actions require the settling company to repay all consumers who are members of the affected class, not just those individuals who take the time to assert a claim.

Other industry and research center commenters suggested that consumers do not obtain significant relief from class actions because settlements often require consumers to file claims to obtain relief, which most consumers do not do. For example, many industry commenters noted that in settlements requiring consumers to file a claim to obtain relief, the Study showed that only 4 percent of consumers filed a claim.[514] Thus, these commenters contended that class action settlements do not serve their compensatory purpose. Further, a few industry commenters contended that taking into account both the 4 percent claims rate in class settlements where consumers were required to submit a claim and the fact that the Study found that only 12 percent of putative class cases in the six selected markets resulted in a classwide settlement as of the Study cutoff date, there is a very low likelihood that a consumer in a putative class case actually receives any compensation from any case filed as a class action. One industry commenter cited a study of class action settlements concerning claims under certain consumer protection statutes that estimated that only 9 percent of the total monetary award in those cases actually went to the plaintiffs as further support for its positions that class actions do not provide significant relief to consumers.[515] Expressing a related concern, an industry commenter stated that it did not find data in the Study of how consumers fared in class action settlements. This commenter stated that the 4 percent claims rate indicated that awards were so small as to not be worth the effort required to make a claim. The commenter asserted that the Study did not contain enough detail on the nature of the settlements or explain how the Bureau was able to conclude that class actions were preferable to arbitration (where 32 consumers recovered over $5,000). A research center commenter further stated its belief that low-income consumers are less likely to file claims and thus such settlements function as a regressive tax on low-income consumers in favor of plaintiff's attorneys. Relatedly, an industry commenter asserted that the Bureau overstates the benefit provided by most class actions—gross relief in almost half of the settlements was $100,000 or less and the gross relief in 79 percent was $1 million or less.

Several industry and research center commenters further criticized the Bureau's reliance on the Study to support its findings that class actions provide significant relief to consumers on the basis that certain cases should have been excluded from the analysis. For example, one research center commenter asserted that a large settlement involving a credit reporting agency should have been excluded as distorting the overall effect because it provided $575 million of ''in-kind'' relief rather than actual cash relief. A number of others commented that the Study's findings on the overall amount of relief provided in class actions was not representative of consumer finance class actions generally because the Overdraft MDL class-action settlements included in the Study were atypically large and unlikely to recur. A research center commenter also noted that if those large settlements were excluded from the Study's data, the average payment to an individual consumer from a class action settlement analyzed in the Study would be $14, a significant reduction from the $32 per consumer average payment for the Study as a whole.[516] In these commenters' view, the overdraft settlements distorted the Study to make it seem that consumers get much more relief than class actions typically provide. Further, one industry commenter asserted that the overdraft settlements may not have been as large had the overdraft activity occurred later because the practices could have been the subject of a Bureau enforcement action. That same industry commenter suggested that the Bureau failed to assess the extent to which consumers' overdraft complaints were resolved through informal channels before the class actions commenced. The commenter also suggested that the conduct at issue was not actually illegal.

One research center commenter contended that the value of the overdraft settlements should be discounted because the settlements do not make customers of those providers better off, overall. This commenter hypothesized that most of the overdraft fee refunds went to low-income consumers and that the defendant banks likely perceived those customers as less profitable following the settlements (since they could no longer assess as many overdraft fees). The commenter posited that, in the event such customers become unprofitable, the settling banks will screen those low-income customers from their customer base in the future, resulting in higher fees for the customers who remain. This commenter stated that after the Overdraft MDL settlements, minimum balance requirements to avoid checking account fees have generally increased and asserted that this may be linked to class action liability, though that link has not been empirically established.

Behavioral and In-Kind Relief in Class Actions. Several industry and research center commenters disagreed with the Bureau's preliminary findings that class settlements benefit non-class members because they cause companies to change their harmful practices with respect to all consumers, asserting that companies agreed to behavioral relief in only 13 percent of the class action settlements analyzed. Many industry and research center commenters further stated their belief that class actions do not provide significant relief to consumers because of the prevalence of non-cash and coupon relief in lieu of providing cash

[514] Study, *supra* note 3, section 8 at 30.

[515] Joanna Shepherd, ''An Empirical Survey of No-Inquiry Class Actions,'' at 2 (Emory U. Sch. of L., Res. Paper No. 16–402, 2016) (these ''no injury'' class actions were not limited to cases concerning consumer financial products, as discussed in more detail below in this Part VI.B.3 where the Bureau responds to these comments).

[516] Study, *supra* note 3, section 8 at 18 tbl. 3.

directly to consumers in class action settlements.[517] For example, one industry commenter noted that the Study found relief other than direct cash payments, including coupon settlements, are provided nearly 10 times as often (for 316 million consumers) as cash relief (for 34 million consumers). The same commenter criticized class actions settlements generally but cited only to examples that did not involve consumer finance that provided consumers with ''worthless'' coupons for future service from the defendant company, rather than with cash.

In contrast, many consumer advocate, consumer law firm and nonprofit commenters agreed with the Bureau's assertion that companies often change their behavior in ways that benefit consumers as the result of class action settlements. One such commenter emphasized the fact that many class action settlements include injunctive relief, such as requiring companies to stop harmful practices that led to the class action, to agree to outside monitoring to ensure that further misconduct does not occur, or to provide increased training or other safeguards to improve future compliance with the law. As an example, one nonprofit commenter cited a class action settlement involving two money transmission companies that agreed to not only compensate consumers but also to halt their use of unfavorable exchange rates, provide better disclosures, and develop a community fund. As another example, a consumer law firm commenter explained how a class action was able to provide complete relief to all affected consumers. This relief included not only cash compensation for their injuries but also injunctive relief that was able to resolve the problem permanently and for all affected in a way that an individual action would not have been able to do. Other commenters provided similar examples.

Proportion of Cases Filed as Class Actions That Ultimately Provide Classwide Relief. Many industry and research center commenters criticized the Bureau's preliminary finding that class actions provide significant relief to consumers based on a contention that the majority of cases filed as class actions do not, in fact, result in class settlement. The commenters asserted that such cases do not provide any relief to consumers other than the named plaintiff when the case settles on an individual basis, while imposing significant costs on providers. As noted above, numerous such commenters noted that only 12 percent of the putative class action filings analyzed in the Bureau's Study resulted in a class action settlement as of the Study cutoff date, while the remainder of the cases filed as class actions resulted in no classwide relief at all.[518] These commenters pointed out that just over 60 percent of the cases filed as putative class actions resulted in either an individual settlement between the defendant(s) and the named plaintiff or a voluntary withdrawal of the case by the named plaintiff (which could also signal that the parties reached an individual settlement). Some commenters further contended that when putative class cases end in a settlement or potential settlement with only the named plaintiff, that outcome may indicate that the case lacked merit.

One industry commenter cited further studies indicating that only a fraction of cases filed as class actions ultimately result in classwide relief to consumers.[519] One such study found that around one-third of the putative class cases resulted in classwide settlement, while another found that 20 percent to 40 percent resulted in such relief.[520] A credit union commenter provided an example of a putative class action case in which the credit union was a defendant; a settlement was reached with the named plaintiff on an individual basis for a few thousand dollars, but the case cost the credit union tens of thousands in defense costs. The credit union commenter asserted that the plaintiff's attorney in that case privately admitted in oral conversation that the claims filed were meritless; the commenter did not explain why it chose to settle a case it knew to be meritless.

Some industry commenters challenged the Bureau's preliminary finding that non-class settlements in putative class action cases do not undermine the benefits of those cases that do result in classwide settlements. For example, one commenter disagreed with the Bureau's finding that putative class members could pursue subsequent claims after a case was settled on a non-class basis because the putative class members would not be bound by the non-class settlement. In this commenter's view, there is no evidence that such follow-on claims are actually brought and, in any event, the commenter asserted that such claims would likely lack merit and thus that it would be difficult for putative class members to find attorneys to assert them on a class basis.

Merits of Claims Resolved by Class Action Settlements. Many industry commenters disagreed that class actions benefit consumers because they contended the Bureau erroneously assumed that a class action settlement necessarily redresses a violation of the law. For example, some industry commenters contended that companies agree to class action settlements when they have not violated the law or where the claims asserted are frivolous to avoid the significant expense of litigating and to avoid the risk of a much higher payout if the case were to survive certain stages of court review. In cases like these, the commenters contended that the settlement represents a failure of the litigation system because the company felt forced to settle claims that lacked merit, rather than a benefit to consumers or a redress of harm. One industry commenter supported this point by citing court decisions recognizing the pressure on companies to settle in class action cases. Some Tribal commenters stated their view that Tribal treasuries are at risk from the prospect of frivolous class action settlements which contradicts longstanding Federal law that provides that protecting the Tribal treasury against legal liability is essential to the protection of Tribal sovereignty.[521]

Another industry commenter contended that the Study's data that dispositive motions were granted before class settlement in 10 percent of the class actions studied is not relevant to whether the allegations in those cases were meritorious because defendants may choose to settle a case even after winning a dispositive motion to avoid the costs of litigation and appeal. The commenter stated that the low frequency of classwide judgments for consumers and plaintiffs who prevailed on dispositive motions suggests that the underlying claims in putative class cases lack merit or are frivolous. Some industry commenters expressed their view that class action litigation is inferior to other forms of dispute resolution, such as arbitration, because class action cases do not reach decisions

[517] A coupon settlement is one in which a company provides class members with a ''coupon'' or other discount of the purchase of a future product or service.

[518] Study, *supra* note 3, section 6 at 37.

[519] Mayer Brown LLP, ''Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions,'' (Dec. 11, 2013), *available at www.instituteforlegalreform.com/uploads/sites/1/Class_Action_Study.pdf.*

[520] *Id.;* Jason S. Johnston, ''High Cost, Little Compensation, No Harm to Deter: New Evidence on Class Actions Under Federal Consumer Protection Statutes,'' (U. Va. Sch. of L., Res. Paper Series 2016–12, 2016).

[521] *E.g., Allen* v. *Gold Country Casino,* 464 F.3d 1044, 1047 (9th Cir. 2006).

''on the merits'' given that class actions almost never go to trial, although they did not explain why the lack of a decision at trial necessarily makes class action litigation inferior. A few industry commenters pointed out that none of the cases identified in the Bureau's analysis of settlements went to trial and therefore that the class members in those putative class action cases never got a ''day in court.''

A State attorney general commenter noted that, in his State, class action plaintiffs seeking to pursue a claim of consumer fraud were required to get approval from his office that the putative claim was not frivolous before it could be filed in court.[522] His office has concluded that not a single one of these complaints was frivolous as alleged. This commenter made a similar point regarding a provision in CAFA that permits State attorneys general to review settlements.[523] This review (done by a team of State attorneys general) has seldom found a settlement that was abusive or unfair.

Other Concerns Regarding Class Actions. A few industry commenters noted that class actions proceed slowly and asserted that the value of the relief that they do provide is diminished by the length of time it takes to receive that relief. One industry commenter further noted that class actions proceed much more slowly than individual arbitration and asserted thus that individual arbitration is therefore a superior forum than class litigation.

Several industry commenters noted that the Study found that consumers filed more individual arbitrations per year (411) than they did Federal class actions (187) and asserted that the Bureau should not have counted putative class members in those class actions as supporting its finding that class actions benefited more consumers than individual arbitration or litigation.

Response to Comments and Bureau Findings

Monetary Relief Provided by Class Actions. Many industry commenters disagreed with the Bureau's preliminary findings that class actions provide significant monetary relief to consumers because they concluded that class action settlements provide, on average, small amounts of relief per consumer (what many commenters calculated as $32 per consumer as shown by the Study) and that, as a result, they provide no meaningful benefit to consumers. For several reasons, the Bureau does not agree that the fact that class actions sometimes provide a small amount of relief per consumer compels a finding that they do not provide significant relief to consumers in the aggregate or detracts from the Bureau's preliminary finding that class actions provide a more effective mechanism of securing relief than individual litigation or arbitration. The Bureau was not surprised to find average individualized monetary recoveries in class actions in such amounts, given that the class action procedure is designed to aggregate claims for small damages precisely because rational consumers do not spend the time or the money to litigate them on their own.

First, in assessing the relevance of the small size of the average relief obtained, it is important to compare that to the alternative in which these consumers obtain no relief at all—because, as discussed above in Part VI.B.2, virtually none of them will pursue their individual claims. The Bureau finds that relief of $32 (or even $14, as some commenters suggest is a more accurate figure reflecting their attempts to exclude the overdraft settlements from the Bureau's data) is a better result for harmed consumers than no relief at all. As noted above, there were only about 25 disputes a year involving affirmative claims in arbitration by consumers for $1,000 or less.[524] Second, companies are less likely to harm consumers when they face the threat of class action liability (this ''deterrent effect'' is discussed in more detail below at Part VI.C.1). While a single harm may be small, that amount of that harm (and the value of claims concerning that harm) multiplied by thousands or millions of consumers is substantial.[525] Yet the single harm remains much less than the amounts for which consumers will choose to challenge or the amounts attorneys typically will take individual cases on contingency; as cited by industry commenters and discussed above, studies have shown that attorneys generally will not accept individual claims worth less than $60,000 on contingency.[526]

Further, the Bureau agrees with some consumer advocate commenters that stated that consumers who are unaware that they have been harmed nonetheless can benefit from a class action. For these reasons, the Bureau finds that consumers who fall victim to legally risky practices are better protected by receiving relatively small amounts from a class action settlement than being relegated to a system in which their only alternative is to pursue relief individually which, in practice, will result in most of them receiving nothing. This is especially true given that class members invest little (and in many cases none) of their own time or money to receive relief in a class action. The Bureau finds that the overall relief provided by class actions, coupled with the large number of consumers that receive payments as part of this relief, are the correct measure of their efficacy and that overall relief is not undermined by the fact that each of these individuals may receive relatively small monetary amounts.

The Bureau also finds that commenters' comparison between the average payment to consumers in a class action (around $32) to the average individual consumer award in arbitration (around $5,000) is not apt. Many commenters have made this comparison to contend that consumers fare better in individual arbitration than in class litigation and, by extension, that class actions do not provide significant relief to consumers. This is an apples-to-oranges comparison. As discussed above, there is not much money at stake in the typical claim of a putative member of a class action, and thus there is little incentive for an individual to devote time and money to litigating the claim. In contrast, the Study found the average claim amount demanded in an arbitration to be $29,308, and the median to be $17,008.[527] No commenters adduced evidence suggesting that the amounts at stake in most consumer class actions are even approaching this magnitude on a per consumer basis. Thus, arbitration claims are not the same magnitude as claims that are brought in class actions. Not surprisingly, the Study found that individual arbitration filings for amounts less than $1,000 were quite rare—only 25 per year. In other words, individuals rarely file claims in individual arbitration over small amounts, whereas class actions more often provide recovery to consumers for those claims.[528] Thus, the disparity

[522] *See* Iowa Code ch. 714H.

[523] *See* 28 U.S.C. 1715(a).

[524] Study, *supra* note 3, section 5 at 10. Similarly, few consumers filed claims in small claims court.

[525] This finding is no less true in cases concerning automobile loans for which the average relief is $337—that amount is likely still too small of an amount for a rational consumer to invest the time and expenses necessary to file an individual claim. In the automobile loan class action settlements analyzed in the Study, consumers received over $202 million in cash relief. *Id.* section 8 at 25 tbl 8.

[526] Hill, *supra* note 477, at 783. Indeed, no commenter suggested that attorneys would bring most of these smaller dollar value claims on an individual basis. Nor would it make economic sense for a consumer to pay a typical attorney's hourly rate to bring a small dollar claim.

[527] Study, *supra* note 3, appendix J at 62 tbl. 16.

[528] As noted above in Part VI.B.2, the Study showed that consumers rarely pursue low value

between the recoveries of an individual consumer in class actions and those in individual arbitration is unsurprising.

With respect to the view asserted by an automobile industry commenter that class actions are not necessary for claims related to that industry because claims are typically for $1,000 or more, the Bureau does not find it to be supported that claims in that industry are typically for $1,000 or more (*i.e.,* that small claims generally do not exist in that market). The commenter asserted that because the principal balance of an automobile loan is higher than the amount of credit extended for other consumer financial products and services, the frequency of small claims is therefore substantially reduced. The Bureau disagrees, however, that the principal balance of a loan is the primary indicator of the likelihood of small claims.[529] Regardless of the size of the loan, claims can arise with respect to, for example the assessment of late fees or other ancillary fees, the application of individual payments, or the failure to provide required disclosures. Even claims of discriminatory pricing may not be for more than $100 on average, as has been true in certain enforcement actions the Bureau has brought involving automobile lending.

Furthermore, even if it were true that automobile loans claims are typically for $1,000, the Bureau does not believe that the existence of a $1,000 claim is sufficient incentive to encourage large numbers of consumers to file individual claims, for all of the reasons discussed above in Part VI.B.2, nor did the commenter cite evidence to the contrary. Indeed, multiple consumer lawyer and law firm commenters noted that it is economically unfeasible for them to represent consumers who have claims of this magnitude on an individual basis; such claims are only viable when they can be aggregated. For these reasons, the Bureau finds that the availability of class actions concerning automobile financing benefits consumers notwithstanding the possibility that the average claims amount in those cases in the Study may be higher than in some other markets.[530]

Many industry and research center commenters criticized the efficacy of class actions because the settlements often require consumers to submit claims to obtain relief and consumers frequently do not do so. The Bureau disagrees that the low claims rate in claims-made settlements undermines the conclusion that significant relief is provided to consumers from class actions generally. Most of the commenters ignored the fact that in many consumer finance class actions, the company's records make it possible to identify the class members entitled to relief and the amount of relief to which they are entitled, thus obviating the need for a claims process. The Study identified 24 million consumers who received automatic payouts in the 133 class settlements that identified the number of class members paid.[531] Moreover, for the 251 settlements where the Bureau had data on the amount consumers were paid, the Study found as many cases that provided automatic relief as provided claims-made relief.[532] In total, the Study found that consumers received $709 million through automatic payment settlements, $322 million by submitting claims, and another $63 million in cases involving both automatic and claims-made relief.[533] No commenters disputed these amounts. The combined total of $1.1 billion in actual payments to consumers represents about half of the total $2.0 billion in cash relief awarded through the settlements analyzed. Further, the actual amounts paid to consumers from the settlements analyzed in the Study are almost certainly higher than what was reported because the Bureau was unable to obtain payments data for 79 of the 208 class settlements it analyzed that required consumers to make claims in order to receive monetary relief.[534] Thus, the class settlements in the Study showed that a substantial portion of the relief awarded was paid, which is contrary to the suggestions of commenters that very little of the settlement amounts is delivered to consumers. Numerous comments from consumer advocates, nonprofits, public-interest consumer lawyers, and consumer lawyer and law firms confirmed this through their own experiences regarding class actions that provided substantial benefits to class members.

The Bureau acknowledges that, in the 105 class settlements analyzed in the Study requiring claims where there was data on the potential class size and claims rates, the unweighted average claims rate was 21 percent and the weighted average was 4 percent. While these figures may understate the percentage of consumers actually eligible for relief who submitted claims (since the claims rate is sometimes calculated based on the number of potential members of a class, and since additional class members may have submitted claims after the Study's release), the figures do indicate that a large majority of consumers potentially entitled to claim relief from class actions do not file a claim when one is required.[535] Nevertheless, the Bureau finds that, even taking into account the fact that many consumers do not file claims in class settlements that require them to do so, a system which enabled 4 percent of consumers to obtain relief for small claims still would be more effective in providing redress than one in which the only alternative is for individuals to pursue their claims individually. Moreover, given the important role that automatic payment settlements play in consumer finance class actions, such actions can deliver relief to far more than 4 percent of class members. Simply stated, the over $200 million in relief provided per year on average to an average of almost 7 million consumers through a combination of automatic payments and claims made by consumers is significant relief to consumers.

With respect to the paper that commenters cited for the proposition that consumers receive only about 9 percent of the settlement amounts in class actions, the paper cited does not state the number of settlements that it analyzed that required consumers to submit claims as compared to the number of settlements that provided automatic relief, if any. Instead, the paper reached that 9 percent conclusion by estimating a 15 percent claims rate rather than through any substantive analysis.[536] Indeed, the author stated

claims in other fora, nor are many such claims resolved informally.

[529] Indeed, the Bureau notes that Congress has prohibited arbitration clauses in mortgages, where the typical size of the loan is much larger than the typical automobile loan.

[530] With respect to the automobile dealer commenter that noted that dealers provide arbitration agreements to consumers as a separate document, the manner in which the arbitration agreement is provided to consumers is not relevant to the Bureau's findings that the class rule is for the protection of consumers or in the public interest.

Indeed, for reasons discussed more fully in the Section 1022(b)(2) Analysis below in Part VIII, consumer awareness of arbitration is not the market failure that this rule intends to address.

[531] Study, *supra* note 3, section 8 at 22 tbl. 6.

[532] *Id.* section 8 at 28 n.46.

[533] *Id.*

[534] *Id.* section 8 at 27. In addition, there were 56 class settlements that provided injunctive relief that covered 106 million class members (as well as future consumers who were not class members) regardless of whether they submitted a claim. Many of the class settlements that required consumers to submit a claim included such injunctive relief. *Id.* section 8 at 20–21 and tbl. 5.

[535] *Id.* section 8 at 5.

[536] Shepherd, *supra* note 515, at 21. The author determined, based on citation to other studies, that claims rates are always 15 percent or less. She then multiplied that by the 60 percent of total awards that go to consumers to reach the 9 percent conclusion.

that she did not actually obtain the claims rates in the settlements analyzed (by contrast, the Bureau's Study did so). Thus, the Bureau does not believe that the author's 9 percent estimated figure is representative of consumer finance class actions overall because, as discussed above, consumer finance class actions are often particularly amenable to automatic payments.

Further, the paper's author limited the settlements analyzed to a subset of class action cases under particular statutes the author classified as ''no-injury.'' [537] As that paper acknowledges, there is no generally accepted definition of a ''no-injury'' case, and the Bureau does not agree, for reasons discussed below at Part VI.C.1 discussing deterrence, with the characterization of claims under these statutes as ''no injury.'' [538] In addition, the bulk of those cases involved claims under the FDCPA, TCPA, FCRA, and EFTA, each of which cover activity that extends beyond the scope of the Study and this rulemaking, to include claims involving nonfinancial goods or services that were not covered in the Study, that are not subject to the final rule, and that are more likely to involve claims-made settlements.[539] For example, FCRA class actions can involve merchants and employers and thus would not be consumer financial in nature, while EFTA class actions in this period were often ATM ''sticker'' claims that no longer violate EFTA and, in any event, involve individuals who did not have contractual relationships with the provider and thus could not involve an arbitration agreement. As the proposal noted, and as finalized, the rule would have no impact on such cases. Similarly, FDCPA class actions cover collection of all types of debt, including debt that does not arise from a consumer financial product or service (such as taxes, penalties and fines), whereas the Study and the rule only cover collection of debt to the extent it is collection on a consumer financial product or service. Finally, TCPA class actions often involve marketing communications unrelated to consumer finance. Such claims are often brought against a merchant or a company with whom the consumer otherwise has no relationship, contractual or otherwise.[540] It may well be that claims rates in TCPA cases could be low, perhaps in some part because there is no contractual relationship between the harmed consumer and the company and thus it is more difficult to reach those consumers.

Many commenters pointed to the fact that in the Study, a small number of settlements—specifically, those that occurred as part of the Overdraft MDL litigation—accounted for a large portion of the relief obtained and a large portion of the consumers obtaining relief. The Bureau notes that, rather than indicating a problem with the Study, this simply reflects the fact that the distribution of class action settlement amounts is right-skewed. Such distributions are commonplace in business and finance: For instance, a small number of banks represent a large fraction of all depository accounts, and a relatively small proportion of individuals hold a majority of household wealth.[541] Similarly, as shown in the Study, smaller settlements are more common than larger ones, even setting aside the overdraft settlements.[542] Mathematically, the inevitable result of very small settlements being common and very large settlements being somewhat uncommon is that the large settlements will represent the bulk of the total dollars.

Insofar as these commenters have suggested that this makes the results observed in the Study unrepresentative of the benefits that class actions can provide in other time periods, the Bureau does not agree. The Bureau believes that the large overdraft settlements reflect, in part, that there was an industry-wide practice in a very large market that harmed many consumers. While class actions concerning such industry-wide practices may not occur every year, they do occur from time to time and can provide significant relief for consumers.[543] Similarly, multidistrict litigations involving many millions of affected consumers come along regularly. And even class actions against a single institution can produce large numbers depending on the scope of the practice and customer base; for instance, one class action against a large bank whose employees routinely opened unauthorized accounts for existing customers recently reached a preliminary settlement of $142 million.[544]

The Bureau thus finds that the body of class actions, when taking into account their overall results, including both the large and small settlements, provides significant relief to consumers. Some commenters suggested that given the existence of the Bureau, in the future public enforcement can be expected to substitute for large class action settlements so that settlements of the magnitude of those that occurred in the Overdraft MDL litigation are unlikely to occur. However, an analysis of the complaints in the overdraft cases indicates that many of the claims were predicated on State law and on the terms of the consumers' contracts, and thus may not have been claims that the Bureau could have brought. Moreover, while it may seem easy, in hindsight, to identify ''big'' cases and assert that these are cases that public authorities like the

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[537] Shepherd, *supra* note 515, at 9.

[538] In any event, the Supreme Court's recent decision in *Spokeo, Inc.* v. *Robbins* reaffirmed that class members must have an actual injury. 136 S. Ct. 1540 (2016).

[539] Shepherd, *supra* note 515, at 2, 13.

[540] For example, a different study that analyzed TCPA filings in one Federal district court over two years found that 58 percent of the claims asserting violations of that statute related to unauthorized marketing faxes, calls, texts, or emails. Johnston, *supra* note 520 at 32.

[541] *E.g.,* Alina Comoreanu, ''Bank Market Share by Deposits and Assets,'' WalletHub (Feb. 9, 2017) (noting that the five largest depository banks, based on total assets, hold 47 percent of total bank assets in the United States); Congressional Budget Office, ''Trends in Family Wealth, 1989 to 2013,'' (2016) (indicating that, in the United States, families in the top 10 percent of the wealth distribution held 76 percent of wealth); Bureau of Consumer Fin. Prot., ''Monthly Complaint Report: Vol. 21,'' (Mar. 2017) at 3, 10 (indicating that complaints against the top 10 most-complained-about companies constituted about 30 percent of all complaints).

[542] Study, *supra* note 3, section 8 at 26 fig. 4.

[543] For example, between 2003 and 2006, 11 automobile lenders settled class action lawsuits alleging that the lenders' credit pricing policies had a disparate impact on minority borrowers under ECOA. Mark Cohen, ''Imperfect Competition in Auto Lending Subjective Markup, Racial Disparity, and Class Action Litigation,'' 1 R. L. Econ. 22, at 49 (2012) (noting that value of 11 settlements included $63 million in direct monetary benefits to consumers plus hundreds of millions of dollars more in savings to consumers from the companies' agreements as part of the settlement to restrict markups). Another example is a series of settlements concerning allegations that mortgage companies forced consumers to purchase unnecessary or excessive insurance that provided hundreds of millions of dollars in relief for consumers. *See, e.g.,* Order Granting Final Approval to Class Action Settlement, *Hall* v. *Bank of Am., N.A.,* No. 12–22700, 2014 WL 7184039 (S.D. Fla. Dec. 17, 2014) ($228 million settlement); Order Granting Final Approval to Class Action Settlement, *Diaz* v. *HSBC USA, N.A.,* No. 13–21104, 2014 WL 5488161 (S.D. Fla. Oct. 29, 2014) ($32 million settlement); Order Granting Plaintiff's Motion for Final Approval of Class Action Settlement, *Saccoccio* v. *JP Morgan Chase Bank, N.A.,* 297 FRD. 683 (S.D. Fla. Feb. 28, 2014) ($300 million settlement); Stipulation and Settlement Agreement, *Fladell* v. *Wells Fargo Bank, N.A.,* No. 13–60721, 2014 WL 10017434, *1 (S.D. Fla. Mar. 17, 2014) ($19.5 million settlement); *see also* Order Granting Final Approval to Class Action Settlement, *Lee* v. *Ocwen, et al.,* 2015 WL 5449813 (S.D. Fla 2015) (granting final approval to $140 million settlement with multiple defendants); Opinion and Order, *Arnett* v. *Bank of Am., N.A.,* 2014 WL 4672458 (D. Or. 2014) (granting final approval to $34 million settlement with one defendant).

[544] Motion and Memorandum in Support of Motion for Preliminary Approval of Class Action Settlement and for Certification of a Settlement Class, *Jabbari* v. *Well Fargo & Co. et al.,* No. 15–2159 (N.D. Cal. Apr. 20, 2017) ECF No. 111. As of the date of this Final Rule, the settlement has received preliminary approval by the district court in which the case is pending.

Bureau would have brought, the view in real time is far murkier. The Bureau certainly hopes that, given the resources available to it and the limitations on its enforcement authority, it will succeed in identifying instances in which large numbers of consumers are subject to harm and will seek and obtain redress. The Bureau acknowledges that, to the extent this occurs, the impact of the rule could be marginally reduced as consumers and class action attorneys might be less likely to pursue class actions with respect to that harm. However, as discussed further below in Part VI.B.5, given both resource and authorities constraints, the Bureau cannot be certain that it or other regulators can or will identify and redress all instances of large-scale consumer harm and thereby displace all large class action settlements.

Moreover, even if it were appropriate to disregard the overdraft cases in assessing the Study's findings, the relief provided to consumers by the class action settlements analyzed in the Study that was unrelated to overdraft is itself significant. Indeed, the Study breaks out the relief provided to consumers through class settlements by product and that relief includes at least four large settlements of more than $50 million in markets other than checking and savings accounts (where the settlements concerning overdraft occurred).[545] Setting aside all of the cash relief provided by cases related to checking and savings accounts, which includes cases beyond the overdraft cases, the payments actually made to consumers totaled $622.8 million, or an average of overage $130 million per year.[546] Many of these cases also resulted in significant behavioral relief as well.

Further, many of the settlements analyzed in the Study were for cases alleging violations of statutes for which the recovery in a single case is capped, such as the FDCPA which is capped at the smaller of $500,000 or 1 percent of the defendant's net worth.[547] It is therefore not possible for there to be settlements of tens or hundreds of millions of dollars under the FDCPA, but the Bureau believes that those smaller settlements, in aggregate, continue to provide significant relief for consumers and deter wrongdoing by debt collectors. The Bureau finds consumers were eligible to receive and did receive substantial relief from class action settlements separate and apart from the overdraft settlements. Again, the Bureau received numerous comments from consumer lawyers and law firms, consumer advocates, and public-interest consumer lawyers regarding their own experiences within which companies provided substantial payouts to consumers. Most of these examples did not concern the overdraft cases, but nonetheless they all involved large sums provided to consumers.[548]

As to commenters' criticisms of the Bureau's inclusion of the overdraft settlements in the Study because the Bureau did not attempt to assess the extent to which companies in those settlements provided informal relief to consumers, the Bureau did in fact address that issue in the Study and in the proposal, and discussed above in Part VI.B.2.[549] In fact, as noted in the Study, the settlement amounts in those cases nearly all took into account the amount of informal relief that companies had provided to consumers prior to the settlement.[550] More precisely, in 17 of the 18 Overdraft MDL settlements, the settlement amounts and class members were determined after specific calculations by an expert witness who took into account the number and amount of fees that had already been reversed based on informal consumer complaints to customer service. Even after controlling for these informal reversals, nearly $1 billion in relief was made available to more than 28 million class members in these MDL cases.[551] These results are consistent with the Bureau's more general concerns that, as discussed above at Part VI.B.2, consumers are often unable to pursue informal dispute resolution and, when they do, experience varying amounts of success.

With respect to the contention that consumers were not made better off by the overdraft settlements because the effect of the agreements to cease maximizing overdraft revenue through reordering drove up the price on all consumer checking accounts, the Bureau acknowledges that to the extent class actions succeed in curtailing unlawful practices that generate revenue for financial institutions, the institutions may respond by changing their pricing structures. Even if the effect of the overdraft litigation was to cause banks to substitute transparent, upfront fees on checking accounts for back-end fees paid by a small percentage of vulnerable consumers,[552] the Bureau does not agree that it would follow that consumer welfare was unchanged or negatively impacted, especially since up-front fees are more likely to generate competition and shopping than more shrouded elements of pricing. In any event, the Bureau believes that consumers generally are made better off when companies follow the law even if in a particular case the effect of doing so is to eliminate a subsidy that one group of consumers is effectively providing to another. For this reason, too, the overdraft settlements made consumers better off in that those banks provided a remedy to consumers for the banks' violations of the law.

Behavioral and In-Kind Relief in Class Actions. In addition to preliminarily finding that class actions were a relatively effective means for securing monetary relief for consumers victimized by unlawful practices, the Bureau also preliminarily found that class actions were effective as a means of providing other forms of relief as well. With respect to behavioral relief, the Study found that behavioral relief was provided for in about 13 percent of the settlements analyzed. That relief inures to the benefit of all consumers, whether the consumers were part of the settlement class or not. Further, as is discussed below in the Section 1022(b)(2) Analysis in Part VIII, the Study's definition of ''behavioral relief'' was quite narrow and referred to class settlements which contained a commitment by a defendant to alter its behavior prospectively, for example by promising to change business practices in the future or implementing new compliance programs.[553] The Bureau did not count as behavioral relief a defendant's agreement simply to comply with the law, even though such a commitment often does, in fact, result in material changes in the company's

[545] The settlements resulting in total payments to class members over $50 million were: Final Approval Order, In re Currency Conversion Fee Litigation, No. 01–01409 (S.D.N.Y. Sept. 17, 2008); Final Approval Order, *Faloney* v. *Wachovia,* No. 07–01455 (E.D. Pa. Jan. 22, 2009); Final Approval Order, *Holman* v. *Student Loan Xpress, Inc.,* No. 08–00305 (M.D. Fla. Jan. 4, 2011); and Final Approval Order and Judgment, In re Chase Bank USA N.A. Check Loan Contract Litig., No. 09–02032 (N.D. Cal. Nov. 11, 2012). Study, *supra* note 3, section 8 at 28 n.47.

[546] Study, *supra* note 3, section 8 at 36 tbl. 13.

[547] 15 U.S.C. 1692k(a)(2)(B).

[548] *See, e.g., Wells* v. *Chevy Chase Bank,* 768 A. 2d 620 (Md. 2001) ($16 million settlement for raising interest rates above advertised amount). Several commenters cited to an example, discussed in the Bureau's Preliminary Results, involving settlement of three cases against payday lenders in North Carolina. The three cases settled for $45 million, with payments sent to over 200,000 consumers. Another commenter cited a $38.6 million settlement involving LVNV Funding. *See Finch* v. *LVNV Funding, LLC,* 71 A.3d 193 (Md. Ct. Spec. App. 2013).

[549] 81 FR 32830, 32850 (May 24, 2016).

[550] Study, *supra* note 3, section 8 at 45.

[551] *Id.* section 8 at 46 and n.63.

[552] The Bureau is not aware of any evidence demonstrating the extent to which the overdraft litigation had such an effect.

[553] Study, *supra* note 3, section 8 at 4 n.7.

behavior.[554] There were many class action settlements in which companies agreed to stop violating the law, behavior that inures to the benefit of all consumers, which are not reflected in the number of cases reporting behavioral relief in the Study.[555] And neither type of behavioral relief was accounted for in the Study's monetary calculations.

No commenters took significant issue with any of these findings; to the extent that some industry commenters were dismissive of behavioral relief based on the Study's stating that it occurred in only 13 percent of cases, they appeared to overlook the fact that the Bureau was using a very narrow definition for this determination. Accordingly, in addition to cash relief provided, the Bureau finds that the behavioral relief—understood broadly—provided by class action settlements is a significant component of the relief provided to consumers. Indeed, as the Bureau noted in the proposal, the Bureau believes that this form of relief is often more meaningful to consumers than monetary recovery in individual class actions, an opinion echoed by several consumer advocate commenters. In resolving a class action, many companies stop potentially illegal practices either as part of the settlement or because the class action itself informed them of a potential violation of law and of the risk of future liability if they continued the conduct in question. Any consumer affected by that practice—whether or not the consumer is in a particular class—benefits from the enterprise-wide change. For example, if a class settlement only involved consumers who had previously purchased a product, a change in conduct by the company might benefit consumers who were not included in the class settlement but who purchase the product or service in the future. The Study found 53 class settlements in which defendants agreed to change their behavior to the benefit of at least the 106 million class members, including, for example agreeing to improve disclosures or stop charging certain fees.[556]

One example of this appears to have occurred with respect to overdraft practices. In *Gutierrez* v. *Wells Fargo,* the court ruled that the defendant bank's overdraft practices were illegal.[557] Although that judgment was limited to a California class of the bank's consumers, the bank thereafter appears to have also changed its overdraft practices in other jurisdictions in the United States, presumably out of concern regarding other State's laws.[558] Similarly, the Bureau bases this finding on its understanding of the important benefits gained by consumers through behavioral changes companies agree to make that benefit both existing customers and future customers. This is, for example, why the Bureau frequently tries to secure such behavioral relief from companies through its own enforcement actions. Although the values of these behavioral changes are typically not quantified in case records, the Bureau believes, based on its experience and expertise, that their value to consumers is significant.[559]

With respect to commenters' criticisms of coupon settlements that they contended provide little tangible relief to consumers and to one commenter's criticism of a large settlement included in the Study, the Bureau notes that its analysis of class action settlements in the Study specifically separated such "in-kind" or "coupon" relief from cash relief and that the data discussed above regarding cash relief provided to consumers does not include the value of in-kind relief.[560] Only slightly more than 2 percent of the class settlements analyzed in the Study provided for only in-kind relief (as opposed to cash relief by itself or in combination with other kinds of relief).[561] Moreover, most of the examples cited by commenters of "worthless" coupon settlements are in cases that do not concern consumer financial products and thus are outside the scope of this rule, such as a case involving a ticket broker. As used in the Study, the term "in-kind relief" refers to class settlements in which consumers were provided with free or discounted access to a service, such as credit monitoring. The Bureau believes that in-kind relief can, in appropriate cases, provide additional benefits to class members. The Bureau valued such relief in the Study based upon the difference between the market price of a service given to class members and the price the class members were required to pay.[562] The Bureau recognizes, that Congress, through CAFA, has provided for the courts to apply heightened scrutiny on in-kind relief, and the Bureau does not believe that such relief is, by itself, generally the primary benefit that consumers receive from class actions.[563]

Proportion of cases filed as class actions that ultimately provide classwide relief. The Bureau has considered commenters' criticism that only a fraction of the cases brought as putative class actions reach a class settlement that provides relief for consumers in the class. While many of these commenters focused on the fact that the Study reported that 12 percent of the cases had resulted in class relief as of 2012, the proposal reported that the percentage of cases in which a final class settlement was approved or pending approval had increased to 18.1 percent as of April 2016.[564] Approximately 60 percent of the putative class actions analyzed either were settled on an individual basis or resolved in a manner consistent with an individual settlement.

The Bureau believes, as it stated in the proposal, that the best measure of the effectiveness of class actions for all consumers is the absolute relief they provide in light of the number of

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[554] *Id.* appendix S at 135.

[555] *See, e.g., Settlement Agreement at 14, Murphy* v. *Capital One Bank,* No. 08–00801 (N.D. Ill. Jan. 12, 2010) ECF No. 76–2 (requiring defendant to continue to "add[ ]to its periodic billing statements a message warning customers that, where appropriate, payment of the minimum payment due shown on their statement may not be sufficient to avoid an overlimit fee" and to "use its best efforts to maintain its policy for a period of not less than eighteen (18) months following the entry of the Final Judgment") (cited at 81 FR 32830, 32932 (May 24, 2016); Settlement Agreement at 13–14, *Nobles* v. *MBNA Corp.,* No. 06–03723 (N.D. Cal. Dec. 5, 2008) ECF 179–3 (requiring defendant to continue to include language in credit agreements compliant with California law) (*cited* at 81 FR 32830, 32932 (May 24, 2016)); Joint Motion for Preliminary Approval of Class Action Settlement at 3, *Peterson* v. *Resurgent Capital Services L.P.,* No. 07–251 (N.D. Ind. Oct. 21, 2008) ECF 47 ("for all members of this class with a known address in Wisconsin, whose debt is time barred, Defendants will cease all efforts to collect the debt and not sell the debt") (*cited* at 81 FR 32830, 32932 (May 24, 2016)).

[556] Study, *supra* note 3, section 8 at 22 and appendix S at 134.

[557] The original bench trial awarded "a certified class of California depositors" both cash and injunctive relief based on violations of California law. *Gutierrez* v. *Wells Fargo Bank, N.A.,* 730 F. Supp. 2d 1080, 1082 (N.D. Cal. 2010).

[558] *See* Danielle Douglas-Gabriel, "Big Banks Have Been Gaming Your Overdraft Fees to Charge You More Money," Wash. Post Wonkblog (July 17, 2014), *https://www.washingtonpost.com/news/wonk/wp/2014/07/17/wells-fargo-to-make-changes-to-protect-customers-from-overdraft-fees/* ("Half of the country's big banks play this game, but one has decided to stop: Wells Fargo. Starting in August, the bank will process customers' checks in the order in which they are received, as it already does with debit card purchases and ATM withdrawals.").

[559] Relatedly, as is noted below in this part, the Overdraft MDL cases provide substantially more relief in perpetuity, to future customers not part of the class, than they did in cash settlements.

[560] The cash relief provided by settlements analyzed in the Study was $1.1 billion. Study, *supra* note 3, section 8 at 29.

[561] *Id.* section 8 at 19.

[562] *Id.* section 8 at 4 n.6 and n.8. Most often, in-kind relief entailed free access to a service.

[563] *See, e.g.,* Kara L. McCall, "Coupon Settlements Play a Continuing Role in Class Litigation After CAFA," ABA Section of Litigation (2012), *available at http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/sac2013/sac_2013/46_buy_this_all_natural.authcheckdam.pdf.*

[564] 81 FR 32830, 32847 (May 24, 2016).

consumers who receive this relief, and not the proportion of putative class cases that result in other outcomes. The fact that many cases filed as putative class cases do not result in class relief does not change the significance of that relief in the cases that do provide it. Moreover, when a named plaintiff agrees in a putative class action to an individual settlement, by rule it occurs before certification of a class, and thus does not prevent other consumers from resolving similar claims in court or arbitration, including by filing their own class actions. Beyond the named plaintiff, an individual settlement of a class case does not bind other consumers or affect their right to pursue their claims; in this sense they are no worse off than if the individually settled case had never been filed at all. Accordingly, the Bureau believes it more appropriate to evaluate class actions based on the number of consumers who obtain relief and the magnitude of relief that these cases collectively (including the many that do result in class settlements) deliver to consumers.[565] Thus, even if, as one commenter noted, the likelihood that any case filed as a putative class action results in actual cash relief to a consumer is low, the amount ultimately provided in those cases that do is large enough to compel a finding that class actions provide significant relief to consumers.

The Bureau acknowledges that when a case is filed as a putative class action and settled individually, the defendant may incur higher defense costs than if the case had been filed individually. Further, while the purpose of the class rule is to preserve the ability for there to be class mechanisms to compensate consumers when they are harmed, the prospect of which deters companies from further harming consumers as discussed in more detail below in Part VI.C.1, the Bureau agrees that the putative class cases that do not end in class settlement may not themselves further this purpose. Nevertheless, it would not be possible for a rule to allow the filing of only such cases that would ultimately end in class settlement or favorable judgments for consumers because the purpose of litigation is to sort such outcomes. Accordingly, while the Bureau considers the prevalence of these outcomes and the cost of defending these cases further below in discussing whether the proposed rule is for the benefit of consumers and in the public interest (and in its Section 1022(b)(2) Analysis below in Part VIII as well), it does not believe these outcomes detract from the Bureau's finding that class actions provide an effective means of providing consumer relief.

Many of the commenters also suggested that the high proportion of putative class cases that resulted in individual settlements or potential individual settlements (around 60 percent) demonstrates that the underlying claims were not meritorious. Even if that were true, it still would not suggest that the class action mechanism as a whole is ineffective as a means of redressing harm to consumers for the reasons discussed above. But the Bureau also notes that there is no way to know with certainty whether the putative class cases settled on an individual basis had merit or involved potentially classable claims; the commenters did not provide evidence to support their assertions that those cases are, on the whole, meritless. Settlement between parties to a lawsuit is an everyday occurrence. Parties may choose to settle a putative class case on an individual basis for any number of reasons, such as because the defendant threatened to move the case to arbitration or offered the named plaintiff full relief on his or her individual claim, which a company may do in litigation in an effort to avoid defense costs or to avoid providing broader relief to other affected consumers. Indeed, there are numerous factors that go into any defendant's decision to settle, including the legal framework of the claims asserted, the facts underlying the allegations, and the costs of defense. When a consumer files an action in court alleging the consumer's individual claims affect a class of other consumers, the rules of civil procedure generally allow that consumer to conclude the action by resolving their individual claims before a court certifies the case is a class action. Sometimes, a consumer who has filed a putative class action may be unwilling to pursue that case if the company decides to make the consumer whole, while in other cases, the law may not have allowed the class claims to proceed if the company offered full relief to the named plaintiffs.[566] This outcome is available at the election of the parties and generally not subject to approval by the court. Therefore, the Bureau does not agree that there is a valid basis to draw inferences about the quality of the claims alleged in these cases based solely on how the parties chose, as a voluntary matter, to resolve them.

In addition, the Bureau finds that individual settlements in putative class cases, when they occur, typically occur relatively early in the class action process. The Study's data on time to resolution of putative class cases suggested that defense costs are likely much lower for putative class cases that result in individual settlement than for a putative class case that reaches classwide settlement. The Study obtained information on the amount of time to resolution for the cases it analyzed and the Bureau expects that a company's defense costs likely increase as the time to resolution of the case increases. This data showed that the median number of days to close for a case filed as a class case but that resulted in a known individual settlement was 193 days; for such a case that resulted in a potential individual settlement, the median days to close was 130 days.[567] In contrast, the median number of days to close when a case was settled on a classwide basis was 670 days.[568] In other words, cases filed as class actions that settled on a classwide basis typically closed more than a year after similar cases that resulted in an individual settlement or a potential individual settlement. These cases settled on an individual basis therefore involved less litigation and thus likely lower defense costs. The relevance of these findings is discussed further below in Part VI.C.2 in the discussion of whether the class rule is in the public interest.

Merits of Claims Resolved by Class Actions. With respect to commenters that contend that class action settlements do not benefit consumers because they often occur in cases where the defendant may have agreed to settle the case but did not actually violate the law or where the claims were frivolous, the Bureau does not dispute that there is some pressure to settle contested matters of all kinds, whether individual

[565] Stakeholders similarly asserted that class actions were ineffective because the fact most are resolved on an individual basis indicates that they were unlikely to result in class certification. The Bureau is not aware of evidence to support this assertion. Cases settle on an individual basis for a variety of reasons and, as noted, whether and why they are resolved does not alter the value of aggregate relief awarded in cases that settle on a classwide basis.

[566] During the period covered by the Study which analyzed cases filed in the years 2010 through 2012, a majority of Federal circuits had held that an offer of judgment to the named plaintiff renders a class action moot. *Diaz* v. *First American Home Buyers Protection Corp.,* 732 F.3d 948, 953 n.5 (9th Cir. 2013) (citing precedent in six Federal appellate circuits under which offers of complete relief were held to moot a class action). The Supreme Court recently held, however, that an unaccepted settlement offer to the named plaintiff does not render a class action moot. *Campbell-Ewald Co.* v. *Gomez,* 136 S. Ct. 663, 670 (Jan. 20, 2016) Study, *supra* note 3, section 6 at 46 tbl. 7.

[567] *Id.*

[568] *Id.*

suits or class actions, to avoid defense costs or the risk of a judgment. Nevertheless, the Bureau does not agree that the existence of this pressure means that a settlement has no correlation with merit or violations of the law. To the contrary, a defendant's assessment of the merits of the plaintiff's claim—specifically, the plaintiff's likelihood of succeeding at trial—is a key factor influencing a defendant's decision to settle.[569] The central role that the merits of a plaintiff's claim plays in this framework is reflected in the fact that it is among the primary factors courts assess when reviewing proposed class settlements.[570]

Further, the Study showed that certification in a class case almost invariably occurs coincident with a settlement, and thus that certification is not typically the force that drives settlement. The Study further found that, not infrequently, settlements follow a decision by a court rejecting a dispositive motion (*e.g.,* a motion to dismiss) filed by the defendants. Such motions provide some evidence as to the merit of the legal theories underlying the complaint and, in the case of summary judgment motions, of the factual allegations as well. In particular, court decisions granting such motions would suggest that the claims lack merit. Yet the data show that courts grant dispositive motions relatively infrequently, indicating that they rarely find that these cases are devoid of legal merit as pled.[571]

The Study analyzed these data in two different case sets: Class action filings in State and Federal courts in six consumer finance markets, and cases with Federal class action settlements across consumer finance markets more generally. Among class action filings in the six markets, the Study found that companies filed dispositive motions in 37.9 percent of the 562 cases analyzed, and that courts granted such a dispositive motion and dismissed at least one company party entirely from the case in only 10 percent of the same cases.[572] Among Federal class action settlements analyzed in the Study, 40.3 percent were approved by courts only after a defendant filed dispositive motions and the court denied at least one such motion.[573] In short, in both case sets, the Bureau found that companies regularly sought to challenge the legal or factual basis for claims asserted in the litigation, and that courts infrequently granted these challenges. The Bureau does not believe that the Study's finding that few class cases conclude with a court granting a defendant's dispositive motions or a trial verdict in favor of the plaintiff is consistent with a lack of merit in the underlying allegations.[574]

With respect to commenters that hypothesized that defendants could nevertheless agree to enter into a class action settlement after winning a dispositive motion, the Bureau notes that these commenters cited no examples, and this did not happen in the class action filings analyzed in the Study.[575] Regardless, if a defendant settles on a classwide basis after winning a motion to dismiss, the Bureau believes that the settlement amount is likely to be lower than it would have been if the defendant had lost the motion to dismiss.[576] This is because among the factors a court considers in reviewing a settlement is likelihood of success on the merits, and if the court has already found a claim to lack merit, that will naturally affect its view of the likelihood of success of such a claim on appeal.[577]

Given the mechanisms within the litigation process for testing the relative merit of allegations short of trial, the Bureau does not agree with commenters that suggested that the dearth of trials in class action cases suggests that the merit of these cases go untested.[578] As discussed, short of verdicts, courts have and use mechanisms to test the merit of and dispose of claims that cannot succeed as pled. Courts dismiss claims that fail to state a plausible claim for relief[579] and can sanction attorneys that

[569] Key factors affecting the expected cost of litigation, and thus a defendant's settlement amount, include the exposure to the class, the plaintiff's likelihood of success at trial (a reasonable proxy for the merits of the plaintiff's claim), and the defendant's litigation costs. *E.g.,* Richard A. Posner, ''An Economic Approach to Legal Procedure and Judicial Administration,'' 2 J. Legal Stud. 399, at 418 (1973); Jennifer K. Robbennolt, ''Litigation and Settlement, in The Oxford Handbook of Behavioral Economics and the Law,'' at 623 (Eyal Zamir and Doron Teichman, eds. 2014).

[570] *E.g.,* 7A Charles Alan Wright & Arthur R. Miller, ''Federal Practice and Procedure: Civil § 1797.1'' at 82–88 (3d ed. 2002) (identifying factors for district court's determination of the fairness of proposed relief for a class settlement, including ''the likelihood of the class being successful in the litigation'' and ''the amount proposed as compared to the amount that might be recovered, less litigation costs, if the action went forward''); Federal Judicial Center, ''Manual for Complex Litigation,'' at § 21.62 (4th ed. 2004) (listing ''the advantages of the proposed settlement versus the probable outcome of a trial on the merits'' as a factor that may bear on review of a settlement). *See also in re Citigroup Inc. Sec. Litig.,* 965 F. Supp. 2d 369, 383 (S.D.N.Y. 2013) (noting that securities settlement was relatively low due to ''the risk that the plaintiffs might not prevail was significant''); *Reynolds* v. *Beneficial Nat'l Bank,* 288 F.3d 277, 285 (7th Cir. 2002) (Posner, J.) (reversing order approving settlement agreement where the ''judge made no effort to translate his intuitions about the strength of the plaintiffs' case, the range of possible damages, and the likely duration of the litigation if it was not settled now into numbers that would permit a responsible evaluation of the reasonableness of the settlement''); *Schneider* v. *Citicorp Mortgage, Inc.,* 324 F. Supp. 2d 372, 376 (E.D.N.Y. 2004) (''[W]hen considering whether to approve a proposed class action settlement, 'the most important factor is the strength of the case for plaintiffs on the merits, balanced against the amount offered in settlement.' ''), citing *City of Detroit* v. *Grinnell Corp.,* 495 F.2d 448, 455 (2d Cir. 1974); *In re Microsoft Corp. Antitrust Litig.,* 185 F. Supp. 2d 519, 526–27 (D. Md. 2002) (denying approval of proposed class settlement in part because record was not ''sufficiently developed on various damages issues'' or the probability of plaintiff's success at trial); *Lachance* v. *Harrington,* 965 F. Supp. 630 (E.D. Pa. 1997) (approving proposed class settlement where parties adequately estimated outcomes and risks of trial as well as value of settlement to proposed class members).

[571] The Bureau acknowledges, as some commenters suggested, that survival of a dispositive motion is not always indicative of the merits of the underlying claim, given that courts typically take allegations as true (in reviewing a motion to dismiss) or most favorably to the non-movant (in reviewing a summary judgment motion). Nevertheless, if most class actions truly were devoid of any merit as many commenters suggested they are, the Bureau would have expected defendants to succeed more often in defeating such claims before entering into a settlement.

[572] Study, *supra* note 3, section 6 at 38 n.68.

[573] *Id.* section 8 at 38–39.

[574] While trial verdicts in consumer financial class action cases are rare, they do occur. A bench trial in *Gutierrez* v. *Wells Fargo Bank, N.A.,* led to a judgment on the merits in favor of the plaintiff class. 730 F. Supp. 2d 1080, 1082 (N.D. Cal. 2010). This case was not included in the Study's analysis of consumer financial litigation in court because it was filed in 2007 and the Study analyzed cases filed from 2010 through 2012. Study, *supra* note 3, section 6.

[575] *See id.* at appendix O.

[576] *See* J. Maria Glover, *The Federal Rules of Civil Settlement,* 87 N.Y.U. L. Rev. 1713, at 1730–31 (2012) (''In general, access to discovery is granted without limitation once a motion to dismiss is denied, enabling claimants to impose significant, asymmetric production costs on the opposing party. . . . Accordingly, a claimant will obtain a 'motion to dismiss premium' in proportion to any temporal or absolute asymmetrical cost imposition in the discovery stage.'').

[577] *See, e.g., Shane Group, Inc.* v. *Blue Cross Blue Shield of Michigan,* 825 F.3d 299, 309 (6th Cir. 2016) (''[T]he district court must specifically examine what the unnamed class members would give up in the proposed settlement, and then explain why—given their likelihood of success on the merits—the tradeoff embodied in the settlement is fair to unnamed members of the class.''); *In the Matter of Synthroid Marketing Litigation,* 264 F.3d 712, 716 (7th Cir. 2001) (determining that a settlement ''is generous in light of the difficulties facing the class'' in proving their case on the merits); *TBK Partners, Ltd.* v. *Western Union Corp.,* 675 F.2d 456, 464 (2d Cir. 1982) (''[I]n light of the substantial risks inherent in further litigation and the limited potential amount of a possible successful recovery, we find no reason to overturn the District Court's evaluation of the settlement as manifestly reasonable.'').

[578] The Bureau notes that one consumer lawyer commenter stated that he had been involved in multiple class actions that reached a verdict in favor of the class.

[579] Fed. R. Civ. P. 12(b)(6). *See also Bell Atlantic Corp.* v. *Twombly,* 550 U.S. 544 (2007), and *Ashcroft* v. *Iqbal,* 556 U.S. 662 (2009) (both elaborating on the requirement that a complaint must dismissed if it does not state a claim upon which relief can be granted).

file frivolous claims without evidentiary support for the allegations.[580] In addition, Congress, through amendments to the Federal Rules of Civil Procedure and enactment of CAFA, has and continues to consider further adjustments to class action procedures.[581] The Supreme Court has also rendered a series of decisions making clear that Federal Rule 23 ''does not set forth a mere pleading standard'' and establishing a number of requirements to subject putative class claims to close scrutiny.[582] Thus as noted above in Part II.B, the law expects courts to act to limit frivolous litigation. Further, the Bureau understands that class action attorneys will typically earn nothing for the time invested in developing, filing, and litigating a class case that is dismissed on a dispositive motion. The Bureau believes this may serve as an incentive not to bring cases that would be dismissed for lacking merit.

With respect to Tribal commenters that asserted that frivolous class action settlements threaten Tribal treasuries, the Bureau notes that Tribal governments are generally immune from private lawsuits and therefore that class actions should not affect their Tribal coffers, as discussed in detail below in the section-by-section analysis of § 1040.3(b)(2) in Part VII. Further, the Bureau clarifies in § 1040.3(b)(2) of this Final Rule that any Tribal government or an arm of such government that is immune from private suit is exempt from the class rule.

Other Concerns Regarding Class Actions. With respect to comments that criticized the value to consumers of class action settlements because they proceed slowly and it takes a long time for consumers to obtain relief, the Bureau recognizes that class actions can proceed slowly. As discussed above in this Part VI.B.3 with respect to the monetary relief provided by class actions, however, the Bureau believes that most consumers who obtain relief in class actions likely would not have pursued relief through other individual litigation or arbitration. For this reason, the Bureau finds that the relief provided to these consumers through class actions, even if slow to arrive, benefits these consumers relative to a system which proceeds faster but only handles individual cases and thus provides relief to few consumers. In an economic sense, if a consumer receives $32 three years from now, instead of immediately, the present value of the later income may be about $8 less (approximately $24), but it is more than zero.[583] Similarly, the Bureau does not believe that it is instructive to compare the duration of an individual arbitration proceeding to the duration of a class action case that ends in a settlement. Very few individuals pursue claims in individual arbitration, and those who do typically do so because they have a claim worth a significant amount of money. As commenters seem to agree, those claims are not the types of claims typically redressed in a class action. In addition, as one consumer advocate suggested, if all consumers harmed by a provider's widespread practice actually did bring their claims individually, or if even a significant portion of them did, the time and expense for consumers and providers alike would likely far exceed what would occur if the claims could be addressed in a single class action.

With respect to one industry commenter's argument that each class action lawsuit should be counted as one filing (despite covering claims of many consumers) and compared to single individual filings in either litigation or arbitration, the Bureau disagrees that that is the relevant comparison. Instead, the Bureau maintains that because there are thousands or even millions of consumers who benefit from class action settlements, the relevant comparison when analyzing individual and class action suits is the number of consumers who ultimately benefit from the suit, rather than the number of consumers who file the suit.

For these reasons, the Bureau finds that the class action mechanism is a more effective means of providing relief for violations of law or contract affecting groups of consumers than other mechanisms available to consumers, such as individual formal adjudication (either in court or arbitration) or informal efforts to resolve disputes.

4. Arbitration Agreements Block Some Class Action Claims and Suppress the Filing of Others

In the proposal, the Bureau made a number of preliminary findings regarding the impact that arbitration agreements have on consumers and, in particular, consumers' ability to pursue relief on a classwide basis. Specifically, the Bureau preliminarily found, based upon the Study, that arbitration agreements are frequently used by providers of consumer financial products and services, that the agreements have the effect of blocking a significant portion of class action claims that are filed. Indeed, the Study found nearly 100 putative class action cases that were blocked by arbitration agreements.[584] The Bureau further preliminarily found that consumers rarely filed claims on an individual basis once a class action was blocked by an arbitration agreement, citing to the Study. The Bureau further cited to its case study of opt-outs from settlements in the Preliminary Results of the Study further demonstrates that consumers who opt of receiving cash relief in a class settlement rarely take the opportunity to file a claim in arbitration.

For instance, for the 46 class cases identified in the Study in which a motion to compel arbitration was granted, there was only an indication of 12 subsequent arbitration filings in the court dockets or the AAA Case Data, only two of which the Study determined were filed as putative class arbitrations.[585]

The Bureau also preliminarily found that the existence of arbitration agreements suppresses the filing of class action claims in the first place, citing in support of this proposition a survey of consumer lawyers who had declined to file class cases concerning products covered by an arbitration agreement.[586]

Comments Received

Frequency of use of arbitration agreements to block class actions. Several industry commenters disagreed that arbitration agreements are frequently used to block class actions. One such commenter noted that in the 562 Federal class actions analyzed by the Study, companies filed motions to compel in only 17 percent of the cases and those motions were successful in only 8 percent of the 562 cases. Accordingly, this commenter suggested that arbitration agreements were not widely used to block class actions and that few class actions were actually blocked. The same industry commenter noted that the Study showed that arbitration agreements were used rarely

[580] Fed. R. Civ. P. 11.

[581] *See, e.g.,* Class Action Fairness Act (CAFA), Public Law 109–2, 119 Stat 4 (2005); Fairness in Class Action Litigation Act, H.R. 985, 115th Cong. (2017); Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2016, H.R. 1927, 114th Cong. (2016); State of Class Actions Ten Years After the Enactment of the Class Action Fairness Act, Hearing before the H. Comm. on the Judiciary, 113th Cong. 114–10 (2015);

[582] *See, e.g., Wal-Mart Stores, Inc.* v. *Dukes,* 564 U.S. 338, 350 (2011).

[583] For example, assuming a 10 percent discount rate, net present value of $32 drops to $24 in three years. By contrast, the value of a company's agreement to change its behavior does not diminish over time and may increase.

[584] Study, *supra* note 3, section 6 at 7.

[585] *See id.* section 6 at 57–58.

[586] *See* Nat'l Ass'n of Consumer Advocates, ''Consumer Attorneys Report: Arbitration clauses are everywhere, consequently causing consumer claims to disappear,'' at 5 (2012), *available at http://www.consumeradvocates.org/sites/default/files/NACA2012BMASurveyFinalRedacted.pdf.*

to block individual cases—motions to compel arbitration were filed in only 1 percent of the 1,200 individual Federal cases analyzed. This commenter disputed the Bureau's assertion that there were ''large'' numbers of individuals in the putative classes that were compelled to arbitration on the basis of arbitration agreements because there was no way to know class size if the case was not certified before the motion to compel was granted.

On the other hand, consumer advocates, public-interest consumer lawyers, consumer lawyers and law firms, and several nonprofits asserted that arbitration clauses frequently block and chill the filing of class action cases. In many instances, commenters proffered examples from their personal experiences. For example, one consumer law firm commenter provided two examples of class actions that could not proceed due to the existence of an arbitration agreement—one case was voluntarily dismissed (and thus would not be counted in the Bureau's Study) and one in which arbitration was compelled upon appeal. Another stated that he had turned away over 100 cases involving arbitration agreements. A different consumer lawyer contrasted her experience with a series of automobile finance class actions involving what she characterized as plainly unlawful behavior; the commenter noted three cases that defendants had successfully blocked by invoking an arbitration agreement and contrasted those to others in which she had successfully recovered damages for a class where there was no arbitration agreement. Another consumer law firm commenter stated that it had turned away 27 cases in the prior year because it lacked the resources to try each of these cases individually, although it would have had the resources and an interest in pursuing them as class actions if there had not been arbitration agreements prohibiting class proceedings. Several public-interest consumer lawyer commenters said that one of the first questions they ask is whether consumers have disputes that may be governed by arbitration agreements and, if so, that they turn down those clients.

A group of Congressional commenters cited the example of a large bank whose employees opened millions of unauthorized accounts in the names of the bank's existing customers over a period of years. The bank successfully used arbitration agreements in its agreements with customers for the authorized accounts to block lawsuits by customer's asserting violations of the law with respect to the unauthorized accounts.[587] In the view of these Congressional commenters, the bank's use of arbitration agreements to block those lawsuits allowed the bank to continue its illegal practices for significantly longer than it would have been able to had the lawsuits been allowed to proceed in court when they were filed. One public-interest consumer lawyer commenter noted several instances in which companies have said informally to him that they maintained arbitration agreements in order to block class actions.

Pursuit of individual claims after class actions blocked. Some industry commenters further challenged the Bureau's preliminary finding that consumers rarely pursued a claim on an individual basis after a putative class claim was dismissed or stayed on the basis of an arbitration agreement. For example, one industry commenter challenged findings in a case study presented in the Bureau's Preliminary Results indicating that only three of the 3,605 individuals who opted out of class action settlements analyzed (comprising approximately 13 million consumers) filed individual claims in AAA arbitration. The commenter contended that the Bureau's data is too limited to support its conclusion because the consumers who opted out could have filed individual claims with JAMS or in court, but the Bureau had data only concerning AAA arbitrations.

Several consumer advocates, nonprofits, and consumer law firms and lawyers agreed with the Bureau's finding. Specifically, one consumer lawyer stated that in his experience individual claims are never filed when class claims are stayed or dismissed. Two public-interest consumer lawyer commenters explained that, in most cases, only the named plaintiff even knows that a claim exists, and even that individual might not have an incentive to pursue the claim in arbitration if there is no promise of benefitting others who are similarly situated given the relative size of the claim and the costs of pursuing it further.

Suppression of claims. With respect to the Bureau's preliminary finding that arbitration agreements suppress the filing of class claims, several industry commenters stated that the survey of consumer lawyers on which the Bureau relied to support this conclusion is flawed because it did not examine whether a case turned down by one attorney was later filed by another nor does it purport to show the total number of cases not filed. Other consumer lawyer and law firm commenters disagreed, asserting that the survey was accurate and, as noted above, in accordance with their own experiences. Specifically, consumer lawyers and law firms stated in their comments examples from their own experiences of not bringing cases due to the existence of an arbitration agreement that a defendant could use to block the case from proceeding. For example, one consumer lawyer explained how, after a case where it was apparent that his fee would take a large portion of his client's potential recovery, he concluded that it was economically impossible for him to continue to handle such individual cases and thus decided to no longer take them at all.

Response to Comments and Findings

Frequency of use of arbitration agreements to block class actions. As noted above in Part III.D.1, the Study showed that arbitration agreements are widespread in consumer financial markets and hundreds of millions of consumers use consumer financial products or services that are subject to arbitration agreements. Arbitration agreements give companies that offer or provide consumer financial products and services the contractual right to block the filing of class actions in both court and arbitration. When a plaintiff files a class action in court regarding a claim that is subject to an arbitration agreement, a defendant can seek a dismissal or stay of the litigation in favor of arbitration.[588] If the court grants such a dismissal or stay in favor of arbitration, the class case could potentially be refiled as a class arbitration.[589] However, the Study showed that, depending on the market, between 85 to 100 percent of the contracts with arbitration agreements the Bureau reviewed expressly precluded an arbitration proceeding on a class basis.[590] The Study did not identify any contracts with arbitration agreements that explicitly permitted class arbitration, nor did any commenters indicate that such agreements exist. The combined effect of these provisions is to enable companies that adopt arbitration agreements effectively to bar *all* class proceedings, whether in litigation or arbitration, to which the agreement

[587] *E.g., Douglas* v. *Wells Fargo,* BC521016 (Ca. Super. Ct. 2013); *Jabbari* v. *Wells Fargo,* (N.D. Cal. 2015).

[588] *See Concepcion,* 563 U.S. 333 (2011).

[589] In class arbitration, a class representative brings an arbitration on behalf of many individual, similarly-situated plaintiffs. The Study identified only two class arbitrations filed before the AAA from 2010 to 2012. Study, *supra* note 3, section 5 at 86–87.

[590] *Id.* section 2 at 44–46.

applies. No commenters disagreed with any of the Bureau's findings in this regard.

As set out above in Part II.C, the public filings of some companies confirmed that the effect—indeed, often the purpose—of arbitration agreements is to allow companies to shield themselves from class liability.[591] Further, companies have stated both to the Bureau and in public news reports after the proposal was released, that they adopted arbitration agreements for the primary purpose of blocking private class action filings.[592] Commenters did not dispute this. Indeed, many industry commenters stated that the class action waiver is integral to their offering of individual arbitration; they asserted that the cost of arbitrating individual claims is too great to bear when they must also defend class action litigation. (This argument is addressed below in Part VI.C.1.)

The Study showed that defendants were not reluctant to invoke arbitration agreements to block putative class actions and were successful in many cases.[593] With respect to industry comments that suggested that arbitration agreements were not widely used to block class actions because companies filed motions to compel arbitration in only 16.7 percent of the class cases analyzed in the Study, the 16.7 percent figure is correct but reflects only one of two data sources in the Study on motions to compel arbitration. The Study cited 92 cases out of 562 putative class cases analyzed in Section 6 of the Study in which motions to compel arbitration were filed (16.7 percent) and in 46 of those cases, the motions were granted and the case was dismissed or stayed. The Study also found an additional 50 putative class cases that were filed outside of the period analyzed in the Bureau's review of filings in court and were dismissed on the basis of an arbitration agreement.[594] Thus, over a period of approximately five years, nearly 100 Federal and State putative consumer class actions were dismissed or stayed because companies invoked arbitration agreements in motions to compel arbitration.[595] While it is true, as one industry commenter noted, that every putative class case blocked by an arbitration agreement might not have been certified or ultimately provided relief to any consumers, it is reasonable to expect that at least some of those 100 cases would have done so. Because one settled class action case can provide relief to many consumers, the Bureau finds that arbitration agreements blocking nearly 100 putative class cases indicates that use of arbitration agreements affects large numbers of consumers.

As just one example, the Bureau notes that in the matter discussed above in Part VI.B.3 involving a large bank that opened unauthorized accounts on behalf of millions of customers in violation of the law, that bank relied on arbitration agreements in its contracts with customers for the authorized accounts to block many of those customers from pursuing classwide relief in court with respect to the unauthorized accounts. Plaintiffs filed two putative class action lawsuits in 2015 against the bank for opening unauthorized accounts, and both lawsuits were later dismissed in response to the bank's motions pursuant to its arbitration agreements.[596] Because those lawsuits were blocked, those consumers were not able to pursue relief in court for the bank's violations of the law. The parties in the latter case later agreed voluntarily to withdraw an appeal of the arbitration dismissal and have recently come to agreement on a proposed class settlement, nearly two years after the class action was first filed.[597]

Moreover, while the Bureau was unable to determine in what percentage of all class action cases analyzed defendants had arbitration agreements and were in a position to invoke an arbitration agreement, in a sample of class action cases against credit card companies known to have arbitration agreements, motions to compel arbitration were filed 65 percent of the time and, when filed, they were successful 61.5 percent of the time.[598] This is strong evidence that companies that do include arbitration agreements in their consumer contracts are very likely to use them to block class actions filed against the company. As noted, the experiences of many public-interest consumer lawyer and consumer lawyer and law firm commenters buttress this finding, as does the evidence with respect to companies' articulated reasons for including arbitration agreements in their consumer finance contracts.

The Study further indicated that companies were at least 10 times more likely to move to compel arbitration in a case filed as a class action than in a non-class case.[599] Put another way, companies used arbitration agreements far more frequently to block class actions than to move individual court cases to arbitration. While some industry commenters disputed the relevance of this comparison because they contended the overall frequency of class actions blocked by arbitration agreements is low, the Bureau finds that this data showed that most companies are more concerned with stopping putative class actions from proceeding than they are with determining in what forum (court or arbitration) individual disputes are resolved. Indeed, this data confirmed the direct evidence that the primary reason many companies include arbitration agreements in their contracts is to discourage the filing of class actions and block those that are filed. While some industry and research center commenters have touted the benefits of arbitration as a forum of individual dispute resolution because it is, for example, quicker and simpler than litigation, as discussed below in Part VI.C.1, for many providers, those

[591] *See* Discover Financial (Form 10–K), *supra* note 95.

[592] *See* SBREFA Report, *supra* note 419, at 16–17; *see also* James Rufus Koren, ''Agency Targets Ban on Class Actions,'' L.A. Times (May 5, 2016) (''What made arbitration clauses attractive was their impact on class-action litigation,' [financial services attorney Alan Kaplinsky] said. 'Most banks and companies using it now will conclude it's no longer worth it.' ''); Kate Berry, ''CFPB's Arbitration Plan Delivers Sharp Blow to Financial Industry,'' American Banker (May 5, 2016) (''For 30 years, financial institutions have used arbitration agreements with so-called class-action waivers to effectively prevent consumers from banding together in class actions to pursue similar claims. 'Under the CFPB's proposal, that shield would no longer be available,' said Walter Zalenski, a partner at the law firm BuckleySandler.'').

[593] Study, *supra* note 3, section 6 at 57.

[594] These putative class cases pertained to consumer financial products or services (including more than the initial six markets studied) and were dismissed pursuant to a motion to compel arbitration that cited the *Concepcion* case. *Id.* section 6 at 58–59.

[595] In any event, if the commenters that argued that arbitration agreements are not actually used to block class actions were correct, then it seems unlikely that industry commenters would so uniformly oppose the likely result of this rule—additional class actions filed against providers that will result in settlements.

[596] *Jabbari* v. *Wells Fargo,* (N.D. Cal. 2015); *Heffelfinger* v. *Wells Fargo.,* (N.D. Cal. 2015). Individuals filed at least two lawsuits in California State court in 2013 against the bank for opening unauthorized accounts, and both lawsuits were dismissed or stayed on the basis of arbitration agreements; one ultimately settled and the other was withdrawn, indicating a possible non-class settlement. *Douglas* v. *Wells Fargo,* BC521016 (Ca. Super. Ct. 2013); *Mokhtari* v. *Wells Fargo,* BC530202, (CA. Super Ct. 2013).

[597] Motion and Memorandum in Support of Motion for Preliminary Approval of Class Action Settlement and for Certification of a Settlement Class, Jabbari v. Well Fargo & Co. et al., No. 15–2159 (N.D. Cal. Apr. 20, 2017) ECF No. 111. *See also* Part VI.B.3 above (discussing this proposed class action settlement) and Part VI.B.2 (discussing the Bureau's enforcement action concerning the same conduct).

[598] Study, *supra* note 3, section 6 at 61.

[599] *Id.* section 6 at 57–58.

benefits seem ancillary to their ability to limit class actions. Indeed, many industry commenters stated that they would no longer include arbitration agreements in their consumer contracts if the class rule were finalized, indicating that the primary purpose of those arbitration agreements is in fact to block class actions.

Pursuit of individual claims after class actions blocked. The Bureau further finds that when courts grant a motion to dismiss class claims based on arbitration agreements, most consumers who would have constituted the putative class are unlikely to pursue the claims on an individual basis in any forum and are even less likely to pursue them in class arbitration. For instance, for the 46 class cases identified in the Study in which a motion to compel arbitration was granted, there was only an indication of 12 subsequent individual arbitration filings in the court dockets or AAA case data, only two of which the Study determined were filed as putative class arbitrations.[600] More broadly, the overall volume of AAA consumer-filed claims—just over 400 individual cases per year—suggests that individual arbitration is not the destination for any significant number of putative class members.

The Bureau's case study of opt-outs from settlements in the Preliminary Results of the Study further demonstrated this.[601] It reviewed Federal and State class action settlements that involved 13 million class members eligible for $350 million in relief from defendants that used arbitration agreements in their consumer contracts, all naming AAA as the arbitration administrator. In these settlements, 3,605 of the 13 million class members chose to opt out of receiving cash relief.[602] Nevertheless, just three out of these 3,605 individuals appear to have taken the opportunity to file arbitrations in AAA against the same settling defendants.[603] Although the case study is a limited sample, the Bureau has little reason to believe (nor have commenters put forth evidence to the contrary) that consumers in putative class cases that never even go through certification and opt-out processes would be more likely to refile in arbitration. Indeed, as two consumer law firm commenters noted, most members of putative classes do not even know they have a potential claim. With respect to the industry commenter that criticized this data as too limited because the Bureau searched only for arbitrations filed before AAA and did not search for whether those consumers who opted out filed in a JAMS arbitration or in a case filed in court, as noted in the proposal, the Bureau obtained data from JAMS—not disputed by any commenter—indicating that the number of consumer arbitrations filed in that forum in 2015 was 115 or approximately one-quarter the number filed with AAA.[604] Thus, even if every single arbitration filed with JAMS involved a consumer that opted out of a class action, that number would be small in comparison to the number of consumers for consumer financial products and services. With respect to the commenter's argument that cases may have been re-filed in court, the Study found that individuals file very few cases in Federal court in comparison to the size of the consumer financial marketplace, as discussed in detail above in Part VI.B.2.

Suppression of claims. In addition to blocking class actions that are actually filed, the Bureau finds that arbitration agreements inhibit putative class action claims from being filed at all for several reasons. Numerous public-interest consumer lawyers and consumer lawyer and law firm commenters indicated that—based on their own experiences—they did not file class actions when they knew that a class claim might be blocked by an arbitration agreement. These commenters explained that plaintiffs and their attorneys frequently choose not to file such claims because arbitration agreements substantially lower the possibility of classwide relief. Given this evidence and the fact that attorneys incur costs in preparing and litigating a case under a contingency pricing structure, attorneys decline to take such cases at all if they calculate that they will incur costs with little chance of recouping them. Not surprisingly, when a consumer or an attorney considers whether to file a class action, the existence of an arbitration agreement that, if invoked, would effectively eliminate the possibility for a successful class claim likely discourages many of these suits from being filed at all.

The Bureau admittedly cannot quantify this effect because there are no records of cases that were never filed in the first instance. Nevertheless, stakeholders that surveyed attorneys found that respondents reported frequently turning away cases—both individual and class—when arbitration agreements were present.[605] The consumer lawyer and law firm commenters that provided details on their personal experiences with cases they declined to pursue support these surveys. While industry commenters criticized that data as anecdotal and not taking into account whether a case rejected by one attorney was taken up by another, these commenters produced no evidence, anecdotal or otherwise, to suggest that the existence of an arbitration agreement does not have a bearing on whether an attorney would pursue a class claim against a company.

For all of these reasons, the Bureau finds that arbitration agreements block class actions and suppress the filing of others.

5. Public Enforcement Is Not a Sufficient Means To Enforce Consumer Protection Laws and Consumer Finance Contracts

In the proposal, the Bureau preliminarily concluded, based upon the results of the Study and its own experience and expertise, that public enforcement is not itself a sufficient means to enforce consumer protection laws and consumer finance contracts. This conclusion was based upon several findings: Consumer protection statutes explicitly provide for both public and private enforcement; the market for consumer financial products and services is enormous and public enforcement resources are limited; the Study results supported a conclusion

[600] *Id.* section 6 at 59. The record reflects that the arbitrator denied class status to one of the arbitrations filed on a class basis; the Bureau does not have information on the second arbitration.

[601] *See* Preliminary Results, *supra* note 150, at 86–87.

[602] *See id.* at 104.

[603] As the Preliminary Results make clear, *at most* three out of 3,605 individuals filed claims before the AAA against the same defendants. It is not clear from the records provided to the Bureau whether these three consumers pressed the same claims in arbitration that formed the basis of the class settlement. *Id.* at 104 n.225.

[604] 81 FR 32830, 32856 (May 24, 2016).

[605] In response to the Bureau's Request for Information in connection with the Study, one trade association of consumer lawyers submitted a 2012 survey conducted of 350 consumer attorneys. *See* Nat'l Ass'n of Consumer Advocates, ''Consumer Attorneys Report: Arbitration clauses are everywhere, consequently causing consumer claims to disappear,'' at 5 (2012), *available at http://www.consumeradvocates.org/sites/default/files/NACA2012BMASurveyFinalRedacted.pdf.* Over 80 percent of those attorneys reported turning down at least one case they believed to be meritorious because the presence of an arbitration agreement would make filing the case futile and of those, the median number of cases each attorney turned away was 10. *Id.* The NACA survey indicates that consumer attorneys believe that the presence of arbitration agreements often inhibit them from filing complaints, including class actions, on behalf of consumers. The Bureau notes that this survey has methodological limits. The survey does not purport to indicate the total number of cases turned away in aggregate. And the survey does not examine whether a case that was turned down by a single attorney was subsequently filed by another attorney.

that private class actions complement public enforcement; and there are some claims concerning consumer financial products and services for which there is no public enforcement.

Comments Received

Statutes provide for class actions. Few commenters disagreed with the Bureau's preliminary findings that consumer protection statutes explicitly provide for both public and private enforcement and that when Congress and State legislatures authorized private enforcement, that generally includes private class actions.[606] Indeed, consumer advocate and nonprofit commenters emphasized the consumer protection role of specific statutes as a reason not to allow arbitration agreements to block class actions. A research center commenter opined that unfettered and meaningful access to the courts has long played a critical role in the effective functioning of the United States' system of governance. A public-interest consumer lawyer commenter highlighted the role of private litigation under fair housing laws as an example of where private litigation has provided clear benefits to class members. This commenter also noted that public regulatory bodies may also be geographically distant from sites of harm and generally have access to less information about unlawful conduct as compared to private litigants.

Public enforcement resources are limited. With respect to the Bureau's assertion that public enforcement resources are limited in comparison to the size of the market for consumer financial products and services, numerous industry commenters disagreed. One such commenter noted that the Bureau has broad enforcement authority and has produced approximately $11 billion in consumer relief through the end of 2015, thus demonstrating the extent of the Bureau's resources to enforce the relevant laws. Another industry commenter stated that Bureau enforcement actions typically provide more relief to consumers than the relief provided from class actions. As compared to the approximately $32 per person that consumers received from class actions in the Study, another industry commenter reported that Bureau enforcement actions provided $440 on average in relief per consumer to more than 25 million consumers. This commenter contended that the threat of public enforcement creates sufficient deterrence to ensure that companies will comply with the relevant laws. Indeed, another industry commenter cited a survey showing that 86 percent of companies surveyed have increased their compliance spending since 2010, when the Bureau was created.[607] One industry commenter stated that public enforcement actions are preferable to private enforcement (*i.e.,* class actions) because private class action attorneys are motivated to bring cases for their own financial self-interest and care little about curtailing harmful conduct or compensating injured consumers. At least one industry commenter asserted that the preliminary findings were deficient because the Study did not prove that public enforcement alone is insufficient to enforce the consumer protection laws. One trade association commenter representing consumer reporting agencies stated its belief that the Bureau has sufficient resources to supervise and enforce consumer reporting agencies because the Bureau supervises only 30 such companies pursuant to its larger participant rule for that market. According to the commenter, the Bureau should have no resource constraints with respect to supervising those 30 entities.

Consumer advocate commenters, on the other hand, agreed with the Bureau's preliminary findings regarding public enforcement. Specifically, these commenters referenced examples of strained public resources for consumer protection. One public-interest consumer lawyer commenter suggested that private enforcement of some claims saves taxpayers money because such activity allows public enforcement agencies to concentrate their resources on cases that private claims cannot reach or that are more appropriate cases for public enforcement. One consumer advocate noted that industry commenters were inconsistent in arguing that the public enforcement by the Bureau provides a sufficient deterrent given that these same commenters are asking Congress and others to substantially reduce or eliminate altogether the Bureau's enforcement powers.

Class actions complement public enforcement. With respect to the Bureau's preliminary finding that the Study showed that private class actions are a necessary companion to public enforcement of consumer finance injuries, several industry commenters disagreed. One commenter asserted that the Study's finding that public enforcement cases overlap with private class actions in 32 percent of the cases analyzed represents a significant amount of duplication. An industry commenter then suggested that overlap would increase because it expected the number of Bureau enforcement actions to rise. Another industry commenter disagreed with the relevance of the Bureau's preliminary finding that many private class action settlements occur without a corresponding public enforcement action. Another industry commenter stated that when a private class action is filed without a corresponding government action, the class action could have been based on a news story or other public information, and thus may not involve situations in which the plaintiff's attorney independently discovered the wrongdoing. In addition, the commenter noted that private class actions filed in the absence of a public enforcement action could have been based on government investigations that uncovered wrongdoing but did not lead to an enforcement action, perhaps because the wrongdoing harmed only a few individuals or because there was no wrongdoing at all.

Another industry commenter criticized the Study's finding that class actions are often filed without a corresponding public enforcement action as simply wrong. The commenter suggested that most class actions are ''copycats'' of government enforcement actions, citing law review articles supporting this theory.[608] In addition, the commenter cited examples of settled class actions in which the FTC filed amicus briefs requesting that fees for class counsel be reduced because the settled case followed directly from an FTC investigation and enforcement action.[609]

[606] One industry commenter noted that Utah law permits closed-end credit contracts to include class action waivers, which the Bureau discusses further below in Part VI.C.2. Another nonprofit commenter specifically asserted that Congress intended statutes that provide for statutory damages, such as EFTA, to be enforced on an individual rather than a classwide basis, and suggested the rule should only apply to laws that explicitly permit class actions. As noted in the Bureau's Section 1022(b)(2) Analysis, however, EFTA does explicitly provide for classwide damages.

[607] Aptean, ''2015–2016 Aptean Consumer Complaints Compass: A Survey of U.S. Financial Service Executives Regarding CFPB Compliance,'' (2016), *available at http://images.broadcast.aptean.com/Web/Aptean/percent7Bd0da75db-6649-4133-bc5a-4f189f65282bpercent7D_Respond_APT_CFPB_Survey_Fast_Facts_03-18-16.pdf.*

[608] John H. Beisner et al., ''Class Action ''Cops'': Public Servants or Private Entrepreneurs?,'' 57 Stan. L. Rev. 1441, 1453 (2005); *see also, e.g.,* Howard M. Erichson, ''Coattail Class Actions: Reflections on Microsoft, Tobacco, and the Mixing of Public and Private Lawyering in Mass Litigation,'' 34 U.C. Davis L. Rev. 1, 2 (2000).

[609] Beisner et al, *supra* note 608, at 1453 (citing Brief of Amicus Curiae The Federal Trade Commission, In re First Databank Antitrust Litig., 209 F. Supp. 2d 96, No. 01–00870, (D.D.C. 2002);

Continued

Consumer advocates and public-interest consumer lawyers disagreed. For example, one consumer advocate asserted that companies know that public enforcers cannot police every instance of financial fraud and that companies therefore make compliance decisions accordingly. A separate nonprofit commenter stated that legislatures designed laws to have both public and private enforcement; where the latter is effectively blocked, the laws' intended effect cannot be achieved. Another nonprofit commenter contended that private class actions are a necessary supplement to public enforcement in the areas of fair lending and equal credit and that this was the view of Congress in passing the nation's fair lending laws. This commenter also noted that individually, privately filed cases can spur subsequent public enforcement actions.

A group of State attorneys general charged with enforcing the laws in their States expressed similar concerns about the inability of public enforcement authorities—including themselves—to enforce all of consumer protection law. They noted that, in their experience, public enforcement is benefited when consumers can also take advantage of private enforcement. The commenters noted that many States' unfair competition and consumer protection laws expressly permit private enforcement, often through class actions. As an example, they quoted a decision by the Massachusetts Supreme Judicial Court finding that that State's law had been amended to allow private enforcement specifically because the public enforcement agency lacked capacity to handle the complaints it was receiving.[610] Another State attorney general, writing separately, made a similar point.

A nonprofit organization commented that private enforcement was important because it may advance more aggressive legal theories and seek more substantial remedies as compared to government agencies. Other public-interest consumer lawyer commenters similarly emphasized that, in their view, public enforcement is insufficient. A public-interest consumer lawyer commenter opined that public enforcement agencies are unlikely to have the resources to uncover all instances of unlawful conduct and that these agencies can be subject to political pressures and limitations by the executive or legislative branches of government.[611]

Academic commenters explained that, in their view, the United States legal system depends in large part on private enforcement of the laws. This comment letter contrasted the American system with those of other countries that invest more in public enforcement. They also noted, and cited the Study, that consumer class actions provide relief for injuries that are not the focus of public enforcers. An individual consumer noted in her letter that class actions, unlike increased public enforcement budgets, do not increase government bureaucracy. Relatedly, another individual consumer commenter and a nonprofit both suggested that while class actions should be generally available, they especially should be available for claims brought pursuant to statutes that expressly provide for classwide civil liability.

Response to Comments and Findings

Statutes provide for class actions. As noted by many commenters, including a group of State attorneys general, most consumer protection statutes provide explicitly for private as well as public enforcement mechanisms. For some laws, only public enforcement is available because lawmakers sometimes decide that certain factors favor allowing only public enforcement. For other laws, lawmakers have expressly decided that there should be both public and private enforcement. For example, on several occasions, Congress expressly recognized the role class actions can have in effectuating Federal consumer financial protection statutes. Commenters noted that State legislators have often done the same. As described in Part II.A, for instance, Congress amended the TILA in 1974 to limit damages in class cases to the lesser of $100,000 or 1 percent of the creditor's net worth. In reports and floor debates concerning the 1974 TILA amendments, the Senate reasoned that the damages cap it imposed would balance the objectives of providing adequate deterrence while appropriately limiting awards (because it viewed potential TILA class damages as too high).[612] Two years later, when the 1976 TILA amendments increased the cap to the lesser of $500,000 or 1 percent of the creditor's net worth, the primary basis put forth for the increase was the need to adequately deter large creditors.[613] No commenters disagreed with any of these findings and several consumer advocate commenters highlighted other, similar examples from State law.[614]

Public enforcement resources are limited. The market for consumer financial products and services is vast, encompassing trillions of dollars of assets and revenue and tens if not hundreds of thousands of companies. As discussed further in the Section 1022(b)(2) Analysis in Part VIII, this rule alone would cover about 50,000 firms. In contrast to the size of the market, the resources of public enforcement agencies are limited. For example, the Bureau enforces over 20 separate Federal consumer financial protection laws (including the Dodd-Frank Act's prohibition on unfair, deceptive and abusive practices) with respect to every depository institution with assets of more than $10 billion and non-depository institutions. Yet the Bureau has about 1,600 employees, less than half of whom work in its Division of Supervision, Enforcement, and Fair Lending, which supervises for compliance and enforces violations of these laws.[615] Furthermore, the Bureau

Brief of Amicus Curiae The Federal Trade Commission, In re Buspirone Patent Litig., 185 F. Supp. 2d 340, No. 1410 (S.D.N.Y. 2002). *Id.* at 1453–54.

[610] *Slaney* v. *Westwood Auto, Inc.,* 366 Mass. 688, 697, 700, 322 NE.2d 768, 775–77 (1975); *see also Grayson* v. *AT&T,* 15 A.2d 219, 240 (DC 2010) (Providing a private right of action in order to "allow the government to coordinate with the nonprofit and private sectors more efficiently. . . . Public-interest organizations will be able to bring additional resources to consumer protection enforcement in the District, contributing private and donated funds that will advance public priorities without causing the expenditure of additional government resources.").

[611] In support, this commenter cited to Jason Rathod and Sandeep Vaheesan, "The Arc and Architecture of Private Enforcement Regimes in the United States and Europe: A View Across the Atlantic," 14 U. of N.H. L. Rev. 306, at 309 (2015) (noting that "[w]ith large populations and complex economies, even a team of committed public enforcers cannot be expected to catch, let alone prosecute, every violation. . . . And during times of fiscal austerity, government budget cuts further diminish the ability of enforcement agencies to uncover wrongdoing") (internal citations omitted).

[612] "Class Actions Under the Truth in Lending Act," 83 Yale L.J. 1410, at 1429 (1974) ("Two major concerns were expressed by the Senate in its report and floor debates on this amendment. First, the Senate took note of the trend away from class actions after [*Ratner* v. *Chemical Bank New York Trust Co.,* 329 F. Supp. 270 (S.D.N.Y. 1971)] and the need for potential class action liability to encourage voluntary creditor compliance. The Senate considered individual actions an insufficient deterrent to large creditors, and so imposed a $100,000 or one percent of net worth ceiling to provide sufficient deterrence without financially destroying the creditor.").

[613] Consumer Leasing Act of 1976, S. Rept. 94–590, at 8 ("The recommended $500,000 limit, coupled with the 1 percent formula, provides, we believe, a workable structure for private enforcement. Small businesses are protected by the 1 percent measure, while a potential half million dollar recovery ought to act as a significant deterrent to even the largest creditor."); *see also* Electronic Fund Transfer Act (1978), H. Rept. 95–1315, at 15.

[614] *See, e.g.,* Iowa Code ch. 714H; California Unfair Competition Law, Bus. & Prof. Code, § 17200 *et seq.;* Massachusetts Consumer Protection Law, G.L. c. 93A, § 9; N.Y. Gen. Bus. Law § 349(h); District of Columbia Consumer Protection Procedures Act, DC Code § 283905(k)(l)(A).

[615] Bureau of Consumer Fin. Prot., "Financial Report of the Consumer Financial Protection

is the only Federal agency exclusively focused on enforcing these laws. Other financial regulators, including Federal prudential regulators and State agencies, have authority to supervise and enforce other laws with respect to the entities within their jurisdictions, but they face resource constraints as well. Additionally, those other regulators often have many different mandates, only part of which is consumer protection. By authorizing private enforcement of the consumer financial statutes, Congress and the States have allowed for more comprehensive enforcement of these statutory schemes.

With respect to commenters that believe the amount of relief that the Bureau has provided to consumers through its enforcement cases demonstrates that the Bureau has sufficient resources to enforce the relevant consumer protection laws with respect to all potential wrongdoers, the Bureau acknowledges that it has provided significant relief to consumers since 2012. At the same time, the Bureau is also aware that its enforcement and supervision efforts have not been able to examine the conduct of every provider subject to its jurisdiction under every law that it enforces.[616] As noted above, excluding the mortgage market and certain other types of financial services not covered by this rule, there are at least 50,000 companies that fall within the Bureau's jurisdiction. The Bureau cannot conceivably supervise or investigate all of those firms or even necessarily take action each time it uncovers some evidence of wrongdoing. Thus, with respect to the trade association commenter's contention that the Bureau could easily supervise all 30 larger participant consumer reporting agencies, the Bureau emphasizes that its resources are spread not just among those 30 agencies but among the tens of thousands of other entities within the Bureau's jurisdiction. While the number of larger participant entities in any particular market may be small, the total number of entities for which the Bureau is tasked with enforcing the law is enormous. Indeed, the Bureau has recognized it must prioritize when it brings public enforcement actions and generally chooses to do so where the harms are most egregious and the most consumers are affected by those harms. This prioritization may leave harms that affect relatively fewer consumers, such as some harms by smaller providers, unremedied by public enforcement. As to the amount of money recovered by the Bureau, commenters did not state that it represents all (let alone a meaningful percentage) of the harm that exists in the marketplace, nor is there evidence to support such a contention. Based on its experience and expertise, the Bureau believes that the amounts it has recovered do not represent all of the harm.

Furthermore, as several consumer advocate commenters noted, the Bureau does not have jurisdiction to enforce all violations of the law pertaining to consumer finance. Specifically, the Bureau cannot enforce claims for violation of State statutes, or claims arising in tort (which includes claims sounding in fraud) or those that allege breach of contract. The Bureau also cannot pursue claims against depository institutions and credit unions with less than $10 billion in assets. For all of these reasons, the Bureau finds that its enforcement authority alone is insufficient to remedy all violations of the law and deter future violations.

With respect to the quantity of relief the Bureau has provided to consumers, for the years of 2013 through 2016, the Bureau brought 165 enforcement actions or an average about 41 enforcement actions per year. This is significantly fewer than the 85 class action consumer finance settlements on average identified in the Study per year (a figure that the Bureau's Section 1022(b)(2) Analysis predicts will be 165 per year once this rule takes effect). And while the number of Bureau enforcement cases has increased year-over-year in the near past, the number of cases that the Bureau brings every year is subject to change, as some commenters noted. Further, only some of these enforcement actions and a portion of the approximately $11 billion in relief provided by the Bureau through its enforcement actions over the past four years concern claims that would be covered by this rule. For example, over $2.5 billion of that relief concerned mortgages, a product not covered by this rule.

The Bureau acknowledges, as several commenters noted, that the Bureau's enforcement actions provided, on average, more relief per consumer than did class action settlements. This reflects the fact that Bureau enforcement may target higher value cases. It may also reflect the fact that the Bureau may be able to pursue cases more effectively than private class actions because, for example, the Bureau has authority to issue civil investigative demands, the Bureau does not need to cover its costs out of recoveries, does not need to certify a class, and can pursue certain claims unavailable to private litigants.[617] But the fact that public enforcement may be a more effective mechanism to secure relief for some consumers on some claims does not mean that it is a sufficient mechanism in and of itself to secure relief on all claims for all consumers. Indeed, private class actions are able to pursue violations of law that the Bureau does not have the resources or enforcement authority to pursue, thereby providing additional relief to consumers and deterring companies from future violations of the law.

With respect to commenters that contended that public enforcement actions are better avenues to address violations of the law because public enforcers are not motivated by their own self-interest to bring cases, the Bureau disagrees that differing motives, if they exist, are relevant. Whatever the motivations of plaintiff's attorneys to bring cases, the Bureau has observed that public enforcers do not have the resources to bring sufficient cases to remedy all violations of the law, and thus that private enforcement of such violations is necessary. Further, as discussed more fully in Part VI.C.2, the Bureau does not agree that the motivation of private plaintiff's attorneys determines whether class action settlements benefit consumers. Indeed, the prospect of fee awards is specifically designed to incentivize plaintiff's attorneys to bring class action cases that individuals might not otherwise pursue, and courts monitor attorney's fee awards to ensure that they are fair and reasonable.

The Bureau notes that most of the commenters critical of the Bureau's preliminary findings regarding public enforcement focused on the Bureau's own enforcement authorities and accomplishments, and to a large extent did not address enforcement by other Federal and State regulators. Most of these other regulators, as the comment letter from the group of State attorneys general noted, enforce not only consumer protection laws but also many other laws and must allocate their enforcement resources accordingly. In addition, as several commenters noted, these regulators, like the Bureau, must manage general budgetary constraints, changing legislative priorities, and

Bureau for Fiscal Year 2016,'' at 13 (Nov. 15, 2016), *available at https://www.consumerfinance.gov/documents/1495/112016_cfpb_Final_Financial_Report_FY_2016.pdf* (stating that, as of Sept. 30, 2016, the Bureau had 1,648 employees, 44 percent of whom worked in the Division of Supervision, Enforcement, and Fair Lending).

[616] Whether that will change, as one commenter suggested, is addressed below in this Part VI.B.5.

[617] Of course, these figures do not include investigations and other cases abandoned by the Bureau.

limitations on jurisdiction and authorities, such as over tort or contract claims, that are more suited to private actions.

Finally, the Bureau notes that if the commenters were correct in claiming that public enforcement is sufficient to address all misconduct in the covered consumer finance markets and secure relief for those affected, the Bureau would expect to see a low incidence of class action litigation due to incentives facing plaintiff's attorneys. Further, the Bureau would expect to see small settlements given that settlements are generally a function of the expected value of the claims. As discussed above, the evidence with respect to number, size, and relief obtained in class actions belies the claim that public enforcement is sufficient to fully vindicate consumers' rights under the consumer protection laws.

Class actions complement public enforcement. The Study showed private class actions complement public enforcement rather than duplicate it. In 88 percent of the public enforcement actions the Bureau identified, the Bureau did not find an overlapping private class action.[618] Similarly, in 68 percent of the private class actions the Bureau identified, the Bureau did not find an overlapping public enforcement action. Moreover, in a sample of class action settlements of less than $10 million, there was no overlapping public enforcement action 82 percent of the time.[619]

In response to commenters that asserted that this still left significant amounts of overlap between private and public cases, the Bureau notes that where there was overlap, private class actions appear to have preceded public enforcement actions roughly two-thirds of the time. Moreover, when there are private cases that follow public enforcement, courts can and do take the earlier public case into account when approving settlements and calculating attorney's fees. For example, one commenter noted cases where the FTC filed an amicus brief requesting that the court reduce plaintiff's attorney fees for a class action settlement that followed a public enforcement matter on the same facts.[620] Further, resources for judges who manage class actions have favorably cited this case as a model for Federal judges handling such follow-on private litigation.[621] As for the commenters that suggested that private class actions that did not overlap with public enforcement cases are somehow less valuable because they may have been based on public news reports or on evidence uncovered by public enforcers in investigations that were not pursued, the Bureau does not believe the origin of those private cases is relevant. Instead, regardless of origin, those cases provided relief to consumers for violations of the law that public enforcers otherwise did not or were not able to pursue.

C. The Bureau Finds That the Class Rule Is in the Public Interest and for the Protection of Consumers

In the proposal, the Bureau preliminarily found, in light of the Study and the Bureau's experience and expertise, that precluding providers from blocking consumer class actions through the use of arbitration agreements would better enable consumers to enforce their rights under Federal and State consumer protection laws and the common law and obtain redress when their rights are violated. Allowing consumers to seek relief in class actions, in turn, would strengthen the incentives for companies to avoid legally risky or potentially illegal activities and reduce the likelihood that consumers would be subject to such practices in the first instance. The Bureau further preliminarily found that because of these outcomes, allowing consumers to seek class action relief was consistent with the Study and would be in the public interest and for the protection of consumers. The Bureau made this preliminary finding after considering costs to providers as well as other potentially countervailing considerations, such as the potential impacts on innovation in the market for consumer financial products and services. In light of all these considerations, the Bureau preliminarily found that the statutory standard was satisfied.

The sections below discuss the bases for the preliminary findings, comments received, and the Bureau's further analyses and final findings in support of the class rule in the reverse order, beginning with a discussion of the protection of consumers and then addressing the public interest. As discussed further below, the Bureau recognizes that creating incentives to comply with the law and causing companies to choose between increased risk mitigation and enhanced exposure to liability imposes certain burdens on providers. These burdens are chiefly in the form of increased compliance costs to prevent violations of consumer financial laws enforceable by class actions, including the costs of forgoing potentially profitable (but also potentially illegal) business practices that may increase class action exposure, and in the increased costs to litigate putative class actions themselves, including, in some cases, providing relief to a class and payment to its attorneys. The Bureau also recognizes that providers may pass through some or all of those costs to consumers, thereby increasing prices. Those impacts are delineated and, where possible, quantified in the Bureau's Section 1022(b)(2) Analysis below in Part VIII and, with regard in particular to burdens on small financial services providers, discussed further below in Part VII in the section-by-section analysis to proposed § 1040.4(a) and in the final Regulatory Flexibility Analysis below in Part IX.

1. Enhancing Compliance With the Law and Improving Consumer Remuneration and Company Accountability Is for the Protection of Consumers

In the proposal, the Bureau preliminarily found that the class rule, by changing the status quo, creating incentives for greater compliance, and restoring an important means of relief and accountability, would be for the protection of consumers.

To the extent that laws cannot be effectively enforced, the Bureau explained in the proposal that it believed that companies may be more likely to take legal risks, *i.e.,* to engage in potentially unlawful business practices, because they know that any potential costs from exposure to putative class action filings have been materially reduced. Due to this reduction in legal exposure (and thus a reduction in risk), companies have less of an incentive to invest in compliance management in general, such as by investing in employee training with respect to compliance matters or by carefully monitoring changes in the law and making appropriate changes in their conduct.

[618] Study, *supra* note 3, section 9 at 4.

[619] *Id.*

[620] *In re First Databank Antitrust Litig.,* 209 F.Supp.2d 96 (D.D.C. 2002)

[621] Barbara J. Rothstein & Thomas E. Willging, ''Managing Class Action Litigation: A Pocket Guide for Judges,'' Fed. Jud. Ctr., at 26 (2005), *available at http://www.uscourts.gov/sites/default/files/classgde.pdf* (citing, *e.g., Swedish Hospital Corp.* v. *Shalala,* 1 F.3d 1261, 1272 (D.C. Cir. 1993) (affirming district court's decision to ''bas[e] its fee calculation only on that part of the fund for which counsel was responsible'' where class counsel brought a case that ''rode 'piggyback' '' on a previous action); *In re First Databank Antitrust Litig.,* 209 F.Supp.2d 96, 98 (D.D.C. 2002)).

As discussed in the proposal's Section 1022(b)(2) Analysis, economic theory supports the Bureau's belief that the availability of class actions affects compliance incentives. The standard economic model of deterrence holds that individuals who benefit from engaging in particular actions that violate the law will instead comply with the law when the expected cost from violation, *i.e.,* the expected amount of the cost discounted by the probability of being subject to that cost, exceeds the expected benefit. Consistent with that model, Congress [622] and the courts [623] have long recognized that deterrence is one of the primary objectives of class actions.

The preliminary finding that class action liability deters potentially illegal conduct and encourages investments in compliance was confirmed by the Bureau's own experience and its observations about the behavior of firms and the effects of class actions in markets for consumer financial products and services. The Bureau analyzed a variety of evidence that, in its view, indicates that companies invest in compliance to avoid activities that could increase their exposure to class actions.

First, the Bureau stated that it was aware that companies monitor class litigation relevant to the products and services that they offer so that they can mitigate their liability by changing their conduct before being sued themselves. This effect was evident from the proliferation of public materials—such as compliance bulletins, law firm alerts, and conferences—where legal and compliance experts routinely and systematically advise companies about relevant developments in class action litigation,[624] for instance claims pertaining to EFTA,[625] FACTA,[626] FCRA,[627] FDCPA,[628] and the TCPA.[629]

Relatedly, where there is class action exposure, companies and their representatives will seek to focus more attention and resources on general proactive compliance monitoring and management. The Bureau stated in the proposal that it had seen evidence of this motivation in various law and compliance firm alerts. For example, one such alert, posted shortly after the Bureau released its SBREFA Outline, noted that the Bureau was considering proposals to prevent arbitration agreements from being used to block class actions. In light of these proposals, the firm recommended several ''Steps to Consider Taking Now,'' including, ''Evaluate your consumer compliance management system to identify and fill any gaps in processes and procedures that inure to the detriment of consumers under standards of unfair, deceptive, and abusive acts or practices, and that could result in groups of consumers taking action.'' [630] Another alert relating

[622] H. Rept. 94–589, Equal Credit Opportunity Act Amendments of 1976, at 14 (Jan. 21, 1976).

[623] *See, e.g., Reiter* v. *Sonotone Corp.,* 442 U.S. 330, 344 (1979) (noting that antitrust class actions ''provide a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations''); *Hughes* v. *Kore of Indiana Enter.,* 731 F.3d 672, 677–78 (7th Cir. 2013) (Posner, J.) (''A class action, like litigation in general, has a deterrent as well as a compensatory objective. . . . The compensatory function of the class action has no significance in this case. But if [defendant's] net worth is indeed only $1 million . . . the damages sought by the class, and, probably more important, the attorney's fee that the court will award if the class prevails, will make the suit a wake-up call for [defendant] and so have a deterrent effect on future violations of the Electronic Fund Transfer Act by [the defendant] and others.''); *deHaas* v. *Empire Petroleum Co.,* 435 F.2d 1223, 1231 (10th Cir. 1970) (''Since [class action rules] allow many small claims to be litigated in the same action, the overall size of compensatory damages alone may constitute a significant deterrent.''); *Globus* v. *Law Research Service, Inc.,* 418 F.2d 1276, 1285 (2d Cir. 1969) (''Compensatory damages, especially when multiplied in a class action, have a potent deterrent effect.'').

[624] A brief search by the Bureau uncovered dozens of alerts advising companies to halt conduct or review practices in light of a class action filed in their industry that may impact their businesses. A selection of these alerts is set forth in the next several footnotes and all are on file with the Bureau. *See, e.g.,* Jones Day LLP, ''The Future of Mandatory Consumer Arbitration Clauses,'' (Nov. 13, 2015) (''Companies that are subject to the CFPB's oversight should take steps now to ensure their compliance with all applicable consumer financial services laws and to prepare for the CFPB's impending rulemaking [on arbitration]. These steps could help to diminish . . . risks that would result from the CFPB's anticipated placement of substantial limitations on the use of arbitration clauses''); Ballard Spahr LLP, ''Seventh Circuit Green Lights Data Breach Class Action Against Neiman Marcus,'' (July 28, 2015) (noting in response to a recent data breach class action that its attorneys ''regularly advise financial institutions on compliance with data security and privacy issues''); Bryan Cave LLP, ''Plaintiffs Seek Class Status for Alleged Card Processing ''Junk Fee'' Scheme,'' (Nov. 5, 2015) (''[P]rocessors and merchant acquirers should revisit their form agreements and billing practices to ensure they are free of provisions that a court might consider against public policy, and that all fees payable by a merchant are clearly identified in the application, the main agreement, or a schedule to the agreement.''); Jenner & Block LLP, ''Civil Litigation Outlook for 2016,'' (Feb. 1, 2016) (''Given such developments, 2016 will bring a strong and continued focus on privacy protections and data breach prevention both in the class action context and otherwise.''); Bryan E. Hopkins, ''Legal Risk Management for In-House Counsel & Managers,'' at 49–52 (2013) (noting a variety of compliance activities companies should consider in product design in order to mitigate class action exposure).

[625] *See, e.g.,* Bracewell LLP, ''Bankers Beware: ATM Fee Class Action Suits on the Rise,'' (Oct. 5, 2010) (noting dozens of class action cases regarding ATM machines and advising ATM operators ''to make sure that their ATMs provide notice to consumers on both the machine and on the screen (with the opportunity for the customer to opt-out before a fee is charged) if a fee will be charged for providing the ATM service.'').

[626] *See, e.g.,* Arent Fox LLP, ''Unlucky Numbers: Ensuring Compliance with the Fair and Accurate Credit Transactions Act,'' (Nov. 18, 2011) (explaining allegations in one class action and noting that ''ensuring proactive compliance with FACTA is crucial because a large number of non-compliant receipts may be printed before the problem is brought to a company's attention.''); Jones Day LLP, ''If Your Business Accepts Credit Cards, You Need to Read This,'' (Sept. 2007) (''If your company has not been sued for a FACTA violation, you still need to act. . . . If any potential violation is noted, correct it immediately. Also, to avoid future unknown liability, monitor the decisions related to FACTA to determine whether there are any changes regarding the statute's interpretation. With that, your company will be able to immediately correct any 'new' violations found to exist under the law. If your company has been sued, act immediately to come into compliance with FACTA.'').

[627] *See, e.g.,* K&L Gates LLP, ''Beyond Credit Reporting: the Extension of Potential Class Action Liability to Employers under the Fair Credit Reporting Act,'' (Apr. 7, 2014) (''In light of FCRA's damages provisions and the recent initiation of putative class actions against large national companies, business entities which collect background information for prospective or current employees should stay abreast of the requirements of FCRA and related State law, and should be proactive in developing sound and logical practices to comply with FCRA's provisions.'').

[628] *See, e.g.,* K&L Gates LLP, ''You Had Me at ''Hello'' Letter: Second Circuit Concludes That a RESPA Transfer-of-Servicing Letter Can Be a Communication in Connection with Collection of a Debt,'' (Sept. 22, 2015) (''[M]ortgage servicers would do well to ensure they are paying close attention when reviewing such letters for FDCPA compliance'' in order to avoid class action liability).

[629] *See, e.g.,* DLA Piper, ''Ninth Circuit Approves Provisional Class Action Certification in TCPA Class Action, Defines 'Prior Express Consent','' (Nov. 19, 2012) (''*Meyer* [a class action] seems to make clear that creditors and debt collectors must verify that debtors provided their cell phone numbers and that the numbers were provided *at the time of the transactions related to the debts* before contact is made using an automated or predictive dialer. For cell phone numbers provided *later* by debtors, it is imperative that creditors and debt collectors make clear to the owners of those numbers that they may be contacted at these numbers for purposes of debt collection.''); Mayer Brown LLP, ''Seventh Circuit Holds That Companies Are Liable Under Telephone Consumer Protection Act for Placing Automated Calls to Reassigned Numbers,'' (May 16, 2012) (''[C]ompanies must ensure that the actual recipients of automated calls have consented to receiving them, and take steps to update their records when telephone numbers have been reassigned to new subscribers. For example, the Seventh Circuit [in a class action] noted that callers could avoid liability by doing a 'reverse lookup to identify the current subscriber' or by 'hav[ing] a person make the first call' to verify that the number is 'still assigned' to the customer.'').

[630] *See, e.g.,* Jones Day LLP, ''The Future of Mandatory Consumer Arbitration Clauses,''

Continued

to electronic payments litigation noted that firms could either improve their compliance efforts or adopt arbitration agreements to limit their class action exposure.[631] Similarly, the Bureau noted that industry trade associations routinely update their members about class litigation and encourage them to examine their practices so as to minimize their class action exposure. For example, a 2015 alert from a credit union trade association describes ''a new potential wave of overdraft-related suits. . . . target[ing] institutions that base fees on 'available' instead of 'actual' balance'' and advises credit unions to take five compliance-related steps to mitigate potential class action liability.[632]

The Bureau also stated in the proposal that while it believed that such monitoring and attempts to anticipate litigation affect the practices of companies that are exposed to class action liability, the impacts can be hard to document and quantify because companies rarely publicize changes in their behavior, let alone publicly attribute those changes to risk-mitigation decisions. The Bureau, however, identified instances where it believed that class actions filed against one or more firms in an industry led to others changing their practices, presumably in an effort to avoid being sued themselves. For example, between 2003 and 2006, 11 automobile lenders settled class action lawsuits alleging that the lenders' credit pricing policies had a disparate impact on minority borrowers under ECOA. In the settlements, the lenders agreed to restrict interest rate markups to no more than 2.5 percentage points. Following these settlements, a markup cap of 2.5 percent became standard across the industry even with respect to companies outside the direct scope of the settlements.[633] The use of caps has continued even after the consent decrees that triggered them have expired.[634]

As another example, the Bureau noted in the proposal that since 2012, 18 banks have entered into class action settlements as part of the Overdraft MDL,[635] in which plaintiffs challenged the adoption of a particular method of ordering the processing of payment transactions that increases substantially the number of overdraft fees incurred by consumers compared with alternative methods. Specifically, the litigation challenged banks that commingled debit card transactions with checks and automated clearinghouse transactions that come in over the course of a day and reordered the transactions to process them in descending order based on amount. Relative to chronological or a lowest-to-highest ordering, this practice typically produces more overdraft fees by exhausting funds in the account before the last several small debits can be processed. In the years since the litigation, the industry has largely abandoned this practice. According to a 2015 study, from 2013 to 2015, the percentage of large banks that used commingled high-to-low reordering decreased from 37 percent to 9 percent.[636]

The proposal noted a third example of companies responding to class actions by changing their practices to improve their compliance with the law that relates to foreign transaction fees and debit cards. *In re Currency Conversion Fee Antitrust Litigation* (MDL 1409) was a class action proceeding in which plaintiffs alleged, in part, that banks that issued credit cards and debit cards violated the law by not adequately disclosing foreign transaction fees to consumers when they opened accounts.[637] In the settlement, two large banks agreed to list the rate applicable to foreign transaction fees in their initial disclosures for personal checking accounts with debit cards.[638] A review of the market subsequent to the 2006 settlement indicated that this type of disclosure is now standard practice for debit card issuers across the market, not merely by the two large banks bound by the settlement.[639]

As the proposal explained, these are a few examples of industry-wide change in response to class actions that the Bureau believed support its preliminary

JonesDay.com (Nov. 2015), *available at http://www.jonesday.com/the-future-of-mandatory-consumer-arbitration-clauses-11-13-2015/*.

[631] Ballard Spahr LLP, ''The Next EFTA Class Action Wave Has Started,'' (Sept. 1, 2015), *http://www.ballardspahr.com/alertspublications/legalalerts/2015-09-01-the-next-efta-class-action-wave-has-started.aspx* (''We have counseled financial institutions and consumer businesses . . . on taking steps to mitigate the risk of claims by consumers (such as by adding an enforceable arbitration provision to the relevant agreement).''); *see also* Wiley Rein LLP, ''E-Commerce—The Next Target of 'Big Data' Class Actions?,'' (Jan. 5, 2016), *http://www.wileyrein.com/newsroom-articles-E-Commerce-The-Next-Target-of-Big-Data-Class-Actions.html* (noting that arbitration agreements can help to avoid class litigation and advising that ''it would also be advisable for e-commerce vendors to include in their privacy policy an arbitration clause establishing that any dispute would be adjudicated in individual arbitration (as opposed to class litigation or arbitration).''). *See also infra* note 670 (noting that this trend has continued with regard to the proposal itself, as law firms have advised clients to review their compliance materials given the potential that the Bureau would finalize the proposal).

[632] Credit Union Magazine, ''Minimize the Risk of Overdraft Fee Lawsuits,'' Credit Union Nat'l Ass'n (June 26, 2015), *available at http://news.cuna.org/articles/106373-minimize-the-risk-of-overdraft-fee-lawsuits*.

[633] *See* F&I and Showroom, ''2.5 Percent Markups Becoming the Trend,'' (Aug. 9, 2005), *available at http://www.fi-magazine.com/news/story/2005/08/2–5-markups-becoming-the-trend.aspx*; Chicago Automobile Trade Ass'n, ''Automotive News: 2.5 Percent Becoming Standard Dealer Finance Markup,'' (Nov. 22, 2010), *http://www.cata.info/automotive_news_25_becoming_standard_dealer_finance_markup/*. The Bureau notes that California's adoption in 2006 of the Car Buyer's Bill of Rights, which mandated a maximum 2.5 percent markup for loan terms of 60 months or less, may also have influenced the adoption of this markup limit. Cal. Dep't of Motor Vehicles, ''Car Buyer's Bill of Rights: Fast Facts,'' (FFVR 35, revised Nov. 2016), *available at https://www.dmv.ca.gov/portal/dmv/?1dmy&urile=wcm:path:/dmv_content_en/dmv/pubs/brochures/fast_facts/ffvr35*.

[634] *See, e.g.,* Automotive News, ''Feds Eye Finance Reserve,'' (Feb. 25, 2013), *available at http://www.autonews.com/article/20130225/RETAIL07/302259964/feds-eye-finance-reserve* (''Most were settled by 2003, with the lenders agreeing to cap the finance reserve at two or three percentage points. That cap became the industry standard.'').

[635] *See supra* note 501 and accompanying text.

[636] *See* Pew Charitable Trusts, ''Checks and Balances: 2015 Update,'' at 12 fig. 11 (May 2015), *available at http://www.pewtrusts.org/~/media/assets/2015/05/checks_and_balances_report_final.pdf*. According to a different 2012 study, community banks predominantly posted items in an order intended to minimize overdrafts, such as low-to-high or check or transaction order. Independent Community Banks of America, ''The ICBA Overdraft Payment Services Study,'' at 40 (June 2012), *available at http://www.icba.org/docs/default-source/icba/solutions-documents/knowledge-vault/icba-surveys-whitepapers/2012overdraftstudyfinalreport.pdf*. Only 8.8 percent of community banks reordered transactions from high to low dollar amount. *Id.* at 42 and fig. 57. Most of the community banks studied did not change their posting order in the two-year period their overdraft practices were reviewed. *See id.* at 42 (noting that 82 percent of community banks had not changed the order in which they posted transactions during the two years before the ICBA's study). To the extent that community banks changed their practices, in the two years preceding the 2012 study, 70.7 percent of those that changed their practices stopped high-to-low reordering. *Id.*

[637] Third Consolidated Amended Class Action Complaint, In Re Currency Conversion Fee Antitrust Litig., No. 1409 (S.D.N.Y. July 18, 2006) (alleging that general purpose and debit cardholders were ''charged hidden and embedded collusively set prices, including a hidden, embedded and collusively set base currency conversion fee equal to 1 percent of the amount of the foreign currency transaction,'' that ''most member banks tack[ed] on a currency conversion fee of their own,'' and that all of this was done in violation of ''TILA, EFTA and the State consumer protection laws require[ing] disclosure of such fees in, inter alia, cardholder solicitations and account statements'').

[638] Stipulation & Agreement of Settlement at 27–30, In re Currency Conversion Fee Antitrust Litig., No. 1409 (S.D.N.Y. July 20, 2006).

[639] In some instances, the dynamics of deterrence may be different. In another example from the *In re Currency Conversion Fee* class action litigation, the defendants voluntarily halted the conduct at issue upon being sued. Karen Bruno, ''Foreign transaction fees: Hidden credit card 'currency conversion fees' may be returned—if you file soon,'' CreditCards.com (May 23, 2007), *available at http://www.creditcards.com/credit-card-news/foreign-transaction-fee-1282.php* (''[I]n most cases the companies voluntarily began disclosing fees once the suit was filed.'').

finding that exposure to consumer financial class actions creates incentives that encourage companies to change potentially illegal practices and to invest more resources in compliance in order to avoid being sued.[640] The cases help to illustrate the mechanisms, among others, by which the proposed class rule would deter potentially illegal practices by many companies. The Bureau stated in the proposal that it believes that the result would be more legally compliant consumer financial products and services that would advance the protection of consumers.

As discussed in more detail in the proposal's Section 1022(b)(2) Analysis, the Bureau did not believe it possible to quantify the benefits to consumers from the increased compliance incentives attributable to the class proposal due in part to the difficulty of measuring the value of deterrence in a systematic way. Nonetheless, the Bureau preliminarily found that increasing compliance incentives would be for the protection of consumers.

The Bureau recognized that some companies may decide to assume the resulting increased legal risk rather than investing more in ensuring compliance with the law and foregoing practices that are potentially illegal or even unlawful. Other companies may seek to mitigate their risk but may miscalibrate and underinvest or under comply. To the extent that this happens, the Bureau preliminarily found that the class proposal would enable many more consumers to obtain redress for violations than do so now while companies can use arbitration agreements to block class actions. As set out in the proposal's Section 1022(b)(2) Analysis, the amount of additional compensation consumers would be expected to receive from class action settlements in the Federal courts varies by product and service—specifically, by the prevalence of arbitration agreements in those individual markets—but is substantial nonetheless and in most markets represents a considerable increase.[641]

Furthermore, the Bureau preliminarily found that through such litigation consumers would be better able to cause providers to cease engaging in unlawful or legally risky conduct prospectively than under a system in which companies can use arbitration agreements to block class actions. Class actions brought against particular providers can, by providing behavioral relief into the future to consumers, force more compliance where the general increase in incentives due to litigation risk are insufficient to achieve that outcome.

The Bureau offered the Overdraft MDL as an example to help illustrate the potential ongoing value of such prospective relief. A 2015 study by an academic researcher based on the Overdraft MDL settlements offered rare data on the relationship between the settlement relief offered to class members compared to the sum total of injury suffered by class members that has important implications for the value of prospective relief. The analysis reviewed settlement documents and found that the value of cash settlement relief offered to the class constituted between 7 and 70 percent (or an average of 38 percent and a median of 40 percent) of the total value of harm suffered by class members from overdraft reordering during the class period.[642] The total value of injuries suffered by class members can be estimated using these settlement relief-to-total consumer harm ratios and the sum of cash settlement relief. Using the average settlement-to-harm rate of 38 percent, and the total cash relief figure of about $1 billion in the Overdraft MDL settlements, an estimate of the total value of harm suffered by consumers in the settlements identified by the Bureau would be approximately $2.6 billion.[643] More concretely, this figure estimates the total amount of additional or excess overdraft fees class members paid to the settling banks during the class periods because of the banks' use of the high-to-low reordering method to calculate overdraft fees.

This sum—$2.6 billion—can also be used as a basis for determining the potential *future* value of the cessation of the high-to-low reordering practice. If $2.6 billion is the total amount of excess overdraft fees class members paid during their respective class periods because of the high-to-low reordering practice, the same figure (converted to an annualized figure using the class period) may be used to estimate how much the same class members save *every year* in the future by no longer being subject to high-to-low reordering practice for purposes of calculating overdraft fees.[644] The prospective benefits to consumers as a whole are often even larger because companies frequently change their practices not just with regard to class members, but to their customer base as a whole, and other companies that were not sued may also preemptively change their practices. As this one example showed, prospective relief—because it can continue in perpetuity—can have wide-ranging benefits for consumers over and

[640] Some stakeholders have suggested that even absent class action exposure there already are sufficient incentives for compliance and that class actions are too unpredictable to increase compliance incentives. The Bureau is not persuaded by these arguments. The Bureau recognizes, of course, as discussed further in the Section 1022(b)(2) Analysis, that exposure to private liability is not the only incentive that companies have to comply with the law. However, based on its experience and expertise and for the reasons discussed herein, the Bureau believes that companies in many cases can (and should) do more to ensure that their conduct is compliant and that the presence of class action exposure will affect companies' incentives to comply.

[641] The Bureau calculates the future number of class actions by estimating that, in any given market, the providers that currently use arbitration agreements would face class litigation at the same rate and same magnitude as the providers that currently do not use arbitration agreements faced during the five-year period covered by the Study. For all but one of the markets for which the Bureau makes an estimate, only one market—pawn shops—was there no Federal class settlement in the period studied, and the Bureau projects that consumers in these markets would receive no additional compensation from Federal class settlements if the class proposal were adopted. Because it did not have the relevant data, the Bureau did not separate State class settlements by markets or project additional compensation attributable to future State class settlements. Where litigation actually occurs, there would also be increased costs to providers in the form of attorney's fees and related expenses. The Bureau addresses these costs below.

[642] Fitzpatrick & Gilbert, *supra* note 484, at 785, (''[N]ot only can we report the average payout for class members who participated in the settlements, but also what the plaintiffs thought these payouts recovered relative to the damage done to class members.''). Fitzpatrick worked with Gilbert, an attorney involved in the Overdraft MDL settlements, to identify the total quantum of overdraft fees attributable to the practice of reordering in settlements identified by the Study. *Id.*

[643] *See id.* at 786 and tbl. 3. The calculation is the total amount of relief the Study identified with the Overdraft MDL settlements ($1 billion), divided by .38 (the average ''recovery rate'' of the 15 Overdraft settlements identified by Fitzpatrick and Gilbert, which ranged from approximately 14 percent to 69 percent). While Fitzpatrick and Gilbert's analysis separately identified the settlement-to-harm ratio for each individual bank, the banks were anonymized for purposes of their analysis and, therefore, cannot be matched to the specific class settlements set out in the Study.

[644] Assuming the average class period was the 10-year class period of the largest settlement, the 18 Overdraft MDL settlements collectively provide $260 million in prospective relief per year to those class members identified in our case studies. This estimate assumes that future overdraft fees generated from the high-to-low practice would have been comparable to the fees generated in the past. This estimate does not take into account the ongoing benefit to other consumers who were not class members (those who, for instance, were not in the jurisdiction covered by the settlement, or those who acquired accounts after the settlement), nor does the benefit include those consumers who bank with institutions that were not sued but voluntarily stopped the overdraft reordering practice. Nor does this figure include any of the other settlements identified by the Bureau in Section 8 of the Study, which did not contain the kind of information on the proportion of calculable harm to settlement relief.

above the value of retrospective relief, and can, through changing the behavior of providers subject to a suit, benefit other customers of these providers who are not class members.

For all of these reasons, the Bureau stated in the proposal that it believed that the class proposal would increase compliance and increase redress for non-compliant behavior and thus would be for the protection of consumers. To the extent that the class proposal would affect incentives (or lead to more prospective relief) and enhance compliance, consumers seeking to use particular consumer financial products or services would more frequently receive the benefits of the statutory and common law regimes that legislatures and courts have implemented and developed to protect them. Consumers would, for example, be more likely to receive the disclosures required by and compliant with TILA, to benefit from the error-resolution procedures required by TILA and EFTA, and to avoid the unfair, deceptive, and abusive debt collection practices proscribed by the FDCPA and the discriminatory practices proscribed by ECOA.[645] In those States that provide for private enforcement of their unfair competition law, consumers similarly would be less likely to be exposed to unfair or deceptive acts or practices. Consumers also would be more likely to receive the benefits of their contract terms and less likely to be exposed to tortious conduct.

The Bureau also discussed in the proposal that some stakeholders had predicted during the SBREFA phase and other early outreach that pursuing a class rule would lead them to remove arbitration agreements, either because arbitration agreements served no purpose if they did not operate to block class actions or because the costs of individual arbitration to providers were substantial enough that providers would want to eliminate that dispute resolution channel in the absence of offsetting benefits from blocking class actions.[646] The Bureau acknowledged in the proposal that it was possible that providers would not maintain their arbitration agreements if they concluded that individual arbitration provides no benefit to themselves or their customers, but was not persuaded that such an outcome was certain simply because the rule would change the outcome on class proceedings. In particular, the Bureau noted that because providers would still face some individual disputes in any event, it was not entirely clear how providers would evaluate the tradeoffs between different channels for resolving those disputes in isolation, if class proceedings were subject to the proposed rule.

For example, the Bureau noted that while some companies may have to pay fees to the arbitration administrators that they would not have to pay in court, the empirical evidence indicates that the absolute number of cases in which these fees are incurred is low (and that the total fees in any one case are also low).[647] Moreover, the costs of the upfront fees would be offset against potential savings from arbitration's streamlined discovery and other processes, which some stakeholders have argued are a substantial benefit to all parties. Indeed, as explained in the proposal's Section 1022(b)(2) Analysis, providers generally already maintain two systems to the extent that most arbitration agreements allow for litigation in small claims courts. Thus, the Bureau did not understand why the costs of resolving a few cases in arbitration, even if somewhat greater than resolving these cases in litigation, would alone cause companies to withdraw an option that they often asserted benefits both themselves and consumers. Further, the Bureau stated that it did not believe that any resulting constraints on individual dispute resolution would be so severe as to outweigh the broader benefits of the class rule to consumers.

Comments Received

Deterrence. Many industry, research center, State attorneys general, and individual commenters took issue with the Bureau's preliminary finding that the threat of private class actions deters companies from violating the law. However, these commenters generally did not disagree with the Bureau's basic premise that a system that provides for liability for violations of law promotes deterrence; instead they asserted that while deterrence in general may exist in such a system, class actions themselves either do not achieve increased deterrence or to the extent that they do increase deterrence, that increase is unnecessary or even harmful to consumers.

Many of these industry, research center, and individual commenters contended that class actions do not deter violations of the law because they exert pressure on companies to settle whether or not the claims asserted have merit. The commenters asserted that such risk is unavoidable regardless of an entity's compliance efforts, and that companies will therefore not in fact increase such efforts. The pressure to settle exists in part, the commenters asserted, because defendant companies must bear high discovery and defense attorney costs and must consider the risk, no matter how small, of a large judgment in a case that is certified as a class action. The commenters asserted that providers are not willing to tolerate the risk that such a judgment would involve substantial payouts to each member of the class, even if the likelihood of the judgment occurring is low. These commenters contended that the pressure to settle regardless of the merit of the claims means that class actions do not deter wrongdoing, they are simply a ''cost of doing business.''

One trade association commenter representing defense lawyers held the opposite view: class actions do deter violations of the law and in fact, they create ''over-deterrence.'' In this commenter's view, many class actions in the financial services market involve ambiguities and uncertainties in the law, rather than clear violations. Thus, when companies settle class actions without final adjudication of these uncertain legal issues and change their behavior to cease the conduct at issue, the commenter asserted that the companies may be avoiding behavior that is lawful, creating over-deterrence. Relatedly, another industry commenter stated its view that class action settlements are unfair when the law is ambiguous or uncertain and thus companies cannot predict that their conduct may violate the law and subject them to a class action. A nonprofit commenter also agreed that class actions deter wrongdoing, but contended that compliant providers are more likely to be sued in class actions than ''bad actor'' providers because the latter are likely judgment proof. In the commenter's view, this fact creates an imbalance wherein compliant providers are more deterred from bad behavior than non-compliant ones.

In the Study, the Bureau found that class action settlements typically occur in conjunction with class certification,

[645] *See generally* Study, *supra* note 3, section 8 at 13 and fig. 1 (noting the number of class settlements by frequency of claim type).

[646] The Bureau addressed this concern in the proposal in the context of its preliminary findings that the class proposal was in the public interest. In this final rule, however, the Bureau addresses this concern in the context of its finding that the class rule is for the protection of consumers, because many commenters raised concerns that the loss of individual arbitration as a forum would harm consumers. As noted below in Part VI.C.2, however, if providers choose to remove arbitration agreements from their contracts, the loss of individual arbitration as a form of dispute resolution arguably impacts both providers and the public interest. Accordingly, the Bureau incorporates this discussion with respect to its public interest findings as well.

[647] *See* Study, supra note 3, section 5 at 75–76.

which the Bureau stated in the proposal suggests that class certification does not itself pressure defendants to settle.[648] Some industry commenters disagreed with the significance of this finding, contending that there is pressure to settle class actions at every stage of litigation, not just after class certification. Many industry and research center commenters further contended that the pressure to settle non-meritorious class actions is particularly acute in cases asserting claims under statutes that provide for statutory damages, such as FACTA, FCRA, and FDCPA, because the statutory damages multiplied by hundreds or thousands of potential class members can create potential liability of hundreds of millions or even billions of dollars.[649] In these commenters' view, statutory damages were designed to incentivize individual claims, and when claims pursuant to those statutes are pursued using the class action device, they can create the potential for ruinous liability that creates massive pressure for companies to settle.

Some industry commenters agreed that the threat of class action liability deters at least some violations of the law, but contended that its deterrent effect is imprecise and inefficient because of statutes that provide for recovery of attorney's fees and double or treble damages. In these commenters' view, these remedy features incentivize attorneys to bring claims under statutes that have them (as opposed to bringing claims under other statutes or common law without those features) in order to maximize their own profit. One commenter asserted that the lawsuits themselves therefore bear no relation to the merit of the claims and thus do not deter wrongdoing.[650] This inefficiency is compounded, according to the commenters, by the fact that statutory damages often provide for significant liability for technical violations of the law even where there has been no actual harm to consumers. For example, another commenter pointed out that companies can face massive liability class actions against merchants under FACTA for accidentally printing credit card expiration dates on a receipt, activity which the commenter contends does not harm consumers. A law firm commenter representing individual automobile dealers in California stated that the remedy for violations of certain State disclosure requirements for automobile purchases is restitution of the vehicle purchase price, resulting in enormous pressure for those dealers to settle cases alleging violations of those laws. As another example, a trade association representing consumer reporting agencies that offer credit monitoring products directly to consumers identified the penalty of disgorgement of all fees paid for the service for violations of CROA as disproportionate. In the view of the commenter, the prospect of such catastrophic damages does not deter wrongdoing; instead the commenter contends that compliance with CROA for its products is impossible, for reasons discussed below in this Part VI.C.1 and in the section-by-section analysis of § 1040.3(b) below in Part VII.

On the other hand, a consumer advocate commenter, quoting Judge Richard Posner, contended that this is precisely the point:

> Society may gain from the deterrent effect of financial awards. The practical alternative to class litigation is punitive damages, not a fusillade of small-stakes claims. The deterrent objective of [EFTA] is apparent in the provision of statutory damages, since if only actual damages could be awarded, the providers of ATM services . . . might have little incentive to comply with the law.[651]

One research center commenter cited the Overdraft MDL settlements as an example of massive liability where consumers were not actually harmed and thus disagreed with the Bureau's reliance in the preliminary findings on those settlements as evidence of deterrence. The commenter asserted that banks lose money on free checking accounts and that overdraft fees were therefore necessary in order for banks to subsidize free checking accounts for consumers. The commenter therefore believed that the overdraft settlements did not remedy harm to consumers, but actually caused harm by decreasing the likelihood that banks will offer free checking accounts going forward. The same commenter criticized the Bureau's inclusion of the overdraft settlements as an example of litigation that prompted companies to change behavior because some banks continue to reorder consumer overdrafts in such a way as to maximize the fees charged to the consumer, despite that settlement. The commenter agreed, however, that the percentage of banks that employ this practice has diminished since the overdraft class action litigation began. An industry commenter asserted that the Bureau's examples of deterrence were misplaced because they concerned settlements, not actual findings or admissions that the defendants had broken the law and thus the Bureau lacked examples of illegal conduct being deterred. Asserting a similar concern, another industry commenter contended that to the extent that the class actions affect change in business practices, private class action settlements are not an efficient policymaking tool. One industry commenter further contended that because it views class actions as inefficient, the Bureau could more efficiently deter violations of the law by deciding which practices are unfair or deceptive and then informing companies of them.

Several industry commenters disagreed with the Bureau's preliminary finding that class actions deter wrongdoing because they believe that the threat of public enforcement from the Bureau, other Federal agencies, or State attorneys general is more likely to deter companies from violating the law than any class action could. A group of State attorneys general similarly asserted that State consumer protection laws and the threat of State public enforcement are sufficient to deter violations of the law. Other industry commenters contended that companies are more likely to be deterred from violating the law by the threat of individual lawsuits or the threat that consumers will take their business elsewhere once they learn of the companies' violations; one of these commenters cited the Study's survey data on the likelihood of this occurring. A Tribal commenter stated its belief that consumers who obtain products or services from Tribes are sufficiently protected through Tribal regulation and enforcement of those regulations and thus there is no need for the deterrent effect of class actions with respect to Tribes.

Several industry commenters asserted that even if class actions do deter wrongdoing, the deterrence they provide is not necessary because companies already comply fully with the law. In support, a credit union commenter provided data on the amount credit unions already spend to comply with regulations ($6.2 billion) and what it asserted was a similar additional financial impact of those

[648] Study, *supra* note 3, section 6 at 7.

[649] The Bureau notes that the FDCPA caps damages in a class action at the lesser of $500,000 or 1 percent of net worth of defendant; capped amount is in addition to any actual damages; punitive damages are not expressly authorized. 15 U.S.C. 1692k(a)(2)(B).

[650] Shepherd, *supra* note 515, at 2.

[651] *Hughes* v. *Kore of Ind. Enter.,* 731 F.3d 672, 677 (7th Cir. 2013) (citations omitted) (further noting that ''The smaller the stakes to each victim of unlawful conduct, the greater the economies of class action treatment and the likelier that the class members will receive some money rather than (without a class action) probably nothing, given the difficulty of interesting a lawyer in handling a suit for such modest statutory damages as provided for in the [EFTA].''). As the Bureau notes above, Congress amended EFTA to remove ATM sticker provisions.

regulation to its business practices. Separately, one industry commenter rejected what it characterized as an assertion by the Bureau that companies are ''scofflaws.'' Such commenters cited data noting that companies have significantly increased their spending on compliance since the Bureau was established. Other industry, research center, and State regulator commenters contended that there is no empirical evidence that compliance with the law is currently under-incentivized and that there is nothing in the Study that supports the Bureau's contentions to the contrary. Similarly, one industry commenter criticized the preliminary finding regarding deterrence because the Bureau did not study compliance rates of companies with and without arbitration agreements, arguing that the Bureau thus had no empirical evidence that companies with arbitration agreements have lower levels of compliance. Relatedly, an industry commenter asserted that the rulemaking record, including the SBREFA Report, indicates that companies do not intend to spend more on compliance and thus it has no deterrent effect. One State regulator commenter also urged the Bureau to do a thorough quantitative analysis to determine whether companies currently comply with the consumer financial laws at less than optimal levels. Relatedly, a comment from a group of State attorneys general asserted that market forces sufficiently encourage firms to comply with the law because they do not want to be perceived as ''bad actors'' relative to their competitors such that they might lose customers.[652] Similarly, a nonprofit commenter stated its belief that individual lawsuits sufficiently deter violations of the law because an individual lawsuit can alert a company to its violation of the law as well as a class action lawsuit can. Accordingly, this commenter contended that class actions are not necessary to deter violations of the law.

Some industry commenters stated their belief that class actions were not necessary to deter violations of the law with respect to providers of certain products or services because the markets for these products or services have particular features which, in their view, encouraged full compliance by providers.[653] A trade association representing debt collectors stated that because arbitration agreements may not always be written in such a way that the class action prohibition can be relied upon by a debt collector, whether a debt collector may be subject to class action liability is typically uncertain. Because of this uncertainty with respect to the arbitration agreements, the commenter stated that debt collectors fully comply with the law and thus that the threat of class actions does not serve to deter debt collectors. Several credit union and credit union association commenters asserted that their member-owned, not-for-profit cooperative structure provides adequate accountability incentives to fully comply with the law, such that the prospect of class actions are not necessary to deter them from violations of the law. Similarly, a community bank commenter stated that community banks are relationship-oriented, and the need to develop customer relationships and retain customers provide an adequate incentive for them to comply with the law.

A few commenters challenged the examples the Bureau cited in the proposal (and summarized above in this Part VI.C.1) of companies that monitor class action lawsuits and adjust their conduct accordingly as supporting the Bureau's preliminary finding that class actions deter violation of the law. However, none of the commenters disagreed with the general observation that companies monitor class action litigation to minimize their class action exposure and at least one industry commenter agreed that doing so is a prudent business practice. One commenter criticized the Bureau's consideration of law firm alerts about class action cases concerning ATM fee notices pursuant to EFTA as evidence that class actions create deterrence because those cases were not analyzed as part of the class action litigation filings in the Study and because Congress has since amended EFTA such that the conduct at issue in those cases is no longer unlawful. That same commenter criticized the Bureau's citation to foreign currency litigation, contending that the only behavioral change companies made in response to that litigation was to add more consumer disclosure, which, in the commenter's view did not benefit consumers because disclosure is ineffective.

In contrast, numerous individuals, consumer advocates, public-interest consumer lawyers, nonprofits, and consumer lawyers and law firms agreed with the Bureau's findings that class action exposure deters wrongdoing and encourages others to comply with the law. One of these consumer advocate commenters suggested, as the Bureau preliminarily found, that the deterrent effect of class actions is their most potent benefit. Several of these commenters remarked that the public nature of class actions and class settlements deter wrongdoing. One consumer law firm commenter noted that companies often require notification to upper management and boards of directors about class actions because of their potentially large liability, emphasizing that such senior leaders are capable of changing the underlying policies at issue. By contrast, the commenter stated that individual actions are often resolved at lower levels of the company and that upper management may not be made aware of the problem. Academic commenters suggested that many named plaintiffs pursue classwide relief not so that they can be compensated but to prevent the company from harming similarly situated consumers in the future. Similarly, a public-interest consumer lawyer and consumer advocate suggested that class action exposure deters bad behavior and prevents harm to victims other than the named plaintiff. A consumer law firm commenter explained that class actions deter misconduct in ways that individual actions cannot. Similarly, a consumer advocate commenter stated that class actions are critically important not only for compensating victims of corporate law-breaking but also for the deterrent effect of civil litigation.

Commenters also provided specific examples, from their personal experience, of deterrence. For example, two public-interest consumer lawyer commenters described class actions involving automobile dealer markups that resulted in an industry-wide agreement to put in place caps on compensation so as to avoid future litigation over this issue. A consumer advocate commenter cited examples of deterrence in the auto-lending, payday loan, deposit account, and credit card industries.

Commenters offered various explanations for why, in their view, class actions deter violations of the law. For example, a consumer advocate

[652] This comment also asserted that the savings clause in section 2 of the FAA, which permits arbitration agreements to be invalidated by generally applicable contract defenses such as ''fraud, duress or unconscionability'' (*Concepcion,* 131 S.Ct. at 1746), also protect consumers from bad conduct. The Bureau is not aware of any evidence to suggest that such defenses are widely available to consumers or that they address most harms that befall them and thus does not believe that exception to the FAA has any significant impact on its Findings with respect to whether the class rule is for the protection of consumers.

[653] A few of these commenters requested that they be excluded from the rule's coverage for this reason. These requests for exclusion are discussed below in Part VII in the section by section analysis to § 1040.3.

asserted that the risk of damages and reputational harm from a class action helps deter wrongdoing. Similarly, a consumer law firm commenter suggested that the public nature of class actions provides an important deterrent effect against wrongdoing. Another consumer advocate stated that the civil justice system reinforces the efforts of regulatory programs aimed at preventing such harms before they can occur, and that the threat of incurring civil liability adds a complementary deterrent factor that can discourage individuals and businesses from breaking the law and engaging in other kinds of harmful behavior. A public-interest consumer lawyer commenter asserted that, if a company could block class actions, it may have a powerful incentive to engage in widespread violations of law that result in small, but significant, individual harms while benefiting the company significantly in the aggregate. The commenter further suggested that this incentive has led companies to act deceptively in small ways to reap additional profits.

A consumer law firm cited to the *Gutierrez* overdraft case cited in the proposal and described above, asserting that it demonstrates how defrauding consumers over small amounts can increase a company's profits. The commenter noted that there was little risk to the company that adopted those practices because it had an arbitration agreement in its customers' contracts and few consumers noticed the fee practices at issue. When companies know consumers can sue in class actions regarding such conduct, the commenter said that they are deterred. A local government commenter explained that, in its experience, class actions have the potential of changing corporate policy. Two consumer advocate commenters asserted that deterrence works because of the risk of damages and reputational harm from a class action; when this risk is low, unfair or deceptive practices become easier to adopt. Similarly, another consumer advocate commenter stated that without the deterrent effect of class actions, companies' worse instincts are unleashed—they become more driven to maximize profits and executive compensation at the expense of protecting consumers. One public-interest consumer lawyer commenter provided examples specific to civil rights class actions, explaining that it viewed private class actions as critical to protect civil rights in the financial markets and that civil rights consumer class actions provide relief beyond the named plaintiff by remedying and deterring civil rights violations and systemic discrimination. Members of Congress cited to a fact sheet written by a consumer advocate regarding discrimination class actions. This fact sheet, which summarized others' work on the topic, asserted that individual discrimination cases are an unrealistic option for remedying discrimination because, among other reasons, it is expensive to prove institutional discrimination, and that class actions may be the only way to prove and remedy a pattern or practice of discrimination.[654] Without class actions deterring companies, stated one consumer advocate commenter, financial services companies would be able to go on enriching themselves by breaking the law at the expense of their largely unsuspecting customers. A consumer law firm commenter stated that class actions force corporate decisionmakers to think twice before inflicting harms that would otherwise escape review if consumers could only proceed on an individual basis.

With respect to the Bureau's preliminary finding that precluding providers from using arbitration agreements to block class actions would better enable consumers to enforce their rights and obtain redress when their rights are violated by providers, many consumer advocate and consumer law firm commenters agreed. By contrast, many industry commenters asserted that the rule would lead companies to remove arbitration agreements from their contracts which would make it more difficult for consumers to obtain relief in arbitration, a forum that the commenters viewed as superior to litigation. As discussed above, however, some industry, research center, and State government and State attorneys general commenters asserted that consumers have adequate alternative means of obtaining relief, whether through the informal dispute resolution channel, pursuing individual disputes via litigation or arbitration or enforcement. Consumer advocate and nonprofit commenters disagreed with these assertions.

Whether the rule will cause providers to remove arbitration agreements. With regard to the debate over whether adopting the class proposal would harm consumers by prompting providers to remove arbitration agreements from their contracts entirely, many industry commenters and a comment from a group of State attorneys general contended that providers would, in fact, remove arbitration agreements from their contracts and that depriving consumers of access to individual arbitration would harm them.[655] With regard to the first point, these commenters asserted that providers incur significant costs in connection with providing arbitration to their customers. As examples, commenters cited the filing fees, hearing fees, and arbitrator compensation that providers often agree to pay when consumers file arbitrations against them. These commenters suggested that providers are not willing to pay these costs for individual arbitration unless they can use arbitration agreements to block class actions and thereby avoid class action defense costs. A few industry commenters argued that it is inevitable that companies would remove their arbitration agreements because it is economically impossible for companies to pay arbitration costs related to individual arbitration and also pay class action defense costs. Nevertheless, no commenter provided a specific accounting of providers' costs or any other concrete evidence to buttress these assertions.

This lack of evidence is particularly important because the Bureau stated in the proposal that it was skeptical that the class rule would cause providers to incur significant additional costs by maintaining ''two tracks'' of dispute resolution (arbitration and court) given that many providers already maintain two tracks for dispute resolution in small claims court and arbitration and that few companies compel arbitration when an individual consumer first files in court. Several industry commenters explained why, in their view, the class rule would impose significant additional costs and why providers currently permit small claims court filings and rarely move to compel arbitration in individual litigation. A few industry commenters asserted that litigating disputes in both arbitration and small claims court is not substantially more burdensome for providers than litigating disputes only in arbitration, because small claims courts have many of the same streamlined procedures as arbitration, such as limits on discovery and individualized proceedings. Consequently, in the commenter's view, the fact that businesses litigate disputes

[654] *See* Center for Justice & Democracy, ''Fact Sheet: Civil Rights Class Actions: A Singularly Effective Tool to Combat Discrimination,'' (Jan. 6, 2014), *available at https://centerjd.org/content/fact-sheet-civil-rights-class-actions-singularly-effective-tool-combat-discrimination.*

[655] Separately, one industry commenter asserted that the combined effect of the class proposal and monitoring proposal would cause providers to drop their arbitration agreements. The impact of the monitoring proposal is discussed below in Part VI.D.

in both arbitration and small claims court does not indicate that they can afford to ''subsidize'' arbitration while paying class action defense costs (and therefore continue to maintain two tracks if the Bureau finalized the class rule). The commenter also disagreed that the Study showed that companies already maintain two tracks of litigation because they move to compel arbitration in only about 1 percent of individual cases filed in Federal court and about 5 percent of the 140 cases against companies known to have an arbitration agreement. The commenter asserted that the Bureau's sample size of 140 cases is too small to draw the conclusion that companies rarely invoke arbitration agreements in individual litigation, although no commenter cited any evidence to the contrary. The commenter also argued that companies' low rate of invocation is not evidence of companies' willingness to litigate in both arbitration and court, because there are many reasons why a provider may not move to compel arbitration despite its preference for litigating disputes in arbitration, such as the consumer opting out of the arbitration agreement, a provider's offer of settlement, or the consumer's failure to prosecute the case.

In response to the Bureau's skepticism in the proposal as to whether the costs of individual arbitration will cause providers to remove arbitration agreements if the class rule is finalized, other industry commenters noted that many arbitration agreements include ''anti-severability provisions,'' which state that if the agreement's no-class provision is held unenforceable, the entire arbitration agreement is unenforceable as well.[656] The commenters stated that through these anti-severability provisions, providers have already effectively chosen to eliminate their arbitration agreements if the no-class provision is not available and thus the Bureau's skepticism is unfounded.

Whether loss of individual arbitration harms consumers. Numerous Congressional, industry, and research center commenters, as well as a group of State attorneys general asserted that arbitration is a superior form of dispute resolution for consumers relative to individual litigation and that consumers would therefore be harmed if the class rule causes providers to remove arbitration agreements from their consumer contracts. These commenters cited several factors in support of their argument. Many stated that arbitration is a superior forum for resolving individual disputes because filing fees are less expensive for consumers than comparable fees in court. For example, these commenters noted that the AAA's consumer arbitration rules require consumers to pay no more than $200 in costs for arbitration, and that many providers use arbitration agreements that require the provider to pay the consumer's entire filing fees in certain circumstances. In contrast, commenters noted that filing fees for individual suits in Federal court are $400, and that State court filing fees vary but are often more than $200. A research center noted that arbitration saves money for both consumers and businesses.

Many of these same industry, research center, and State attorneys general commenters noted that individual disputes filed in arbitration are, on average, resolved more quickly than those filed in individual litigation. One industry commenter noted that arbitrations analyzed in the Study were resolved in a median of four to seven months, depending on whether the consumer appeared at the hearing and whether that hearing was in person or by telephone. By contrast, the commenter noted that the average time to reach trial for an individual suit filed in Federal court was 26.7 months.[657] Several of these industry commenters further stated that many State courts have significant backlogs, thus increasing the time to resolution in those courts.

Many industry and research center commenters also stated their belief that arbitration is a better forum for consumers to resolve their disputes with consumer finance companies than individual litigation in court because consumers may proceed without an attorney in arbitration. These commenters believe that arbitration's streamlined process, which does not typically include motions or discovery practice common to litigation and has simpler pleading requirements, allows consumers to pursue their own claims without an attorney and are far lower than what one industry commenter asserted is the astronomical cost of litigation. Indeed, these commenters noted that the Study showed that unrepresented consumers more often received favorable decisions from arbitrators than did consumers represented by attorneys. On the other hand, one industry commenter asserted that when consumers do have an attorney in an arbitration, that attorney is likely to have prior arbitration experience. Some industry commenters and a group of State attorneys general noted that arbitration hearings were typically held in locations that were convenient for consumers and often occurred via telephone, Skype or email without the consumer having to appear in person. In contrast, these commenters noted that litigation typically requires consumers to appear in person and often during the day, requiring them to miss work. An industry and research center commenter and a group of State attorneys general noted that the arbitration process is simpler than litigation and therefore easier for consumers to navigate. Relatedly, an industry commenter noted that fees are modest and disclosed in arbitrations and that arbitrators may waive or reduce them further. An industry commenter asserted that arbitration is better than litigation because consumers can play a role in choosing their arbitrator, while they cannot choose a judge. An industry commenter and several State attorneys general asserted that arbitration benefits consumers because they are more likely to receive a decision on the merits as compared to class actions, where the Study showed no trials occurred in class actions.

Many of the industry and research center commenters noted that the Study showed that consumers prevailed on their claims in arbitration at least as much as they did in litigation. They noted, for example, that the Study showed that consumers received a favorable decision from an arbitrator 6 percent of the time and settled with companies 57 percent of the time in arbitration (appearing to reflect data from the Study that identified known and likely settlements), while consumers received a favorable judgment in 7 percent of their claims in individual litigation and settled 48 percent of claims filed in court (appearing to reflect data from the Study that identified known settlements only). Many industry commenters and a group of State attorneys general further contended that successful consumers won significant amounts in arbitration; according to the Study, the average consumer who received a favorable award received more than $5,000 and a group of State attorneys general noted that arbitration agreements rarely limit consumers' recovery.

Several of these same commenters also asserted that arbitration is at least as fair for consumers as litigation because the major arbitration administrators, AAA and JAMS, each have due process standards that require arbitrators to handle claims fairly. An industry commenter and a research

[656] Study, *supra* note 3, section 2 at 46–47.

[657] U.S. Courts, ''Federal Judicial Caseload Statistics 2016,'' (June 2016) *available at http://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2016.*

center both further noted that courts have authority under the FAA to invalidate arbitration agreements that impose unfair terms on consumers, such as those that limit consumers' right to recovery in ways not permitted by Federal or State law. In addition, these commenters noted that the Study found that few arbitration agreements contained provisions that these commenters thought were unfair to consumers on their face, such as those that required arbitration to occur in an inconvenient forum or that required the consumer to pay for all arbitration fees if the consumer failed to win the claim. Commenters additionally asserted that the majority of arbitration agreements contain provisions intended to ensure fairness for consumers, citing provisions such as those fully disclosing the arbitration process, allowing consumers to opt out of the arbitration agreement, and allowing consumers to file claims that meet the relevant claims limits in small claims court rather than be subject to arbitration. One industry commenter went further and asserted that arbitration is in fact more fair than the alternatives because disputes can be reasonably aired, considered, and resolved.

Some industry and research center commenters asserted that individual arbitration is frequently and successfully used by both consumers and companies in other areas of the law, such as in employment, securities, and medical malpractice. They further contended that, given time, consumer finance arbitration can achieve the same levels of success.[658] They did not state how much time would be required nor what should happen to consumers bound by arbitration now until that threshold is crossed. One industry commenter asserted that consumers are more satisfied but did not provide evidence supporting this claim nor did it explain what consumers were more satisfied with—their provider or arbitration.

Several industry and research center commenters stated that the loss of individual arbitration as an option for consumers is particularly problematic because, in their view, most injuries suffered by consumers in consumer finance cases are individualized and therefore could not be remedied through class action lawsuits, which are the focus of the Bureau's class rule. These commenters cited, as examples, cases in which an individual consumer had a deposit not properly credited at an ATM machine, was improperly charged a fee, or had incorrect interest calculations on his or her account when other consumers did not. One of these commenters stated that, in its opinion, such individualized non-classable claims are a significant majority of all consumer claims. However, the commenters did not provide any empirical evidence for their assertions that most injuries to consumers occur because of unique or individualized harms.

Many of these same industry and research center commenters noted that without arbitration, many consumer finance claims may be filed in court. Specifically, they contended that small claims courts are not an adequate forum for these claims that would have been resolved in arbitration. While small claims courts ostensibly allow consumers to pursue low-value claims more simply than in State courts of general jurisdiction or in Federal court, these commenters cited evidence suggesting that small claims courts are overcrowded or closing as a result of budget cuts in some jurisdictions (citing examples in parts of California, Alabama, and Texas). The commenters further contended that to the extent that small claims courts are over-crowded (or non-existent), they are slow in providing relief to consumers who are injured or do not provide relief at all. These commenters also pointed out that small claims courts typically require consumers to appear in person during standard working hours, which can be difficult for many consumers who cannot take time off from their jobs.[659]

Some industry commenters stated their belief that arbitration was particularly useful, as compared to litigation, for claims concerning certain products or services. For example, a debt collection industry trade association stated that in debt collection disputes, consumers place a particularly high value on confidentiality, which it believed arbitration better preserves. It also stated that debt collection claims are simpler to adjudicate, and thus suited to a simpler process, which it believed arbitration offers.

On the other hand and as noted above in Part VI.B.2, consumer advocates, consumer lawyers, trade associations of consumer lawyers, public-interest consumer lawyers, consumer law firms, nonprofits, and many individual commenters commented at length as to why, in their view, litigation in court of individual disputes along with the availability of class actions was far preferable to pursuing the same claims in arbitration. Several of these commenters stated that industry preferred to funnel all disputes into individual arbitration not to benefit consumers but instead to insulate themselves from class actions and that they did not have consumers' best interest in mind when suggesting that arbitration was preferable.

As discussed above in Part VI.B.1, many of these commenters further stated that individual arbitration was so unfair relative to individual litigation that the Bureau should have protected individual consumers by banning outright the use of pre-dispute arbitration agreements. For example, some commenters argued that consumer arbitration outcomes cannot be consistently fair because arbitration naturally favors providers, as repeat players, over consumers, who may only face an arbitration once. One public-interest consumer lawyer commenter argued that individual arbitration is necessarily worse for consumers than litigation because consumers cannot find legal representation and few consumers file arbitrations in any case. Accordingly, these commenters did not agree that a loss of individual arbitration, if it occurred in response to the Bureau's rule, would negatively impact consumers. Instead, many of these commenters thought that consumers would be better off without it.

One industry commenter challenged an argument it believed was raised by some consumer advocates who it claims have asserted that the widespread

[658] A few commenters pointed out that the Bureau requires its employees to sign pre-dispute arbitration agreements and to arbitrate employment claims against the Bureau.

[659] While many commenters asserted that individual arbitration is a superior form of dispute resolution to individual litigation, a few industry commenters asserted that individual arbitration is a superior form of dispute resolution to class litigation. One industry commenter noted that individual arbitration proceeded significantly more quickly than class litigation, stating that consumer arbitration was up to 12 times faster than class action litigation when comparing resolution on the merits in arbitration to a class settlement. Another industry commenter noted that arbitration hearings occurred significantly more often than do trials in litigation and thus asserted that arbitration claims were ''heard on the merits'' more often than were claims in class action litigation. For example, hearings occurred in 30 percent of the arbitrations analyzed in the Bureau's Study whereas not one of the class actions analyzed in the Study went to trial (those cases ended by a plaintiff's withdrawal of claims, a settlement, or a dismissal by the court). The Bureau does not believe such a comparison is dispositive to an assessment of whether arbitration is better than litigation for resolving individual disputes. Moreover, even assuming that arbitration resolves claims more quickly than class litigation or holds hearings on the merits more often than class litigation, the Bureau believes that consumers and the public interest benefit more from the availability of class actions than from the availability of individual arbitration (for the few consumers who choose it), for all the reasons stated in this Part VI.C.1.

removal of pre-dispute arbitration agreements would not harm consumers because both sides would mutually agree to ''post-dispute arbitration'' (*i.e.,* a voluntary agreement to arbitrate reached after a dispute has arisen).[660] The commenter disagreed with this argument, asserting that parties are less likely to agree to post-dispute arbitration because they become invested in their positions and refuse to arbitrate and because attorneys discourage them from doing so in order to maximize attorney's fees in litigation. The commenter also asserted that post-dispute arbitration would be less attractive to consumers than pre-dispute arbitration because providers are unwilling to pay as many of the costs in such cases. In the commenter's view, post-dispute arbitration would therefore not replace pre-dispute arbitration, even where it is the most efficient option for both parties.

Response to Comments and Findings

The Bureau has carefully considered the comments received on these aspects of the proposal and further analyzed the issues raised in light of the Study and the Bureau's experience and expertise. Based on all of these sources and for the reasons discussed above in Part VI.B, in the proposal, and further below, the Bureau finds that precluding providers from blocking consumer class actions through the use of arbitration agreements would substantially strengthen the incentives for companies to avoid legally risky or potentially illegal activities, thereby reducing the likelihood that consumers would be subject to such practices in the first instance. To the extent that companies nonetheless engage in unlawful conduct, permitting class actions would also better enable consumers to enforce their rights under Federal and State consumer protection laws and the common law and obtain redress when their rights are violated. For these reasons and those discussed below, the Bureau finds that both of these results are for the protection of consumers.

Deterrence. With respect to commenters that contended that class actions do not deter wrongdoing because, in practice, companies face pressure to settle class actions whether or not they are meritorious, the Bureau does not agree that the conclusion follows from the premise. As discussed above in Part VI.B.3 and below in the Section 1022(b)(2) Analysis in Part VIII, the Bureau understands that there is some pressure to settle class action lawsuits given attorney's fees and the potential of a large verdict. At the same time, plaintiff's attorneys have an incentive to bring cases with the greatest likelihood of success since the amount they can secure in fees will be affected, at least in part, by the amount they are able to obtain for the class. Precisely because all that is true, companies that face the threat of class actions will have an incentive to avoid being sued and to reduce the expected value—and thus the likely settlement costs—of any suits that are filed. That, in turn, means that the potential for class action litigation creates an incentive for companies to rigorously adopt compliance measures and to avoid legally risky practices. While compliance with the law may not fully insulate a company from the threat of a class action lawsuit, failing to comply with the law would almost certainly increase the likelihood that company will be sued and the value of the claims asserted. Thus, because the Bureau believes that the likelihood of being sued in a class action and the expected value of class claims are inversely proportional to the efforts a company makes to assure compliance with the law, then it necessarily follows that an increased risk of class action litigation will incentivize companies to improve compliance efforts.

An example of this deterrent effect can be found in comments from a credit reporting agency that provides credit monitoring and a consumer data trade association representing providers of credit monitoring. These commenters contended that two Federal appellate courts have improperly interpreted CROA to apply to at least one credit monitoring product.[661] As discussed in more detail in the section-by-section analysis of § 1040.3(a)(4) below in Part VII, among the requirements that CROA imposes on credit monitoring are a disclosure to potential consumers, waiting three days before commencing the services with a right of cancelation for the consumer, and prohibiting pre-payment of fees.[662] CROA further provides for statutory damages for violations of the statute that amount to disgorgement of the fees paid for the product.[663] In the view of these commenters, if they were subject to CROA, they would face significant risk of class action exposure for what the commenters referred to as ''technical'' violations of CROA's requirements. These companies currently offer credit monitoring services that would not meet CROA's requirements if they were applied to them. They contend that they would be forced to increase their prices and there is a possibility they would not be able to offer credit monitoring services if they had to comply with CROA's requirements because doing so would be infeasible both practically and financially. Further, they believe they are able to offer these services without significant risk now because they include arbitration agreements in their consumer contracts, thus insulating them from class action liability. Setting aside, for the moment, the legal question of whether CROA does apply to credit monitoring and if it did, the policy question of whether these companies *should* be able to offer credit monitoring services to consumers without complying with CROA,[664] these comments suggested that the prospect of class action liability would alter how these companies approach providing their product. In other words, their ability to insulate themselves from CROA class action liability has caused them to offer a service that the companies fear courts could hold violates CROA. Were they to lose that insulation, they say they will be deterred from offering that service.

As another example, debt collector commenters noted that debt collectors do not underinvest in compliance because the presence of class action waivers does not provide enough certainty to them that they will be always able to minimize class action liability. The Bureau believes that one corollary of this argument is that some debt collectors could be encouraged to spend less on compliance if they had more certainty about their ability to block class actions. To the extent this is true, the Bureau believes that debt collectors would be less deterred if they were more certain that they could block class actions, and conversely would be more deterred if they knew with certainty that they could not block class actions.

As for the commenter that criticized the behavioral relief in the foreign currency fee litigation as worthless because disclosures provided about these fees are ineffective, the Bureau first notes that Congress believes in the importance of timely and understandable disclosures for

[660] The Bureau did not receive any comments from consumer advocates or others asserting this position, however.

[661] *Stout* v. *Freescore, LLC,* 773 F.3d 680, 686 (9th Cir. 2014); *Zimmerman* v. *Puccio,* 613 F.3d 60, 72 (1st Cir. 2011).

[662] Credit Repair Organizations Act (CROA), 15 U.S.C. 1679 *et seq.*

[663] 15 U.S.C. 1679g(a)(1)(B).

[664] That issue is addressed more fully below in Part VII in the section-by-section analysis of § 1040.3, in which the Bureau responds to the CRA's request for an exception to the class rule.

consumers.[665] In addition, the Bureau notes that, following settlement of the foreign currency fee cases, the number of credit cards charging fees for foreign currency transactions decreased dramatically.[666] Based on the Bureau's understanding of this industry, it believes that had companies not agreed to disclose these fees, the competitive pressure to eliminate them would have been lower. In any event, the Bureau cited the foreign currency fee class action settlements in the proposal as evidence of deterrence because those settlements caused issuers to disclose their exchange fees. The fact that other companies changed their practices is evidence of the deterrent effect, even if some commenters disagreed that disclosure of such fees is beneficial. Along the same lines, in response to the commenter that claimed the overdraft settlements did not deter such behavior because a few banks have not changed their overdraft practices following the wave of class action litigation, the commenter itself admitted that the litigation has encouraged most banks to change their overdraft practices. This bolsters the Bureau's finding that those class actions deterred banks from further violations of the law with respect to their overdraft practices, even if there are some banks that did not change their practices. Indeed, perfect compliance with the law is unlikely to be achieved through any mechanism, whether agency enforcement or class action litigation.

With these examples, as well as the EFTA ATM ''sticker'' litigation example discussed in the proposal and above,[667] the Bureau disagrees with industry commenters that assessments as to the value to consumers of particular protections afforded by the law are relevant to the question of whether or not class actions have a deterrent effect.[668] Instead, these examples illustrate the broader principle that companies have altered or would alter their behavior in response to class action exposure. To the extent that the commenters were really trying to argue that the underlying laws provide no benefit to consumers, that argument is addressed separately below.

Indeed, the Bureau notes that while some industry commenters resisted the premise that potential class action liability produces deterrent effects, other industry, individual, and research center commenters agreed with the Bureau's finding and supplied additional evidence in support of it. One such individual commenter (who otherwise strongly opposed the proposal) agreed that class actions have the ability to ''prompt 'enterprise-wide change' '' in providers. Similarly, one of the studies cited by industry and research center commenters that analyzed the results of class action lawsuits included interviews of corporate representatives regarding class action liability in which those representatives acknowledged that ''damage class action lawsuits have played a regulatory role by causing them to review their financial and employment practices.'' [669] Furthermore, upon issuance of the Bureau's proposal, several law firms advised their clients to review their compliance given the possibility of the Bureau finalizing the proposal and the clients' subsequent increased risk of class actions.[670] As one firm advised:

> Affected companies should use this time, before implementation, to mitigate class action claims that previously might have been subject to arbitration. Companies should consider a review of all consumer-facing documents to confirm language complies with applicable federal and state law. Additionally, internal policies and procedures must be reviewed to ensure that product origination and servicing is consistent with all legal requirements. Likewise, vendor agreements must be reviewed in relation to applicable law—including, most importantly, principal-agency theories. It is imperative that companies anticipate ways to limit liability and manage future class action risks now—as class action defense litigation spending is anticipated to surge in every consumer finance sector.[671]

One industry commenter asserted that class actions create over-deterrence because class settlements may encourage companies to avoid behavior that is legally ambiguous but not necessarily unlawful.[672] To the extent

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[665] *See* Dodd-Frank section 1021(b) (''The Bureau is authorized to exercise its authorities under Federal consumer financial law for the purposes of ensuring that . . . consumers are provided with timely and understandable information to make responsible decisions about financial transactions'').

[666] Sienna Kossman, ''Survey: More Cards Bid Farewell to Foreign Transaction Fees,'' CreditCards.com (March 31, 2015), *available at http://www.creditcards.com/credit-card-news/foreign-transaction-fee-survey.php* (finding that, from 2012 to 2015, ''the eight issuers that charge foreign transaction fees on at least some of their consumer cards have increased the total number of fee-free cards from 21 to 38.'').

[667] In 1999, Congress amended the EFTA to require that ATM operators make disclosures about ATM fees to be charged consumers, both (1) ''on or at'' the ATM itself (usually a sticker on the machine) and (2) on the screen of the ATM during the transaction or on the receipt after the transaction. This EFTA amendment made ATM operators liable for actual and statutory damages in individual and class cases if consumers did not receive both disclosures. A number of class actions were filed and settled on the grounds that the ATM operator had failed to comply with the ''on or at'' requirement because the ATM sticker was missing. In 2012, Congress amended EFTA again to eliminate the ATM sticker requirement, and in 2013, the Bureau issued a final rule implementing this amendment.

[668] The Bureau notes that the EFTA ATM sticker requirements are no longer in place. A few commenters criticized the fact that the Bureau cited EFTA ATM sticker cases in the proposal as an example of companies changing their behavior in response to class action lawsuits because cases related to that conduct were not included in the Study. The fact that those cases were not included in the Study is irrelevant—the salient point is that companies changed their behavior in response to class action lawsuits being filed and thus that those cases deterred companies from violating EFTA in that regard.

[669] Deborah R. Hensler, et al., ''Class Action Dilemmas: Pursuing Public Goals for Private Gain,'' at 9 (Mar. 24, 1999) (RAND Inst. for Civil Just.).

[670] Jones Day LLP, ''CFPB Proposes New Rule on Mandatory Consumer Arbitration Clauses,'' (May 2016), *available at http://www.jonesday.com/cfpb-proposes-new-rule-on-mandatory-consumer-arbitration-clauses-05-16-2016/* (in an alert regarding the potential impact of the proposal, instructed companies subject to Bureau regulation to ''[c]onduct a review of your compliance management system. Evaluate your consumer compliance management system to identify and fill any gaps in processes and procedures that inure to the detriment of consumers under standards of unfair, deceptive, and abusive acts or practices, and that could result in groups of consumers taking action.''); Paul Hastings LLP, ''Class (Not) Dismissed: CFPB Proposes New Rule Prohibiting Mandatory Arbitration Clauses, Encourages Consumer Class Action Law Suits,'' (May 12, 2016), *available at https://www.paulhastings.com/publications-items/details/?id=8e53e969-2334-6428-811c-ff00004cbded* (stating that ''CFPB-regulated entities should consider the following action items,'' including ''review[ing] customer complaint logs to identify those products and services that elicit the most frequent consumer complaints and could potentially serve as the basis for consumer class action lawsuits''); Venable LLP, ''The CFPB's New Arbitration Clause Ban: How to Prepare Your Organization,'' (June 15, 2016), slide 31, *available at https://tinyurl.com/l32qjdb* (analyzing what the proposed rule ''mean[s] for regulatory compliance'' and advising entities to ''assess litigation exposure,'' ''assess recourse available to consumers,'' ''know the terms of your contract,'' and ''consider product and service enhancements''). These law firm alerts were preceded by others before the issuance of the proposal providing similar advice to companies to improve their compliance management and systems in anticipation of the rule. 81 FR 32830, 32862–63 (May 24, 2016). A compliance firm similarly advised its clients to ''batten down the hatches'' by taking steps to ''mitigate the flow of class actions.'' *See* Treliant Risk Advisors, ''Pre-dispute Arbitration Clauses: Batten Down the Hatches,'' *available at https://www.treliant.com/News-and-Events/New-Coordinates-Newsletter/NC-Articles-Details/ArticleID/27227* (Summer 2016) (listing several steps firms can take to reduce risk, including that they should ''analyze complaints . . . to identify [compliance] problems'' and to ''complete thorough root cause analysis for any concerning trends'').

[671] Katten Muchin Rosenman LLP, ''CFPB Issues Proposed Rule to Restrict Use of Mandatory Arbitration Clauses and Class Action Waivers,'' (May 16, 2016), *available at https://www.kattenlaw.com/CFPB-Issues-Proposed-Rule-to-Restrict-the-Use-of-Mandatory-Arbitration-Clauses-and-Class-Action-Waivers.*

[672] The Bureau adopts this definition of ''over-deterrence'' (*i.e.,* deterring legally ambiguous and

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that the comment was referring to the ''over-deterrent'' effect as to a company that engaged in the legally ambiguous behavior and that was sued because of it, the Bureau notes that the company was not deterred by the threat of class action liability to the extent that it did, in fact, engage in the behavior that was the subject of the class complaint. Accordingly, a company that takes the risk of engaging in conduct that may violate an ambiguous or uncertain law was neither deterred nor ''over-deterred.'' To the extent that the comment was referring to an ''over-deterrent'' effect as to that same company once it chooses to stop engaging in the behavior that generated the class action settlement or as to other companies that become aware of the settlement and avoid similar behavior, the Bureau understands that the prospect of class action liability may, at the margins, deter some conduct that is legally ambiguous but not necessarily illegal. But, even if at the margins, the effect of the class rule would be to deter conduct that may be legal from occurring, the Bureau believes that, on balance, that would be a reasonable cost to achieve the benefits of the rule for the public and consumers. Moreover, the Bureau believes that most providers consult attorneys to assess the legal risk of engaging in particular conduct and that providers likely have different levels of tolerance for the legal risk that arises from engaging in conduct that is legally ambiguous.

Moreover, as discussed in more detail in Part VI.B.3 above, there is a relationship between the likelihood of success on class action claims and the amount of the settlement. For this reason, the Bureau believes, all else equal, that a class action that asserts legally ambiguous but not clearly unlawful claims is likely to result in a smaller settlement, if any, than a class action that asserts a clear violation of the law. As a result of a smaller settlement amount, the deterrent effect of a settlement with regard to a legally ambiguous or uncertain claim would be correspondingly smaller than the deterrent effect of a larger settlement. In other words, class action settlements involving ambiguous or uncertain violations of the law may deter some lawful conduct at the margins, but the Bureau does not believe this deterrent effect would be significant. And, even if there is some small impact from these settlements on legally ambiguous but not unlawful behavior, the Bureau believes that, on balance, that it would be a reasonable cost to achieve the benefits of the class rule for the public and for consumers.[673] As to the research center commenter that contended that bad actors are likely not deterred from violations of the law because they are judgment proof, the commenter offered no evidence to support that most or all providers that violate the law are judgment proof. In any event, the Bureau believes for all of the reasons stated above that the prospect of class action liability deters violations of the law for providers that are not judgment proof, regardless of whether some judgment proof defendants may not be deterred.

With respect to the industry commenters that contended that statutes providing for statutory damages or double and treble damages compound the pressures to settle and thus create a deterrent effect that is imprecise or inefficient, the Bureau does not dispute that the existence of statutory damages or attorney's fee provisions may encourage lawsuits under those statutes. Some commenters contended this is ''imprecise'' or ''inefficient.'' It is nevertheless a direct consequence of the statutory regime adopted by Congress and the States and, if anything, is evidence that lawmakers chose to emphasize the need for compliance with these laws. As for the commenter that suggested that class actions are an inefficient policymaking tool, the Bureau disagrees that class actions constitute policymaking themselves. Rather, the Bureau believes that class action settlements occur only because Federal and State legislatures had already adopted policy choices by enacting particular statutes or the common law had developed to reflect certain policy judgments. In response to the commenter that suggested that the Bureau should determine which conduct is unfair or deceptive because that would be more efficient than class actions, the Bureau's resources are limited, for all of the reasons discussed above in Part VI.B.5. For this reason, even if such a practice were more efficient than unfettered class actions, the Bureau has many competing priorities and likely would not be able to identify and communicate every type of unfair or deceptive practice for the many thousands of products or services within its jurisdiction.

As for commenters that contended that statutory damages were designed to incentivize individual claims and are misapplied when asserted in class actions, the Bureau does not agree that the class action liability that results under statutes that provide for statutory damages is unintended or accidental. Instead, and as discussed more fully in Part II.C, Congress has repeatedly enacted measures to address the interaction of statutory damages and the class action mechanism, as evidenced by its adoption of classwide damages caps for many statutes.[674] The statutory regimes enacted, including whether the statute allows for class action liability, reflect policy decisions by Congress. Commenters may disagree with those decisions, but it is Congress who makes them, not the Bureau. In any event, as discussed below in Part VI.C.2 and in the Study, most of the consumer credit protection statutes cap statutory damages.

Similarly, commenters that criticized the underlying statutes as incentivizing private lawsuits when the commenters claim there is ''no harm to deter'' are, in essence, either claiming that courts will allow the lawsuits to proceed despite the absence of an in injury-in-fact (which the Constitution requires for Federal court litigation[675]) or are expressing concern about the measure of damages for injuries that these commenters asserted to be minor. As to the first, Federal courts have repeatedly considered what it means for a plaintiff to establish individual, concrete harm in order to have standing to assert a claim for statutory damages. Indeed, the Supreme Court recently addressed the issue.[676] The judicial system can and does address whether plaintiffs must suffer harm in order to allege the violation of a statute; the Bureau is not in the position to make such assessments in the context of this rulemaking. As to the second, these

potentially lawful behavior) solely for purposes of addressing the argument raised by the commenter. In economic terms, the existence of over-deterrence would generally imply that providers were responding to the deterrent (class actions) by taking actions where the costs (*e.g.,* foregone profits) exceed the social benefits (*e.g.,* avoided harm to consumers). That is, over-deterrence leads to more compliance than is socially optimal, regardless of the exact legal status of the conduct. As discussed in the Bureau's Section 1022(b)(2) Analysis in Part VIII below, the Bureau believes that in general the level of compliance in consumer financial products is below the optimal level, although there may be exceptions for particular firms in particular markets.

[673] The Bureau notes that it similarly finds below, in Part VI.C.2, that even if the class rule may, at the margin, the deter certain innovations from occurring, the Bureau believes that, on balance, that would be a reasonable cost to achieve the benefits of the rule for the public and consumers.

[674] *See infra* note 740 (classwide statutory damage caps).

[675] *Lujan* v. *Defenders of Wildlife,* 504 U.S. 555, 560–61 (1992).

[676] *Spokeo, Inc.* v. *Robbins,* 136 S. Ct. 1540, 1549 (2016) (affirming that injury to a legal interest must be ''concrete'' as well as ''particularized'' to satisfy the injury-in-fact element of standing and because Congress is ''well positioned to identify intangible harms that meet minimum Article III requirements, its judgment is . . . instructive and important.'').

commenters may be disagreeing, to some extent, with Congressional decisions about the remedies for certain harms. For example, commenters cited many statutes that they believe create violations of law and large penalties without any corresponding harm to consumers. Those statutes include FACTA requirements for printing credit card numbers on receipts that apply to merchants, a now-repealed EFTA requirement concerning ATM fee notices, TCPA restrictions concerning unsolicited telephone calls, California disclosure requirements for automobile purchases, and CROA, which concerns credit repair products and provides for the remedy of disgorgement of fees paid. While commenters may disagree that unwanted telephone calls, the printing of credit card expiration dates on receipts, or the failure to disclose certain terms of automobile purchase transactions harm consumers, Congress and the State legislatures have the authority to make those judgments and set the remedies for the harms it chooses.

With respect to CROA, as discussed below, since 2005, there have been a number of efforts in Congress to determine whether CROA could be improved by clarifying the CROA credit monitoring coverage issue that commenters raised here. No consensus has been reached to date and the FTC has twice expressed concern about the difficulty in structuring a revision to CROA to address this concern. This history suggests that the author of CROA (Congress) and its enforcer (the FTC) are not certain CROA should be revised, or how. In any event, with respect to CROA and all statutes, it is Congress that sets the remedies and determines coverage for its statutory regimes. Further, though some providers may currently be able to block class actions under these statutes through their use of arbitration agreements, these statutes nevertheless govern providers' conduct and those providers who violate the law may be subject to individual claims. In short, to the extent that commenters believe class actions provide outsized liability under particular statutes without requiring proof of any real harm to consumers, courts, Congress, and State legislatures are presumptively the proper branches of government to address this concern.

Relatedly, one research center commenter cited the Overdraft MDL class settlements as examples of violations of the law where consumers were not harmed. In fact, in the commenter's view, consumers received a benefit from the violations, because the fees generated by those overdraft practices enabled the banks to offer free checking accounts to its customers. Whether those overdraft policies generated revenue from overdrafters that subsidized free checking accounts for consumers generally is beside the point; when companies violate the law, the consumers who are victims of the wrong are better protected and accountability is improved when there is an effective remedy, regardless of how the company may have invested the profits from those violations. If companies were excused from violating the law because doing so allowed them to charge lower prices, they could, for example, justify charging higher prices to a certain race or gender in order to subsidize lower prices to other groups. The Bureau does not believe such a result would protect consumers and likewise does not agree that the overdraft settlements harmed consumers in the way the commenter suggested. To the contrary, the Bureau believes that consumers benefitted from these aspects of the overdraft settlements, which resulted in more transparent upfront pricing that facilitates comparison shopping by consumers.

For all of the reasons stated, the Bureau finds that class action settlements are not wholly random and are sufficiently correlated to merit to deter wrongdoing. The Bureau also does not agree that the deterrence provided by class actions is limited to those cases that result in class settlements or even those that are filed at all. Mere exposure to the potential to be sued for a meritorious class action, in the Bureau's view, creates an incentive to refrain from the conduct that would give rise to that action. As one commenter noted, the exposure to potential liability based on cases filed against other companies often put upper management and boards of directors on notice of widespread misconduct in a way that individual cases are unlikely to do. To appreciate the potential for such a suit, it is not necessary for a company to be aware that another company engaged in the same conduct and was sued.[677] The Bureau therefore adopts its preliminary findings, as further elaborated here, with respect to the fact that class actions deter violation of the law.[678]

In response to commenters that contended that there is no need for the deterrence provided by class actions because companies are fully deterred from violating the law by the threat of public enforcement, the threat of individual litigation, the threat of consumers taking their business elsewhere, or by Tribal regulation and enforcement, the Bureau explained why each of these is insufficient in enforcing the law above in Part VI.B. To the extent these other mechanisms do not allow for sufficient enforcement of the law they also do not sufficiently deter companies from violating the law. As discussed there, the Bureau finds these avenues both individually and jointly insufficient to fully enforce the consumer protection laws.

Moreover, the Bureau has observed, through its experience and expertise that there is not full compliance with the law. Indeed, despite the Bureau's creation and subsequent work, it continues to receive thousands of complaints per month and regularly uncovers wrongdoing that has not been deterred simply by the existence of the Bureau or the threat of individual dispute resolution, whether formal or informal. Further, the Bureau does not believe that the wrongdoing it uncovers is the only wrongdoing that exists, in part because the markets for consumer financial products and services are numerous and often large, and the Bureau's work is necessarily limited by its resources. Thus, the Bureau finds that the commenters' assertion that all providers comply fully with all applicable laws to be unsupported.

As for those commenters that suggested that specific types of providers—such as debt collectors, credit unions, and community banks—have sufficient incentives because of the nature of their particular product or service to comply fully with the law, the Bureau does not find evidence that these entities are sufficiently deterred from violation in a way that warrants their exclusion from the class rule. With respect to debt collectors, commenters noted that whether debt collectors can rely on arbitration agreements is uncertain. This, they contend, means that they already sufficiently invest in compliance. Accordingly, while debt collectors may have more incentive to comply with the law than providers that are certain that they can block class actions, debt collectors still have less incentive to comply than providers that

[677] Although, as discussed above, the fact that providers monitor such filings in order to determine whether adjustments in their practices may be advisable demonstrates that the deterrence incentives are meaningful.

[678] The Bureau notes that one commenter requested that the Bureau commit, if the rule is finalized, to revisit the rule and determine if an increase in frivolous lawsuits occurs as a result. The Bureau notes that it regularly monitors and receives feedback from interested stakeholders on all of the rules that it administers. However, it is premature for the Bureau to decide whether it will conduct an assessment of this final rule pursuant to Dodd-Frank section 1022(d), similar to what it has announced recently regarding certain other final rules.

do not include arbitration agreements in their contracts at all. In other words, while the legal uncertainty with respect to the ability of debt collectors to rely on arbitration agreements to block class actions suggests they may be somewhat more deterred from violations of the law than providers who are certain that they can do so, the Bureau believes that debt collectors will be further deterred from violations of the law once the class rule takes effect and debt collectors are certain that they may not rely on arbitration agreements to block class actions. With respect to credit unions, the Bureau does not believe that member ownership is a sufficient compliance incentive to replace a right to enforce the relevant laws on a class basis, in part because the members of a credit union are not necessarily aware of legal harms and thus may be unable to use the membership structure to hold their credit union providers to account. Moreover, even when consumers are aware, credit union customers do not necessarily engage in active efforts to hold management of the credit union accountable, such as by attending annual meetings.[679] Just as an individual consumer is very unlikely to bring formal legal action over a small-dollar harm, a credit union customer is not necessarily likely to know about membership accountability mechanisms much less to spend the time and effort to coordinate a campaign to use them to hold a credit union accountable for small-dollar harms.[680] Further, even if credit union customers do participate in the accountability process, very few are likely to exercise their vote on this basis alone, particularly over small-dollar harms. Indeed, the Bureau has observed violations of the law by credit unions with respect to their members.[681] For similar reasons, the Bureau further believes that the presence of a financial institution in a community, with the interest of developing and retaining customers in that community, also is not a sufficient compliance incentive to replace a right to enforce relevant laws on a class basis.

Moreover, in the period since the Bureau released the proposal, several more large-scale violations of consumer finance law have become public. In one example discussed above, the Bureau fined a large bank $100 million for widespread illegal practices related to the opening of thousands of unauthorized accounts on behalf of its customers.[682] The Bureau's order in this case addressed unfair and deceptive conduct between 2011 and the date of the order. The existence of the Bureau and the threat of enforcement and supervisory actions evidently did not deter employees of the bank from routinely opening unauthorized accounts on behalf of its customers. Nor did the prospect of individual lawsuits or the threat of losing customers apparently deter the bank's employees from that conduct.

Another example involved a large money transmitter that recently agreed to a $586 million settlement with several public enforcement agencies, including the FTC and the Department of Justice. In that settlement, the money transmitter admitted to criminal and civil violations of the law involving aiding and abetting massive wire fraud by its agents.[683] As the complaint in this case demonstrates, the money transmitter not only failed to meet legal requirements to maintain an effective anti-money laundering program but also appeared to ignore ample evidence gathered through its complaint system (*i.e.,* its mechanism for resolving informal disputes) that indicated the extent of the problem.[684]

In general, the Bureau disagrees with commenters that stated that the Bureau should have further studied current levels of compliance in the marketplace. The Bureau's supervision function has the purpose of assessing compliance and remedying non-compliance either through supervisory resolutions or through referral of cases for public enforcement actions. The Bureau's enforcement function investigates cases where there is reason to believe violations are occurring and pursues those where the evidence warrants doing so. It would not be practical to somehow study compliance levels independent of the work the Bureau does on an ongoing basis through supervision and enforcement, nor would the Bureau expect companies to be forthcoming with evidence of non-compliance were the Bureau to attempt such a study.

With respect to the Bureau's preliminary finding that precluding providers from using arbitration agreements to block class actions would better enable consumers to enforce their rights and obtain redress, some commenters suggested that the other means do sufficiently remedy all violations of law. Those comments are discussed in above in Part VI.B. Otherwise, no commenters disagreed with the Bureau's findings in this regard and the Bureau adopts these findings with respect to the final class rule.

Whether the rule will cause providers to remove arbitration agreements. The Bureau is not persuaded by the industry commenters' claims that, if the Bureau's rule goes into effect, providers inevitably would remove their pre-dispute arbitration agreements because they would be unwilling to subject themselves to the costs of arbitration while simultaneously being exposed to class action defense costs. Once the Bureau's rule goes into effect, class actions will become available to all consumers. Thus, the relevant question is whether, in a world where class actions are available, maintaining arbitration agreements would no longer be in the companies' interest, resulting in the loss of arbitration as a dispute resolution option for those consumers that would have elected to pursue it. If a company were to decide to remove

[679] Robert F. Hoel, ''Power and Governance: Who Really Owns Credit Unions,'' at 25 (Filene Research Institute 2011), *available at https://filene.org/assets/pdf-reports/244_Hoel_Power_Governance.pdf.*

[680] Although Appendix A to the Proposal identified several class action settlements from the Study involving credit unions related to products and services that would be covered by the rule (*i.e.,* excluding EFTA ATM ''sticker'' litigation), industry commenters did not point to any efforts by customers at these or other credit unions to hold the credit union accountable through membership accountability mechanisms.

[681] *E.g.,* Press Release, Bureau of Consumer Fin. Prot. ''CFPB Orders Navy Federal Credit Union to Pay $28.5 Million for Improper Debt Collection Actions,'' Oct. 11, 2016, *available at https://www.consumerfinance.gov/about-us/newsroom/cfpb-orders-navy-federal-credit-union-pay-285-million-improper-debt-collection-actions/;* Tina Orem, ''12 Credit Unions Face Overdraft Suits,'' Credit Union Times (Jan. 5, 2016), *available at http://www.cutimes.com/2016/01/05/12-credit-unions-face-overdraft-suits. See generally* NCUA, ''Administrative Orders,'' *available at https://www.ncua.gov/regulation-supervision/Pages/rules/administrative-orders.aspx* (listing dozens of government enforcement actions against credit unions each year).

[682] Press Release, Bureau of Consumer Fin. Prot., ''Consumer Financial Protection Bureau Fines Wells Fargo $100 Million for Widespread Illegal Practice of Secretly Opening Unauthorized Accounts,'' (Sept. 8, 2016), *available at http://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-fines-wells-fargo-100-million-widespread-illegal-practice-secretly-opening-unauthorized-accounts/.*

[683] Press Release, Fed. Trade Comm'n, ''Western Union Admits Anti-Money Laundering Violations and Settles Consumer Fraud Charges, Forfeits $586 Million in Settlement with FTC and Justice Department,'' (Jan. 19, 2017), *available at https://www.ftc.gov/news-events/press-releases/2017/01/western-union-admits-anti-money-laundering-violations-settles.*

[684] The complaint in this case detailed how the company had gathered 550,928 complaints of fraudulent money transfers involving $632 million. The complaints allowed the company to identify particular agents that should have made the company aware of the agents who were likely implicated in fraudulent transfers. The company not only ignored these complaints on an individual basis but also did not take steps to eliminate the fraudulent agents from its network. *See* Complaint at ¶¶ 18–19, *FTC* v. *The Western Union Co.,* No. 17–00110 (M.D. Pa. Jan. 17, 2017), *https://www.ftc.gov/system/files/documents/cases/western_union_complaint-jan2017.pdf.*

individual arbitration agreements from their consumer contracts, the Bureau believes that these decisions would not be motivated by the costs associated with individual arbitrations because those costs are minimal. Instead, such a decision would suggest the company only viewed the agreement as useful for blocking class actions and no other significant purpose.

Insofar as the Bureau believes that the cost of individual arbitration is minimally different from litigation, it remains skeptical that this is the reason that will cause companies to remove arbitration agreements from their contracts. Specifically, the Bureau is unpersuaded that providers incur significant net costs in connection with maintaining pre-dispute arbitration agreements today. As the commenters indicated, providers generally pay the bulk of the filing fees, hearing fees, and arbitrator compensation in individual consumer financial arbitrations. In consumer arbitrations conducted by AAA, the provider is responsible for a filing fee of $1,700 to $2,200; a hearing fee of between $0 and $500; and arbitrator compensation of between $750 per case and $1,500 per day, depending on the type of arbitration.[685] However, the Bureau believes that, in many cases, these fees may be offset by savings from streamlined procedures, such as limited discovery in arbitration, fewer in-person hearings, reduced motions practice, and less need to hire local counsel, among others.[686] Indeed, one research center commenter that otherwise strongly opposed the rule stated its belief that arbitration saves money for both consumers and companies. Further, as noted above, while commenters asserted that they expend significant resources to ''subsidize'' arbitration, no commenter provided a specific accounting or any other concrete evidence to support this assertion.

The commenters' arguments that they incur significant net costs in connection with individual arbitration are further undermined by the fact that most providers face no arbitrations and those that do, face very few. The Study identified about 616 AAA consumer arbitrations per year for six large consumer financial markets, about 411 of which were filed by consumers.[687] Because individual providers face so few arbitrations, even if individual arbitration is marginally more expensive than defending the same claim in court (and the Bureau makes no determination on that issue), providers are unlikely to realize such dramatic cost savings by removing their arbitration agreements that it is inevitable that they will do so for cost savings reasons alone.

The Bureau also remains skeptical that providers would be unwilling to litigate individual disputes in both arbitration and court once the Bureau's rule goes into effect because providers already litigate disputes in both fora today. Providers with arbitration agreements also must litigate in State and Federal court to the extent they are sued by individuals with whom they do not have contractual relationships or to the extent that consumers sue them in Federal or State court and the provider does not move to compel arbitration (which the Study showed occurred in nearly all individual cases filed in Federal court).[688] While commenters cited several reasons why providers currently maintain two tracks of litigation, they did not challenge the Bureau's underlying assertion that providers indeed do so. With respect to the commenter that criticized the Bureau's sample of 140 individual Federal court cases against companies with arbitration agreements as too small to draw the conclusion that providers rarely invoke arbitration in individual cases, the Bureau disagrees because its analysis of individual Federal cases reviewed 1,205 cases and found invocation of arbitration was very rare.[689] More broadly, neither that commenter nor others cited specific evidence suggesting that the Study undercounted instances in which companies invoked arbitration clauses in individual cases.

With respect to some industry commenters' contention that anti-severability provisions in arbitration agreements show that providers would choose to remove arbitration agreements if this rule were finalized, the Bureau understands that providers have adopted anti-severability provisions for the purpose of preventing cases from proceeding as class arbitrations if a court were to find a no-class provision to be unenforceable in a particular case.[690] Because those provisions were created for a different purpose, the Bureau does not construe the clauses to reveal a preference against maintaining individual arbitration once this rule becomes effective.[691]

For the reasons described above, the Bureau does not believe that commenters set forth persuasive reasons for concluding that the costs of individual arbitration would cause them to remove their arbitration agreements once the class rule becomes effective.

Whether loss of individual arbitration harms consumers. The Bureau further believes that, even if providers do remove their arbitration agreements, harm to consumers would be negligible because so few consumers pursue arbitration today. The Study showed that very few individual consumers filed claims in arbitration about consumer financial products; as noted, there were just over 600 arbitration filings per year in the six product markets studied and just over 400 of those were filed by consumers. By contrast, more than 60 million consumers per year were eligible for either cash or in-kind relief from class actions in the five-year period covered by the Study. Indeed, more than 34 million of these consumers obtained cash relief over five years studied, or more than six million per year. Thus, the number of consumers who sought relief in arbitration pales in comparison to the number who actually obtained relief through class actions. The number of consumers who sought relief in arbitration also pales in comparison to the benefited to consumers from the deterrent effect of class actions, which is discussed above in this Part VI.C.1.

In any event, even if consumers do not have access to arbitration for individual claims those still can be filed in court, including small claims court.

[685] AAA, ''Consumer Arbitration Rules,'' at 33 (fees effective January 1, 2016).

[686] *See generally* Study, *supra* note 3, section 4 (comparing the procedures available in Federal court with the generally more streamlined procedures in arbitration). *See also AT&T Mobility, LLC* v. *Concepcion,* 563 U.S. 333, 345 (noting that ''the informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution.'').

[687] Study, *supra* note 3, section 1 at 11.

[688] *Id.* section 6 at 57–60.

[689] *Id.* section 6 at 59. The 140 individual cases cited by the commenter were those against credit card companies where the Bureau could determine that those companies included arbitration agreements in their consumer contracts. *Id.* section 6 at 61. In that set of cases, the rate of invocation was 5 percent. In the larger set of 1,205 Federal individual cases where the Bureau could not determine whether the defendant companies included arbitration agreements in their consumer contracts, the Bureau also found a very low rate of invocation, only 1 percent. *Id.* section 6 at 59.

[690] *See, e.g.,* Alan S. Kaplinsky & Mark J. Levin, ''Arbitration Update: Green Tree Financial Corp. v. Bazzle–Dazzle for Green Tree, Fizzle for Practitioners,'' 59 Bus. L. 1265, at 1272 (2004) (stating that companies should consider adopting anti-severability provisions ''in order to protect themselves from class-wide arbitration such as occurred in [*Green Tree Financial Corp.* v. *Bazzle,* 539 U.S. 444 (2003)].'').

[691] With respect to the industry commenter's contention that post-dispute arbitration will not fill the void created by the removal of pre-dispute arbitration agreements, the Bureau does not address this comment because the Bureau did not assert in the proposal (and does not assert in the final rule) the argument that this comment is addressing, nor did any other commenter make it.

As is discussed above, the Bureau is not making a finding as to whether individual arbitration is superior to individual litigation for consumers; it finds that any such comparison is inconclusive. However, even assuming that arbitration is a better forum for resolution of individual disputes than the courts—and the Bureau does not have any basis to so assume—the few hundred consumers who would be forced to file in court rather than in arbitration if providers stopped using arbitration agreements would be harmed only to the extent that arbitration is worse for them than litigation. These consumers would not be left without a forum to prosecute their individual claims. Given the extremely low number of consumer-filed AAA and JAMS arbitrations, the Bureau believes that the magnitude of consumer benefit, if any, of individual arbitration over individual litigation would need to be implausibly large for the elimination of some, or even all, arbitration agreements to make a noticeable difference to consumers in the aggregate.

Because the Bureau believes that preserving consumers' right to participate in a class action is for the protection of consumers even if providers will no longer include arbitration agreements in their consumer contracts, it is not necessary to address each individual argument cited by commenters about why arbitration is a superior forum for dispute resolution than litigation. However, the Bureau notes that there is reason to be skeptical of those arguments. For example, while many industry commenters asserted that arbitration is less expensive for consumers to pursue than litigation because filing fees are generally less, the Bureau notes that one-third of the arbitration agreements analyzed in the Study required consumers to reimburse fees and expenses paid by the company if the consumer loses the arbitration.[692] Thus, while arbitrating a successful claim might cost less in fees than an individual litigation, arbitrating an *unsuccessful* claim could be quite expensive for a consumer, especially as compared to litigation where a consumer will not bear additional expenses if he or she loses a claim. Indeed, this risk may even deter consumers who are aware of these cost-shifting provisions from pursuing individual arbitration because a consumer who loses the case could end up worse off than if he or she had never filed a claim in the first place.

[692] Study, *supra* note 3, section 2 at 65–66 tbl. 13.

Moreover, some of the commenters that addressed the cost of arbitration only compared it to the cost of litigating in Federal court. The Bureau believes that many of the consumers who would otherwise choose arbitration will pursue their claims in small claims courts or courts of general jurisdiction if arbitration is not available going forward. Filing fees in these courts are frequently quite reasonable and almost always far lower than Federal court.[693]

As to the comments that noted that consumers often succeeded in arbitration claims without an attorney and thus did not need attorneys in arbitration, the Bureau notes that consumers likewise do not need attorneys to pursue claims in small claims court, which is the most apt comparison to arbitration because it offers streamlined procedures similar to those available in arbitration.[694] As to the comments that noted that arbitration can be conducted telephonically or online, the Bureau notes that this may save consumers some time compared to individual litigation which may be required to be filed and heard in-person. But this time savings alone does not make arbitration superior, given the other issues described above.

As for the commenters' assertion that most harms that are suffered by consumers are individualized and not classable, the Study showed that there are millions of consumers who suffer group harms, as reflected by the number of consumers who obtained relief in class actions (60 million per year), and the Bureau's experience and expertise in supervision and enforcement is consistent with this conclusion. Most consumer financial products and services involve products offered on the same terms to all customers, so it stands to reason that when these terms violate the law, they harm all consumers bound by them. While there was no dispute that some consumers suffered individualized harms, commenters did not put forth any data that both contradicted the Bureau's Study and supported commenters' assertion that most harms were individualized and not classable.[695]

[693] *E.g.,* N.Y. Uniform. Just. Ct. Act section 1803(a) (setting filing fees for small claims court at between $10 and $20); Cal. Civ. Proc. sections 116.230(b)–116.230(d) (same with fees between $30 and $75). *See also* Study, *supra* note 3, section 4 at 10–12 (which stated that the fee for filing a case in Federal court is a $350 plus a $50 administrative fee, while the fee for a small claims filing in Philadelphia Municipal Court ranges from $63 to $112).

[694] *E.g.,* District of Columbia Court, ''Small Claims and Conciliation Branch,'' (noting that ''The Small Claims Branch is less formal than other branches of the Court. The procedures are simple and costs kept low so that most people do not need a lawyer to represent them in their small claims case. You must be 18 years old to file a case.''). *http://www.dccourts.gov/internet/public/aud_civil/smallclaims.jsf* (last visited Dec. 20, 2016).

Some industry commenters have argued that more consumers would use arbitration if only they understood the process more, if arbitration agreements were drafted more clearly, or if consumers were properly educated to the benefits of arbitration (whether by the Bureau or by providers or both), thereby reducing the disparity between the number of consumers who use arbitration and the number who obtain relief in class actions. The Bureau is not persuaded that the presence of education or promotional materials would, for dispute resolution, materially alter the dynamics that result in so few individual arbitrations for all of the reasons discussed above at Part VI.B.2. The alternatives offered by commenters are addressed in detail in the Section 1022(b)(2) Analysis below at Part VIII.G.

2. By Enhancing Compliance With the Law and Improving Consumer Remuneration and Company Accountability, the Class Rule Is in the Public Interest

In the proposal, the Bureau also preliminarily found that the class rule would be in the public interest. This preliminary finding was based upon several considerations which individually and collectively supported that finding. First, as discussed extensively above, the Bureau believed that its preliminary finding that the class proposal would protect consumers also contributed to a finding that the class proposal would be in the public interest.

Second, the Bureau preliminarily found that the proposal was in the public interest because of the effect it would have on leveling the playing field in markets for consumer financial products and services. The Bureau preliminarily found that the class proposal would create a more level playing field between providers that concentrate on compliance and providers that choose to adopt arbitration agreements to insulate themselves from being held to account by the vast majority of their customers and, as the Study showed, from virtually any private liability.

[695] While many commenters highlighted that the amount of relief awarded in arbitration was much higher than what was awarded in individual litigation, they failed to explain the relevance of this distinction. As noted above in Part VI.B.2 class actions are typically brought to remedy small harms suffered by large groups of people that are unlikely to be brought individually. Thus, it is not surprising that those claims that consumers do bring individually involve much larger claim sums.

Specifically, the Bureau stated in the proposal that it believed that companies that adopt arbitration agreements with class action prohibitions to manage their liability may possess certain advantages over companies that instead make greater investments in compliance to manage their liability, both in their ability to minimize costs and to profit from the provision of potentially illegal consumer financial products and services. The Bureau does not expect that eliminating the advantages enjoyed by companies with arbitration agreements that have class action prohibitions would necessarily shift market share to companies that eschew such arbitration agreements (and instead focus on upfront compliance) because the competitive balance between companies would continue to depend on many additional factors. It thus did not count the effects of this factor as a major element of the Section 1022(b)(2) Analysis. However, the Bureau preliminarily found that eliminating this type of arbitrage as a potential source of competition would be in the public interest.[696]

Third, the Bureau preliminarily found that the class proposal was in the public interest because it would have the effect of achieving greater compliance with the law which creates additional benefits beyond those noted above with respect to the protection of individual consumers and impacts on responsible providers. Federal and State laws that protect consumers were developed and adopted because many companies, unrestrained by a need to comply with such laws, would engage in conduct that is profit-maximizing but that lawmakers have determined disserves the public good by distorting the efficient functioning of these markets. These Federal and State laws, among other things, allow consumer financial markets to operate more transparently and to operate with less invidious discrimination, and for consumers to make more informed choices in their selection of financial products and services. Thus, the Bureau believed that by creating enhanced incentives and remedial mechanisms to enforce compliance, the class proposal could improve the functioning of consumer financial markets as a whole. First, enhanced compliance would, over the long term, create a more predictable, efficient, and robust regime. Second, the Bureau also believed enhanced compliance and more effective remedies could also reduce the risk that consumer confidence in these markets would erode over time as individuals, faced with the non-uniform application of the law and left without effective remedies for unlawful conduct, may be less willing to participate in certain sections of the consumer financial markets. For all of these reasons, the Bureau stated in the proposal that it believed that promoting the rule of law—in the form of accountability under transparent application of the law by providers of consumer financial products or services—would be in the public interest.

In the proposal, the Bureau also addressed several reasons stakeholders had given during both the SBREFA process and ongoing outreach to support their belief that the class rule was not in the public interest. These stakeholders had expressed concern that the class rule would, among other things, cause providers to remove arbitration agreements from their contracts thereby negatively impacting the means available to consumers to resolve individual disputes formally and informally, impose costs on providers that would be passed through to consumers, and reduce incentives for innovation in markets for consumer financial products and services. In the proposal, the Bureau addressed concerns regarding whether the class rule would cause providers to remove arbitration agreements from their contracts in the context of its public interest finding; however, for this final rule, the Bureau addresses those comments above in Part VI.C.1 in connection with its finding that the class rule is for the protection of consumers. The Bureau does so because many commenters contended that the loss of individual arbitration would harm concerns because arbitration is a superior form of dispute resolution than individual litigation. The Bureau notes, however, that if providers choose to remove arbitration agreements from their contracts, that the loss of individual arbitration as a form of dispute resolution arguably impacts both providers and the public interest. Accordingly, the Bureau incorporates that discussion with respect to its public interest findings as well.

With respect to pass-through costs, the Bureau preliminarily found that the class rule would still be in the public interest, even if some costs of the rule may be passed through to customers. First, the Bureau stated in the proposal its belief that compliance, litigation, and remediation costs generally are a necessary component of the broader private enforcement scheme, and that certain costs are vital to uphold a system that vindicates actions brought through the class mechanism. Thus, the Bureau preliminarily found that the specific marginal costs that would be attributable to the class rule are similarly justified, even if some of those costs are passed through to consumers. Second, the Bureau preliminarily found that given hundreds of millions of accounts across affected providers, the hundreds or thousands of competitors in most markets, and the numerical estimates of costs as specified in the Section 1022(b)(2) Analysis, the Bureau did not believe that the expenses due to the additional class settlements that would result from the class rule would result in a noticeable impact on access to consumer financial products or services. Similarly, the Bureau preliminarily found that the potential cost impacts on small providers, and individual providers more generally are not as large as some stakeholders have suggested based on the detailed analysis in the Section 1022(b)(2) Analysis that factors in the likelihood of litigation, recovery rates, and other considerations.

With respect to innovation, the Bureau noted that some stakeholders suggested that the class rule would discourage innovation in that providers would refrain from developing or offering products and services that benefit consumers and are lawful due to concerns that the products may pose legal risk, for instance because they are novel. The Bureau preliminarily found that some innovation can disserve the public and that deterring such innovation would actually be in the public interest. The Bureau noted examples of such innovation in the mortgage market that were a major cause of the financial crisis and led to the introduction of a set of high-risk

[696] The Bureau recognizes, of course, that under the current system companies without arbitration agreements can level the playing field by adopting such agreements. But the Bureau believes that the public interest would be served by a system in which a level playing field is achieved by bringing all companies' compliance incentives up to the level of those that face class action liability for non-compliance. The public interest would not be served by a system in which the level playing field is achieved by bringing compliance incentives down to the level of those companies that are effectively immune from such liability. Indeed, ''races to the bottom'' within the consumer financial services markets were a significant concern prompting Congress to enact the Dodd-Frank Act because of their potential impacts on consumers, responsible providers, and broader systemic stability. The Restoring American Financial Stability Act of 2010, S. Rept. 111–176 (2010), at 10 (''This fragmentation led to regulatory arbitrage between Federal regulators and the States, while the lack of any effective supervision on nondepositories led to a 'race to the bottom' in which the institutions with the least effective consumer regulation and enforcement attracted more business, putting pressure on regulated institutions to lower standards to compete effectively, 'and on their regulators to let them.'').

products and underwriting practices.[697] Similarly, the Bureau noted that Congress enacted the CARD Act in response to ''innovation'' in the credit card marketplace—such as the practice of triggering interest rate hikes based on ''universal default''—that made the pricing of credit cards more opaque and unpredictable for consumers and distorted what was then the second largest consumer credit market.[698]

Conversely, the Bureau preliminarily found that some innovation is designed to mitigate risk. For example, many banks and credit unions are experimenting with ''safe'' checking accounts (accounts that do not allow consumers to overdraft) and these products are designed to reduce overdraft risks to consumers. Similarly, some credit card issuers have experimented with products with fewer or no penalty fees as a means of reducing risk to consumers. The Bureau believed that to this extent the class proposal would affect positive innovations of this type—it would tend to facilitate them. The Bureau further preliminarily found that even if the class rule deterred some positive innovation on the margins, the benefits of the class proposal justified any such impact on innovation.[699] Thus, the Bureau preliminarily found that the class rule would still be in the public interest, notwithstanding its impact on innovation in the consumer financial marketplace.

Comments Received

The Bureau preliminarily found that the class proposal would protect consumers for all of the reasons described above in Part VI.C.1, level the playing field in the market for consumer financial products and services, and that compliance with the law generally benefits the public interest. Commenters that opposed this preliminary finding on the public interest generally did not dispute the affirmative points made by the Bureau in the proposal, but rather cited several reasons that the commenters believed led to the conclusion that the class proposal was not in the public interest (at least some of which the Bureau had preliminarily addressed in the proposal). These arguments are discussed in detail below. Many consumer advocate and individual commenters agreed with the Bureau's preliminary findings that the class proposal is in the public interest because it would level the playing field between providers and produce other benefits through enhanced compliance with the law. For example, a consumer advocate commenter agreed with the Bureau's preliminary finding that pre-dispute arbitration agreements harm competition and put providers that do follow the law at a competitive disadvantage. An individual commenter that was formerly the FINRA Director of Arbitration also agreed that the rule was in the public interest and cited the long-term success of FINRA's similar rule as applied to broker-dealers and their customers.[700]

Pass-through costs. Numerous individual commenters expressed a general concern about the possibility of higher prices for their products as a result of the proposal. These comments urged the Bureau not to adopt the proposal but did not elaborate on their pricing concerns.[701] Numerous industry, research center, and State regulator commenters also asserted that the potential for pass through of costs of the rule to consumers and related effects on consumers should invalidate the Bureau's preliminary finding that the class proposal was in the public interest. These commenters contended that an increase in defense costs for companies will force them to raise prices for consumers, decrease their services or slow innovation, none of which are in the public interest. For example, a comment from trade associations representing depository institutions cited law and economics research—some of which relied in part on empirical studies outside of the consumer finance context and one of which made claims about the lack of consumer benefit achieved by statutory claims—as support for its conclusion that the cost of class actions are passed through to consumers and that consumers gain little benefit in return. To support this point, another industry trade association cited to a law review article discussing economic principles. That industry commenter also asserted that the Bureau's preliminary findings largely rejected the notion that businesses pass on the cost savings of arbitration to consumers.

In contrast, some commenters were supportive of the Bureau's preliminary finding acknowledging that some costs of the rule may be passed on to consumers, but concluded that this effect did not negate the impacts of the rule that advanced the public interest. For example, two commenters questioned whether providers would in fact pass through costs to consumers. A public-interest consumer lawyer stated that, in its view, assertions of pass-through costs have not been supported by credible economic data or studies. Similarly, a research center stated that the Bureau's Study supported the conclusion that any cost savings from arbitration agreements are not, in fact, passed on to consumers. A few consumer advocate commenters and a public-interest consumer lawyer commenter stated their belief that there is no evidence that companies pass-through savings from pre-dispute arbitration agreements to customers and thus conversely no evidence that the class rule would increase costs for consumers.

An individual commenter contended that higher prices passed on to consumers may force some consumers out of particular credit markets that the consumers could have afforded if the Bureau's proposal were not finalized. Several automobile dealers commented that the class rule will raise the price of automobile loans significantly, even pricing some credit-challenged customers out of automobiles, although the commenters provided no specific calculations or details. A group of automobile dealers also asserted that the cost of a motor vehicle could increase. Several other automobile dealers further asserted that costs may be passed on by the indirect automobile lenders to the dealers through indemnification obligations. An individual commenter further noted that, although Section 10 of the Study found no statistically significant increase in the total cost of credit (whether for consumers overall or any sub-segment) in analyzing credit card pricing patterns after some issuers temporarily dropped their arbitration agreements, the Study found an increase in Annual Percentage Rate (APR) for consumers with lower credit scores and an increase in annual fees for all customers. In the view of this commenter, this data suggests that the card issuers' goal was not necessarily to

[697] *See* Fin. Crisis Inquiry Comm'n, ''The Financial Crisis Inquiry Report,'' at 104–05 (2011), *available at https://www.gpo.gov/fdsys/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf* (discussing creation of a larger, new, subprime mortgage market, expanded use of high-risk products such as certain adjustable rate mortgages, and looser underwriting practices).

[698] *See* Bureau of Consumer Fin. Prot., ''CARD Act Report,'' at 27, 74 (2013), *available at http://files.consumerfinance.gov/f/201309_cfpb_card-act-report.pdf.*

[699] In the proposal, the Bureau also discussed two other reasons that stakeholders had given for why the class rule was not in the public interest: that class settlements deliver windfalls to named plaintiffs and class members and that the class rule would negatively affect the means available for consumers to resolve individual disputes in arbitration because the class rule will cause companies to remove arbitration agreements from their contracts. The first issue is addressed above in Part XX, and the second issue is addressed above in Part XX.

[700] FINRA, ''Class Action Claims,'' at Rule 12204(d).

[701] The Bureau received over 110,000 similar comments, mostly from individuals.

pass on new costs to their customers, but instead to adjust certain pricing components that tended to make cards *appear* less attractive for riskier customers. That is, this commenter believed card issuers sought to ''screen out'' lower-value customers in particular due to the increased probability that amounts would be refunded in class actions, which rendered such customers particularly less profitable to the card issuer.[702]

An industry association representing small-dollar lenders and a commenter in this industry asserted that because many States limit not only the interest rates but also the fees that small-dollar lenders can charge consumers, those lenders may not be able pass through such costs onto consumers. These commenters contended that the class rule would therefore pose a particular threat to the business model for small-dollar lenders, who are lenders of last resort for consumers. The commenters predicted that the class rule could force consumers to resort to unlawful lenders if the rule forced small-dollar lenders out of business. Similarly, a Tribe that operates a small-dollar lender stated that the class rule would harm the underbanked in particular. Several credit union and credit union trade association commenters noted that credit unions are member-owned and thus the cost on providers to defend additional class actions is passed on to their members directly even in the absence of higher fees. A credit union trade association also cited a survey of its members as indicating that almost half expected to need to raise the cost of credit as a result of the class rule.[703] As discussed above in Part III.D.9, automobile dealer commenters and others also criticized the Bureau's Study of pricing by credit card issuers that had removed arbitration agreements from their consumer contracts as the result of litigation and raised a number of criticisms of the methodology and analysis of that Study. A Congressional commenter stated his view that the class rule would likely cause financial institutions to increase the cash reserves they hold to mitigate litigation risk. The commenter stated that this increase in cash reserves could, in turn, reduce the amount of cash that institutions have available to lend to consumers and small businesses, or to invest in technology upgrades and employee retention. The commenter referred to this effect as creating ''dead capital.''

Innovation and availability of products. Several industry commenters, a research center, and a group of State attorneys general contended that the class rule as proposed is not in the public interest because it would deter innovation. In general, these comments were very high-level and did not offer specific data or examples of how this would happen. A group of State attorneys general, who described the rule as paternalistic, asserted in their comment that the class proposal would limit competition among providers and that competition benefits consumers because it generally produces lower prices and better products. An association of State regulators asserted that the rule will deter innovation, which would harm consumers and the public interest. An industry commenter asserted that the class rule is not in the public interest because it would deter innovation without producing a corresponding benefit to consumers or the public.

Generally, comments about the impacts on innovation did not touch on particular products. The Bureau did receive comments from a credit reporting agency and an industry trade association that raised concerns regarding the impact the class rule could have on their ability to offer credit monitoring and related credit education products they may develop due to potential for new exposure to CROA class actions, as discussed more fully above in Part VI.C.1 above. The Bureau explains below in the section-by-section analysis of § 1040.3(a)(4) in Part VII why it finds an exemption for these products not to be in the public interest. A research center commenter also stated its belief that the rule would have a devastating effect on peer-to-peer lending and financial technology products because individuals lending money through these platforms may no longer be able to do so if they are subject to class action lawsuits and have to bear that risk.

One industry commenter appeared to agree with the Bureau's preliminary finding that some types of innovation can harm consumers and the public interest while noting that some types of innovation fall in a ''gray area'' between benefitting and harming the public interest. A consumer advocate commenter agreed with the Bureau's preliminary finding, asserting that valuing unbridled innovation over compliance with the law is inappropriate.

Payments to plaintiff's attorneys. Many Congressional, industry and individual commenters and a research center criticized the Bureau's preliminary finding that class actions are in the public interest because they believe the Bureau failed to adequately consider the costs of class actions that settle, both to consumers and to industry. Many industry and individual commenters stated their view that class actions are not in the public interest because a disproportionate share of class action settlement proceeds go to plaintiff's attorneys rather than to consumers. According to many of these commenters, the amounts that plaintiff's attorneys receive from class actions are relevant to determining whether class actions are in the public interest because attorney's fees are often deducted from settlement amounts that would otherwise go to consumers. For example, one industry commenter noted that the Study showed that plaintiff's attorneys received, on average, more than $1 million in fees from each class settlement. As a percentage of the total settlement amount, the commenter further noted that the attorney's fees were 41 percent of each settlement, on average, with a median of 46 percent.[704] Another commenter cited examples from an external study of class actions in which class members received small payouts while attorneys received large fee awards.[705]

Relatedly, many industry commenters criticized the Study for reporting on the percentage of attorney's fees compared to the total settlement amount available to consumers, rather than compared to the amount actually paid to consumers. These commenters stated that this was misleading because consumers in class settlements often do not file claims in those cases that require it and thus consumers rarely receive the full settlement amount. Accordingly, these commenters believe that the proportion of the settlement payments that are paid to attorneys is significantly higher than reflected in the Study. One research center commenter suggested that the Bureau should have considered whether the total amount of money paid to plaintiff's attorneys from class action settlements analyzed in the Study—$424,495,451—is an acceptable cost. This commenter also noted that the Study showed that attorney's fees were a significantly higher proportion of smaller class action settlements than of larger settlements. For example, the commenter noted that attorney's fees

[702] Some commenters also characterized the removal of arbitration agreements by companies in response to the class rule as a form of pass-through costs to consumers. The Bureau analyzes the issue of whether providers will remove arbitration agreements separately, above in Part VI.C.1.

[703] The application of the rule to Tribal entities and credit unions is discussed below in the section-by-section analysis of 1040.3 in Part VII.

[704] Study, *supra* note 3, section 8 at 34 tbl. 11.

[705] Mayer Brown, *supra* note 519.

were 56 percent of the total relief in settlements of less than $100,000.

Some industry commenters questioned the accuracy of the Bureau's Study with respect to the amounts paid to plaintiff's attorneys from class action settlements because those amounts were lower than found in other studies. For example, whereas the Bureau's Study found that the combined plaintiff's attorney fees over all of the 419 class action settlements analyzed were 16 percent of gross relief made available, and 21 percent of the combined payments made to consumers, one research center commenter cited a study of class action settlements in cases filed in one Federal district court concerning both consumer financial and other products under a limited number of Federal statutes that found plaintiff's attorney fees were rarely less than 75 percent of the total amount paid to the class.[706] Similarly, another industry commenter cited a 1999 study of class action settlements that found that in three out of 10 cases studied, involving a range of consumer markets not limited to consumer finance, plaintiff's attorneys received more in fees than consumers received in compensation.[707] Another industry commenter criticized the efficiency and fairness of class action settlements that provide significant plaintiff's attorney fees but provide only *cy pres* relief to consumers.[708]

Several consumer advocate commenters explained that in many cases attorney's fees are awarded after a settlement is reached and that, therefore, they do not impact consumers' recovery; one commenter also provided several examples. A consumer advocate commenter explained that courts typically calculate fees as a reasonable percentage of the value of the settlement and, therefore, attorneys receive fees only when they have created value for class members. This commenter noted that Federal Rule 23(h) empowers judges to determine reasonable compensation for attorneys in class actions. Several commenters noted that various factors, including results achieved, risk, and the age and difficulty of the case may impact a court's fee award. A letter from a coalition of consumer advocates further disputed claims that attorney's fees are excessive in class actions. Several comments cited to the Study and noted that fees were a reasonable 21 percent of cash compensation paid to consumers and only 16 percent of all relief awarded. One of these commenters cited to another study that showed that attorney's fees may be even lower than found in the Study—only 15 percent of awards in an analysis of 688 Federal class actions.[709] A public-interest consumer lawyer commenter further disputed the relative impact of attorney's fees by noting its agreement with the Bureau that mechanisms exist to curtail frivolous litigation. A comment from a consumer lawyer explained that attorney's fees provide motivation to private attorneys to act as a market check on bad actors and bad practices. One consumer advocate commenter noted that the cost of class action settlements, including the cost of settlements themselves and defense costs, is likely lower than the cost of litigating each class member's claims in a separate case. Another consumer lawyer acknowledged that some lawsuits are frivolous but stated that the court system does a good job at weeding them out.

Several industry commenters criticized the Bureau's preliminary finding that class actions are in the public interest because they contend that the class action mechanism primarily benefits plaintiff's attorneys who abuse the mechanism for their own financial gain. One such industry commenter contends that attorneys file putative class claims out of self-interest, rather than to benefit consumers. That same industry commenter cited instances from the mid-2000s where courts or prosecutors found plaintiff's attorneys had made improper payments to individuals to recruit potential plaintiffs. The commenter further contended that class action settlements are typically structured to benefit the plaintiff's attorneys rather than the absent plaintiffs because the named plaintiffs have almost no involvement in the case. Indeed, the commenter argued that because plaintiff's attorney fees are based on the total amount of the settlement, attorneys have an incentive to negotiate a high settlement amount, but have no incentive to structure the settlement such that absent class members actually receive that amount. This commenter further asserted that plaintiff's attorneys often enter into ''clear sailing'' agreements with defense counsel in class cases, through which defendants agree not to object to awards of attorney's fees below a certain amount. In the commenter's view, these agreements benefit plaintiff's attorneys at the expense of absent class members because the plaintiff's attorneys have no incentive to negotiate for better compensation for class members when they know that they will receive high fees through the settlement. One industry commenter added together the amounts awarded to plaintiff's attorneys in the Study and the Bureau's estimate of costs to defend class actions from the Section 1022(b)(2) Analysis below in Part VIII and contends that the combined totals indicate that attorneys (whether plaintiff's attorneys or defense attorneys) benefit more from the rule than do consumers.[710]

The same industry commenter further contended that courts do not adequately supervise class action settlements to ensure that they are fair to absent class members, notwithstanding the court's obligation to do so under the Federal Rules of Civil Procedure and analogous State rules. The commenter, citing a law review article that refers to the legislative history leading to the adoption of CAFA, asserted its belief that courts face pressure to approve settlements in class action cases to clear their dockets and thus do not adequately supervise settlements.[711] A research center commenter cited a study for the proposition that judges are more likely to approve class settlements in cases where the claims are weak because of the high cost of litigating the case on the merits.[712]

A consumer advocate commenter disputed the relevance of attorney's fees, noting that they often come from a common fund, meaning that the cost of litigation is paid out of the common fund created by the settlement, and that attorneys only receive fees when they have created value for class members. Other commenters, including consumer advocates, consumer law firms, law

[706] Note that this figure refers to the amount paid to the class (*e.g.,* after claims have been made), not the amount actually awarded. Johnston, *supra* note 520.

[707] Hensler et al., *supra* note 669, at 5, 14. Notably, this Study pre-dated the passage of CAFA.

[708] In class actions, cy pres relief is relief that is distributed to a third party (often a charity) on behalf of consumers, instead of to consumers directly in cases where doing so is difficult or impossible.

[709] The commenter cited to Brian T. Fitzpatrick, ''An Empirical Study of Class Action Settlements and Their Fee Awards,'' (Vand. U. Sch. of L. Pub. L. & Legal Theory Working Paper No. 10–10, 2010), *available at https://ssrn.com/abstract=1442108* (this paper analyzed all Federal class action settlements in all markets, not just consumer finance, in 2006 and 2007).

[710] The Bureau notes that the commenter incorrectly totaled the Bureau's estimates of defense costs from the proposal, as noted in the Section 1022(b)(2) Analysis below in Part VIII.

[711] Linda S. Mullenix, ''Ending Class Actions as We Know Them: Rethinking the American Class Action,'' 64 Emory L. J. 399, at 430 (U. Tex. Sch. of L., Pub. L. Res. Paper No. 565, 2014) (citing Edward Purcell, ''The Class Action Fairness Act in Perspective: The Old and The New in Federal Jurisdictional Reform,'' 156 U. Pa. L. Rev. 1823, at 1883 (2008) (citing House Judiciary views in CAFA legislative process).

[712] Johnston, *supra* note 520, at 13.

academics and others emphasized that attorneys should be compensated for their time. One of these commenters explained that attorneys litigate class actions at considerable risk to themselves. In addition to paying all costs upfront, they do not get paid for their time unless they prevail or settle the case.

Strain on the court system. Several industry commenters, a group of State attorneys general, and a group of Congressional commenters contended the class proposal is not in the public interest because it would increase the number of class action lawsuits filed and therefore create a strain on the Federal and State court systems, which the commenters believe are already overburdened. These commenters asserted that an increase in class action lawsuits will cause delays in judicial administration and increased costs to Federal and State courts. One commenter pointed out that even an unmeritorious class action lawsuit creates a burden on the court system because a court must use its resources to determine whether it should be dismissed. Several industry commenters cited reports and statistics for both State and Federal courts supporting this overcrowding and showing that the number of cases filed have increased significantly since 2013.[713] One industry commenter referred to the class proposal as an ''unfunded mandate'' that the Bureau is imposing on the courts. In contrast, a consumer commenter expressed an opinion that strain on the courts should be minimal because parties pay their own court costs (as opposed to taxpayers funding additional public enforcement).

Harm to relationships between customers and providers. Another industry commenter criticized the proposal as not in the public interest because the commenter predicted that it would harm the relationships between consumers and their financial institutions. The commenter stated its belief that the availability of class actions discourages consumers and financial institutions from informal resolution of disputes.

Federalism concerns. An individual commenter contended that the class rule is not in the public interest because the commenter predicted that it would encourage companies to change their behavior nationwide in response to class actions brought under a single State's consumer protection laws, which could lead to that one State's consumer protection laws trumping Federal laws and other States' laws. This phenomenon was described by the commenter as ''inverse federalism,'' which the commenter viewed as problematic because it contended that certain State legislatures are captured by the plaintiff's bar and thus pass statutes that are not in the public interest. An industry commenter expressed a similar federalism concern. Similarly, an industry commenter contended that *Gutierrez* v. *Wells Fargo,*[714] the overdraft case discussed above in Part VI.B.3 is an example of such inverse federalism in that the case was based on State contract law, rather than Federal law, but nonetheless generated nationwide changes in behavior with regard to bank overdraft practices.

Impairment of freedom of contract. A group of State attorneys general commented that the class proposal is not in the public interest because they believed that it would impair the freedom of contract by preventing consumers and financial institutions from agreeing to certain forms of arbitration. In these commenters' view, there is significant benefit to empowering consumers and companies to contract freely in part because doing so creates prosperity and political freedom. Similarly, one industry commenter suggested that the class rule would deprive consumers of the ability to choose a consumer financial product or service with an arbitration agreement that blocks class actions in order that the consumers could avoid being part of a class action or potentially having contact with plaintiff's attorneys. A research center commenter and a comment from several State attorneys general asserted that because arbitration agreements are not universal in consumer finance contracts, they do not pose substantial problems for consumers because consumers can therefore choose products without them.

In contrast to these comments, a consumer advocate commenter stated its belief that arbitration agreements in consumer contracts are contracts of adhesion because consumers lack bargaining power with their providers and do not negotiate the contracts. An individual commenter asserted that this rule does not implicate freedom of contract because consumers are powerless to refuse terms imposed upon them.

Public policy concerning arbitration and legal uncertainty. Many industry commenters contended that public policy strongly favors arbitration, as exemplified by the Supreme Court's decision in *AT&T* v. *Concepcion.*[715] In *Concepcion,* the Court held that the FAA preempted a California law that would have prohibited the enforcement of a consumer arbitration clause that disallowed participation in class actions. The commenters noted that, in doing so, the majority opinion had referenced ''a liberal Federal policy favoring arbitration.''[716] In these commenters' view, the class rule would override both the FAA and the Supreme Court precedent upholding arbitration agreements and is thus against this public policy. These commenters believed that the authority provided to the Bureau under Dodd-Frank section 1028 is insufficient to supplant this longstanding policy in the absence of clear evidence from the Study, which these commenters asserted the Study did not provide.

A group of State regulators contended that the class rule will harm the public interest because they predicted that the rule would create legal uncertainty in various ways, thereby amplifying the risk of litigation exposure for consumer financial service providers. For example, the commenter asserted that it is unclear how a class rule would affect future cases following *Concepcion* and other case law regarding preemption of State law under the Federal Arbitration Act. The commenter asserted that there was uncertainty with respect to whether proposed § 1040.4(a)(2) would apply to class actions under consumer finance laws only or to all State and Federal class actions. The commenter asserted there was also uncertainty concerning whether Congress's delegation of authority to the Bureau under section 1028 was proper.

Impact on certain State laws. An industry commenter contended that the proposal was not in the public interest (or for the protection of consumers) because of the effect it may have on certain State laws. The comment specifically referred to a Utah statute which authorizes creditors to include class-action waivers in bold type and all capital letters in consumer contracts for closed end credit.[717] The commenter believed that this law would be preempted by the Bureau's proposal and asserted that such a result would not be in the public interest (or for the

[713] U.S. Courts, ''Federal Judicial Caseload Statistics 2016,'' (June 2016), *available at http://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2016;* Exec. Comm. of the Bd. of the N.Y. Cty. Lawyers' Ass'n, ''Task Force on Judicial Budget Cuts Report,'' (Jan. 18, 2014), *available at https://www.nycla.org/siteFiles/Publications/Publications1516_0.pdf.*

[714] *Gutierrez* v. *Wells Fargo Bank, N.A.,* 730 F. Supp. 2d 1080, 1082 (N.D. Cal. 2010).

[715] 563 U.S. 333 (2011).

[716] *Id.* (quoting *Moses H. Cone Memorial Hospital* v. *Mercury Constr. Corp.,* 460 U.S. 1, 24 (1983)).

[717] Utah Code 70C–3–14.

protection of consumers) because it would contradict the determination of the Utah legislature.[718]

Response to Comments and Findings

The Bureau has carefully considered the comments received on the proposal and further analyzed the issues raised in light of the Study and the Bureau's experience and expertise. Based on all of these sources, the Bureau reaffirms its preliminary findings that the class rule is in the public interest because it will benefit consumers (for the reasons discussed above at Part VI.C.1), will level the playing field in the market for consumer financial products and services, and will promote the rule of law—in the form of accountability under and transparent application of the law to providers of consumer financial products or services. As noted, no commenters disagreed with the Bureau's findings with respect to leveling the playing field in the market or promoting the rule of the law. The Bureau addresses commenters' other arguments challenging the Bureau's public interest finding below.

Pass-through costs. With respect to commenters that asserted that the class rule is not in the public interest because providers will pass through increased costs of compliance activities or litigation to consumers, the Bureau disagrees that the risk of a pass-through impact on consumers negates a finding that the rule is in the public interest. The Bureau acknowledged in the proposal and acknowledges again here that there is a risk that some or potentially even all such costs will be passed through to consumers.[719] Commenters have been unable to identify empirical sources that would permit an estimate of the extent of any pass-through effect in consumer financial products and services as a whole or for specific markets.[720] However, despite the lack of conclusive quantifiable data on this issue, the Bureau has carefully analyzed it at each stage of the rulemaking process as detailed in the Study, the proposal, this public interest finding, and the Section 1022(b)(2) Analysis below in Part VIII. The Bureau finds that the risk of pass-through impacts is real, but believes that even if all costs of the rule are passed through to consumers that the overall impact would be relatively modest on any per-consumer basis. Indeed, the Section 1022(b)(2) Analysis finds that the pass-through costs would be, on average, less than one dollar per account per year. The Bureau further finds that these impacts do not negate the conclusion that the class rule is in the public interest.

Furthermore, the Bureau disagrees that the general risk of pass-through costs necessitates a conclusion that the class rule is not in the public interest. Rather, the Bureau believes, as it stated in the proposal, that complying with laws has costs, because exposure to class litigation deters non-compliance (or incentivizes compliance), these additional costs are justified. To incentivize such compliance there must be meaningful consequences for non-compliance. Given the Bureau's findings, as discussed above, that few consumers will invoke individual remedies (either through litigation or arbitration) and that public enforcement is not sufficient to enforce the relevant laws in light of the size of these markets and the limitations on public resources, exposure to class action litigation will serve as an effective compliance incentive. Accordingly, litigation and remediation costs generally are a necessary component of the success of the broader private enforcement scheme.

Thus, in the Bureau's view, the specific marginal costs that are attributable to the class rule are justified and in the public interest because of the resulting benefits in the form of protection of consumers (chiefly deterrence, and where non-compliance has not been deterred, remediation of consumer harm along with a more level playing field). The Bureau finds that the class rule would bring about better compliance and make more remedies for non-compliance available to consumers. Both of these may result in increased costs, but the Bureau finds that the costs are necessary to make covered products generally safer and fairer for consumers.[721]

It is possible that, in certain markets, a particular provider may increase its pricing so as to make its products unaffordable for persons of more limited means, or otherwise change its pricing structure to attract fewer of these customers. Commenters raised concerns along these lines related to certain credit and deposit products, for example. However, the Bureau does not believe that overall pricing across providers in these markets would be so affected as to limit access to products or services. In several of the markets covered by the Bureau's Study, the Bureau found that many providers do not use arbitration agreements today. As demonstrated by the information gathered to estimate prevalence in those markets for the Bureau's impacts analysis in Part VIII below, the Bureau believes the same is likely to be true of many other markets covered by the rule but outside the scope of the Study. In all of these markets, the pricing of providers who do not use arbitration agreements would be unaffected by the rule.

Moreover, even in markets where arbitration agreements are ubiquitous, the Bureau does not believe that to the extent providers pass through costs, they will do so in a way that materially

[718] The commenter also stated that the rule would conflict with similar provisions in other State laws. The commenter did not cite to other laws, however, and the Bureau has not identified other laws of this type. Separately, a credit reporting industry commenter stated that expanding the coverage to reach security freeze activity by consumer reporting agencies would be tantamount to a preemption of State laws allowing consumers to place a security freeze on their credit reports, since, in its view, it is the prerogative of the State legislatures to determine whether to permit class actions under these State laws, whose requirements vary.

[719] As summarized above and in Section 10 of the Study, the Bureau performed what it believes is the most rigorous analysis of potential pass-through effects in the use of arbitration agreements in the consumer financial products and services context by analyzing pricing patterns in the credit card market after certain issuers dropped their arbitration agreements as part of a settlement in an antitrust case. The Bureau found no statistically significant evidence of changes in overall pricing among the issuers who dropped their agreements relative to issuers who did not change their approach to arbitration. However, the Bureau acknowledged in the Study and in the proposal that the results do not allow for conclusive determinations with respect to the likelihood of pass-through costs given that the settlement only required issuers to drop their arbitration agreements for a limited time period. The Bureau's proposal did not make a preliminary finding that the Study indicated that pass-through effects would not occur if the proposal were adopted. In addition, the Bureau disagrees with commenters that assumed that, if the Bureau did not generate an estimate of a particular type of cost, this meant that the Bureau assumed or found that such a cost would not be passed through in the first instance. For example, the Bureau acknowledges that State class action costs and costs of individual settlements may be as likely to be passed through to consumers as other costs that the Bureau was able to generate numerical estimates for.

[720] As noted above, commenters cited some limited empirical evidence from markets for other types of products and services but largely relied on more general economic principles and reasoning.

[721] Some stakeholders have suggested that providers would incur costs that produce no benefits by engaging in compliance management activities that would not result in any changes in the providers' behaviors. According to this view, providers would sustain an increase in costs in the compliance function without any actual change in behavior or added compliance by, for example, double or triple checking previous compliance efforts. However, the Bureau would not expect a firm to waste money confirming that it already complies when it receives no benefit in exchange for that investment. Compliance investments are generally risk-based, and if those activities identify areas where there are consistently no errors detected, then firms may shift their efforts to other areas of higher risk. In addition, as the examples cited above suggest, class actions can assist firms in locating areas where their compliance efforts may be insufficient and allow them to focus their increased compliance efforts in areas where private actions are most likely.

shrinks their customer base. For example, in the automobile market, the Section 1022(b)(2) Analysis below in Part VIII estimates that the overall annual increase in costs to the average firm is $17,049, and the Bureau does not expect any resulting price increase for automobile loans to be significant enough to price a substantial number of consumers out of that market. As for the commenter that suggested that the pass-through costs from the class rule will cause providers to stop offering products to lower-value customers, the Bureau does not believe that the costs as estimated in the Section 1022(b)(2) Analysis are large enough to cause this to occur at an industry-wide level (though it could, however, occur for certain individual providers).

To the extent that commenters such as small-dollar lenders asserted that their industry's profit margins are so thin that their products cannot be offered in a legally compliant manner (including by complying with State usury and other pricing limitations), the Bureau believes that such arguments essentially assert that those products do not currently comply with the law and thus the providers would likely be sued in class actions if their arbitration agreements did not block class actions. To the extent that is the case, the Bureau believes that protecting consumers against products and services that do not comply with the law both benefits consumers for the reasons explained above in Part VI.C.1 and advances the public interest.

To the extent that commenters asserted that the possibility of a differential impact on other particular types of providers or their customers negates a finding that the class rule is in the public interest, the Bureau disagrees.[722] With regard to the particular economic structure of credit unions, as further discussed in the section-by-section analysis of § 1040.3 in Part VII and in the Section 1022(b)(2) Analysis below in Part VIII, the Bureau recognizes that to the extent credit unions absorb increased costs as a result of the class rule, at least some of those costs may be passed on to credit union members in the form of lower dividends. It is also true, of course, that the credit union members will benefit from those costs to the extent they reflect increased levels of compliance or redress for wrongful or legally risky conduct. In any event, the Study indicated, and credit union industry commenters acknowledged, that credit unions do not rely heavily on arbitration agreements. Furthermore, even for the small percentage of credit unions that do employ arbitration agreements, the fact that credit unions are member-owned—and the fact that most credit unions are small institutions—suggests that credit unions are unlikely to face a significant increase in the frequency of class actions and thus unlikely to incur a significant cost increase.[723]. Similarly, to the extent that creditors hold extra cash reserves or are unable to pass through costs and therefore reduce lending, the Bureau believes that this effect would be relatively modest and does not alter the conclusion that the class rule is in the public interest.

The Bureau also has considered the comments that expressed concern that rather than raising prices, companies could instead be forced out of business as a result of the class proposal. To the extent these commenters were concerned that a class action settlement could put a provider out of business, the Bureau believes that risk is low.[724] If paying full relief to consumers in a class settlement would threaten a provider's financial condition, that institution may have leverage to negotiate a settlement that provides less than full relief. In particular, Federal courts have broad discretion to consider the financial condition of the defendant as a factor when determining whether a proposed class action settlement is fair, reasonable, and adequate, as is required by Rule 23 of the Federal Rules of Civil Procedure.[725] Courts have exercised that discretion to approve class settlements that provide considerably less relief to consumers than may have been available if the case proceeded to trial and consumers prevailed.[726] And on the rare occasion that a class action does proceed to trial, the trial court must take into account due process considerations when determining or reviewing damage awards, which naturally leads to a review of the defendant's financial condition.[727]

Innovation and availability of products. In response to commenters that contended that the class rule would deter innovation, the Bureau notes that the implicit premise of this argument is that innovators will be prepared to engage in more legally risky behavior in a regime in which they are exposed only to the risk of individual arbitration or litigation than in a regime in which they

[722] To the extent that commenters argued instead that the rule should exempt particular types of providers, those arguments are discussed in greater detail below in the Section 1022(b)(2) Analysis.

[723] The particular impact of the class rule on small entities is addressed in the Final Regulatory Flexibility Act Analysis below at Part IX. As discussed in detail there, an exemption to the class rule for small entities would not reduce burden by any significant degree for most of the over 50,000 small entities covered by the rule, while at the same time would potentially create significant unintended market distortions. Further, the Bureau notes that insurance may be another way for small businesses to manage concerns about the unpredictability of litigation costs. Insurance is itself a cost, but it reduces exposure to a larger cost that is incurred episodically by some insureds by spreading those costs across a large base of insureds. Some small businesses that participated in the SBREFA process indicated that they maintained potentially useful coverage, although they indicated some uncertainty due to such factors as ambiguous language in insurance contracts and caps on coverage against certain types of claims. SBREFA Report, *supra* note 419, at 23–24.

[724] To the extent these commenters were concerned that compliance with the law would put providers out of business, as discussed below, the rule would still be in the public interest even if certain providers could not offer their products if they had to comply with the law.

[725] *See, e.g., County of Suffolk* v. *Long Island Lighting Co.,* 907 F.2d 1295, 1323–24 (2d Cir. 1990) (affirming that ''ability of the defendants to withstand a greater judgment,'' announced in *City of Detroit* v. *Grinnell Corp.,* 495 F.2d 448, 463 (2d Cir. 1974), remains a factor to be considered by the court when determining whether a class settlement is fair, reasonable, and adequate); *New England Carpenters Health Ben. Fund* v. *First DataBank, Inc.,* 602 F.Supp.2d 277, 280 (D.Mass. 2009) (noting that many courts in the 1st Federal appellate circuit have relied upon the test announced in *Grinnell*); *Girsh* v. *Jepson,* 521 F.2d 153, 157 (3d Cir. 1975) (adopting ''ability of defendants to withstand a greater judgment'' as a factor to be considered), *cited in Osher* v. *SCA Realty I, Inc.,* 945 F.Supp. 298, 304 (D.D.C. 1996) (trial court in D.C. Federal circuit considering ability to withstand greater judgment as a factor); *In re: Jiffy Lube Securities Litigation,* 927 F.2d 155, 159 (affirming trial court approval of settlement taking into account the solvency of the defendants); *Swift* v. *Direct Buy, Inc.,* 2013 WL 5770633 at *7 (N.D. In. 2013) (trial court in 7th Federal appellate circuit considering financial condition of defendant as a factor, based on *Grinnell*); *In re: Wireless Telephone Federal Cost Recovery Fees Litig.,* 396 F.3d 922, 932 (8th Cir. 2005) (''defendant's financial condition'' is a factor that a court must consider); *Torrisi* v. *Tucson Elec. Power Co.,* 8 F.3d 1370, 1376 (9th Cir. 1993) (affirming consideration of defendant's financial condition as a predominant factor).

[726] *See, e.g., In re: Capital One TCPA Litig.,* 80 F.Supp.3d 781, 790 (N.D. Ill. 2015) (court approving proposed $75.5 million settlement, despite estimating that class recovery in a successful litigation would range between $950 billion and $2.85 trillion, because courts ''need not—and indeed should not'' reject a settlement solely because it does not provide full relief, ''especially . . . when complete victory would most surely bankrupt the prospective judgment debtor'').

[727] Courts must take into account the reasonableness of the damages awarded at trial including whether they are so severe and oppressive as to be wholly disproportionate and offending due process under the U.S. Constitution. These considerations naturally lead to analysis of a defendant's financial condition as well. *See, e.g., United States, et al* v. *Dish Network LLC,* Case No. 09cv3073 (C.D.Ill.) (Slip Op. of June 5, 2017 at 373–75, 427–28) (citing due process standards announced in *St. Louis I.M. & S. Ry. Co.* v. *Williams,* 251 U.S. 63, 66–67 (1919), as a significant factor in support of court's decision to award penalties and statutory damages totaling $280 million for violations of telemarketing laws including the TCPA, based on detailed consideration of defendant's financial condition, where plaintiffs had requested $2.1 billion and defendants faced maximum exposure of over $727 billion).

face potential class action exposure. That is at the heart of why the Bureau believes that, on balance, the rule is in the public interest. As the Bureau noted in its proposal, not all forms of innovation necessarily benefit consumers. No commenters disagreed with the Bureau's preliminary findings noting that there are some types of innovation that disserve consumers and the public and the Bureau reaffirms its preliminary findings in this regard. To the extent innovations of these types would be discouraged, the Bureau believes such a result would be in the public interest.[728]

Conversely, the Bureau notes, as it stated in the proposal, that some innovation is designed to mitigate risk and that to the extent that the class rule would affect positive innovations of this type, it would tend to facilitate them. No commenters disagreed with the Bureau's preliminary findings in this regard and the Bureau reaffirms them here.

The Bureau recognizes that there may be some innovation that is designed to serve the needs of consumers but that leverages new technologies or approaches to consumer finance in ways that raise novel legal questions and, in that sense, carries legal risk. The Bureau believes that these innovators who create such products, in general, consider a variety of concerns when bringing their ideas to market and doubts that the innovators would be deterred from launching a new product they would otherwise choose to launch because of the risk of class action exposure. But, even if at the margins, the effect of the class rule would be to deter certain innovations from occurring or to reduce the availability of certain products, the Bureau believes that, on balance, that would be a reasonable cost to achieve the benefits of the rule for the public and consumers. The Bureau believes that, in general, in a well-functioning regulatory regime, entities must balance their desire to profit, such as through innovation, with the need to comply with laws designed to protect consumers.[729] With respect to the commenter that particularly focused on the effect of the rule on peer-to-peer lending, without taking a position on the liability of such peer lenders, the Bureau notes that the pre-dispute arbitration agreements of online lending platforms, generally reference and protect only the platform, not the individual lenders.

In response to commenters that asserted that the proposal would chill innovation without providing any corresponding benefit, the Bureau finds that the class rule would produce significant benefits, as noted throughout the Section 1022(b)(2) Analysis, such as relief provided to consumers through class action settlements and deterring companies from future violations of the law. The Bureau thus finds that the impact of the class proposal on innovation and the availability of products supports, rather than refutes, a finding that the class proposal would be in the public interest because it would incentivize providers to reach the right balance between innovation in the marketplace and consumer protection as well as to encourage innovation leading to more efficient compliance. For all of these reasons, the Bureau reaffirms its preliminary findings, as elaborated here, that the class rule is in the public interest both because of and notwithstanding its impact on innovation or the availability of products in the marketplace for consumer financial products and services.

Payments to plaintiff's attorneys. Many commenters, including those from Congress, industry nonprofits, and individuals also criticized the class rule as not being in the public interest because a substantial portion of class action settlement funds goes to plaintiff's attorneys instead of to consumers. As commenters noted and the Study reflected, the amounts paid to plaintiff's attorneys from class action settlements are substantial—a total of $424,495,451—for the 419 class settlements analyzed in a five-year period, for an average of more than $1 million per settlement.[730] This amounts to 16 percent of gross relief awarded to consumers, and 21 percent of the amounts actually paid to consumers, and are the averages more likely applicable to consumers. And while one commenter emphasized per-settlement attorney's fees percentages from the Study—with a mean of 41 percent and median of 46 percent—such data is less relevant to the average consumer. This per-settlement data reflects the high number of settlements involving claims under statutes that cap the amount of recovery in a class action (such as those involving debt collection under the FDCPA), which necessarily result in lower gross relief to the class and proportionally higher attorney's fee awards, as discussed in detail below in this Part VI.C.2. Indeed, the Study broke out the attorney's fee percentages by class size, which showed that as the size of the class settlement decreases, the proportion of the attorney's fees relative to the total relief awarded consumers increases.[731]

The Bureau does not believe that these data suggest that plaintiff's attorneys are being unjustly enriched, let alone call into question the overall efficacy or value of class actions to the public interest. Commenters did not dispute that it is time-intensive and expensive to litigate large-scale consumer class actions and that most plaintiff's attorneys would not take on such cases if they did not expect to be paid for successful cases. In the typical individual case, an attorney will request a 33 percent or higher contingency from any funds that their client might receive.[732] Indeed, and as is discussed above, the class action procedure was designed to make it economical to pursue small claims *en masse.* Further, no commenters suggested that class actions could be prosecuted on a pro se basis especially given Federal Rule 23's requirement that representation be adequate in order for a class to be certified, and the Bureau found no support for this notion in the Study either. Thus, for class actions to make it economical to pursue small claims *en masse,* they would need to provide fee awards to attorneys, in part, to incentivize attorneys to invest time and resources to litigate class actions on behalf of individual consumers who rationally do not litigate small claims.[733] Under this system, there is no

[728] To the extent that the rule encourages compliance with relevant laws by deterring innovation that involves legally-risky behavior, the Bureau nevertheless believes that the rule would be for the protection of consumers as well as discussed above in Part VI.C.1.

[729] *See* Dan Quan, ''Project Catalyst: We're open to innovative approaches to benefit consumers,'' Bureau of Consumer Fin. Prot. Blog (Oct. 10, 2014), *https://www.consumerfinance.gov/about-us/blog/were-open-to-innovative-approaches-to-benefit-consumers/* (''Consumer-friendly innovation can drive down costs, improve transparency, and make people's lives better. On the other hand, new products can also pose unexpected risks to consumers through dangers such as hidden costs or confusing terms.'').

[730] Study, *supra* note 3, section 8 at 33 tbl. 10.

[731] Study, *supra* note 3, section 8 at 34 tbl. 11. Indeed, the Study showed that in many of the smaller cases, attorney's fee awards were often higher than the amounts awarded to consumers.

[732] *E.g.,* Nora Freeman Engstrom, ''Attorney Advertising and the Contingency Fee Cost Paradox,'' 65 Stan. L. Rev. 633, at 692 (2013) (''For years, commentators have observed that contingency fees are remarkably sticky, hovering around 33 percent.'').

[733] *See* Theodore Eisenberg, et al., ''Attorneys' Fees in Class Actions: 2009–2013,'' (N.Y.U. Sch. of L. Law & Economics Res. Paper Series Working Paper No. 17–02, 2016) *available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2904194* (''If fees are set too low, counsel will not receive fair compensation for their services to the class. Worse yet, if fees are too low, then qualified counsel will not bring these cases in the first place. Injured parties will receive no redress and potential

guarantee that plaintiff's attorneys who invest their time and money in such cases will receive any fee at all. In addition, as described in the summary of the comments above, many plaintiff's attorneys commented in support of the class rule and explained the role that fee awards play in allowing them to pursue class action relief on behalf of consumers that they would not rationally pursue (and thus typically do not pursue) on an individual basis.

With respect to commenters that criticized the fact that plaintiff's attorney fees are deducted from the settlement amounts intended for consumers, the Bureau notes that legal representation has a cost and this cost must be paid so that consumers can achieve class relief. To the extent the fees of plaintiff's attorneys are paid by the beneficiaries of their services (and diminish the beneficiaries' net recovery) that is not, in the Bureau's view, an inappropriate allocation of costs. Indeed, legal representation, like any other service, has a cost and is how most plaintiff's attorneys—class or otherwise—are compensated. The Bureau also notes that deduction of plaintiff's attorney fees from consumer recoveries does not occur in all class actions. Plaintiff's attorney fees in class action settlements can be based on recovery from the ''common fund'' (in which case the fees are subtracted from the amount agreed to be paid to consumers) or they can be awarded separate from the fund in cases where the underlying statute under which claims were asserted provides for attorney's fees.[734] Some commenters suggested that even when attorney's fees are awarded separate from the fund, the company still has an incentive to reduce the amount of the fund in order to make room for the attorney's fees. Assuming this is true, as noted above, this is the cost of litigating class actions and it is reasonable for that cost to be paid (even by consumers) when benefits are achieved in a class settlement.

Similarly, some commenters criticized plaintiff's attorney fee awards because they are based on the amount available to be paid to the class, rather than the amounts that end up being paid out after consumers make claims. As discussed above in Part VI.B.3, however, a significant number of consumer finance class actions settlements provide for automatic payments. With respect to all class settlements, including claims-made settlements, courts oversee the fairness and adequacy of fee awards in accordance with case law. Pursuant to these precedents, courts are required to find that fee awards in settled class action cases are fair.[735] As part of that review, the courts also examine consumer notice procedures and can consider potential claims rates. Further, in cases in which attorney's fee awards are statutory, courts typically award the fees based on a reasonable number of hours expended working on the case, multiplied by a reasonable rate and by a factor to compensate the plaintiff's attorneys for the risk they took (the ''lodestar'' method).[736] Even in common fund cases, courts typically require plaintiff's attorneys to justify their request for fees by submitting records of the number of hours that they worked on the case, so that the court can ensure that the fee award is reasonable.[737] Thus, it is not surprising that the Study found that the overall attorney's fee percentages did not increase significantly when calculated as a percentage of amounts actually paid (21 percent) as compared to when calculated as a percentage of the gross relief awarded to consumers (16 percent).

As to the commenters that noted that plaintiff's attorney fees are proportionately higher in smaller settlements than in larger settlements, the Bureau believes that this likely reflects that there are certain minimum ''fixed costs'' to litigating a class action, which courts recognize as reasonable to recover, and also that a number of Federal consumer laws cap the amount available for recovery in a class action. When these costs occur in a case that ultimately provides smaller amounts of relief to consumers, the percentage of attorney's fees will necessarily be higher.[738] In terms of hours, as noted above, courts often take into account the number of hours an attorney worked on a class action case in awarding attorney's fees. The Bureau does not agree that the potential for consumer finance cases in which plaintiff's attorney fees are high relative to the settlement amount or even more than the settlement amount compels a finding that those class actions do not protect consumers or are not in the public interest. The Bureau finds that such an outcome is uncommon, and notes that courts scrutinize these settlements like any other, rejecting them when they are not fair and reasonable or approving them when they are.[739] These cases still provide

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wrongdoers will no longer be deterred out of fear of potential class action liability.'').

[734] *See, e.g.,* Federal Judicial Center, ''Manual for Complex Litigation,'' at § 21.7 (4th ed. Thomson West 2016).

[735] *E.g.,* Newberg et al., *supra* note 65, at § 15. *See also,* Order & Final Judgment at 1, *Trombley* v. *National City Bank,* No.10–00232, (D.D.C. Dec. 1, 2011), ECF No. 56 (''Upon careful consideration of the Revised Settlement Agreement, its subsequent modifications, plaintiffs' motion for final approval of the class action settlement, *plaintiffs' motion for an award of attorneys' fees, reimbursement of expenses, and incentive awards to the representative plaintiffs* . . . and the entire record herein, . . . the Court grants final approval of the settlement as set forth in the parties' Revised Settlement Agreement . . . .'') (cited at 81 FR 32830, 32932 (May 24, 2016)); Memorandum Order & Opinion at 2, In Re: Trans Union Corp. Privacy Litig., No. 1350, (N.D. Ill. Apr. 6, 2009) ECF No. 591–2 (reducing requested attorney's fees to 10 percent of recovery where ''[m]ovants . . . submitted extensive, yet flawed, documentation and declarations to support their requests for these fees'') (cited at 81 FR 32830, 32849 (May 24, 2016)).

[736] Newberg et al., *supra* note 65, at § 15:38. *See e.g.,* Order Granting Plaintiff's Motion for Final Settlement Approval & Granting Plaintiff's Application for Attorney's Fees, Expenses, & Incentive Awards, *Villaflor* v. *Equifax Info. Svcs.,* L.L.C., No. 09–00329 (N.D. Cal. May 3, 2011), ECF No. 177 (approving attorney's fee application based on hours worked in case based on FCRA claim and request for statutory attorneys fees) (cited at 81 FR 32830, 32932 (May 24, 2016)); Order Granting: (1) Final Approval to Class Action Settlement; (2) Award of Attorney's Fees; and (3) Judgment of Dismissal at 7, *Lemieux* v. *Global Credit & Collection Corp.,* No. 08–01012, (S.D. Cal. Sept. 20, 2011), ECF No. 46 (analyzing attorney's fee request in a settlement involving TCPA claims and a request for statutory attorney's fees, under the lodestar method and determining ''[u]nder the facts presented in this case, the Court finds the amount of hours expended, Counsel's billing rates, and the positive multiplier of 1.46 to be reasonable,'' justifying payment of requested fees) (cited at 81 FR 32830, 32931 (May 24, 2016)).

[737] Federal Judicial Center, ''Manual for Complex Litigation,'' at § 21.724 (4th ed. Thomson West 2016). *See, e.g.,* Order Awarding Attorneys' Fees And Reimbursement of Expenses at 3–4, Faloney v. Wachovia Bank, N.A., No. 07–01455 (E.D. Pa. Jan. 22, 2009), ECF No. 118 (granting an attorney's fees request in common fund case, noting that 6,372 attorney hours had been billed, and that the fee requested was based on a reasonable multiple of the resulting loadstar of $2,266,691) (cited at 81 FR 32830, 32931 (May 24, 2016)); Final Approval Order & Judgment at 3–4, In re: Chase Bank USA, N.A. ''Check Loan'' Contract Litig., No. 09–02032, (N.D. Cal. Nov. 19, 2012), ECF No. 386 (''The Court further finds the requested service awards are fair and reasonable, given the time and effort expended by the recipients on behalf of the Class. Accordingly, Class Counsel is hereby awarded attorneys' fees . . . to be paid from the common Settlement Fund . . . .'') (cited at 81 FR 32830, 32931 (May 24, 2016)).

[738] *See, e.g.,* Theodore Eisenberg & Geoffrey P. Miller, ''Attorney Fees and Expenses in Class Action Settlements: 1993–2008,'' 7 J. Empirical Legal Stud. 248, at 279 (2010) (noting that class action awards exhibit a strong ''scale effect'' in that attorneys receive a smaller proportion of the recovery as the size of the recovery increases, and stating that this effect occurs because increased aggregation of claims leads to greater efficiency).

[739] *E.g., Allen* v. *Bedolla,* 787 F.3d 1218, 1224, 24; 165 Lab. Cas. P 36348, 91 Fed. R. Serv. 3d 1108, 24 Wage & Hour Cas. 2d (BNA) 1437 (9th Cir. 2015) (emphasizing that warning signs such as the fact that the amount of attorney's fee was three times higher than the amount paid to the class ''does not mean the settlement cannot still be fair, reasonable, or adequate''); *Harris* v. *Vector Marketing Corp.,* 2011 WL 4831157, *4 (N.D. Cal. 2011) (''This is not

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benefits to consumers, whether in the form of injunctive relief or more limited compensation, and deter companies from violating the law, as discussed above in Part VI.C.1. Indeed, the prospect that a company might be forced to pay attorney's fees in a class action settlement deters violations of the law just as much as the prospect that a company might be forced to provide relief to consumers. Given the limited resources of public enforcers, it is less likely that public enforcement would devote resources to cases involving harms totaling relatively small amounts; thereby making private enforcement more important for such cases.

Further, certain statutes cap the total amount of relief that can be awarded in a class action under that statute. For consumer finance laws, these include the Expedited Funds Availability Act (EFAA), EFTA, FDCPA, TILA (including the Consumer Leasing Act and the Fair Credit Billing Act), and ECOA, which provides for punitive and actual damages but not statutory damages.[740] Given the fixed costs of litigating, it is therefore more likely that cases asserting claims under such capped statutes would result in attorney's fee awards that are higher in relation to the amount of monetary relief awarded to the class than awards in cases asserting claims under uncapped statutes or under common law theories. The Bureau does not believe that the existence of these damages caps or the resulting relationship between attorney's fees and consumer relief suggests that class actions for violations of these statutes are not in the public interest. The Bureau finds no evidence to suggest that class actions with lower recovery amounts (and potentially relatively higher attorney's fees) do not benefit consumers in part because, as discussed above in Part VI.C.1, the Bureau believes such class actions, like all class actions, have a deterrent effect.[741]

With respect to commenters that questioned the accuracy of the Study's data as it pertained to attorney's fees in class action settlements, the Bureau points out that the two competing studies cited by commenters covered many cases that would not be covered by this rule and were not covered in the Study. For example, the RAND study cited by one commenter was a 1999 case study of 10 cases that pre-dated CAFA, and only four of the cases studied were consumer finance cases.[742] For comparison, the Bureau's Study analyzed 419 class action settlements, all of them concerning consumer financial products or services.[743] Moreover, while one commenter cited the RAND study for the proposition that attorney's fees were higher than relief provided to consumers in three out of 10 cases, two of those cases were small settlements (each just under $300,000), which as discussed above are more likely to lead to situations in which attorney's fees are higher than consumer payout. Further, that study's authors ultimately did not agree with the conclusion that class actions produce large payouts for the attorneys at the expense of plaintiffs and consumers. Instead, the authors opined that ''[t]he wide range of outcomes that we found in the lawsuits contradicts the view that damage class actions invariably produce little for class members, and that class action attorneys routinely garner the lion's share of settlements.'' [744]

With respect to a paper cited by several commenters as supporting the conclusion that attorney's fees are higher than shown by the Bureau's Study and ''rarely less than 75 percent of the amount actually paid to consumers,'' the paper does not appear to have reported the overall mean for attorney's fees of all the cases analyzed as a percentage of payments.[745] Instead, the attorney's fee data in that paper was reported for ''claim types'' that were subsets of claims under particular statutes.[746] The data was not reported for cases under each statute as a whole. Thus, the 75 percent figure appears to be an estimate of the various percentages data that were reported for each claim type within the various statutes.[747] The paper analyzed a set of class actions from a single Federal district court concerning claims under the FDCPA, TCPA, FCRA, and EFTA. As noted above in Part VI.B.3 in a discussion of a separate study cited by commenters,[748] many of those statutes cover activity that extends beyond consumer financial services, to include nonfinancial goods or services that were neither included in the Study nor are subject to the final rule.[749] Indeed, of those cases analyzed in the paper, only the FDCPA cases and a few of the TCPA debt call cases would likely involve consumer financial products and services covered by this rule. For those cases, the relative proportion of attorney's fees to consumer payout does not appear inconsistent with what was found in the Study for cases with smaller class settlements.

Specifically, the paper analyzed 26 FDCPA class action settlements and found the proportion of attorney's fees to cash relief to be between 62 percent and 84 percent and the proportion of attorney's fees to cash payments to be 64 percent to 100 percent.[750] Accordingly, the ratio of attorney's fees to nominal

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to suggest that fees which exceed actual class recovery are necessarily disproportionate or reflect a conflict of interest.''); *Koby* v. *ARS,* 846 F.3d 1071 (9th Cir. 2017) (rejecting class settlement approved by magistrate judge because there was no evidence that class members received any benefit from the settlement and class members relinquished their rights to seek damages on the same issue in any other class action).

[740] These caps can be summarized as follows:

EFAA: Capped amount of lesser of $500,000 or 1 percent of net worth of creditor; capped amount is in addition to any actual damages; punitive damages are not expressly authorized. 12 U.S.C. 4010(a)(2)(B)(ii);

EFTA: Capped amount of lesser of $500,000 or 1 percent of net worth of the defendant; capped amount applies to statutory damages for ''the same failure to comply''; punitive damages are not expressly authorized. 15 U.S.C. 1693m(a)(2)(B). As discussed in Appendix L of the Study, we did not cover cases related solely to violation of EFTA ATM disclosure requirements. EFTA also authorizes trebling of actual damages for certain claims under 15 U.S.C. 1693f(e);

FDCPA: Capped amount of lesser of $500,000 or 1 percent of net worth of defendant; capped amount is in addition to any actual damages; punitive damages are not expressly authorized. 15 U.S.C. 1692k(a)(2)(B);

TILA including CLA, FCBA: Capped amount of lesser of $1 million or 1 percent net worth of creditor; capped amount is in addition to any actual damages; punitive damages are not expressly authorized; prior to Dodd-Frank July 2010 DFA 1416(a)(2), was $500,000. 15 U.S.C. 1640(a)(2)(B); and

ECOA: Does not authorize statutory damages, but rather actual damages, as well as punitive damages up to $10,000, with combined amounts in a class case subject to limit of lesser of $500,000 or 1 percent of net worth of creditor. 15 U.S.C. 1691e(b).

[741] Indeed, some of the law firm alerts cited by the Bureau as examples of the deterrent effect of class action settlements involve class actions asserting claims under capped statutes.

[742] Hensler, et al., *supra* note 669, at 5, 14.

[743] Study, *supra* note 3, section 8 at 3.

[744] Hensler et al., *supra* note 669, at 18.

[745] See the Section 1022(b)(2) Analysis below in Part VIII for a related discussion of attorney's fees.

[746] For example, cases asserting claims under the FDCPA were divided into four claim-types: Bad affidavit; bad debt; formality; and litigation threat. Johnston, *supra* note 520, at 31.

[747] Johnston, *supra* note 520, at 41.

[748] Shepherd, *supra* note 515, at 2, 13.

[749] For example, as discussed more fully above regarding ''no-injury statutes'' in ''Monetary Relief Provided,'' FCRA class actions can involve merchants and employers. EFTA class actions in this period were often ATM ''sticker'' claims that no longer violate EFTA. As the proposal noted, the rule would have no impact on such cases because they are either brought against merchants, or by non-customers who do not have contractual relationships with a provider. FDCPA class actions cover the collection of all types of debt, including debt that does not arise from a consumer financial product or service (such as taxes, penalties and fines), whereas the Study and the rule only covered collection of debt to the extent it was a collection on a consumer financial product or service. Finally, TCPA class actions often involve marketing communications unrelated to consumer finance. Such claims are often brought against a merchant or a company with whom the consumer otherwise has no relationship (contractual or otherwise).

[750] Johnston, *supra* note 520, at 31. That paper also found the average nominal settlement in those cases to be relatively low: $58,724.

relief is consistent with that reported in the Study for settlements of $100,000 or less which showed that the proportion of attorney's fees to gross relief for such cases averaged 55.9 percent.[751] The Study did not disaggregate the data with respect to fee awards in relation to cash payout by size of settlement or type of claim, but the ratios likely would have been similar to what the paper found for settlements of that size given the data reported in the Study on the attorney's fees by size of settlement.[752] As for comments that criticized high attorney's fees in settlements that provided for *cy pres* relief, the Study's analysis of cash payments to consumers did not include any additional value of *cy pres* relief. Indeed, the Study found relatively few consumer finance settlements providing for *cy pres* relief without also providing relief directly to consumers—28 out of 419 analyzed. Had the Bureau included *cy pres* in its analyses, the attorney's fees ratios would have been even lower. For these reasons, the Bureau finds that the attorney's fees awarded in *cy pres* cases, when they occur, do not undermine the findings that class actions are in the public interest insofar as *cy pres* payouts are above and beyond the amounts reported by the Study.[753]

Many of the commenters criticized the role of plaintiff's attorneys in class action settlements, asserting that they often have improper conflicts of interest with absent class members. However, judicial review of class action settlements, including the portion of any settlement allocated to the attorneys, is required in part because of the potential for such conflicts. Indeed, the Federal Judicial Center Manual notes, with respect to class action settlements, that ''the parties or the attorneys often have conflicts of interest . . .'' and instructs courts on how to manage those conflicts.[754] In other words, while the commenters are correct that class actions can pose potential conflicts of interest between plaintiff's attorneys and absent class members, courts are explicitly aware of these conflicts and, for those reasons among others, have procedures in place to review class action settlements. While many commenters expressed their belief that courts do not adequately review class action settlements for fairness or reasonableness, there are numerous examples of courts that, in exercising their power to review class action settlements, found certain aspects of settlements to be unfair or unreasonable.[755] Commenters and commentators may debate whether an attorney's fee award in a particular case is appropriate, but commenters have not put forth evidence to suggest that courts cannot and do not effectively supervise class action settlements or attorney's fee awards or that they fail to do so in such a way that the entire class action process is rendered faulty.[756]

Similarly, some industry commenters put forward examples, prior to the period analyzed in the Study, of plaintiff's attorneys who engaged in unlawful practices such as paying individuals to serve as lead plaintiffs or recruiting professional plaintiffs to serve as lead plaintiffs in multiple cases. However, no commenters submitted evidence to support that such abuses are widespread, nor is the Bureau aware of support for that view. Further, the nature of the examples submitted indicates that prosecutors and the courts have uncovered and remedied such abuses when they occurred. Indeed, in the example cited by one commenter that involved plaintiff's attorneys who paid people to be lead plaintiffs, those attorneys were criminally charged with racketeering, mail fraud, and bribery and pleaded guilty to numerous charges.[757]

As to commenters that criticized plaintiff's attorneys as ''self-interested'' in choosing to bring class action cases that might benefit them personally through generation of large fee awards, the Bureau recognizes that plaintiff's attorneys are unlikely to be motivated purely by altruism and may, indeed, factor the potential to earn a fee into their decisions about whether to pursue a case. The Bureau does not agree that the pecuniary motives of the plaintiff's attorney in pursuing a class action on behalf of absent class members determine whether a case ultimately provides relief to consumers or is in the public interest, much like the Bureau would not consider a provider's profit motive as evidence of whether the provider's product or service complies with the law.

In any event, plaintiff's attorneys are incentivized by the prospect of fee awards to pursue relief on behalf of consumers in cases where individual recoveries would be small and thus both individual consumers and individual attorneys would not have a financial motivation to proceed. By design, the class vehicle groups individual claims and thereby provides the plaintiff's attorney with the incentive to bring them.[758] The fact that a plaintiff's attorney was motivated to bring a class action case by the potential to earn a profit does not undermine the validity of the case. Indeed, individual consumers are not generally qualified to represent themselves in filing a class action, so someone else must bring it for them. As long as courts continue to

[751] Study, *supra* note 3, section 8 at 34 tbl. 11.

[752] *Id.*

[753] *Id.* section 8 at 4 n.5 and n.9.

[754] Federal Judicial Center, ''Manual for Complex Litigation,'' at § 13.14 (4th ed. Thomson West 2016). A separate section of that manual notes ''[i]n common-fund litigation, class counsel may be competing with class members for a share of the fund, thus placing a special fiduciary obligation on the judge because class members are unrepresented as to this issue.'' *Id.* § 14.231.

[755] *See generally* Newberg et al., *supra* note 65, at § 13:61, citing many cases. *See also In re Bluetooth Headset Products Liability Litigation,* 654 F.3d 935, 947 (9th Cir. 2011) (describing possible signs of collusion, such as ''when counsel receive a disproportionate distribution of the settlement, or when the class receives no monetary distribution but class counsel are amply rewarded'' (quoting *Hanlon* v. *Chrysler Corp.,* 150 F.3d 1011, 1021 (9th Cir. 1998)); *Crawford* v. *Equifax Payment Services, Inc.,* 201 F.3d 877, 882, 45 Fed. R. Serv. 3d 811 (7th Cir. 2000) (reversing settlement approval where it appeared plaintiffs' counsel was ''paid handsomely to go away'' and ''the other class members received nothing . . . and lost the right to pursue class relief.''). *Vought* v. *Bank of America, N.A.,* 901 F. Supp. 2d 1071, 1100–01 (C.D. Ill. 2012) (stating that ''[t]he terms of the settlement, despite the superficially generous $500,000 cap, ended up being a zero-sum framework where the putative attorneys' fees award cannibalized the funds that would otherwise have gone to the class'' and denying approval). *Sobel* v. *Hertz Corp.,* 2011 WL 2559565, *13 (D. Nev. 2011) (denying approval in part because ''the only components with any determinate—or on this record, determinable—value are the attorneys' fees, incentive payments, and to some extent the costs of notice and administration''). *True* v. *American Honda Motor Co.,* 749 F. Supp. 2d 1052, 1078 (C.D. Cal. 2010) (noting that ''there is no certainty that class members will receive any cash payments or rebates at all,'' then concluding ''to award three million dollars to class counsel who may have achieved no financial recovery for the class would be unconscionable''). *In re TJX Companies Retail Sec. Breach Litigation,* 584 F. Supp. 2d 395, 406 (D. Mass. 2008) (''Similarly, unscrupulous class counsel may agree to conditions on a settlement—such as a short timeframe in which to make claims or a burdensome claims procedure—in order to obtain additional concessions from the defendant that purportedly increase the value created by the litigation and that support an enhanced fee award.'').

[756] One commenter cited a study that the commenter claimed supports the proposition that judges are more likely to approve class settlements in cases where the claims are weak. Johnston, *supra* note 520, at 13. The Bureau has reviewed that Study and disagrees that it supports such a proposition.

[757] Martha Graybow, ''US Shareholder Lawyer Melvyn Weiss to Plead Guilty,'' Reuters (Mar. 21, 2008), *available at http://www.reuters.com/article/sppage014-n20401632-oistl-idUSN204016322 0080321*; Business Day, ''Lawyer Pleads Guilty in Securities Case,'' N.Y. Times (July 10, 2007), *available at http://www.nytimes.com/2007/07/10/business/09cnd-bershad.html?hp.*

[758] *See, e.g.,* John C. Coffee, Jr., ''Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions,'' 86 Colum. L. Rev. 669, at 677–679 (1986) (stating that, in the context of class and derivative actions, ''our legal system has long accepted, if somewhat uneasily, the concept of the plaintiff's attorney as an entrepreneur who performs the socially useful function of deterring undesirable conduct'').

review settlements and attorney's fee awards for reasonableness and fairness, there is a check on the self-interest of plaintiff's attorneys to ensure that it does not prevent consumers from benefitting from the class action procedure.

Strain on the courts. A few commenters stated that the rule would encourage class action litigation and therefore strain the resources of the court system. As noted above in Part VI.A, for the public interest standard, the Bureau considers benefits and costs to consumers and firms, including more direct consumer protection factors, and general or systemic concerns with respect to the functioning of markets for consumer financial products or services, the broader economy, and the promotion of the rule of law and accountability.[759] The Bureau does not believe that the impact of the rule on the resources of the court system per se or to the extent it impacts non-consumer product and service-related litigation is appropriately considered under this standard; this impact does not fall under the Bureau's purposes and objectives.[760] To the extent any strain on the court system could impact consumers bringing claims related to consumer financial products and services by, for example, increasing court costs as well as the waiting time for court dates or decisions, the Bureau has considered this impact in its public interest analysis. The Bureau has also considered impacts on providers in their claims related to consumer financial products or services. In any event, the Bureau does not believe that strain on the court system to be a likely or significant outcome of its rule.

The Bureau does estimate that there will be some increased class action litigation as a result of the class rule. Indeed, the Section 1022(b)(2) Analysis below in Part VIII estimates that there will be 3,021 additional Federal court class actions over a five-year period, or 604 Federal cases per year. The Bureau does not agree, however, that this increase in class action cases will overburden the Federal court system. In the most recent year for which data is available, there were 673 authorized district court judgeships.[761] Accordingly, the class rule would likely increase the case load of each Federal district judge by slightly less than one case per year, which the Bureau believes would be a minimal impact. Similarly, there are approximately 11,800 State court judges of general jurisdiction.[762] Assuming the same number of additional class actions are filed in State courts as in Federal courts as a result of the class rule[763] and that class actions can be heard by these judges, each State court judge would face an additional 0.05 cases per year, or one case per judge over the course of 20 years. The Bureau finds that these increases per judge are so small that the increase in the number of class cases caused by the class rule would not significantly impact the costs or efficiency of administration of the Federal and State court system. However, even if the entirety of the strain on the court system fell upon consumers and providers, as explained below, the Bureau finds that the relatively small impact in the form of additional class action cases is preferable to class action cases that could have provided relief to consumers from violations of the law being blocked by arbitration agreements or never filed at all.

To the extent that this small impact on the court system occurs, the Bureau finds that resolution of the additional class cases will provide relief for consumers and the threat of liability in those cases will deter providers from violating the law and therefore that the impact on the court system is justified. In other words, the Bureau finds that a relatively small impact on the court system in the form of additional class action cases is preferable to class action cases that could have provided relief to consumers from violations of the law being blocked by arbitration agreements or never filed at all. Accordingly, the impact on the court system from the class rule does not detract the Bureau's finding that the class rule is in the public interest.

Harm to relationships between customers and providers. As to commenters that contended that the class rule is not in the public interest because it would harm relationships between consumers and their financial institutions because the availability of class actions discourages informal resolution of disputes, the Bureau does not agree. The Bureau does not believe that the mere possibility of obtaining relief through a class action, or the pendency of a putative class action, will materially affect the number of consumers who seek to resolve complaints informally. Nor does the Bureau believe that class action exposure or the pendency of a class action will reduce the frequency with which providers will agree to informal resolution. If anything, the Bureau believes the reverse to be true as companies may be more likely to resolve complaints informally to reduce the risk that a consumer initiates a class action and, if a putative class action is pending, to reduce the likely class recovery as the class action settlement may deduct the amount of the company's informal relief provided to customers when calculating damages.[764]

Federalism concerns. In response to the research center commenter that contended that the class rule will encourage ''inverse federalism,'' the Bureau notes that this argument rests on the premise that providers that face only exposure to individual arbitrations or litigation will not deem it necessary to conform to the most protective State laws, whereas the availability of class relief will result in compliance with such laws and have spillover effects on other States. Thus, like the objection based on the impact of the rule on innovation, this comment conceded the key predicates on which the class rule rests—that class actions deter violations of the law.

The Bureau does not agree that to the extent the class rule increases compliance with the most protective State laws and has spillover effects in other States such a result would represent federalism in reverse. Companies that operate in multiple States have a choice of either acting differently in different States depending upon the permissiveness of State law or acting uniformly in a manner consistent with the most consumer-protective State law. The Federal system does not presuppose that a company may choose to so cabin its exposure in certain States (*e.g.,* by entering into arbitration agreements) so as to enable it to ignore the laws of more protective States. Thus, if the result of the class rule is to cause companies to comply with protective State laws—and if, as a result, those companies choose to adopt the same

[759] The Bureau uses its expertise to balance competing interests, including how much weight to assign each policy factor or outcome.

[760] *See, e.g., Nat'l Ass'n for Advancement of Colored People* v. *FPC,* 425 U.S. 662, 667–68 (1976).

[761] United States Courts, *Authorized Judgeships, http://www.fjc.gov/history/home.nsf/page/research_categories.html http://www.uscourts.gov/sites/default/files/allauth.pdf* (last visited Jun. 23, 2017).

[762] Nat'l Ctr. for State Courts, ''Number of Authorized Justices/Judges in State Courts, 2010,'' (Court Statistics Project 2012), *available at http://www.courtstatistics.org/~/media/Microsites/Files/CSP/SCCS/2010/Number_of_Authorized_Justices_and_Judges_in_State_Courts.ashx.*

[763] For the basis for this assumption, see the detailed discussion in the Section 1022(b)(2) Analysis below in Part VIII.

[764] For example, in 17 of the 18 Overdraft MDL settlements analyzed in the Study, the settlement amounts and class members were determined after specific calculations by an expert witness who took into account the number and amount of fees that had already been reversed based on informal consumer complaints to customer service. Study, *supra* note 3, section 8 at 46 n.63.

practices in States with fewer restrictions—such an outcome would be entirely consistent with the Federal system.

Impairment of freedom of contract. In response to a group of State attorneys general that contended that the class rule harms the public interest because it reduces parties' freedom of contract, the Bureau notes that consumer finance contracts are not negotiated; they are almost always standard-form contracts that consumers may either choose to sign in order to obtain the product or not. Further, the Study's consumer survey of credit card customers found that consumers did not mention dispute resolution features as relevant to them when shopping for credit cards and chose dispute resolution last on a list of nine features that influenced their decision of whether to choose a particular credit card.[765] These findings suggest that consumers do not consider dispute resolution when obtaining consumer financial products.[766] The survey further found that consumers generally do not understand the consequences of entering into a contract that includes an arbitration agreement.[767] Thus, while it is true that in certain covered markets the rule will eliminate the option for consumers to choose a contract on the basis of its dispute resolution procedures, the Bureau does not view that as negatively impacting consumers' freedom of contract, in practice. Furthermore, to the extent that the class rule affects the providers' freedom of contract, the Bureau notes that there are any number of laws and regulations that take precedence over the unfettered freedom of contract in consumer finance. For example, State usury laws limit the interest than can be charged to consumers who borrow money,[768] State and Federal consumer protection laws establish certain minimum standards which cannot be varied by contract, and State common law typically does not permit enforcement of contractual terms that are unconscionable.[769] The Bureau therefore finds that, to the extent the class rule has any impact on the freedom of contract, that limited impact to consumers and providers' freedom of contract is justified by the consumer protection and other public interest benefits of the class rule, discussed herein. Put another way, the commenters did not explain why consumers' freedom to contract (for products with form contracts) should take precedence over their liberty to engage with providers more likely to comply with consumer protection laws. Similarly, the Bureau believes that any limited impact the class rule may have on consumers' freedom of contract and, in turn, consumers ability to avoid contact with plaintiff's attorneys, is justified for all the reasons discussed herein.

Public policy concerning arbitration and legal uncertainty. Lastly, with respect to commenters' assertion that the class rule contravenes public policy and Supreme Court precedent culminating in *AT&T* v. *Concepcion,* the Bureau notes that this assertion stems from the general public policy established by Congress in passing the Federal Arbitration Act. But the Supreme Court has also acknowledged that this general " 'liberal federal policy favoring arbitration agreements' " may be overridden in specific instances where "Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." [770] The Bureau further notes that section 1028 of the Dodd-Frank Act provides the Bureau with authority to regulate arbitration agreements.[771] To do so, the Bureau must find, consistent with the Study, that doing so is in the public interest and for the protection of consumers. For all of the reasons discussed herein, the Bureau finds that class rule meets the standard for the Bureau to exercise its section 1028 authority.

In response to commenters' concerns regarding the legal uncertainty that may follow from the class rule that may create potential liability for covered providers, the Bureau does not believe that the rule creates any uncertainty as to the type of actions to which it would apply. Rather, the Bureau believes that the regulation text is clear that the final class rule applies to all State and Federal class actions, as discussed more fully in the section-by-section analysis to § 1040.4(a)(2) below in Part VII. To address any potential confusion, the Bureau intends to develop a suite of compliance materials for new part 1040, just as it has done with the other regulations it has issued. Nor does the Bureau believe that the rule creates any uncertainty as to the scope of preemption under the Federal Arbitration Act, since the Supreme Court has been quite clear that Congress can authorize exceptions to the FAA by statute as Congress did in section 1028.

Moreover, to the extent that covered entities have the ability to challenge legislation or rulemaking through the litigation process or otherwise, there is always some degree of uncertainty with respect to any statute or rulemaking. If the potential for that type of legal uncertainty discouraged the adoption of new legislation or regulations, new legislation or regulations would rarely occur. For this reason, the Bureau finds that the potential for legal uncertainty, if any, does not undermine a finding that the class rule is in the public interest.

Impact on certain State laws. The Bureau disagrees with industry commenter that asserted that the proposal was not in the public interest because of its potential effect on Utah's law authorizing class-action waivers in closed-end consumer credit contracts.[772] As relevant here, the Bureau has found that certain limitations on the use of pre-dispute arbitration agreements related to class waivers are in the public interest and for

[765] *Id.* section 3 at 11–15.

[766] This also addresses the comment that consumers do have a choice regarding whether to enter into contracts with arbitration agreements. The survey demonstrated that dispute resolution was not something most consumers considered at the time they acquired a product. In any event, the Study showed that for some products, there was almost no option for a consumer who did not want an arbitration agreement. *Id.* section 2 at 6–26.

[767] *Id.* section 3 at 18.

[768] *E.g.,* Tex. Fin. Code Ann. § 302.001 ("The maximum rate or amount of interest is 10 percent a year except as otherwise provided by law."); N.Y. Banking Law § 14-a ("The maximum rate of interest . . . shall be sixteen per centum per annum."); Ohio Rev. Code Ann. § 1343.01 ("The parties to a bond, bill, promissory note, or other instrument of writing for the forbearance or payment of money at any future time, may stipulate therein for the payment of interest upon the amount thereof at any rate not exceeding eight per cent per annum payable annually, except as authorized in division (B) of this section.").

[769] *E.g.,* Richard A. Lord, "Williston on Contracts" at § 18.1 (Thomson Reuters, 4th ed. 2010) ("[W]hile freedom of contract has been regarded as part of the common-law heritage . . . courts of equity have often refused to enforce some agreements when, in their sound discretion, the agreements have been deemed unconscionable."). *See also Gandee* v. *LDL Freedom Enters., Inc.,* 293 P.3d. 1197, 1199–1202 (Wash. 2013) (finding arbitration agreement unconscionable where agreement required arbitration to take place in Orange County, California; contained provision shifting all costs to losing party; and shortened statute of limitations from four years to 30 days); *Newton* v. *Am. Debt Services, Inc.,* 854 F. Supp. 2d 712, 722–27 (N.D. Cal. 2012) (same, where agreement was part of an adhesion contract; was inconspicuously located within the contract; deprived plaintiff of statutory rights; required plaintiff to arbitrate in Tulsa, Oklahoma; and gave defendant unilateral right to choose arbitrator, among other things); *Bragg* v. *Linden Research, Inc.,* 487 F. Supp. 2d 593, 605–11 (E.D. Pa. 2007) (same, where agreement was included in a lengthy paragraph under the benign heading "General Provisions;" consumer was required to advance a significant share of the fees; and venue was limited to San Francisco, among other things).

[770] *Gilmer* v. *Interstate/Johnson Lane Corp.,* 500 U.S. 20, 26 (1991) (citing *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.,* 460 U.S. 1, 24 (1983)).

[771] *Compucredit Corp.* v. *Greenwood,* 132 S. Ct. 665 (2012).

[772] Utah Code 70C–3–14.

the protection of consumers. As noted above, the Bureau has determined that eliminating class actions reduces and weakens consumer protections because the remaining forms of dispute resolution are insufficient. In addition, as discussed in the Section 1022(b)(2) Analysis, the Bureau does not believe that a disclosure-focused regulation would address the market failure the Bureau has identified in this rule.[773] Accordingly, these findings are equally applicable where a State law authorizes the use of class waivers in arbitration agreements that apply to consumer financial products and services covered by this final rule, such as the Utah law does with respect to consumer credit contracts.[774] Based on the Bureau's findings, even if such a law would conflict with the class rule to the extent it allows providers to rely on class waivers in arbitration clauses in the absence of the class rule, the class rule is in the public interest and for the protection of consumers and affords consumers greater protections than such a State law. The Bureau also believes that a uniform approach to the conduct covered by this rule across the States is consistent with the goal of promoting consistency in compliance and a level playing field across the providers covered by the rule.[775]

It also bears noting that, as described in Part VI.A above, a group of State-legislator commenters argued that the proposed class rule was in the public interest precisely because Federal law currently undermines States' ability to pass laws that will be privately enforced, measure the efficacy of those laws, or observe their development.

D. The Bureau Finds That the Monitoring Rule Is in the Public Interest and for the Protection of Consumers

As described above, in the proposal, the Bureau preliminarily found—in light of the Study, the Bureau's experience and expertise, and the Bureau's analysis—that a comparison of the relative fairness and efficiency of individual arbitration and individual litigation was inconclusive and thus that a complete prohibition on the use of pre-dispute arbitration agreements in consumer finance contracts was not warranted. Accordingly, the class proposal would not have prohibited covered entities from continuing to include arbitration agreements in consumer financial contracts generally; providers would still have been able to include them in consumer contracts and invoke them to compel arbitration in court cases that were not filed as class actions. In addition, the class proposal would not have foreclosed class arbitration; it would be available when the consumer chooses arbitration as the forum in which he or she pursues the class claims and the applicable arbitration agreement permits class arbitration.

However, in light of historical evidence that there have been serious concerns about the fairness of thousands of past arbitration proceedings, and that the Study identified some fairness concerns about certain current arbitration agreement provisions and practices, the Bureau believed that it was appropriate to propose a system to facilitate monitoring and public transparency regarding the conduct of arbitrations concerning covered consumer financial products and services going forward. Specifically, the Bureau proposed § 1040.4(b), which would have required providers to submit certain arbitral records to the Bureau that the Bureau would then further redact, if necessary, and publish. The Bureau preliminarily found this part of the proposal to be consistent with the Bureau's authority under section 1028(b) including finding that this part was in the public interest and for the protection of consumers. The Bureau made this preliminary finding after considering such countervailing considerations as the costs and burdens to providers.

This section discusses the bases for the preliminary findings, comments received, and the Bureau's further analyses and final findings pertaining to the monitoring rule. Similar to the Bureau's analysis of the statutory elements pertaining to the class rule, this discussion first addresses whether the monitoring rule is for the protection of consumers, and then addresses whether the rule is in the public interest. As discussed briefly in the findings and in the section-by-section analysis of § 1040.4(b) below, the Bureau is expanding the list of records that must be reported to the Bureau as urged by some commenters in order to better promote both statutory objectives. The Bureau is also finalizing its proposal to publish the reported records, with appropriate redactions, on the Bureau's Web site.

1. The Monitoring Rule Is for the Protection of Consumers

In the proposal, the evidence before the Bureau, including the Study, was inconclusive as to the relative fairness and efficacy of individual arbitration compared to individual litigation. The Bureau remained concerned, however, that the historical record demonstrated the potential for consumer harm in the use of arbitration agreements in the resolution of individual disputes. Among these concerns is that arbitrations could be administered by biased administrators (as was alleged in the case of NAF), that harmful arbitration provisions could be enforced, or that individual arbitrations could otherwise be conducted in an unfair manner.

The Bureau preliminarily found, consistent with the Study, that the monitoring proposal would have positive outcomes that would be for the protection of consumers. Specifically, the Bureau preliminarily found that the collection of arbitration documents would help the Bureau monitor how arbitration proceedings and agreements evolve and to see if they evolve in ways that harm consumers.[776] The collection of arbitration claims would provide transparency regarding the types of claims consumers and providers are bringing to arbitration and would allow the Bureau to monitor the raw number of arbitrations.

While the Study data identified only hundreds of arbitrations per year filed with the AAA in selected markets, in the period before the Study, there were tens of thousands of arbitrations per year, largely filed by providers. For instance, a large increase in the volume of provider-filed claims identified by the Bureau under the monitoring rule could suggest a need to monitor for potential fairness issues associated with large-scale debt collection arbitrations, such as those historically filed by providers before NAF and the AAA. The collection of awards would provide

[773] Moreover, the Bureau has emphasized the importance of the coverage of extensions of consumer credit in the rule, as it did in the Study, based on date gathered since the adoption of the Utah law in 2006 by searching cases in Federal courts including any cases in Utah Federal court or in other courts based on choice of Utah law.

[774] The commenter suggested other States have similar laws but provided no citations to those laws nor is the Bureau aware of any.

[775] As to the commenter concerned about potential preemption of States' laws regarding security freezes, when a State law provides a private right of action and does not explicitly prohibit class claims, then claims under that law generally may be classable under Federal Rule 23 or an analogous State law. In such a situation, the class rule provides that arbitration agreements cannot be used to block class actions. However, when a State law precludes class actions for violations of that State law, the class rule will not alter that legislative decision.

[776] As explained in Part VI.A the transparent application of laws has general benefits to society and is therefore a factor that the Bureau considers as a part of the public interest analysis. In this section, however, ''transparency'' is used in a different sense to refer to access for both the Bureau and the public to information related to arbitrations that serves to directly facilitate deterrence and redress.

insights into the types of claims that reach the point of adjudication and the way in which arbitrators resolve these claims. The collection of correspondence on nonpayment of fees and non-compliance with due process principles would allow the Bureau insight into whether, and to what extent, providers fail to meet the arbitral administrators' standards or otherwise act in ways that prevent consumers from accessing dispute resolution.

The Bureau also stated in the proposal that, more generally, the collection of these documents would help the Bureau monitor consumer finance markets for risks to consumers, potentially providing the Bureau and the public with additional information about the types of potential violations of consumer finance or other laws alleged in arbitration, and whether any particular providers are facing repeat claims or have engaged in potentially illegal practices, and the extent to which providers may have adopted one-sided agreements in an attempt to avoid liability altogether by discouraging consumers from seeking resolution of claims in arbitration. Finally, monitoring would allow the Bureau to take action against providers that harm consumers.[777]

Comments Received

Some commenters opposed the monitoring proposal, though they were split on whether it was inadequate to protect consumers in light of concerns about the fairness of arbitration or whether action by the Bureau was not warranted at all.

On one side, a consumer advocate commenter suggested that the Bureau adopt what it deemed a stronger alternative to the monitoring proposal[778] in which it would identify and ban a number of specific practices in arbitration agreements and proceedings, such as fee-shifting provisions requiring the losing party in the arbitration to pay the fees of the winning party. The same commenter expressed the concern that fee-shifting could harm consumers because the major arbitration administrators currently do not have any *in forma pauperis* provisions (which allow impoverished consumers to file arbitrations without paying filing fees). Another consumer advocate commenter contended that the proposal did not go far enough, asserting that law-breaking companies are unlikely to provide documents to the Bureau pursuant to the proposed monitoring rule, and thus the rule might not accomplish the Bureau's goals.

On the other side, some industry commenters wrote in general opposition to the Bureau's monitoring proposal, asserting that the record before the Bureau did not warrant taking action with regard to the fairness of arbitration proceedings. One industry commenter made several arguments in opposition to the monitoring proposal generally. First, the commenter asserted that the Study found no evidence of harm in arbitrations that warranted the Bureau's intervention. Next, the commenter asserted that the Bureau did not meet its burden to show that monitoring and publication were in the public interest and for the protection of consumers because the Study's assessment of AAA arbitrations did not show that arbitration was unfair to consumers. Finally, the commenter asserted that this must be so because the Bureau did not propose to also regulate post-dispute arbitration agreements. Another industry commenter asserted that, based upon its review of the Bureau's consumer complaints database, consumers are not experiencing unfairness in arbitration that warranted the proposed monitoring rule. An industry trade association commenter criticized the Bureau's citation of NAF as an example of the risks posed by individual arbitration to consumers as a red herring on the grounds that NAF is no longer an active risk to consumers as very few agreements currently specify NAF as an administrator, and that consumers are free to seek a different administrator even if NAF is specified in the agreement.

By contrast, many commenters supported the Bureau's preliminary finding that monitoring would have positive outcomes for consumers and for the public. A group of State attorneys general, nonprofit, individual, Congressional, consumer advocate, academic, industry, consumer law firm, and individual commenters wrote in general support of the Bureau's monitoring proposal. More specifically, the group of State attorneys general and nonprofit commenters supported the Bureau's preliminary finding that the collection and publication of documents would be valuable because it would help the Bureau and the public better understand arbitration generally. The academic commenters observed that the past existence of NAF provided a case study on the need for the transparency that the Bureau's monitoring proposal would provide. The academic commenters also suggested that NAF may have stopped certain practices sooner had more information about the outcomes of its arbitration proceedings been publicly available earlier.

Responses to Comments and Final Findings

The Bureau has carefully considered the comments received on the monitoring proposal and further analyzed the issues raised in light of the Study and the Bureau's experience and expertise. Based on all of these sources and for the reasons discussed above, in the proposal, and further below, the Bureau finds that requiring providers to submit specified, redacted arbitral records and then publishing redacted versions of these records will be for the protection of consumers by helping the Bureau and the public monitor for the risks to consumers in the underlying consumer finance markets.

The Bureau believes that such monitoring is important to this ongoing risk assessment because the kinds of fairness concerns that have been raised about some arbitration proceedings historically could prevent consumers from obtaining redress for legal violations and expose them to harmful practices in arbitrations filed against them. While the Bureau expects that the number of consumer-filed individual arbitrations will remain low for the reasons discussed above, to the extent that arbitrations occur (and consumers are precluded from proceeding in court), it is in their interest that the proceeding be fair. The Bureau believes that the monitoring rule is for the protection of consumers because the awareness that certain basic information about disputes filed in arbitration will be available to the public will tend to discourage unfair and unlawful conduct by provides of both consumer financial products and services and arbitral services. In the event that transparency alone is not sufficient, the monitoring rule will also facilitate appropriate follow-up actions by the Bureau and others to protect consumers.

[777] In the proposal, the Bureau treated the question of whether the use of individual arbitration in consumer finance cases is in the public interest and for the protection of consumers as discrete from the question of whether some covered persons are engaged in unfair, deceptive, or abusive acts or practices in connection with their use of individual arbitration agreements. The Bureau emphasized in the proposal that it intended to continue to use its supervisory and enforcement authority, as appropriate, to evaluate whether specific practices in relation to arbitration—such as the use of particular provisions in agreements or particular arbitral procedures—constitute unfair, deceptive, or abusive acts and practices pursuant to Dodd-Frank section 1031.

[778] Many of the comments on this issue urged the Bureau to adopt a total ban on arbitration agreements in contracts for consumer financial products and services. Those comments are addressed above in Section VI.B. This section addresses only those comments that urge the Bureau to take action regarding arbitration other than a total ban and issues related to the class rule.

Specifically, the Bureau finds that the monitoring rule is for the protection of consumers for several reasons. It would deter potential wrongdoers who would know that their practices, with respect to both their use of arbitration proceedings and to their provision of consumer financial products and services, will be made public and would facilitate redress for related harms to consumers. Additionally, the Bureau finds that the rule will allow the Bureau and the public to better understand arbitrations that occur under arbitration agreements entered into after the compliance date and to determine whether further action is needed to ensure that consumers are being protected. The materials the Bureau is requiring providers to submit in redacted form—similar to the AAA materials the Bureau reviewed in the Study—will allow the Bureau to more broadly monitor how arbitration proceedings are conducted, what provisions are contained in the underlying arbitration agreements, and whether providers are taking steps to prevent consumers from being able to seek relief in arbitration.

In particular, the Bureau finds, consistent with the Study, that the documents the Bureau collects will provide the Bureau with different and useful insights relevant to the above-mentioned assessment of risks to the consumers. The collection of arbitration claims will provide transparency regarding the types of claims consumers and providers are bringing to arbitration and the number of arbitrations filed,[779] and the collection of awards will provide insights into the types of claims that reach the point of adjudication and the way in which arbitrators resolve these claims. The collection of arbitration agreements, when considered with other arbitral documents, will allow the Bureau to monitor the impact that particular clauses in arbitration agreements have on consumers and providers, the resolution of those claims, and how arbitration agreements evolve. Finally, as noted before, the collection of correspondence regarding nonpayment of fees and non-compliance with due process principles will allow the Bureau to understand the extent to which providers do not meet the arbitral administrators' fairness standards and to identify when consumers are harmed by providers' nonpayment of fees.

The Bureau notes that the two categories of documents it is adding to what it had proposed will protect consumers by providing the Bureau and the public further insights into the risks that the use of arbitration agreements may pose for consumers in the covered consumer finance markets. The collection of answers to arbitral claims, required by new § 1040.4(b)(1)(i)(B), will supplement the Bureau's collection of claims and awards and will provide additional insights by providing a more balanced understanding of the facts (or disputes regarding the facts) in an arbitration proceeding, especially in cases where no award is issued. The collection of provider-filed motions in litigation in which they rely on arbitration agreements (and the collection of the underlying arbitration agreements that are invoked in such proceedings), as required by new § 1040.4(b)(1)(iii), will aid the Bureau in determining the frequency with which providers compel arbitration in response to individual litigation claims as well as to monitor the content of arbitration agreements for reasons similar to those described above. The Bureau also finds that this collection, in conjunction with the other arbitral records it will receive, will over time help track whether such claims are ultimately heard in arbitration rather than being dropped entirely, which could in turn shed more light on the extent to which consumers are deterred from pursuing individual claims more generally because of arbitration agreements.[780]

The Bureau further finds that the collection of these documents will enhance the Bureau's ability to protect consumers by monitoring consumer finance markets for risks to consumers. The collection of these documents will provide another source of information to help the Bureau and others understand the markets in which claims are brought more broadly and how consumers and providers interact. For example, the collection of claims and awards will provide additional information about the types of issues that consumers and providers face that are not or cannot be resolved informally, including those issues that appear to give rise to repeat claims. This monitoring may facilitate the ability of the Bureau and other actors to address emerging market concerns for the protection of consumers.

As described above in Part VI.B.2, the Bureau believes that the number of consumer-filed individual arbitrations is likely always to be too low to provide optimal levels of deterrence and redress for legal violations affecting groups of consumers, and thus that greater advancements to the protection of consumers and public interest derive from the class rule. Nevertheless, the Bureau notes, as described further below, that some commenters expressed concern that the records from individual arbitrations would trigger increased scrutiny by regulators and increased litigation risk with regard to the disputed conduct by the affected financial services providers. The Bureau agrees with these commenters' underlying assumption that the monitoring rule would tend to increase deterrence and redress for legal violations but sees this as a positive impact. This is, in fact, one of the purposes of the rule.

In addition, if sunlight is not a sufficient disinfectant to discourage unfair practices in connection with arbitration proceedings,[781] the monitoring rule will better position the Bureau to address conduct or practices that impede consumers' ability to bring claims against their providers, for instance, if a particular company was routinely not paying arbitration fees and thus preventing arbitrations against it from proceeding.[782]

As noted in the proposal and above, the Bureau intends to draw upon all of its statutorily authorized tools to address conduct that harms consumers that may occur in connection with providers' use of arbitration agreements. For example, the Bureau intends to continue to use its supervisory and enforcement authority, as appropriate, to evaluate whether specific practices in relation to arbitration—such as the use of particular provisions in agreements or

[779] *See, e.g.,* Preliminary Results, *supra* note 150 at 61; Study, *supra* note 3, section 5 at 9. Rapid changes in the number of claims might signal a return to large-scale debt collection arbitrations by companies and potential consumer protection issues, as had occurred in the past with NAF (discussed above in Part II.C).

[780] The Bureau has no practical way to determine when a consumer was inclined to file some sort of individual claim, in litigation or arbitration, but was deterred by the prospect of an arbitration agreement. With the new requirement the Bureau will be able to measure directly the extent to which individual litigation filings are dismissed by a provider-filed motion to compel arbitration, and the extent to which those consumers try to press their claims in an individual arbitration proceeding. If few consumer-filed individual arbitrations are filed after the dismissal of individual litigation cases dismissed pursuant to provider motions, an inference may be made that the net effect of arbitration agreements is to discourage individual claims.

[781] *See* Louis. D. Brandeis, ''Other People's Money—and How the Bankers Use It'' at 62 (Washington, National Home Library Foundation ed., 1933) (''Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.'').

[782] Study, *supra* note 3, section 5 at 66 n.110 (identifying over 50 instances of nonpayment of fees by companies in cases filed by consumers).

particular arbitral procedures—constitute unfair, deceptive, or abusive acts and practices pursuant to Dodd-Frank section 1031. The Bureau expects to pay particular attention to any provisions in arbitration agreements that might function in such a way as to deprive consumers of their ability to meaningfully pursue their claims.

With regard to commenters that generally opposed the monitoring proposal, the Bureau disagrees with comments suggesting that the Study provided no basis for the monitoring proposal or that no consumer harm has been shown. As noted above in Parts II and III, the Study identified evidence of multiple historical problems with the conduct of arbitration, including potential conflicts of interest involving a major arbitration administrator, general fairness concerns about the filing of thousands of debt-collection arbitrations across multiple administrators, failure to pay fees by some individual financial services providers, and at least sporadic use of particular clauses in arbitration agreements that raise fairness concerns.[783] Additionally, the Study's analysis of pre-dispute arbitration agreements identified the prevalence of some provisions that may make arbitration proceedings more difficult for consumers.[784] Further, the Study showed that, in the markets covered by the Study, an overwhelming majority of arbitration agreements specified AAA or JAMS as an administrator (or both), and both administrators have created consumer arbitration protocols that contain procedural and substantive safeguards designed to ensure a fair process.[785] While the Bureau believes that these safeguards currently apply to the vast majority of consumer finance arbitrations being conducted, this could change over time. Administrators, including potentially new ones, may decline to adopt or change the safeguards in ways that could harm consumers, companies may (and currently do) select other arbitrators or arbitration administrators that adopt different standards of conduct or operate with no standards at all (*e.g.,* a company may choose an individual as an arbitrator who conducts the arbitration according to his or her own rules), arbitration agreements may contain provisions that could harm consumers, or the use of arbitration agreements may evolve in other ways that the Bureau cannot foresee, particularly as the markets reacts to the adoption of the class rule. Finally, in response to the commenter that asserted that the Bureau's citation of NAF was a red herring, the Bureau's citation of NAF was illustrative of what could occur and not intended to suggest that NAF was still a problem. The commenter did not dispute the Bureau's finding that NAF's past practices were problematic, that other administrators such as AAA may have identified problematic practices such that they also altered their policies in response to NAF's settlement with the Minnesota Attorney General, and that a new administrator may replace NAF in the future or current administrators may change their standards.

In addition, as noted by other commenters, State monitoring and publication laws have helped identify and stop potentially problematic practices. As set out in Part II.C, the California law requiring the reporting of arbitration statistics led to the investigations of arbitral administrators by city and State regulators,[786] caused NAF to stop administering consumer arbitrations, and may have led to additional changes, such as the AAA's voluntary moratorium on debt collection arbitrations and JAMS's adoption of fairness standards.[787] The Bureau believes that the facts set out above point to the importance of collecting arbitration records and publishing them. Based on the above, the Bureau finds, as it set out in the proposal, that it is in the public interest and for the protection of consumers for the Bureau to monitor providers' use of arbitration agreements and arbitration proceedings to determine if there are any changes in the overall volume in arbitrations, in the types of arbitrations filed, in the outcome of arbitrations, or in the prevalence of certain harmful clauses in arbitration agreements.

In response to a commenter's assertion that the Study's analysis of AAA arbitrations did not demonstrate that arbitration was unfair to consumers, the Bureau disagrees that the monitoring rule must only be based upon demonstrated unfairness in the status quo. As set out in Part VI.B, the Bureau notes that the AAA data merely showed that (1) there were very few arbitrations, and (2) the data were *inconclusive* as to whether individual arbitration proceedings lead to better outcomes than individual litigation. This data alone does not support a finding that individual arbitration is fair, *ipso facto.* Indeed, as discussed above, other AAA data and Study analyses as well as broader historical information suggested that continued monitoring is warranted because consumer finance arbitration is dynamic and continues to pose a potential ongoing risk to consumers.[788]

With regard to the commenter that suggested that, because the Bureau's proposal did not address post-dispute arbitration, the Bureau must have regarded arbitration as fair overall, the Bureau observes that section 1028 only authorizes the Bureau to study and regulate the use of pre-dispute arbitration agreements.[789] The Bureau therefore did not analyze the use of post-dispute agreements and takes no position on their fairness but notes that proceedings pursuant to an agreement between parties who are aware of a specific present conflict and jointly agree to resolve it through arbitration rather than litigation may be different in nature than proceedings subject to pre-dispute arbitration agreements, which are typically entered into by parties not necessarily anticipating future conflict and, in the context of consumer finance, are often included in a larger form contract rather than being the subject of negotiations between the parties. As such, the fact that the Study and proposal did not mention post-dispute arbitration does not alter the Bureau's

[783] *See* Study, *supra* note 3, section 4 at 2 n.3 and section 5 at 16–17 and n.29.

[784] *See generally id.* section 2 at 40–44 (identifying incidence in pre-dispute arbitration clauses of, *inter alia,* confidentiality and non-disclosure provisions, limits on substantive relief, and cost and fee-shifting).

[785] *Id.* section 2 at 34–40; *see generally id.* section 4.

[786] Sam Zuckerman, ''S.F. Sues Credit Card Service, Alleging Bias: S.F. City Attorney Alleges Bias for Debt Collectors in Arbitration,'' *sfgate.com* (Apr. 8, 2008) (''The complaint cites forum statistics showing that of 18,075 cases brought before one of its arbitrators from January 2003 to March 2007, a total of 30 resulted in victories for consumers.'').

[787] *See* AAA Press Release, *supra* note 102; JAMS Policy on Consumer Arbitrations, *supra* note 140.

[788] Some commenters seemed to suggest that under section 1028(b) a Bureau rulemaking imposing limitations or conditions on arbitration must be based only on data found in the Study. The Bureau interprets section 1028(b), in accord with the plain text of the statute, to say that any findings supporting the rulemaking must be ''consistent with'' the Study. Dodd-Frank Act, section 1028(b) (''The findings in such rule shall be consistent with the study conducted under subsection (a).''). Moreover, the Bureau notes that the Bureau's analysis of the AAA data did flag certain problematic practices by providers in arbitration proceedings, such as the nonpayment of fees to delay consumer-filed proceedings. Study, *supra* note 3, section 5 at 34 n.69. (The Bureau has similarly received consumer complaints involving entities' alleged failure to pay arbitral fees.) The Study's analysis of arbitration agreements also catalogued problematic clauses as discussed above, and the Study recounted several fairness concerns raised in the years preceding the study (enforcement actions against NAF, administrators adopting due process protocols, and fairness concerns regarding debt-collection arbitrations raised across multiple administrators as discussed in Part III above).

[789] *See* Dodd-Frank, section 1028(c).

overall findings on the fairness of pre-dispute arbitration.

With regard to the comment that the data in the Bureau's consumer complaint database proves that arbitration is not unfair, the Bureau notes that its complaints function takes in informal complaints before the start of formal dispute resolution such as arbitration. The Bureau believes that a low volume of complaints about arbitration in the consumer complaint database is not dispositive of the fairness of arbitration. Moreover, the monitoring rule does not rest on a finding that arbitration as it is occurring today is unfair but rather that there is a significant risk that arbitration could operate in the future in ways that are injurious to consumers and that monitoring will enable the Bureau to mitigate that risk and to address it should it occur.

With regard to the comment that law-breaking providers might not submit documents to the Bureau pursuant to the proposed monitoring rule, the Bureau agrees that there is some risk of non-compliance, but notes that this is true of any regulation that the Bureau implements. The Bureau has no reason to believe that any substantial number of providers will not comply, such that the Bureau should not implement the monitoring rule. Further, the Bureau does not at this time believe that the risk of underreporting by providers is likely to be severe enough that a different type of intervention is warranted, such as a total ban on the use of pre-dispute arbitration agreements or standards for arbitration proceedings. As set out in Part VI.B, the Bureau is not adopting either intervention instead of monitoring. Nevertheless, the Bureau will monitor efforts to comply with the reporting requirements of providers over which it has enforcement or supervisory authority.

2. The Monitoring Rule Is in the Public Interest

In the proposal, the Bureau also preliminarily found that the monitoring proposal would be in the public interest. This preliminary finding was based upon several considerations, including the considerations pertaining to the protection of consumers set out above. The Bureau also considered potential benefits stemming from the other public interest factors.

Consistent with the legal standard outlined above, in making its preliminary findings, the Bureau also analyzed potential tradeoffs under the public interest factors such as the monitoring proposal's potential compliance burden on providers, the potential confidentiality concerns of providers, and the potential privacy considerations affecting consumers and providers.

The Bureau summarizes comments on these preliminary findings and sets out final findings in response to these comments below.

Comments Received

The Bureau received three general categories of comments in response to the public interest factors addressing (1) consistent enforcement of consumer laws; (2) issues relating to whether the publication component of the monitoring rule in particular was in the public interest; and (3) privacy, redaction, and related issues associated with the proposal.

Consistent enforcement of consumer laws. One consumer advocate commenter agreed generally that the monitoring proposal was likely to provide policymakers, including the Bureau, with additional information that would enable it to develop better substantive policies for the consumer finance markets. No commenter opposed to the intervention commented on this aspect of the Bureau's preliminary public interest findings.

Publication. Several comments addressed whether publication in particular was in the public interest. One set of academic commenters, State attorneys general, and nonprofit commenters wrote in support of the monitoring proposal on the grounds that it would improve transparency in consumer finance markets. In addition, a group of State attorneys general noted in their comment that publication of arbitral records would assist the Bureau and other regulators with analyzing arbitration outcomes and would help regulators determine if additional regulation of arbitration was necessary. Academic commenters noted that, with the exception of California's arbitration disclosure law, researchers only have access to those case-level data and documents on arbitration proceedings that arbitral administrators permit non-parties to see. These commenters noted that access to more comprehensive arbitration data would aid their work.

Another set of commenters asserted that making arbitral decision-making more transparent to the general public would have such negative impacts as to negate a finding that publication is in the public interest. One industry commenter argued that the Bureau should not publish awards because transparency in the decision-making of arbitrators would be detrimental to arbitrators and providers. That is, according to the commenter, arbitrators would face disincentives to make explicit findings, publication would put the onus on arbitrators to keep arbitration fair, and providers would be subject to further Bureau scrutiny. By contrast, other commenters argued that such transparency was beneficial, for many of these same reasons. For instance, academic commenters identified NAF as a case study on the importance of making arbitration records transparent, noting that NAF kept its arbitration files private until the Minnesota Attorney General's office obtained documents, and speculated that NAF may have been less likely to enter questionable agreements with certain debt collectors had it known its files would be made publicly available. A trade association of lawyers representing investors asserted that the public has an interest in accessing arbitral records and data. A nonprofit commenter suggested that there was a public interest in analyzing potential issues with individual arbitration, citing as examples secrecy, limited discovery, and arbitrator bias.

Another set of comments offered differing views on the attention that publication would draw to the underlying substantive claims, and the providers associated with them, set out in arbitration records. Some commenters believed this added attention—to business practices and particular providers—was unwarranted. Several industry commenters asserted that publication, and the accompanying publicity as to business practices identified in arbitration records would lead plaintiff's attorneys to bring more frivolous litigation generally, including additional class action lawsuits and follow-on individual arbitrations. One industry commenter expressed concern that the publication of records would subject providers to class actions concerning non-compliance with the monitoring rule if providers made errors in redacting arbitration documents or if pre-dispute arbitration agreements did not comply with the requirements of proposed § 1040.4(a)(2)(i). Other industry commenters suggested that providers would remove pre-dispute arbitration agreements from contracts with consumers to avoid the increased exposure to litigation risk associated with publication. A commenter that is an association of State regulators suggested that the publication would lead to more class action litigation, which it contended would exacerbate the difficulties State bank examiners face in assessing the risks associated with such class actions in their examinations. An industry commenter

argued that the Bureau should not publish arbitration records because the Bureau's consumer complaint database already exists and serves the same function in alerting the public to potentially objectionable business practices. Another industry commenter suggested that important or relevant information in arbitration records should be pursued by the Bureau itself, not published for others to see and exploit.

Another group of commenters focused on other negative impacts on financial services providers besides increased litigation risk, emphasizing that they viewed arbitral confidentiality as one of the main benefits of the process that would be harmed by the proposal. Some commenters were concerned that, without confidentiality, providers would be subject to reputational risks if arbitrations filed against them were public. Some credit union and trade association commenters opposed the publication proposal on the grounds that it would expose credit unions and their members to reputational risk, especially because allegations made in arbitral filings could be taken as fact. Other industry commenters further complained that consumer data was to be redacted but not information on providers and their employees, potentially compromising the privacy of the provider's employees. Other industry commenters opposed the Bureau's monitoring proposal on the grounds that confidentiality was standard or customary in arbitration, and that the Bureau's publication proposal would undermine that. A commenter that is an association of State regulators also opposed the publication rule on the grounds that it may conflict with State laws on the confidentiality of arbitral records.

Other commenters contended that providers should not be able to maintain secrecy about their disputes with customers. A trade association of lawyers representing investors contended that the public has an interest in accessing arbitral records and data. Some academic and nonprofit commenters referenced other types of arbitrations where they asserted that results are published with no ill effects (*e.g.,* FINRA, labor arbitration, and internet domain name disputes before the Internet Corporation for Assigned Names and Numbers, known as ICANN). These commenters stated that publication would not deter or impede the use of arbitration as a dispute settlement mechanism; instead, they asserted that the willingness of these administrators to publish arbitration records shows the value of transparency in arbitration proceedings.

Several commenters also argued that the publication of claims and awards could help to facilitate the development of consumer protection law. A consumer advocate commenter argued that the publication of arbitration records is likely to help industry understand what actions might violate the law. Several consumer advocate commenters argued that the publication of arbitration records is likely to help consumer advocates and others advising consumers directly know what issues to pursue, in particular when they advocate on behalf of or advise low-income consumers. A consumer advocate commenter also argued that the publication of arbitration records collected from providers would permit consumers themselves to avoid harm by becoming aware of certain business practices.

Privacy, redaction, and related issues. Several commenters focused on the proposal's provisions concerning redaction of certain consumer information prior to submission of arbitral records. For example, some asserted that the proposal's redaction provisions would be more burdensome to providers than the Bureau estimated. An industry commenter asserted that the redaction of arbitration documents, as required by proposed § 1040.4(b)(3), would be costly for credit unions, taking time and money that they could otherwise use to serve their members. Relatedly, a credit union industry commenter requested an exemption for credit unions from this requirement because of the burdens the monitoring proposal would impose on them. The commenter stated that the estimate of $400 per institution to redact documents in the proposal's Section 1022(b)(2) Analysis underestimated the cost of a program to redact and submit documents to the Bureau.

In contrast, other commenters agreed with the Bureau's assessment of the burden of complying with the proposal as being relatively low, but for different reasons. A consumer advocate commenter observed that the burden under the monitoring proposal would be minimal. An industry commenter argued that the burden would be low because it predicted that providers would drop their arbitration agreements in response to the risk of increased litigation exposure arising from publication and thus few would have to comply with the substantive requirements of this rule.

Second, several industry commenters asserted that the collection of both public and non-public information by financial regulators poses a threat to consumer privacy. One of these industry commenters asserted that the collection of even redacted information could be combined with public information to re-identify consumers. Other industry commenters expressed concerns that monitoring and publication would expose consumers to a risk of privacy and data security violations. Another industry commenter suggested that the proposal would force consumers to expose their private data without consent. One trade association commenter asserted that consumers in debt collection cases may not wish to have their personal finances publicly disclosed. (The trade association made this comment in the context of opposing the class rule, but the Bureau construes this as a comment on privacy concerns pertaining to publication). Finally, another industry commenter expressed skepticism about permitting government regulators to collect data because of a lack of security at regulators, citing examples such as a recent Office of the Inspector General report on the security of the Bureau's consumer complaint database and issues affecting other Federal regulators.[790]

Finally, several comments focused on the impact that the publication proposal would have on arbitral confidentiality. Some commenters were concerned that, without confidentiality, providers would be subject to reputational risks if arbitrations filed against them were public. Some credit union and trade association commenters opposed the publication proposal on the grounds that it would expose credit unions and their members to reputational risk, especially because allegations made in arbitral filings could be taken as fact. Other industry commenters raised a further concern that consumer data was to be redacted but not information on providers and their employees, potentially compromising the privacy of the provider's employees. Other industry commenters opposed publication on the grounds that confidentiality was standard or customary in arbitration, and that the Bureau's publication proposal would undermine that. A commenter that is an association of State regulators opposed the publication rule on the grounds that it may conflict with State laws on the confidentiality of arbitral records.

Other commenters agreed with the Bureau that providers should not be able to maintain secrecy about their

[790] *See* Office of the Inspector General, ''Security Control Review of the CFPB's Data Team Complaint Database'' (2015), *available at https://oig.federalreserve.gov/reports/cfpb-dt-complaint-database-summary-jul2015.htm.*

disputes with customers in arbitration. A trade association of lawyers representing investors contended that the public has an interest in accessing arbitral records and data. Some academic and nonprofit commenters referenced other types of arbitrations where results are published with no ill effects (*e.g.,* FINRA, labor arbitration, and internet domain name disputes before the Internet Corporation for Assigned Names and Numbers, known as ICANN). Thus, these commenters stated that publication would not deter or impede the use of arbitration as a dispute settlement mechanism; instead, the willingness of these administrators to publish arbitration records shows the value of transparency in arbitration proceedings.

Responses to Comments and Final Findings

The Bureau has carefully considered the comments received on the monitoring proposal and further analyzed the issues raised in light of the Study and the Bureau's experience and expertise. Based on all of these sources, the Bureau finds that requiring providers to submit redacted arbitral records and publishing them in redacted form is in the public interest. The Bureau finds that the monitoring rule is in the public interest because, along with creating deterrence and facilitating redress, as described above, it will allow the Bureau to better evaluate whether the Federal consumer finance laws are being enforced consistently; promote confidence in a fair and efficient arbitration system; and facilitate transparency and accountability in the broader markets for consumer financial products and services. The Bureau also finds that the potential costs and burdens of the monitoring rule identified by commenters—including the cost of compliance and potential privacy and confidentiality issues—are modest and do not overshadow the rule's benefits to the public interest.

Consistent enforcement of consumer laws. The Bureau finds that the monitoring rule is in the public interest because it will allow the Bureau to better evaluate whether the Federal consumer finance laws are being enforced consistently. The public interest analysis is informed by one of the purposes of the Bureau, which is to ''enforce Federal consumer financial law consistently.'' [791] As a consumer advocate commenter pointed out, with the insight garnered from a fuller collection of arbitral records, the Bureau will be better able to know whether arbitral decisions are applying the laws consistently on an ongoing basis and whether any consumer protection issues arise in those cases that may warrant further action by the Bureau. The Bureau's experience with the Study showed how the analysis of arbitral records is likely to provide useful information to policymakers and insights into particular consumer financial products and services.

Publication. The Bureau finds that the publication rule will tend to promote confidence in the fairness of the arbitration system for covered markets and in the functioning of the markets themselves by promoting transparency and accountability generally, beyond the specific benefits discussed above for any individual consumers who are victims of legal violations or unfair proceedings. While the impact will not be as substantial as the class rule given the relatively small number of individual arbitrations currently, the logic is related in that the Bureau believes that the availability of fair remedial mechanisms to enforce compliance with the law will tend to create a more predictable, efficient, and robust regulatory regime for all participants. Thus, the Bureau believes that the way that publication promotes the rule of law—in the form of accountability through transparent application of the law to providers of consumer financial products or services—contributes to the conclusion that the rule is in the public interest.

The Bureau finds that the publication requirement is in the public interest because, as commenters observed, it will promote transparency and insight into the conduct of arbitration proceedings. The Bureau believes that creating a transparent system of accountability is an important part of any dispute resolution system for formally adjudicating legal claims. By allowing the public access to redacted documents about the conduct of arbitrations, the public will be able to learn of and assess consumer allegations that providers have violated the law and, more generally, assess the degree to which arbitrations may proceed in a fair and efficient manner. By publishing the materials, the rule will also promote greater transparency among consumers and other members of the public. The Bureau also believes that providers may find the increased transparency arising from the Bureau's publication of records helpful to monitor best practices and avoid potentially unfair conduct or arbitration administrators.

The Bureau agrees with commenters that noted that publication would assist the members of the public and other regulators with analyzing arbitration outcomes and would help regulators determine if additional regulation of arbitration is warranted. Just as Dodd-Frank section 1028 called upon the Bureau to publish a report on arbitration to Congress, the Bureau finds it is in the public interest to permit anyone to review records of arbitration proceedings to better understand the workings of arbitration and its impact on consumers. The Bureau believes that the publication of claims will lead to transparency by revealing to the public the types of claims filed in arbitration and whether consumers or providers are filing them. The publication of answers will shed some light on the potential merits of these claims. The publication of awards will lead to increased transparency by revealing how different arbitrators decide cases. The Bureau believes that publishing redacted awards may generate public confidence in the arbitrators selected for a specific case as well as the arbitration system, at least for administrators whose awards tend to demonstrate fairness and impartiality. Publication of all of these arbitral records collectively could help educate the public and demonstrate the extent to which arbitration results in fair processes and outcomes for consumers. In particular, the Bureau agrees with the commenter that suggested that there is a public interest in analyzing potential issues with individual arbitration, such as limited discovery and arbitrator bias.

The publication of redacted awards will also signal to attorneys for consumers and providers which sorts of cases favor and do not favor consumers, thereby potentially facilitating better pre-arbitration case assessment and resolution of more disputes informally.[792] Publication may also help develop a more general understanding among consumers of the facts and law at issue in consumer financial arbitrations.

The Bureau believes that publication will assist academic researchers with analyzing consumer arbitration. To date,

[791] *See generally* Dodd-Frank section 1021(b) (setting forth the Bureau's purposes).

[792] The Bureau already publishes certain narratives and outcomes data concerning consumer complaints submitted to the Bureau. The Bureau has explained that it publishes this material because it ''believes that greater transparency of information does tend to improve customer service and identify patterns in the treatment of consumers, leading to stronger compliance mechanisms and customer service. . . . In addition, disclosure of consumer narratives will provide companies with greater insight into issues and challenges occurring across their markets, which can supplement their own company-specific perspectives and lend more insight into appropriate practices.'' Bureau of Consumer Fin. Prot., Disclosure of Consumer Complaint Narrative Data, 80 FR 15572, 15576 (Mar. 24, 2015).

academic studies of arbitration[793] and the Study were made possible only by the voluntary participation of the AAA. Such analyses will likely be made easier, and more widespread, if more data were available on a regular basis, in a standard form, and regardless of the arbitral forum.

The Bureau also finds that the publication of records would lead to greater transparency of the operation of the markets for consumer financial products and services. As noted by commenters, the publication of records under the monitoring rule will permit consumers, regulators, consumer attorneys, and providers to identify trends that warrant further action. These groups routinely use public databases, such as online court records, decision databases, and government complaint databases (*e.g.,* the Bureau's complaint database, various States' arbitration disclosure requirements, and the FTC's Consumer Sentinel database[794]) today in conducting their work.

The Bureau agrees with commenters that asserted that the publication requirement would help consumer advocates identify issues to pursue in assisting consumers, and may help consumers themselves to avoid harm by becoming aware of certain business practices. In these ways, the Bureau believes that the monitoring rule will improve the ability of a broad range of stakeholders to understand whether markets for consumer financial products and services are operating in a fair and transparent manner.

The Bureau further finds that the publication of arbitral records will help draw attention to certain business practices by providers. This is beneficial because it will help not just consumers but also providers understand what actions might violate the law. While not binding precedent, arbitral awards in consumer finance cases (not currently available to non-parties in most cases) may provide an analysis of relevant law and facts that can assist others. Making awards available may help consumers identify potentially harmful practices by providers and may create incentives for providers to identify potentially safer practices. The Bureau agrees with commenters that this will assist the development of persuasive reasoning, including arbitration and litigation disputes, on issues of consumer financial protection.

While one commenter suggested the publication of awards would act as a disincentive for arbitrators to make explicit findings, no evidence was presented of this phenomenon. If this were true, it would generally only be known as a result of analyzing awards that have actually been published. Yet the Bureau is not aware of evidence of such a disincentive reflected in arbitration awards made public by FINRA and the AAA. The Bureau does agree with the commenter that publication will further incentivize arbitrators to keep arbitration fair. Arbitrators may feel more pressure knowing that their decisions are more likely to be scrutinized, and the Bureau believes that this awareness will have a salutary effect on arbitrator decisions, making them more likely to be fair.

With regard to the commenters concerned that providers would be subject to reputational risks unless arbitrations were kept confidential, the Bureau acknowledges the concern that publication may expose providers to reputational risk to the extent that mere allegations made in arbitral statements of claim would be taken as fact. In response, the Bureau has drafted, as set out below in the section-by-section analysis of § 1040.4(b)(1)(i)(B), a provision requiring providers to submit answers as well as arbitral counterclaims to balance out one-sided accounts and mitigate any perceived reputational risk. In any case, as is noted above, relatively few providers may be subject to any form of reputational risk according to the Bureau's estimate of the number of providers likely to submit records to the Bureau. In addition, in the Bureau's experience with publishing consumer complaints, reputational risk is not necessarily significant when there are low numbers of complaints; and the Bureau does not estimate that any one provider is likely to have a significant number of arbitrations with public records. The reputational risk associated with arbitration is not unique—providers are already exposed to reputational risk when complaints are filed in litigation, given that such records are public by default. Further, the Bureau believes that the potential benefits of transparency to consumers and the public at large outweigh any potential reputational risk to providers. The Bureau further agrees with commenters, as is noted above, that NAF is a key case study demonstrating the importance of transparency and how arbitral records can produce private and public responses to potentially problematic practices, and notes that the default for individual litigation is that records, absent compelling reasons, are available to the public.[795] This is also the case with the practice of many arbitral administrators, including FINRA and the AAA (for certain types of cases).

While one commenter expressed the concern that providers that lose in arbitration proceedings in which they are accused of violations of consumer protection law may face more scrutiny from the Bureau than others, the Bureau finds that the loss of a single dispute with one consumer does not necessarily trigger such scrutiny, but to the extent this occurs it will benefit the public interest. The Bureau believes that any risk of added scrutiny could result in more relief for consumers and better business practices by providers deterred by the prospect of additional public enforcement or litigation in response to arbitral awards identifying certain illegal business practices.

The Bureau also believes that the publication portion of the rule is in the public interest because it will increase transparency and accountability with regard to conduct in the underlying consumer financial services markets. In contrast to commenters that viewed the possibility of increased scrutiny by regulators or plaintiff's attorneys as a negative outcome from the monitoring rule, the Bureau believes that the increased transparency will tend to increase consumers' ability to seek redress for legal violations, providers' incentives for compliance, and general public confidence in the orderly operation of the markets. While these impacts are likely to be modest compared to the class rule given that the number of consumer-filed individual arbitrations is so low, the Bureau still views them as supporting the adoption of the publication portion of the rule.

While some commenters were concerned that the publication of arbitral records may permit plaintiff's attorneys to identify potentially classable claims or claims that could be brought in individual arbitrations or litigations, the Bureau does not find this is necessarily a frequent result of publication. As discussed in Part VI.B.3

[793] *See* Drahozal & Zyontz, Empirical Study, *supra* note 233, at 845 (reviewing 301 AAA consumer disputes); Drahozal & Zyontz, Creditor Claims, *supra* note 233 (follow-on study analyzing collection claims by companies in AAA consumer arbitrations).

[794] Fed. Trade Comm'n, ''Consumer Sentinel Network,'' *https://www.ftc.gov/enforcement/consumer-sentinel-network* (last visited Mar. 13, 2017) (''Consumer Sentinel is the unique investigative cyber tool that provides members of the Consumer Sentinel Network with access to millions of consumer complaints. Consumer Sentinel includes complaints about: Identity Theft, Do-Not-Call Registry violations, . . . Advance-fee Loans and Credit Scams, . . . [and] Debt Collection, Credit Reports, and Financial Matters'').

[795] *See, e.g., Nixon* v. *Warner Communications, Inc.,* 435 U.S. 589, 597 and n.7 (1978) (noting that historically courts have recognized a ''general right to inspect and copy public records and documents, including judicial records and documents'').

above, class actions are more likely to serve as a vehicle for adjudicating small-dollar claims affecting large groups of consumers than are individual arbitrations. The Bureau also notes, as discussed above in Parts III and VI.B.3, that there are many differences between the few claims consumers bring in arbitration and those brought in class actions. To the extent that individual arbitrations do lead to class claims, however, the Bureau finds no evidence that such suits would necessarily be frivolous or meritless insofar as attorneys are prohibited by ethics and court rules from bringing such cases. For example, the Study identified several arbitrations in which consumers were awarded relief by the arbitrators and many more that may have settled on terms favorable to the consumers.[796] Nor is there evidence that any significant number of arbitrations involve consumers succeeding on claims that are frivolous or meritless.

With regard to the industry commenter's concern that the publication requirement would subject providers to class actions concerning provider compliance with the monitoring rule itself, the Bureau will review records received from providers to ensure compliance with § 1040.4(b)(3) before publishing them, and pursuant to new § 1040.4(b)(5) the Bureau will further redact the records to reduce re-identification risk. The Bureau notes that, in any case, this rule does not permit private claims for non-compliance with § 1040.4(b)(3). The Bureau also believes that, given the low number of arbitrations identified by the Bureau in the Study, it is unlikely that any given provider would make enough redactions (let alone redaction mistakes) to face class liability. As to the concern that noncompliance of pre-dispute arbitration agreements with § 1040.4(a)(2)(i) may result in class action liability, the Bureau notes that there is no private right of action for non-compliance when this rule does not give rise to a private right of action.

With regard to the comment that providers would remove pre-dispute arbitration agreements from contracts with consumers because the publication of awards favoring consumers would increase provider exposure to litigation risk, the Bureau believes it unlikely that the publication requirement will cause providers to remove pre-dispute arbitration agreements above and beyond those that would do so because of the class rule. As explained further in the Section 1022(b)(2) Analysis, the odds that any one provider will be required to comply with the reporting and redaction requirements in a given year are quite low; out of the approximately 50,000 providers covered by the rule, the Bureau expects that each year less than 1,000 or so providers will be involved in arbitration proceedings or litigation motions relying on pre-dispute arbitration agreements such that they would be required to submit records to the Bureau. Moreover, the Study indicated that awards favoring consumers in individual arbitration are uncommon.[797] Given these small odds and the modest burdens involved, the Bureau is skeptical that the monitoring rule would be the decisive factor in a provider's dropping of arbitration agreements. In any case, to the extent that any providers would drop their pre-dispute arbitration agreements due to the publication requirement, the Bureau concludes that the publication requirement is still in the public interest. In particular, the Bureau believes that transparency from the publication regime for those arbitrations subject to it will provide benefits described above that will more than offset the possible loss of access to arbitration under pre-dispute arbitration agreements that some consumers may experience if any providers chose to remove their arbitration agreements. In other words, the Bureau believes that the public interest favors a more transparent system, even at the potential cost of forgoing some non-transparent arbitration. Indeed, to the extent that consumers who would have brought claims in individual arbitrations must bring them in court instead, where litigation documents are made public by default, transparency would be advanced.

With regard to the commenter concerned that publication would make the work of State bank examiners more complicated, the Bureau disagrees that this is a reason not to publish arbitral records, as discussed above. In any event, for the reasons discussed above in connection with the class rule, the Bureau believes that investment in compliance activities is the best way to reduce class action risk; State bank examiners are well positioned to evaluate such compliance activities and encourage providers to take additional mitigation actions where warranted. The Bureau also believes that ease of forecasting class action risk does not outweigh the benefits to consumers and the public described above in connection with the monitoring rule, including the expressed interests of other State government commenters in using published arbitration data to protect consumers. As noted above, if there is additional class action litigation resulting from the publication of arbitral awards, the Bureau believes that such activity may benefit consumers and the public interest.

With regard to the comment that suggested that the existence of the Bureau's consumer complaint database obviated the need for the publication of arbitral records, the Bureau disagrees that the complaint database serves the same function. As discussed above, the consumer complaints database lists complaints that typically occur prior to a consumer's engagement with a formal dispute mechanism such as arbitration. The Bureau's consumer complaint function exists to ensure that ''consumers can be heard by financial companies, get help with their own issues, and help others avoid similar ones.'' [798] Any resolution of complaints through the service is informal and does not serve as precedent for future disputes or as guidance for like situations. By contrast, Bureau-published arbitration records may contain awards that could serve as useful guidance. And, as set out below in the Bureau's Section 1022(b)(2) Analysis, unlike the complaint database, the publication of arbitration records will make public binding decisions on the merits of a case by a third party that can serve as a means by which the public can better understand potential areas of non-compliance.

With regard to the comment that important information derived from arbitration records should be pursued by the Bureau itself, not published for others to see and exploit, the Bureau disagrees because it has, as is set out in Part VI.B, limited enforcement and supervisory resources and does not have the ability or authority to pursue every potential violation of law. Other State and Federal regulators, or private attorneys, may be able to further

[796] *See* Study, *supra* note 3, section 5 at 32 (likely settlements); *see also id.* section 5 at 13 (arbitrators provided some kind of relief in favor of consumers' affirmative claims in 32 disputes).

[797] Study *supra* note 3, section 5 at 13 (arbitrators reached decisions in less than one third of cases with affirmative consumer claims and awarded consumers relief in only about one- fifth of those).

[798] Bureau of Consumer Fin. Prot., ''Consumer Complaint Database,'' *http://www.consumerfinance.gov/data-research/consumer-complaints/* (last visited June 22, 2017) (''By submitting a complaint, consumers can be heard by financial companies, get help with their own issues, and help others avoid similar ones. Every complaint provides insight into problems that people are experiencing, helping us identify inappropriate practices and allowing us to stop them before they become major issues. The result: Better outcomes for consumers, and a better financial marketplace for everyone.'').

investigate and pursue trends that they discover in the arbitration records on the Bureau's Web site.[799]

Privacy, redaction, and related issues. The Bureau finds that the potential costs and burdens on providers of the monitoring rule will be sufficiently low such that they are not a significant factor weighing against the rule being in the public interest. As discussed in greater detail in the Section 1022(b)(2) Analysis below, the Bureau expects that, unless the use of arbitration changes dramatically, the number of arbitrations subject to this part of the monitoring proposal would remain low. As noted above, most providers will have no obligations under the monitoring proposal in any given year because most providers do not face even one consumer arbitration in a year and motions to compel arbitration in individual litigation are rare as the Study indicated.[800] In any event, the burden of redacting and submitting materials for any given provider will be relatively low when they did have an arbitration. While a few commenters suggested the Bureau's estimates were too low, they neither offered alternative estimates nor identified items left out of the Bureau's estimates.

With regard to the comment that the cost of complying with the rule would be low because providers would drop their arbitration agreements in response to the publication requirement, the Bureau disagrees that this is because the publication requirement will induce providers to drop their arbitration clauses. As set out above, the cost to providers is likely to be low because relatively few will face individual arbitrations and be required to submit documents to the Bureau. The Bureau believes that the publication requirement is unlikely to be a decisive factor in convincing providers to drop their clauses.

The Bureau finds that the monitoring rule will minimize any adverse impact to consumer privacy. The key potential concern identified by commenters is that consumers may fear that, by engaging in arbitration, the Bureau's requirements may cause information about them to be divulged. The Bureau does not believe that these concerns will materialize because the final rules set out below require providers to redact information that identifies consumers, and also requires the Bureau to redact additional information (as well as any private information the providers may have inadvertently left unredacted) before publishing any records to further reduce the risk that consumers are identified.

The Bureau acknowledges the concern expressed by commenters that even redacted information could be combined with publicly available information to re-identify specific consumers, but the Bureau believes that the redactions required of providers under § 1040.4(b)(3) will substantially reduce the availability of personal and financial information. Further, to address these concerns, the Bureau is adopting § 1040.4(b)(5), which was not in the proposal and which requires the Bureau to further redact other information to reduce even further any risk of re-identification before it publishes the materials.

With regard to the comment that the publication proposal will result in the exposure of private consumer data without consumer consent, § 1040.4(b)(3) requires the redaction of information identifying individual consumers, and new § 1040.4(b)(5) requires the redaction of additional data that could be used to re-identify individuals. The Bureau also notes that no consumer or consumer advocates submitted comments that suggested that the monitoring proposal created a concern with the disclosure of private consumer data. As to the comment that consumers in debt collection cases may not wish to have their personal finances publicly disclosed, the Bureau reiterates its belief that the redactions it requires of providers, along with the additional redactions to be made by the Bureau, will sufficiently reduce re-identification risk.

With regard to the comment that expressed skepticism about allowing government regulators to collect private data, the Bureau notes that the information it will receive from providers will generally be devoid of personal information to begin with, and the information the Bureau publishes will be redacted even further. While data breaches are a general concern for any public institution, the data that the Bureau will keep and publish will be redacted to reduce re-identification risk. The Bureau will also employ the same data security measures that it employs for other sensitive data that it currently maintains.

With regard to the comments that suggested that the Bureau exclude credit unions from the Bureau's monitoring requirement because of the burdens it would impose on credit unions, the Bureau declines to do so for several reasons. Most importantly, the commenter did not point to any unique burden that a credit union would face in complying with the monitoring rule that would warrant an exemption for credit unions. In fact, as the Study showed,[801] pre-dispute arbitration agreements are not common in credit union products. Further, the Bureau determined, as set forth below, to not adopt a blanket exemption from the rule for credit unions. Finally, while credit unions may be nonprofit, member-owned entities that may have fewer incentives to engage in problematic practices with their members, it is not true that credit unions have never violated the law and have never faced cases in response to their past violations of the law.[802] To the extent that credit unions enter pre-dispute arbitration agreements and engage in business practices that result in arbitration awards favoring consumers, the Bureau concludes that they should be subject to the monitoring and publication requirements.

With regard to the concern that the loss of arbitral confidentiality would compromise the privacy of providers and their employees, the Bureau notes that § 1040.4(b)(3) requires the redaction of personal information of all individuals, not just consumers. This would include providers' employees unless the provider is an individual. In addition, the Bureau will redact other information to comply with applicable privacy laws, if necessary.

Confidentiality is not, as some commenters suggested, standard or custom in all arbitrations. As noted in the Study and by some commenters above, other arbitral administrators publish records by default, as set out above in the context of FINRA and AAA consumer arbitrations.[803] The AAA, the largest administrator of consumer arbitrations, makes some consumer

[799] Transparency into arbitral claims and awards may aid other regulators and private attorneys identify consumer harms. Otherwise, consumer harms may be hidden from the public. For instance, as noted above, providers have filed motions to compel arbitration even in individual litigation in court. See *Douglas* v. *Wells Fargo,* BC521016 (Ca. Super. Ct. 2013); *Mokhtari* v. *Wells Fargo,* BC530202, (CA. Super Ct. 2013).

[800] Study *supra* note 3, section 6 at 54–61.

[801] Study, *supra* note 3, section 2 at 14 (noting that of the sample of 49 credit unions surveyed, just four credit unions, representing 8.7 percent of insured deposits in that sample, used arbitration agreements in consumer contracts).

[802] *See, e.g.,* Tina Orem, ''12 Credit Unions Face Overdraft Suits,'' Credit Union Times (Jan. 5, 2016), *available at http://www.cutimes.com/2016/01/05/12-credit-unions-face-overdraft-suits*.

[803] *See* Study, *supra* note 3, section 2 at 51–52 (''Arbitration rules typically do not impose express confidentiality or nondisclosure obligations on parties to the dispute, although arbitrator ethics rules do impose confidentiality obligations on the arbitrator. Most arbitration clauses in the sample were silent on confidentiality and did not impose any nondisclosure obligation on the parties.'').

arbitrations available to the public,[804] and maintains consumer rules that permit it to publish consumer awards, thus putting providers on notice that their arbitration proceedings may become public.[805] FINRA, the arbitration administrator and self-regulatory organization for the securities industry, has long published all arbitration-related documents without redactions. The Bureau finds that the trend among administrators is to expand public access to arbitration documents. The Bureau agrees with the commenters that argued that the public has an interest in accessing arbitral records and data, and the comments citing the experience of other arbitration administrators and State governments that publication does not deter or impede the use of arbitration as a dispute settlement mechanism.

In any case, any expectation of confidentiality is lost to the extent parties to an arbitration file arbitration awards and other documents containing parties' names and other information with a court, such as in an effort to enforce an award. Finally, the Bureau finds the publication of arbitration records will likely not result in conflict with State laws on the confidentiality of arbitral records, given the experience of other nationwide administrators, such as FINRA, that publish arbitration records by default. To the extent that there is a conflict with State laws, the Bureau finds that publication would still be in the public interest.

VII. Section-by-Section Analysis

Section 1040.1 Authority and Purpose

The Bureau proposed § 1040.1 to set forth the authority for issuing the regulation and the regulation's purpose.

1(a) Authority

Proposed § 1040.1(a) provided that the rule is being issued pursuant to the authority granted to the Bureau by sections 1022(b)(1), 1022(c), and 1028(b) of the Dodd-Frank Act. As the proposal noted, section 1022(b)(1) authorizes the Bureau to prescribe rules and issue orders and guidance, 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. Section 1022(c)(4) authorizes the Bureau to monitor for risks to consumers in the offering or provision of consumer financial products or services, including developments in markets for such products or services. Section 1028(b) states that the Bureau, by regulation, may prohibit or impose conditions or limitations on the use of an agreement between a covered person and a consumer for a consumer financial product or service providing for arbitration of any future dispute between the parties, if the Bureau finds that such a prohibition or imposition of conditions or limitations is in the public interest and for the protection of consumers. Section 1028(b) further states that the findings in such rule shall be consistent with the study of pre-dispute arbitration agreements conducted under section 1028(a).

For the reasons described in Part VI and below, the Bureau issues this final rule pursuant to its authority as described in § 1040.1(a), with findings that are consistent with the Study conducted under section 1028(a). The Bureau did not receive any comments on proposed § 1040.1(a) and is finalizing this provision as proposed.

1(b) Purpose

Proposed § 1040.1(b) stated that the purpose of part 1040 is the furtherance of the public interest and the protection of consumers regarding the use of agreements for consumer financial products and services providing for arbitration of any future dispute. This statement of purpose is consistent with Dodd-Frank section 1028(b), which authorizes the Bureau to prohibit or impose conditions or limitations on the use of pre-dispute arbitration agreements if the Bureau finds that they are in the public interest and for the protection of consumers. Dodd-Frank section 1028(b) also requires the findings in any rule issued under section 1028(b) to be consistent with the Study conducted under section 1028(a), which directs the Bureau to study the use of pre-dispute arbitration agreements in connection with the offering or providing of consumer financial products or services.

For the reasons described above in Part VI, the Bureau believes that the final rule is in the public interest and for the protection of consumers, and that its findings are consistent with the Study. The Bureau did not receive any comments on proposed § 1040.1(b) and is finalizing this provision as proposed with one addition. Final § 1040.1(b) incorporates the Bureau's exercise of its authority in Dodd-Frank section 1022(c), the purpose of which is monitoring for risks to consumers in the offering or provision of consumer financial products or services, including developments in markets for such products or services.

Section 1040.2 Definitions

Proposed § 1040.2 set forth definitions for certain terms relevant to the proposal. The Bureau received a number of comments on those proposed terms and their definitions, as well as suggestions to define additional concepts. The Bureau is finalizing § 1040.2 with certain revisions from the proposal as discussed below.

2(a) Class Action

The Bureau proposed to define the term class action because the substantive provisions of § 1040.4(a)(1) concern class actions. Proposed § 1040.2(a) would have defined the term class action as a lawsuit in which one or more parties seek class treatment pursuant to Federal Rule of Civil Procedure 23 or any State process analogous to Federal Rule of Civil Procedure 23.

Some consumer advocates and public-interest consumer lawyer commenters requested that the Bureau expand the definition of class action to include other types of mass actions that the commenters believed would have been excluded from the proposed definition. While the commenters suggested different approaches, they generally recommended that the definition be extended to cover two types of actions: (1) Actions in which one or more parties seek relief on a representative basis; and (2) actions in which there is more than one plaintiff but the plaintiffs do not seek relief on a representative basis (for example, mass joinder cases). One of the commenters, a public-interest consumer lawyer, suggested that the Bureau address this concern not by revising the definition of class action, but by adding a provision to proposed § 1040.4 that would prohibit providers from moving to compel arbitration in a multiple-plaintiff action brought by a group of plaintiffs after they have been denied class certification. The commenters stated that some pre-dispute arbitration agreements expressly prohibit these types of mass actions separate from the prohibition on class actions. The commenters also noted that these types of mass actions resemble class actions in that they enable multiple consumers to obtain relief through a single lawsuit.

After considering the comments, the Bureau is finalizing § 1040.2(a) as

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[804] *See* AAA, ''Consumer Arbitration Statistics,'' *https://adr.org/ConsumerArbitrationStatistics* (last visited Jan. 27, 2017).

[805] AAA, Consumer Arbitration Rules,'' *supra* note 137, at R–43(c) (''The AAA may choose to publish an award rendered under these Rules; however, the names of the parties and witnesses will be removed from awards that are published, unless a party agrees in writing to have its name included in the award.''). The AAA also provides public access to arbitration demands and awards for all class arbitrations (including party names). *See* AAA, ''Case Docket,'' *supra* note 141.

proposed, with a technical edit to clarify that the definition of the term class action still applies even after class action status is obtained. When a court certifies a class action, class action status is no longer sought but instead, has been obtained. The Bureau declines to extend the definition of class action to cover additional types of mass actions. Although there may be similarities between class actions and the mass actions referenced in these comments, the Study did not analyze these types of actions, and the commenters did not provide any data or other evidence regarding the extent to which these types of actions enable consumers to enforce their rights under Federal and State consumer financial law. The Bureau also notes that it intends the phrase ''State process analogous to Rule 23'' to refer to any State process substantially similar to the various iterations of Federal Rule 23 since its adoption; the State process in question need not precisely match Federal Rule 23. The Bureau further notes that the term class action refers to cases in which one or more parties seek class treatment regardless of when they seek class treatment; it is not intended to be limited to cases filed initially as class actions.

2(b) Consumer

Section 1028(b) of the Dodd-Frank Act authorizes the Bureau to prohibit or impose conditions or limitations on the use of a pre-dispute arbitration agreement between a covered person and a ''consumer.'' Section 1002(4) defines the term consumer as an individual or an agent, trustee, or representative acting on behalf of an individual. Proposed § 1040.2(b) would have incorporated the Act's definition of consumer by stating that a consumer is an individual or an agent, trustee, or representative acting on behalf of an individual.

An industry commenter stated the proposed definition of consumer is sufficiently clear, and a consumer advocate commenter requested that the Bureau finalize the definition of consumer as proposed. The consumer advocate commenter stated that the proposed definition was clear and easy to apply and that including agents, trustees, and representatives acting on behalf of individuals would ensure that the rule protects important groups of consumers. Another consumer advocate commenter expressed concern that companies contracting with one another could agree to relinquish a consumer's right to participate in a class action in a manner that binds the consumer even though the consumer was not a party to the contract. The commenter stated that the proposal acknowledged this issue by defining consumer to include an agent, trustee, or representative acting on behalf of an individual, and requested that the definition be amended by adding ''or otherwise purporting to obligate, or limit the rights of, an individual.''

The Bureau is finalizing § 1040.2(b) as proposed. Regarding the consumer advocate's concern that companies could contract with one another to relinquish a consumer's right to participate in a class action in a manner that binds the consumer, the Bureau believes that a company would only have the legal authority to relinquish the consumer's rights if it were an ''agent, trustee, or representative acting on behalf of'' the consumer, and thus the company would be covered by the definition as proposed. The commenter did not explain how such a relinquishment could happen otherwise. Accordingly, the Bureau declines to revise the definition of consumer in response to this concern. The Bureau believes that, to the extent that a consumer is party to an arbitration agreement and a provider seeks to assert that agreement in a class action involving a covered product, this rule would apply.

2(c) Pre-Dispute Arbitration Agreement

Proposed § 1040.2(d) would have defined the term pre-dispute arbitration agreement as an agreement between a provider and a consumer (as separately defined in proposed § 1040.2(b) and § 1040.2(c)) providing for arbitration of any future dispute between the parties.[806] The Bureau derived its proposed definition from Dodd-Frank section 1028(b), which, under certain conditions, authorizes the Bureau to regulate the use of agreements for consumer financial products or services that provide for arbitration of future disputes between covered persons and consumers. Proposed comment 2(d)-1 would have stated that the term includes any agreement between a provider and a consumer providing for arbitration of any future disputes between the parties, regardless of its form or structure, and provided illustrative examples of contract types.

Both a consumer advocate and a public-interest consumer lawyer commenter expressed concern about the phrase ''between a provider and a consumer'' in the proposal's definition of pre-dispute arbitration agreement. The commenters asserted that the phrase is confusing and could potentially limit the rule's application in ways the Bureau did not appear to intend, given that the Bureau stated elsewhere in the proposal that the provisions of proposed § 1040.4 were intended to apply to pre-dispute arbitration agreements that were originally between consumers and entities other than providers. These commenters also stated that the phrase is redundant, because the substantive provisions in proposed § 1040.4 would have applied only to providers; thus, in the commenters' view, it is unnecessary also to limit the scope of the term pre-dispute arbitration agreement to an agreement between a provider and a consumer. The consumer advocate commenter suggested that the Bureau remove the phrase ''between a provider and a consumer,'' while the public-interest consumer lawyer commenter requested that the Bureau replace the word ''provider'' with the phrase ''person'' as defined in Dodd-Frank section 1002(19).[807]

Additionally, the public-interest consumer lawyer commenter suggested that the Bureau amend proposed comment 2(d)–1 or add a new comment, to clarify that the presence or absence of opt-out provisions does not affect whether an agreement is a pre-dispute arbitration agreement under the rule. According to this commenter, providers sometimes argue that opt-out provisions make arbitration agreements fairer and that a consumer's failure to opt out indicates the consumer's assent to the arbitration agreement's terms. The commenter did not say, however, why it was necessary to clarify the definition of pre-dispute arbitration agreement on this point.

Additionally, several commenters expressed concern that providers would seek to evade the rule if it was finalized as proposed by adopting a practice of amending their consumer agreements after a class action has been filed but before certification to state that any claims related to the dispute that is the subject of the class action must be resolved individually. These commenters were concerned that the definition of pre-dispute arbitration agreement in proposed § 1040.2(d) was limited to agreements providing for arbitration of any *future dispute* between the parties because they were

[806] As noted below, for ease of reference, the Bureau has re-numbered the definition of pre-dispute arbitration agreement in the final rule as § 1040.2(c). The definition of provider, which was § 1040.2(c) in the proposal, is § 1040.2(d) in the final rule.

[807] Dodd-Frank section 1002(19) defines ''person'' as ''an individual, partnership, company, corporation, association (incorporated or unincorporated), trust, estate, cooperative organization, or other entity.''

concerned that a dispute related to a pending class action could be construed as a ''current dispute'' between the consumer (who is presumably an absent class member) and the provider. One of the commenters, a public-interest consumer lawyer, predicted that providers might stop using pre-dispute arbitration agreements and instead adopt ad hoc agreements requiring arbitration of particular disputes that have given rise to class actions.[808] Additionally, a consumer advocate commenter requested that the Bureau clarify that the definition of pre-dispute arbitration agreement includes delegation provisions, which are agreements to delegate to arbitration decisions regarding threshold issues concerning an arbitration agreement (such as enforceability).[809]

After consideration of the comments, the Bureau is finalizing the definition of pre-dispute arbitration agreement with modifications as described below.[810] Final § 1040.2(c) defines pre-dispute arbitration agreement as an agreement between a covered person as defined by 12 U.S.C. 5481(6) and a consumer providing for arbitration of any future dispute concerning a consumer financial product or service covered by § 1040.3(a). The final rule's definition of pre-dispute arbitration agreement mirrors Dodd-Frank section 1028(b), which authorizes the Bureau, if certain conditions are met, to regulate ''the use of an agreement between a covered person and a consumer for a consumer financial product or service providing for arbitration of any future dispute between the parties.''

Final § 1040.2(c) reflects two modifications from the proposal. First, the final rule's definition contains a new limitation: Pre-dispute arbitration agreements must be agreements providing for arbitration of any future dispute ''concerning a consumer financial product or service covered by § 1040.3(a).'' This limitation is already built into the operation of the rule because § 1040.4 only applies to pre-dispute arbitration agreements concerning consumer financial products or services. Nonetheless, for clarity, the Bureau has added this limitation into the definition of pre-dispute arbitration agreement itself to reflect section 1028(b), which authorizes the Bureau to regulate agreements ''for a consumer financial product or service'' providing for arbitration of any future dispute between the parties.

Second, the Bureau has replaced the phrase ''between a provider and a consumer'' with the phrase ''between a covered person as defined by 12 U.S.C. 5481(6) and a consumer.'' The Bureau is persuaded that defining pre-dispute arbitration agreement as an agreement ''between a provider and a consumer,'' as in the proposal, is unnecessary and potentially confusing as to the intended scope of the rule. Specifically, as stated in the proposal, the Bureau had intended that the substantive provisions in proposed § 1040.4 apply to providers as defined in proposed § 1040.2(c) when they are relying on arbitration agreements in contracts for consumer financial products and services that were originally between consumers and persons who were excluded from the definition of provider in accordance with proposed § 1040.3(b). The Bureau believes the phrase ''between a consumer and a covered person as defined by 12 U.S.C. 5481(6)'' addresses this concern and more closely reflects the Bureau's intention. The Bureau also notes that, while the term ''covered person'' is broader than the term ''provider,'' the final rule's use of the term ''covered person'' does not expand the universe of persons subject to the rule's requirements. That is because the rule's substantive requirements—the requirements imposed by § 1040.4(a)(1), (a)(2), and (b), discussed below—apply only to ''providers.''

New comment 2(c)–1 further clarifies this concept. Comment 2(c)–1.i explains that, while § 1040.2(c) defines ''pre-dispute arbitration agreement'' as an agreement between a covered person and a consumer, the rule's substantive requirements, which are contained in § 1040.4, apply only to ''providers.'' Comment 2(c)–1.i notes further that, while ''covered persons,'' as that term is defined in Dodd-Frank section 1002(6), includes persons excluded from the Bureau's rulemaking authority under Dodd-Frank sections 1027 and 1029, the requirements contained in § 1040.4 would not apply to any such persons entering into a pre-dispute arbitration agreement because they are not ''providers,'' by virtue of § 1040.2(d) (stating that persons excluded under § 1040.3(b) are not providers) and § 1040.3(b)(6) (excluding any person to the extent not subject to the Bureau's rulemaking authority including under sections 1027 or 1029). The comment further clarifies that the requirements in § 1040.4 would apply, however, to the use of any such pre-dispute arbitration agreement by a different person that meets the definition of provider, when the pre-dispute arbitration agreement was entered into after the compliance date.

New comment 2(c)–1.ii illustrates this concept with an example. Comment 2(c)–1.ii states that an automobile dealer that provides consumer credit is a covered person under Dodd-Frank section 1002(6)—and such a person's contracts may contain pre-dispute arbitration agreements as that term is defined in § 1040.2(c). Yet an automobile dealer that is excluded from the Bureau's rulemaking authority in circumstances described by Dodd-Frank section 1029 would not be required to comply with the requirements in § 1040.4, because those requirements apply only to providers, and such automobile dealers, while they are covered persons, are excluded by § 1040.3(b)(6) and therefore are not providers under § 1040.2(d). The requirements in § 1040.4 would apply, however, to the use of the automobile dealer's pre-dispute arbitration agreement by a different person that meets the definition of provider, such as a servicer, or purchaser or acquirer of the automobile loan, where the agreement was entered into after the compliance date.

To clarify the relationship between the definition of pre-dispute arbitration agreement and delegation provisions, the Bureau is adding comment 2(c)–2 to the final rule.[811] Comment 2(c)–2 clarifies that the term pre-dispute arbitration agreement as defined in § 1040.2(c) includes delegation provisions, which the comment identifies as agreements to arbitrate threshold issues concerning the arbitration agreement, which may sometimes appear elsewhere in a contract containing or relating to the arbitration agreement.[812] The Bureau believes that the definition of pre-dispute arbitration agreement in § 1040.2(c) includes delegation provisions because such provisions are agreements between covered persons and consumers providing for arbitration

[808] This commenter also recommended that the Bureau revise § 1040.4(a)(1) and (a)(2) to address this concern. However, for the reasons described below in its response to this comment, the Bureau does not believe that the revisions to either are necessary.

[809] The commenter also recommended that the Bureau revise § 1040.4 to prohibit providers from relying on delegation provisions.

[810] For ease of reference, the Bureau has re-numbered this definition in the final rule as § 1040.2(c); the definition of provider, which was proposed § 1040.2(c), is § 1040.2(d) in this final rule.

[811] As noted above, the commenter also recommended that the Bureau revise proposed § 1040.4 to prohibit providers from relying on delegation provisions. New comment 2(c)–3 addresses how delegation provisions relate to the Bureau's rule.

[812] This comment is consistent with *Rent-A-Center West, Inc.* v. *Jackson,* 561 U.S. 63, 68 (2010) (stating that ''[t]he delegation provision is an agreement to arbitrate threshold issues concerning the arbitration agreement.'').

of any future dispute concerning a consumer financial product or service—namely, disputes over threshold issues concerning the arbitration agreement for such a consumer financial product or service. Accordingly, § 1040.4(a)(1) prohibits a provider from relying on a delegation provision entered into after the compliance date with respect to any aspect of a class action that concerns a covered consumer financial product or service until such time as the case is determined not to be a class action. This interpretation is consistent with jurisprudence recognizing delegation provisions as arbitration agreements for purposes of the FAA.[813]

The Bureau intends this interpretation to apply even if the delegation provision is contained in a separate provision of the contract. In accordance with the Supreme Court's decision in *Jackson,* delegation provisions are themselves arbitration agreements that the Bureau has the authority to regulate under section 1028(b). That section authorizes the Bureau to ''prohibit or impose conditions or limitations on the use of an agreement between a covered person and a consumer for a consumer financial product or service providing for arbitration of any future dispute between the parties.'' A delegation provision in a consumer contract for a consumer financial product or service is an ''agreement between a covered person and a consumer for a consumer financial product or service providing for arbitration of any future dispute'' pertaining to threshold issues concerning the arbitration agreement; thus, section 1028(b) authorizes the Bureau to prohibit or impose conditions or limitations on the use of such provisions.

The Bureau believes it is not necessary to revise the definition of pre-dispute arbitration agreement to address the commenters' concern that providers will seek to evade the rule by amending consumer agreements after a class action has been filed (but before certification) to state that any claims related to the dispute that is the subject of the class action must be resolved individually. The Bureau believes that, under existing precedents, courts would not enforce such agreements. Courts have routinely held arbitration agreements adopted after a class action has been filed, but before certification, unenforceable as unconscionable or as improper communications with the class.[814] Regarding the public-interest consumer lawyer's concern that providers would respond to the rule by abandoning pre-dispute arbitration agreements and adopting ad hoc agreements requiring arbitration of particular disputes that have given rise to class actions, the Bureau believes that, to the extent that providers adopt such agreements to bind putative class members, the precedents described above would apply. And to the extent that providers adopt such agreements to bind their consumers before a class action is filed against that provider, the Bureau believes that those types of agreements are plainly pre-dispute arbitration agreements under § 1040.2(d), because they concern a future dispute.

Regarding the public-interest consumer lawyer commenter's concern about opt-out provisions, the Bureau does not believe that it is necessary to clarify that the presence or absence of an opt-out provision does not affect whether an agreement is a pre-dispute arbitration agreement within the meaning of § 1040.2(c). The Bureau believes that it is clear that, where a pre-dispute arbitration agreement includes an opt-out provision, and the consumer has not opted out, there remains a governing pre-dispute arbitration agreement to which the Bureau's rule would apply.

The Bureau did not receive comment on proposed comment 2(d)–1 and is finalizing the proposed comment, renumbered as comment 2(c)–3, as proposed.

2(d) Provider

Dodd-Frank section 1028(b) authorizes the Bureau to prohibit or impose conditions or limitations on the use of a pre-dispute arbitration agreement between a ''covered person'' and a consumer. Section 1002(6) defines the term covered person as any person that engages in offering or providing a consumer financial product or service and any affiliate of such a person if such affiliate acts as a service provider to that person. Section 1002(19) further defines person to mean an individual, partnership, company, corporation, association (incorporated or unincorporated), trust, estate, cooperative organization, or other entity.

Throughout the proposal, the Bureau used the term provider to refer to the entity to which the requirements in the proposal would have applied.[815] Proposed § 1040.2(c) would have defined the term provider as a subset of the term covered person. Specifically, proposed § 1040.2(c) would have defined the term provider to mean (1) a person as defined by Dodd-Frank section 1002(19) that engages in offering or providing any of the consumer financial products or services covered by proposed § 1040.3(a) to the extent that the person is not excluded under proposed § 1040.3(b); or (2) an affiliate of a provider as defined in proposed § 1040.2(c)(1) when that affiliate would be acting as a service provider to the provider with which the service provider is affiliated consistent with the meaning set forth in 12 U.S.C. 5481(6)(B).

Proposed comment 2(c)–1 would have clarified that a provider as defined in proposed § 1040.2(c) that also engages in offering or providing products or services not covered by proposed § 1040.3 must comply with this part only for the products or services that it offers or provides that would be covered by proposed § 1040.3. The proposed comment would have illustrated this concept by noting that a merchant that transmits funds for its customers would be covered pursuant to proposed § 1040.3(a)(7) with respect to the transmittal of funds, but the same

[813] *See Jackson,* 561 U.S. at 70 (''An agreement to arbitrate a gateway issue is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other.'').

[814] *See, e.g., O'Connor* v. *Uber Techs., Inc.,* No. 13–3826, 2013 WL 6407583, at *7 (N.D. Cal. Dec. 6, 2013) (defendant communicated improperly with class where it sought approval of arbitration agreement after class action was filed); *Balasanyan* v. *Nordstrom, Inc.,* Nos. 11–2609, 10–2671, 2012 WL 760566, at *4 (S.D. Cal. Mar. 8, 2012) (denying employer's motion to compel arbitration based on arbitration agreement adopted by defendant after class action was filed on the ground that agreement was an improper communication with class); *In re Currency Conversion Fee Antitrust Litig.,* 361 F. Supp. 2d 237, 250–254 (S.D.N.Y. 2005) (denying defendants' motion to stay litigation pending arbitration based on arbitration agreements adopted through change-in-terms notices that did not inform class members of lawsuit, on the ground that the agreements were improper communications with class); *Carnegie* v. *H&R Block, Inc.,* 687 N.Y.S.2d 528, 533 (N.Y. Sup. Ct. 1999) (ordering that arbitration agreements in loan contracts entered into with consumers after filing of class action could not be enforced, on the basis that agreements were improper communications with putative class members); *Powertel* v. *Bexley,* 743 So. 2d 570, 577 (Fla. Dist. Ct. App. 1999) (affirming trial court's denial of motion to compel arbitration and ruling that arbitration agreements adopted through change-in-terms notice after filing of class action were unconscionable). *Cf. Balasanyan* v. *Nordstrom, Inc.,* 294 FRD. 550, 574 (S.D. Cal. 2013) (holding that where, after class action was filed, employer began requiring new employees to sign an arbitration agreement, new employees who signed that agreement may be excluded from class, because company was not communicating improperly with class members but ''engaging in standard practice that many companies engage in when hiring new employees'').

[815] For example, proposed § 1040.4(a)(1) would have prohibited a provider from seeking to rely in any way on a pre-dispute arbitration agreement entered into after the compliance date in a class action related to a covered consumer financial product or service.

merchant generally would not be covered with respect to its sale of durable goods to consumers, except as provided in 12 U.S.C. 5517(a)(2)(B)(ii) or (iii).[816]

Other than a comment from an industry commenter, which stated that the proposed definition of provider was sufficiently clear, the Bureau received no comments on this proposed provision.[817] The Bureau is finalizing the definition of provider largely as proposed, except for minor technical revisions.[818] For ease of reference and as noted previously, the Bureau has also re-numbered this definition in the final rule as § 1040.2(d); the definition of pre-dispute arbitration agreement, which was § 1040.2(d) in the proposal, is § 1040.2(c) in the final rule. Having not received any comment, the Bureau is also finalizing proposed comment 2(c)–1, renumbered as comment 2(d)–1, as proposed, with minor updates to align the comment with changes to § 1040.3(a)(7) to which the comment refers and to clarify that the references to Dodd-Frank section 1027 refer to the activity of extending consumer credit. The Bureau is also adding comment 2(d)–2 to clarify that a person is a provider if it meets either prong of the definition of provider in § 1040.2(d)(1) and (2). In particular, even if an affiliated service provider does not meet the definition of provider in § 1040.2(d)(2), because it provides services to a person who is excluded from the rule under § 1040.3(b) and who thus is not a provider, the affiliated service provider still could be a provider as defined in § 1040.2(d)(1). For example, if an affiliate of a merchant excluded by § 1040.3(b)(6) services consumer credit extended by the merchant, the affiliate servicer may meet the definition of provider in § 1040.2(d)(1) even though the merchant is not a provider. The comment also emphasizes that the rule applies to affiliated service providers in certain circumstances even when they are not themselves offering or providing a consumer financial product or service.

As stated in the proposal, the definition of the term ''person'' under section 1002(19) of the Dodd-Frank Act includes an individual, partnership, company, corporation, association (incorporated or unincorporated), trust, estate, cooperative organization, or other entity, and the term ''entity'' readily encompasses governments and government entities. Even if the term were ambiguous, the Bureau, based on its expertise and experience with respect to consumer financial markets, believes that interpreting the term to encompass governments and government entities would promote consumer protection, fair competition, and other objectives of the Dodd-Frank Act. Further, as stated in the proposal, the Bureau believes that the terms ''companies'' or ''corporations'' under the definition of ''person,'' on their face, cover all companies and corporations, including government-owned or -affiliated companies and corporations. In addition, even if those terms were ambiguous, the Bureau believes based on its expertise and experience with respect to consumer financial markets that interpreting them to cover government-owned or -affiliated companies and corporations would promote the objectives of the Dodd-Frank Act. Accordingly, while the Bureau has chosen to exempt certain government entities under § 1040.3(b)(2), the term provider is broad enough to encompass such entities to the extent that they are not otherwise excluded from the rule.[819]

Comments on Possible Additional Definitions

Several commenters requested that the Bureau define additional terms relevant to this rulemaking that the Bureau did not propose to define.

A public-interest consumer lawyer commenter and an industry commenter requested that the Bureau define the term ''arbitration.'' The public-interest consumer lawyer commenter suggested that the Bureau define ''arbitration'' as ''any binding alternative dispute resolution process'' and stated that this definition would provide clarity and limit evasion. The industry commenter did not recommend a specific definition of ''arbitration'' but stated that a definition would ensure compliance with the regulation.

The Bureau declines to add a definition of ''arbitration'' to § 1040.2. While neither commenter stated why they believed a definition of arbitration would either prevent evasion or improve compliance, the Bureau believes that the relevant evasion concern would be that providers would create a binding alternative dispute resolution (ADR) process that is similar to arbitration but that uses a different name, and that such an arrangement could harm consumers were a court to conclude that it would not be covered by this rule. The Bureau believes that any such evasion attempts would fail. The Bureau is aware that there has been extensive litigation on the question of whether a particular ADR process is arbitration, in part because the FAA does not define the term. Most circuits apply a ''Federal common law'' standard that looks to whether disputants empowered a third party to render a final and binding decision settling their dispute.[820] Two circuit courts apply the relevant State law, as long as that law does not frustrate the purposes of the FAA.[821] The Bureau believes these precedents are broad enough to capture any ADR process that entities could implement in an effort to evade the rule, but the Bureau will nonetheless monitor the market for any attempts by providers to evade application of this rule in this manner.

A consumer lawyer commenter requested that the Bureau add to § 1040.2 a definition of ''business of insurance'' that would cross-reference the definition of ''business of insurance'' in Dodd-Frank section 1002(3).[822] The commenter also

[816] As stated in the proposal, the Bureau intends the phrase ''that engages in offering or providing any of the consumer financial products or services covered by § 1040.3(a)'' to clarify that the proposal would apply to providers that use a pre-dispute arbitration agreement entered into with a consumer for the products and services enumerated in proposed § 1040.3(a). The Bureau also intends this phrase to convey that, even if an entity would be a provider under proposed § 1040.2(c) because it offers or provides consumer financial products or services covered by proposed § 1040.3(a), it would not be a provider with respect to products and services that it may provide that are not covered by proposed § 1040.3(a).

[817] A consumer advocate commenter also commented on this proposed definition. However, these comments related more directly to the rule's coverage mechanism. For this reason, the Bureau summarizes and responds to these comments in the section-by-section analysis for § 1040.3, below.

[818] In the commentary to the definition of provider, the Bureau has corrected the cross-reference to transmitting funds coverage, which is in § 1040.3(a)(7), and has clarified when that coverage would apply. The Bureau also has shortened the definition in § 1040.2(d)(1) to refer to an ''activity'' covered by § 1040.3(a), so that the terms governing which activities are covered appear in § 1040.3(a). Finally, the Bureau has deleted the second usage of the phrase ''as defined in paragraph (c)(1)'' from the proposed definition, as only one usage of that phrase is needed.

[819] *See supra* section-by-section analysis of § 1040.3(b)(2).

[820] *See, e.g., Bakoss* v. *Certain Underwriters at Lloyds of London Issuing Certificate No. 0510135,* 707 F.3d 140 (2d Cir. 2013) (affirming district court's application of Federal common law standard that ''if the parties have agreed to submit a dispute for a decision by a third party, they have agreed to arbitration'').

[821] *See Portland General Electric Co.* v. *U.S. Bank Trust Nat'l Ass'n,* 218 F.3d 1085 (9th Cir. 2000) (applying Oregon law); *Hartford Lloyd's Insurance Co.* v. *Teachworth,* 898 F.2d 1058 (5th Cir. 1990) (applying Texas law).

[822] Dodd-Frank section 1002(3) states that the term business of insurance means the writing of insurance or the reinsuring of risks by an insurer, including all acts necessary to such writing or reinsuring and the activities relating to the writing of insurance or the reinsuring of risks conducted by persons who act as, or are, officers, directors, agents, or employees of insurers or who are other persons authorized to act on behalf of such persons.

requested that the Bureau adopt commentary stating that certain contractual arrangements similar to guaranteed asset protection (GAP) waiver arrangements are not the ''business of insurance.'' [823] The commenter stated that these revisions are needed because judges and litigants often deem such arrangements to be the business of insurance, when, in the commenter's view, they are not. If considered the business of insurance, such arrangements would be exempt from the rule under Dodd-Frank section 1027(m).[824] If not, part 1040 could apply to pre-dispute arbitration agreements in contracts for such arrangements where charges incurred by consumers pursuant to such arrangements are included in the cost of credit.[825]

The Bureau declines to add to § 1040.2 a definition of ''business of insurance'' that cross-references the Dodd-Frank Act's definition of that term. The Bureau also declines to add commentary stating that contractual arrangements similar to GAP waiver agreements are not the business of insurance. The Bureau understands that a number of State courts and State banking regulators have determined that debt cancellation or suspension products such as those described by the commenter are not insurance.[826] However, whether a particular debt cancellation arrangement involves the business of insurance may vary based on the particular facts and circumstances. The Bureau believes that whether a product involves the business of insurance is best ascertained by the provider's obtaining legal advice based on the facts in a particular case.[827]

An industry commenter requested that the Bureau define ''account'' and ''pre-dispute.'' The commenter did not recommend specific definitions for these terms but stated that they would help ensure compliance with the regulation. The Bureau believes it is unnecessary to define either of these terms. In the final rule, two provisions—§ 1040.3(a)(5) and (a)(6)—use the term account. However, these provisions cross-reference TISA and EFTA respectively and their implementing regulations, both of which define the term.[828] Thus, the Bureau believes it unnecessary to define those terms here. While § 1040.4(b)(3)(vi) uses the term ''account number,'' the Bureau does not believe that the commenter was indicating confusion over this term or that there is confusion about this concept. The Bureau believes it is unnecessary to define the term pre-dispute because the term is only relevant in the context of the term pre-dispute arbitration agreement, which § 1040.2(c) already defines.

Section 1040.3 Coverage and Exclusions From Coverage

As discussed above, Dodd-Frank section 1028(b) authorizes the Bureau to issue regulations concerning agreements between a covered person and a consumer ''for a consumer financial product or service'' providing for arbitration of any future disputes that may arise. Accordingly, the Bureau proposed § 1040.3 to set forth the products and services to which proposed part 1040 would apply. Proposed § 1040.3(a) generally would have provided a list of products and services that would be covered by the proposal, while proposed § 1040.3(b) would have provided limited exclusions.

The Bureau proposed to cover a variety of consumer financial products and services that the Bureau believed are in or tied to the core consumer financial markets of lending money, storing money, and moving or exchanging money—all markets covered in significant part in the Study. Lending money includes, for example: Most types of consumer lending (such as making secured loans or unsecured loans or issuing credit cards), activities related to that consumer lending (such as providing referrals, servicing, credit monitoring, debt relief, and debt collection services, among others, as well as the purchasing or acquiring of such consumer loans), and extending and brokering those leases that are consumer financial products or services because they are similar to automobile loans. Storing money includes storing funds or other monetary value for consumers (such as providing deposit accounts). Moving money includes providing consumer services related to the movement or conversion of money (such as certain types of payment processing activities, transmitting and exchanging funds, and cashing checks).

Proposed § 1040.3(a) described the products and services in these core consumer financial markets that the Bureau proposed to cover in part 1040. Each component is discussed separately below in the discussion of each subsection of § 1040.3(a), along with a summary of comments received on each component, the Bureau's response to these comments, and any changes the Bureau is making to the subsection in the final rule.[829] The Bureau notes that both banks and nonbanks may provide the products and services described in § 1040.3(a). As discussed in the section-by-section analysis of ''provider'' (see § 1040.2(d) above), below in this section, and in the Bureau's Section 1022(b)(2) Analysis, a covered person under the Dodd-Frank Act who engages in offering or providing a product or service described in proposed § 1040.3(a) generally is subject to the proposal, except to the extent an exclusion in proposed § 1040.3(b) applies to that person. Proposed § 1040.3(b) thus described exceptions to proposed § 1040.3(a). Each proposed exception is discussed separately below, along with a summary of comments received related to each proposed exception, the Bureau's response to these comments, and any changes the Bureau is making to the subsection in the final rule.

3(a) Covered Products and Services

The Bureau's Proposal

As set forth above, the Bureau's rulemaking authority under Dodd-Frank section 1028(b) generally extends to the use of an agreement between a covered person and a consumer for a ''consumer financial product or service'' (as defined in Dodd-Frank section 1002(5)).

[823] In a typical GAP waiver arrangement, a lender agrees, for an additional charge, to forgive some or all of any remaining debt following a covered loss. For example, where a waiver covers automobile theft, the lender would forgive the amount of any difference between the remaining balance on the consumer's automobile loan and the payout by the consumer's automobile insurance company following the theft of the consumer's automobile.

[824] Section 1027(m) explains that the Bureau may not define as a financial product or service, by regulation or otherwise, engaging in the business of insurance.

[825] *See* § 1040.3(a).

[826] *See, e.g., First Nat'l Bank of E. Arkansas* v. *Eubanks,* 740 F. Supp. 1427 (E.D. Ark. 1989) (holding that bank did not engage in the business of insurance when it entered into debt cancellation agreements); *Automotive Funding Group, Inc.* v. *Garamendi,* 7 Cal. Rptr. 3d 912 (Cal. Ct. App. 2003) (holding that an automobile lender's debt cancellation program was not insurance); 7 Tex. Admin. Code 12.33(b)(3) (Texas rule adopted in 2003 providing that State banks' debt cancellation and suspension agreements are governed by the Texas Administrative Code and applicable provisions in the Finance Code and not State insurance laws).

[827] *See also* the section-by-section analysis for § 1040.3(a)(1), below, which discusses additional comments the Bureau received concerning life insurance policy loans.

[828] *See* 12 CFR 1030.2(a) (defining ''account'' for purposes of Regulation DD); 12 CFR 707.2(a) (defining ''account'' for purposes of National Credit Union Administration's rule implementing TISA); 12 CFR 1005.2(b)(1) (defining ''account'' for purposes of Regulation E).

[829] Following that discussion, an illustrative set of examples of persons providing these products and services is included in the introduction of the section-by-section analysis to § 1040.3(b).

However, as discussed in the section-by-section analysis of proposed § 1040.3(b)(5), Dodd-Frank sections 1027 and 1029 [830] exclude certain activities by certain covered persons, such as the sale of nonfinancial goods or services, including automobiles, from the Bureau's rulemaking authority in certain circumstances.[831]

In exercising its authority under Dodd-Frank section 1028, the Bureau proposed to cover consumer financial products and services in what it described as the core markets of lending money, storing money, and moving or exchanging money. Accordingly, the Bureau did not propose to cover every type of consumer financial product or service as defined in Dodd-Frank section 1002(5), particularly those outside these three core areas. As the proposal explained, Bureau intends to continue to monitor other markets for consumer financial products and services in order to determine over time whether to revisit the scope of this rule.

In addition, the Bureau structured the proposed scope provisions to use a number of terms derived from existing, enumerated consumer financial protection statutes implemented by the Bureau in order to facilitate compliance. In so doing, the Bureau expected that the coverage of proposed part 1040 would have incorporated relevant future changes, if any, to the enumerated consumer financial protection statutes and their implementing regulations and to provisions of title X of Dodd-Frank referenced in proposed § 1040.3(a). For example, the proposal noted that changes that the Bureau had proposed regarding the definition of an account with regard to prepaid products under Regulation E would have, if adopted, affected the scope of proposed § 1040.3(a)(6).[832]

To effectuate this approach, the Bureau specifically proposed in § 1040.3(a) that proposed part 1040 generally would have applied to pre-dispute arbitration agreements for the products or services listed in proposed § 1040.3(a) to the extent they are consumer financial products or services as defined by 12 U.S.C. 5481(5). As proposed comment 3(a)–1 would have explained, that statutory provision generally defines two types of consumer financial products and services. The first type is any financial product or service that is ''offered or provided for use by consumers primarily for personal, family, or household purposes.'' The second type is a financial product or service that is delivered, offered, or provided in connection with the first type of consumer financial product or service.

Comments Received

A number of consumer advocates, nonprofits, consumer law firms, and industry commenters identified specific products or services that, in their view, should or should not be covered; these comments are addressed in relevant subsections of the section-by-section analysis below.[833] Some industry commenters challenged areas of proposed coverage, on the basis that their industry was either not analyzed, or not sufficiently analyzed, in part or all of the Study. Those comments are discussed in the analysis of comments on the Study above in Part III.

In addition, the Bureau received several comments more generally addressing its overall proposed approach to scope of coverage that focused on three core markets and its frequent reliance on already-enumerated terms in Federal consumer financial laws. One consumer advocate agreed with the Bureau's proposed approach to delineating the scope of coverage, which, in its view, would reduce uncertainty and assist the Bureau and courts in administration of the rule. Three public-interest consumer lawyer commenters believed the proposed coverage was extensive. Nonetheless, a trade association of consumer lawyers, a consumer advocate, and an individual commenter stated in their comments that the scope of coverage should be broadened to reach all consumer financial products and services that may be regulated by the Bureau in the Dodd-Frank Act.[834] These commenters generally believed that consumers of financial products and services do not knowingly and voluntarily enter into arbitration agreements, which often cover a broad range of claims, and as a result, arbitration agreements should be regulated wherever they occur in Bureau-regulated markets without limitation.

A public-interest consumer lawyer commenter supported the proposal's references to other laws and regulations to define scope, as this would ensure that the scope of coverage in the proposal would evolve as those laws and regulations are updated to address developments in the relevant markets. The commenter stated that this feature of the proposal would be particularly important for African American communities the commenter represents, which, in its view, are often a target for novel, and sometimes exploitative, consumer financial products and services. This commenter also suggested that for clarity the Bureau noted this feature in the official interpretations to part 1040. A consumer advocate commenter also supported the Bureau's proposed incorporation of definitions found in other regulations that may later be amended, noting the availability of notice-and-comment rulemaking for such amendments would allow commenters on those potential changes to address the relevance and application of part 1040.[835]

In addition, a consumer advocate and a public-interest consumer lawyer also expressed concern in their comments that persons who provide services to providers covered by the proposal (but who are not themselves providers) could escape the reach of the proposal. In particular, these commenters asserted that if a covered provider failed to comply with the proposal's requirement to insert a contract provision preventing

[830] 12 U.S.C. 5517 and 5519.

[831] However, as also discussed in greater detail in the section-by-section analysis of proposed § 1040.3(b)(5) and clarified in comments 2(c)–1 and 2(c)–1.i to the final rule, even where the person offering or providing a consumer financial product or service may be excluded from coverage under the regulation, for instance because that party is an automobile dealer extending a loan in circumstances that exempt the automobile dealer from the rulemaking authority of the Bureau under Dodd-Frank section 1029, the rule would still apply to providers of other consumer financial products or services (such as servicers or debt collectors) in connection with the same consumer financial product or service offered or provided by the entity excluded from the Bureau's rulemaking authority (such as the automobile loan referenced above).

[832] The Bureau did adopt changes to that regulation in a final rule issued in October 2016 that, when it takes effect, will expand the types of products that are considered accounts and that would be subject to proposed § 1040.3(a)(6), as is discussed below. *See* Prepaid Accounts Under the Electronic Fund Transfer Act (Regulation E) and the Truth in Lending Act (Regulation Z), 81 FR 83934 (Nov. 22, 2016); 82 FR 18975 (Apr. 25, 2017) (setting effective date of April 1, 2018 for most provisions). *See also* Prepaid Accounts Under the Electronic Fund Transfer Act (Regulation E) and the Truth in Lending Act (Regulation Z), 82 FR 29630 (June 29, 2017) (proposal seeking comment on whether the effective date should be further delayed).

[833] In addition, a consumer advocate also urged the Bureau to cover real estate brokerage and title insurance because arbitration agreements in those markets are, in their view, common and have the effect of suppressing claims. Having not sought notice and comment, the Bureau declines to add these markets to the rule.

[834] This other consumer advocate also noted, however, that the rule should cover at least those products and services in the proposal because, in their view, consumers have been subjected to arbitration agreements in most, if not all, of those markets. Other consumer advocate comments similarly indicated that arbitration agreements were common in consumer finance markets.

[835] This commenter also stated in its comment that the rule should cover all types of mortgage settlement services, and not just mortgage brokering or mortgage lending. Having not sought notice and comment, the Bureau declines to add these markets to the rule.

reliance on the arbitration agreement in a class action (proposed § 1040.4(a)(2)), then the service provider might attempt to rely on the arbitration agreement of the provider in a class action against the service provider because another provision of the rule, prohibiting invocation of an arbitration agreement in a class action (proposed § 1040.4(a)(1)) would not apply.

The Final Rule

The Bureau is finalizing the rule consistent with the overall approach it had set forth in the proposal to defining a broad but specific scope of coverage within the core markets of storing, lending, and moving money. The Bureau continues to believe that this approach will facilitate compliance with the rule and its administration. The Bureau recognizes, however, that the use of arbitration agreements for other consumer financial products or services not covered by the final rule nonetheless has a potential to cause harm to consumers. As stated in the proposal, the Bureau therefore plans to monitor the impact of arbitration agreements in these other markets. Based upon this monitoring, the Bureau may consider adjusting the scope of coverage of the rule in the future, whether by adjusting an existing category of coverage or by adding a new category of coverage, consistent with its rulemaking obligations and authority including Dodd-Frank section 1028.

In addition, the Bureau believes that the references in the scope of coverage § 1040.3 to existing laws and regulations is sufficient to signal that the coverage is determined based upon the content of those laws, as they exist now and as they may evolve in the future through amendments or new interpretations. Because this is how any regulation defining scope would function when it incorporates citations to existing laws, the Bureau does not believe it is necessary to adopt a specific comment to this effect, as one commenter suggested.

With regard to the commenter that sought broader coverage of service providers, the Bureau does not believe a change is necessary to address this commenter's concern. To the extent a service provider is providing or offering a covered consumer financial product or service, then the class rule (§ 1040.4(a)(1)) prohibits that service provider from relying upon any arbitration agreement entered into after the compliance date, regardless of whether the service provider itself had entered into the agreement (see comment 4–2). For example, a debt collector collecting consumer credit on behalf of the creditor may be a service provider, but also would be covered directly (see § 1040.3(a)(10)(iii)). To the extent this commenter was, in effect, seeking an expansion in the proposed scope of coverage to reach persons who are not offering or providing a covered consumer financial product or service and are not an affiliated service provider to persons offering or providing a covered consumer financial product or service, the Bureau does not believe such an expansion in scope of coverage is warranted. Nevertheless, the Bureau shares the commenter's concern regarding a situation in which a person provides services to a provider that had failed to comply with this rule, and relies on the provider's non-compliant arbitration agreement. The Bureau believes that this problem can be addressed through means other than adding unaffiliated service providers to the coverage of this rule. For example, consumers may assert that the arbitration agreement in this example was invalid or unenforceable for its failure to comply with the Bureau's rule.[836]

The Bureau is also making minor technical revisions to the introductory paragraph of § 1040.3(a). First, because the definition of pre-dispute arbitration agreement in § 1040.2(c) already refers to agreements concerning the consumer financial products and services listed in § 1040.3(a), it is not necessary to repeat the term ''pre-dispute arbitration agreement'' when describing the provisions relating to coverage and exclusions from coverage in § 1040.3(a). Second, the Bureau also is replacing the term ''generally applies'' from the proposal with the phrase ''except for persons when excluded from coverage pursuant to § 1040.3(b).'' The Bureau is adopting this change to indicate that although a product or service may be listed in § 1040.3(a), a person described in § 1040.3(b) nonetheless will not be subject to the rule.[837] Finally, the Bureau has added language to clarify that the rule applies to both the offering and provision of any product or service described in § 1040.3(a) when such offering or provision is a consumer financial product or service in the Dodd-Frank Act.[838] Section 1040.3(a) describes some of the covered products and services using the term ''providing.'' For example, § 1040.3(a)(1)(i) covers an extension of consumer credit under Regulation B. Accordingly, the Bureau believes it is important to clarify that offering such a product also is covered by the rule.

The Bureau is adopting comment 3(a)–1 to § 1040.3(a) as proposed to explain the two general categories of consumer financial products or services defined in the Dodd-Frank Act. In addition, in response to comments described below in the section-by-section analysis of § 1040.3(a)(3), the Bureau also is adopting comment 3(a)–2 concerning the rule's coverage of mobile phone applications and online access tools for covered products.

3(a)(1)

The Bureau believed that the proposal should apply to consumer credit and related activities including collecting on consumer credit. Specifically, proposed § 1040.3(a)(1) would have included in the coverage of proposed part 1040 consumer lending under the ECOA, as implemented by Regulation B, 12 CFR part 1002, and various supplemental activities related to that lending, while the related activity of debt collection would have been covered by proposed § 1040.3(a)(10).

In particular, proposed § 1040.3(a)(1) would have covered specific consumer lending activities engaged in by persons acting as ''creditors'' as defined by Regulation B, along with the related activities of acquiring, purchasing, selling, or servicing such consumer credit. Proposed § 1040.3(a)(1) would have broken these covered consumer financial products or services into the following five types: (i) Providing an ''extension of credit'' that is ''consumer credit'' as defined in Regulation B, 12 CFR 1002.2; (ii) acting as a ''creditor'' as defined by 12 CFR 1002.2(l) by ''regularly participat[ing] in a credit decision'' consistent with its meaning in 12 CFR 1002.2(l) concerning ''consumer credit'' as defined by 12 CFR 1002.2(h); (iii) acting, as a person's primary business activity, as a ''creditor'' as defined by 12 CFR 1002.2(l) by ''refer[ring] applicants or prospective applicants to creditors, or select[ing] or offer[ing] to select creditors to whom requests for credit may be made'' consistent with its meaning in 12 CFR 1002.2(l); (iv) acquiring, purchasing, or selling an extension of consumer credit covered by proposed § 1040.3(a)(1)(i); or (v) servicing an extension of consumer

[836] *See, e.g.,* Cal. Civ. Code § 1608 (providing that a contract is void if any component of consideration is unlawful), 1667(1) (defining unlawful to include a contract that is ''contrary to an express provision of law'').

[837] *But see* comment 2(c)–1 (clarifying that the rule applies to providers even when they are relying on pre-dispute arbitration agreements entered into by another person that is not subject to the rule).

[838] *See* 12 U.S.C. 5481(5) (defining the term consumer financial product or service to include a financial product or service that is ''offered or provided'' in specified circumstances).

credit covered by proposed § 1040.3(a)(1)(i). The Bureau describes and responds to the comments in categories (i) and (ii), (iii), and (iv) and (v), respectively, below.

3(a)(1)(i) and (ii)

The Bureau's Proposal

Proposed § 1040.3(a)(1)(i) would have covered providing any ''extension of credit'' that is ''consumer credit'' as defined by Regulation B, 12 CFR 1002.2.[839] In addition, proposed § 1040.3(a)(1)(ii) would have covered acting as a ''creditor'' as defined by 12 CFR 1002.2(l) by ''regularly participat[ing] in a credit decision'' consistent with its meaning in 12 CFR 1002.2(l) concerning ''consumer credit'' as defined by 12 CFR 1002.2(h). This coverage proposed in § 1040.3(a)(1) would have reached creditors whether they approve consumer credit transactions and extend credit, or they participate in decisions leading to the denial of applications for consumer credit. ECOA has applied to these activities since its enactment in the 1970s, and the Bureau believes that entities are familiar with the application of ECOA to their products and services. Regulation B, which implements ECOA, defines credit as ''the right granted by a creditor to an applicant to defer payment of a debt, incur debt and defer its payment, or purchase property or services and defer payment therefor.'' [840] By proposing to cover extensions of consumer credit and participation in consumer credit decisions already covered by ECOA, as implemented by Regulation B, the Bureau expected that participants in the consumer credit market would have a significant body of experience and law to draw upon to understand how the proposal would have applied to them, which would have facilitated compliance with proposed part 1040.

As indicated in the proposal, the Bureau had considered covering consumer credit under two statutory schemes: TILA and ECOA, as well as their implementing regulations. The Bureau believed, however, that using a single definition would have been simpler and thus it proposed to use the Regulation B definitions under ECOA because they are more inclusive. For example, unlike the TILA and its implementing regulation (Regulation Z, 12 CFR 1026.2(17)(i)), ECOA and Regulation B do not include an exclusion for credit with four or fewer installments and no finance charge. Regulation B also explicitly addresses participating in credit decisions, and as discussed below in the section-by-section analysis to proposed § 1040.3(a)(1)(iii), loan brokering.

The Bureau further noted in the proposal that in many circumstances, merchants, retailers, and other sellers of nonfinancial goods or services (hereinafter, merchants) may act as creditors under ECOA in extending credit to consumers. While such extensions of consumer credit would have been covered by proposed § 1040.3(a)(1), exemptions proposed in § 1040.3(b) would have excluded certain merchants from coverage.[841] On the other hand, if a merchant creditor were not eligible for any of these proposed exemptions with respect to a particular extension of consumer credit, then, as indicated in the proposal, proposed part 1040 generally would have applied to the merchant with respect to such transactions. For example, the Bureau believed merchant creditors significantly engaged in extending consumer credit with a finance charge often would have been ineligible for these exemptions.[842]

Comments Received

The Bureau received a number of comments on in its proposed approach to covering extensions of consumer credit in proposed § 1040.3(a)(1). For the most part, these comments focused on coverage (or exclusion) of specific types of consumer credit and related activities.

Two public-interest consumer lawyer commenters and a consumer advocate expressed support for the proposal's defining covered consumer credit based upon the coverage in Regulation B implementing ECOA, rather than what they viewed as a narrower universe of consumer credit transactions covered by Regulation Z implementing TILA. One of the public-interest consumer lawyers noted the ECOA-based coverage would be broader than TILA-based coverage, and importantly, in its view, reach persons with roles in the decision to approve or deny credit beyond only the person extending the credit. This commenter also stated that ECOA coverage would reach certain activities in relation to credit extended to consumers by merchants that are not subject to TILA. In the view of the consumer advocate, ECOA-based coverage is important because the alternative—TILA-based coverage—could incentivize companies to try to avoid coverage by reducing the number of installments or embedding a finance charge into the purchase price in order to render the credit not subject to TILA. A consumer lawyer also stated that, based on his experience counseling members of the armed forces, the proposal is important because it would extend its protections to products and services, such as loans secured by automobiles and other personal property, that are not reached by regulations implementing the MLA's restrictions on arbitration agreements. Finally, another public-interest consumer lawyer stated that the proposed broad coverage of consumer credit, including short-term loans, is particularly important, as these products are used at higher rates by African Americans.

Comments concerning mobile wireless third-party billing. A few comments focused specifically on a passage in the proposal's section-by-section analysis in which the Bureau had noted that mobile wireless third-party billing could be subject to proposed § 1040.3(a)(1)(i) to the extent that providers pass on charges to consumers for goods or services provided by third parties. Some comments specifically supported treatment of mobile wireless third-party billing as credit. For example, a consumer advocate commenter stated that the use of these platforms to impose charges for goods or services that consumers did not authorize (which often is called cramming) is a serious consumer protection problem and that arbitration agreements impede

[839] As is explained in proposed comment 3(a)(1)(i)–1, Regulation B defines ''credit'' by reference to persons who meet the definition of ''creditor'' in Regulation B. Persons who do not regularly participate in credit decisions in the ordinary course of business, for example, are not creditors as defined by Regulation B. 12 CFR 1002.2(l). In addition, by proposing to cover only credit that is ''consumer credit'' under Regulation B, the Bureau was making clear that the proposal would not have applied to business loans.

[840] 12 CFR 1002.2(j). *See also* 12 CFR 1002.2(q) (Regulation B provision defining the terms ''extend credit'' and ''extension of credit'' as ''the granting of credit in any form (including, but not limited to, credit granted in addition to any existing credit or credit limit; credit granted pursuant to an open-end credit plan; the refinancing or other renewal of credit, including the issuance of a new credit card in place of an expiring credit card or in substitution for an existing credit card; the consolidation of two or more obligations; or the continuance of existing credit without any special effort to collect at or after maturity'').

[841] *See* 81 FR 32830, 32879–84 (May 24, 2016), and the discussion of § 1040.3(b) below.

[842] As indicated in the proposal, certain automobile dealers would have been exempt, however, under proposed § 1040.3(b)(5) when they are extending credit with a finance charge in circumstances that exclude the automobile dealer from the Bureau's rulemaking authority under Dodd-Frank section 1029. In addition, certain small entities would have been exempt under proposed § 1040.3(b)(5) in other circumstances, such as those specified in Dodd-Frank section 1027(a)(2)(D). A merchant that is a government or government affiliate also would have been exempt in circumstances described in proposed § 1040.3(b)(2). *Id.* at 32873 n.449.

consumers harmed by these practices from seeking relief. However, an industry trade association commenter asserted that mobile wireless providers when they provide such billing platforms do not extend consumer credit within the meaning of proposed § 1040.3(a)(1)(i).[843] The commenter noted that extending credit entails the granting of a right to defer payment of a debt, and asserted that mobile wireless providers do not grant the consumer the right to defer payment for the nonfinancial goods or services of the third party in such situations. In this commenter's view, the right to defer payment for those goods or services is granted, if at all, only by the provider of those goods or services (*i.e.,* the third party). As a result, in this commenter's view, the mobile wireless third-party billing product or service is merely a billing platform, and not itself a credit granting process that would cause it to be covered under this proposed subsection. This commenter urged the Bureau to reconsider its position that the proposed categories of coverage would reach mobile wireless third-party billing platforms.

Comments concerning life insurance policy loans. An association of State insurance regulators, two insurance industry trade associations, a financial services industry trade association, and a consumer advocate specialized in insurance matters in their comments all took issue with the observation in the proposal's Section 1022(b)(2) Analysis that an impact on life insurance policy loans[844] was unlikely but not entirely certain because whether life insurance policy loans would be covered by the proposal would depend on the facts and circumstances determination of whether they are the ''business of insurance'' under Dodd-Frank section 1002(15)(C)(i) and 1002(3).[845]

The consumer advocate stated its support for coverage of any life insurance policy loans that are not the business of insurance. The industry trade association commenters asserted, however, that the Bureau unnecessarily created uncertainty for the insurance market by insinuating that there are loans administered by insurers that are not in business of insurance. These commenters requested that the Bureau confirm life insurance policy loans are categorically excluded from the rule because they are always the business of insurance, so that there is no uncertainty regarding the potential impact of the rule on them. In support of their arguments, they pointed to a number of ways in which, in their view, State law and State regulators treat policy loans as the business of insurance. These commenters emphasized that many States have adopted a model policy loan interest rate bill issued by the National Association of Insurance Commissioners (NAIC),[846] and a number of States also specifically require that policy loan features be included in insurance contracts. They also noted that State insurance regulators typically review policy loan features of insurance contracts and that the NAIC has adopted accounting principles governing these transactions that are applied by insurance regulators.[847] One commenter further urged that Regulation B should be construed as excluding policy loans just as they had been excluded from Regulation Z when there was no independent obligation to repay.[848] This commenter cited to a prior statement of the Federal Reserve Board indicating that policy loans were not credit transactions because they were ''in effect, using the consumer's own money,'' *i.e.,* the accrued cash value.[849] Finally, one commenter asserted that State regulation of policy loans is sufficiently comprehensive that a Bureau assertion of authority over the product would violate the McCarran-Ferguson Act,[850] a Federal law specifically directed at the regulation of insurance, which, in its view, prohibits Federal regulation of State-regulated insurance products absent a specific authorization from Congress.[851]

The Final Rule

The Bureau is adopting § 1040.3(a)(1)(i) and (a)(1)(ii) as proposed, with minor edits to more clearly signify how the coverage of these provisions is tied to established terms in Regulation B. For example, subparagraph (i) is revised to emphasize that it only applies to persons who are ''creditors'' under Regulation B. By proposing to cover extension of ''consumer credit,'' the proposal had already implicitly incorporated the term ''creditor,'' which is part of the definition of ''credit'' in Regulation B.[852] Nonetheless, the Bureau believes the scope of subparagraph (i) is clearer if the regulation text explicitly states that it only applies to creditors as defined in Regulation B. The Bureau also notes that Regulation B defines the term ''creditor'' as covering persons regularly engaging in the activities described in 12 CFR 1002.2(l) in the ordinary course of business. Because the term ''regularly'' is included in the definition of ''creditor'' in Regulation B, that term will have the meaning given by Regulation B, and persons not regularly engaged in those activities in the ordinary course of business will not be covered by § 1040.3(a)(1)(i)–(ii). In addition, in subparagraphs (i) and (ii), the Bureau is placing terms that are derived directly from Regulation B in quotes to improve clarity. The Bureau

[843] See also the section-by-section analysis of § 1040.3(a)(7) and (a)(8) below (discussing other issues raised by the industry trade association commenter, concerning uncertainty about the application of the rule to mobile wireless third-party billing and advocating for an exemption to ensure these products or services are not discontinued to the detriment of consumers § 1).

[844] The Bureau understands that a life insurance policy loan is generally a transaction in which the insurer of a life insurance policy that has an accumulated cash value provides money to the insured, and this amount is paid to the insurance company with interest either through payments made by the insured or as a deduction by the insurer from the cash value or payable benefits under the policy. *See* Nat'l Ass'n Ins. Comm'rs, ''Life Insurance Buyer's Guide,'' at 4 (2007) (describing loan features on insurance with a cash value), *available at http://www.naic.org/documents/prod_serv_consumer_lig_lp.pdf.*

[845] Comments on insurance matters focused almost exclusively on the potential coverage of life insurance policy loans. One industry trade association asked whether the proposal would cover insurance. Products that are the business of insurance are excluded from the Bureau's title X authority, and § 1040.3(b)(6) incorporates that exclusion by reference. In addition, one consumer law firm stated in its comment that the proposed business of insurance exclusion should not apply to contractual commitments of automobile lenders to waive any loan amount in excess of the collateral value in the event of destruction or damage to the automobile. This comment cited an opinion from a State insurance regulator declining to regulate these debt cancellation or suspension products. The Bureau notes that the consumer law firm commenter did not identify in its comment any reasons why contractual commitments of automobile lenders might be the business of insurance, or why there was uncertainty over that question.

[846] Nat'l Ass'n Ins. Comm'rs, ''Model Policy Loan Interest Rate Bill, An Act to Regulate Interest Rates on Life Insurance Policies,'' Model Regulation Service (Apr. 2000), *available at http://www.naic.org/store/free/MDL-590.pdf.*

[847] Nat'l Ass'n Ins. Comm'rs, ''Statement of Statutory Accounting Principles,'' No. 49.

[848] This commenter cited to the exclusion of such a product from the definition of credit in Regulation Z. *See* 12 CFR 1026.2 comment 2(a)(14)–1(v) (explaining that ''[b]orrowing against the accrued cash value of an insurance policy or a pension account, if there is no independent obligation to repay'' is excluded from Regulation Z's definition of credit). This commenter believed this exclusion also should apply to the definition of consumer credit under Regulation B, and thus that such loans would therefore not be covered by proposed § 1040.3(a)(1).

[849] 46 FR 20848, 20851 (Apr. 7, 1981).

[850] 15 U.S.C. 1012(b).

[851] This commenter also noted that Dodd-Frank section 1027(m) prohibits the Bureau from ''defin[ing] as a financial product or service, by regulation or otherwise, engaging in the business of insurance.''

[852] 12 CFR 1002.2(j) (defining ''credit'' as certain rights granted by a ''creditor''). *See also* 12 CFR 1002.2(h) (defining ''consumer credit'' by incorporating the defined term ''credit'').

believes these revisions will provide greater certainty as to the scope of these subparagraphs.

As to the comments addressing whether mobile wireless third-party billing providers extend consumer credit, as noted above, because this rule borrows defined terms from an existing regulation, providers can look to interpretations of ECOA and Regulation B for the particular circumstances as they may arise. It is beyond the scope of this rulemaking to specify or describe the details of the circumstances that are covered by ECOA and Regulation B. Moreover, regardless of whether mobile wireless third-party billing providers are granting the consumer a right to defer payment, there are other potential bases for coverage, such as transmitting or exchanging funds under § 1040.3(a)(7) or payment processing under § 1040.3(a)(8). In addition, if the third party is the one granting the consumer a right to defer payment in circumstances described in § 1040.3(a)(1)(i), and the mobile wireless provider is billing for and collecting those payments, these billing activities of the mobile wireless provider may involve the servicing of consumer credit covered by § 1040.3(a)(1)(v).

The Bureau also acknowledges the comments from the association of State insurance regulators and the industry trade associations that expressed concern over a statement in the Bureau's Section 1022(b)(2) Analysis in the proposal that did not rule out the possibility that the proposal could cover some life insurance policy loans. As the Bureau noted in its Section 1022(b)(2) Analysis in the proposal, however, the Bureau did not believe such coverage was likely.[853] As the commenters recognized, and as stated in § 1040.3(a) of the final rule, the final rule only covers products that are defined as consumer financial products and services under the Dodd-Frank Act, which, in its section 1002(15)(C)(i), excludes the ''business of insurance.'' The Bureau is not interpreting the term business of insurance in this final rule, and observations in the Bureau's impacts analysis regarding a low likelihood of impact on life insurance policy loans should not be construed as a determination of coverage of any particular product or service. The Bureau recognizes that commenters have provided relevant information on how State insurance laws and State insurance regulators regulate or supervise aspects of this product. The Bureau therefore believes that the comments, taken as a whole, supported the estimate the Bureau had made in the Section 1022(b)(2) Analysis in the proposal, that any impact on this product is unlikely, whether because these loans would be determined to be the business of insurance, or for other reasons, such as laws precluding the use of arbitration agreements.[854] The Bureau's Section 1022(b)(2) Analysis in this final rule therefore confirms this estimate. Contrary to the request of industry commenters, the Bureau does not believe it would be appropriate to delete that observation in the impacts analysis, as the observation does not reflect a determination of coverage. In any event, the Bureau confirms that when these products constitute the business of insurance, they are not subject to this rule, and thus the rule does not violate the McCarran-Ferguson Act.

3(a)(1)(iii)

The Bureau's Proposal

Proposed § 1040.3(a)(1)(iii) would have covered persons who, as their primary business activity, act as ''creditors'' as defined by Regulation B, 12 CFR 1002.2(l), by referring consumers to other ECOA creditors and/or selecting or offering to select such other creditors from whom the consumer may obtain ECOA credit. Regulation B comment 2(l)–2 describes examples of persons engaged in such activities.[855] Regularly engaging in these activities generally makes a person a creditor under Regulation B, 12 CFR 1002.2(l). Thus proposed § 1040.3(a)(1)(iii) would only have applied to persons who are regularly engaging in these activities.[856]

Because the Bureau did not generally propose to cover activities of merchants to facilitate payment for the merchants' own nonfinancial goods or services,[857] proposed § 1040.3(a)(1)(iii) would only have applied to persons providing these types of referral or selection services as their primary business.[858] Thus, as proposed comment 3(a)(1)(iii)–1 would have clarified, a merchant whose primary business activity consists of the sale of nonfinancial goods or services generally would not have fallen into this category. Proposed § 1040.3(a)(1)(iii) would not have applied, for example, to a merchant that refers the consumer to a creditor to help the consumer purchase the merchant's own nonfinancial goods and services.[859]

Comments Received

With regard to proposed § 1040.3(a)(1)(iii)'s treatment of persons providing creditor referral or selection services as their primary business, several commenters, including consumer advocates, consumer law firms, public-interest consumer lawyers, and a nonprofit, stated that lead generators for consumer credit products should be explicitly covered because these persons can steer consumers to harmful consumer credit products. A consumer advocate added in its comment that it assumed that these lead generators would have been covered by the proposal based on the coverage in this provision of persons regularly engaged in consumer credit referrals or creditor selection as their primary business. This commenter stated that the final rule should include a clarification making this assumption explicit, otherwise, the commenter was concerned that lead generators that sell a list of leads to creditors may claim that the mere act of selling leads does not constitute ''referring'' or ''selecting'' a creditor to make an offer within the meaning of Regulation B.

A consumer lawyer also stated that, based on his experience counseling members of the armed forces, the proposed coverage concerning consumer credit referrals is important because these activities are not reached

[853] 81 FR 32830, 32917 (May 24, 2016) (indicating that life insurance policy loans were unlikely to be affected by the proposal). *See also id.* at 32933 appendix B (indicating that three cases against life insurance companies were excluded from the impacts analysis).

[854] With regard to the comment that the Bureau should in this rule construe the definition of credit in Regulation B similarly to Regulation Z, the Bureau was not proposing to interpret Regulation B in this rule and does not do so in the final rule.

[855] Regulation B comment 2(*l*)–2 states: ''*Referrals to creditors.* For certain purposes, the term creditor includes such persons as real estate brokers, automobile dealers, home builders, and home-improvement contractors who do not participate in credit decisions but who only accept applications and refer applicants to creditors, or select or offer to select creditors to whom credit requests can be made.''

[856] The Bureau also had proposed a more specific exemption for activities that are provided only occasionally. *See* proposed § 1040.3(b)(3) and the section-by-section analysis thereto, 81 FR 32830, 32882–83 (May 24, 2016), and the discussion below on § 1040.3(b)(3) in the final rule.

[857] As noted above, however, the proposal would have applied to merchant creditors engaged significantly in extending consumer credit with a finance charge.

[858] Transmitting or payment processing in similar circumstances also generally would not have been covered by paragraphs (7) and (8) of proposed § 1040.3(a), as discussed in the section-by-section analysis of those provisions in the proposal. 81 FR 32830, 32876–77 (May 24, 2016). *See also* below.

[859] As the proposal noted, however, if the merchant regularly participates in a consumer credit decision as a creditor under Regulation B, the merchant would have been subject to the proposal under proposed § 1040.3(a)(1)(ii) unless the merchant was subject to one of the exemptions in proposed § 1040.4(b). 81 FR 32830, 32874 n.454 (May 24, 2016).

by regulations implementing the MLA's restrictions on arbitration agreements.

Two consumer advocates and a public-interest consumer lawyer also urged the Bureau to remove the ''primary business'' limitation in proposed § 1040.3(a)(1)(iii). One of the consumer advocate commenters asserted that this limitation was a loophole that would allow companies engaged in credit referrals or creditor selection to restructure their business to avoid coverage of the rule. The other consumer advocate commenter asserted that a company can have more than one primary business and thus the proposed exclusion was confusing. Finally, the public-interest consumer lawyer commenter stated that the rule should cover merchants providing credit referrals (including automobile dealers, medical providers and others) even when their primary business activity is the sale of nonfinancial goods or services to consumers.

The Final Rule

The Bureau is finalizing proposed § 1040.3(a)(1)(iii) and its associated commentary with certain technical edits [860] and a change to the scope of this provision. In particular, final § 1040.3(a)(1)(iii)(C) excludes from the coverage of § 1040.3(a)(1)(iii) creditor referral or selection activity by a creditor that is incidental to a business activity that is not covered by § 1040.3(a).

As explained in the proposal, the Bureau's goal in proposing a primary business limitation on § 1040.3(a)(1)(iii) was to exclude from coverage merchants that are facilitating payment for their own nonfinancial goods or services in transactions with consumers through, for example, creditor referrals or selection activities.[861] The Bureau specifically requested comment on its proposed approach to this issue. In light of the comments asserting that the term primary business may have an uncertain meaning in this context, the Bureau believes that using the term incidental would more clearly accomplish the goal stated in the proposal. In particular, the Bureau believes that the term incidental more clearly denotes the relationship between the creditor referral or selection activity and the underlying business activity that the Bureau is not seeking to cover in this rule.[862]

The Bureau also is making conforming changes to comment 3(a)(1)(iii)–1 and providing an example of incidental merchant referral or selection activity that would be excluded, even if performed regularly by a merchant who therefore may meet the definition of the term creditor in Regulation B.

With regard to the commenters seeking coverage of consumer credit lead generators under proposed § 1040.3(a)(1)(iii), the Bureau is not including an express reference to lead generation in the final rule. As noted above, the Bureau believes that basing consumer credit coverage on a longstanding regulation implementing an enumerated consumer protection law (*i.e.,* Regulation B), including its provisions covering referral or creditor selection activity, facilitates compliance with this rule and reduces uncertainty over the scope of this rule. As a result, any person engaged in lead generation would be covered by the rule whenever their activities fall into one or more of the coverage categories in § 1040.3(a), including § 1040.3(a)(1)(iii), which is linked to existing coverage in Regulation B. Whether a person is engaged in creditor referral or selection services within the meaning of Regulation B is a matter of application of that regulation based on the relevant facts and circumstances.[863] The Bureau believes that extending the final rule beyond Regulation B to separately cover ''lead generation,'' a term that has no definition in existing law, could introduce the very uncertainty that the Bureau seeks to prevent by relying on Regulation B to define the scope of coverage. Having not sought notice and comment, the Bureau is not defining ''lead generation'' in this rulemaking.

3(a)(1)(iv) and (v)

Proposed § 1040.3(a)(1)(iv) and (v) would have covered certain specified types of consumer financial products or services when offered or provided with respect to consumer credit covered by proposed § 1040.3(a)(1)(i). First, proposed § 1040.3(a)(1)(iv) would have covered acquiring, purchasing, or selling an extension of consumer credit that would have been covered by proposed § 1040.3(a)(1)(i). In addition, proposed § 1040.3(a)(1)(v) would have covered servicing of an extension of consumer credit that would have been covered by proposed § 1040.3(a)(1)(i). With regard to servicing, the Bureau did not propose a specific definition but noted in proposed comment 3(a)(1)(v)–1 other examples where the Bureau has defined servicing: For the postsecondary student loan market in 12 CFR 1090.106 and the mortgage market in Regulation X, 12 CFR 1024.2(b).

The Bureau received one comment on its proposal to cover acquiring, purchasing, or selling an extension of consumer credit in proposed § 1040.3(a)(1)(v). A consumer advocate expressed support for covering those who acquire credit extended by others. The commenter cited the example of indirect automobile finance companies that acquire loans from automobile dealers in circumstances where the Dodd-Frank Act excludes the dealer from the Bureau's rulemaking authority. The commenter stated that, in its view, acquirers and purchasers of consumer debts risk harming consumers if they fail to pass along information about the debt to debt collectors or subsequent purchasers.

The Bureau received some comments concerning its proposal to cover the servicing of consumer credit in proposed § 1040.3(a)(1)(v). A consumer advocate and a public-interest consumer lawyer expressed support for how this proposed coverage would reach third-party servicers of consumer credit extended by medical providers. In addition, many commenters addressed the Bureau's request for comment on whether the Bureau should add language explicitly covering furnishing information to consumer reporting agencies. These commenters, including consumer advocates, nonprofits, public-interest consumer lawyers, consumer law firms, and a research center urged the Bureau to add language explicitly covering furnishing information to consumer reporting agencies.[864] Some

[860] For clarity, the Bureau is adding the term ''consumer credit'' to clarify that is the type of credit referral and selection activity that triggers coverage, is moving the term ''creditor'' to later in the provision and making associated edits, is placing defined terms in Regulation B in quotes for clarity, and is dividing the components of § 1040.3(a)(1)(iii) into subparagraphs (A), (B) and (C).

[861] 81 FR 32830, 32874 (May 24, 2016). The public-interest consumer lawyer commenter stated that the rule should cover merchant credit referrals such as those made by automobile dealers to a third-party financing company. The Bureau declines to cover such referrals and instead is maintaining the general goal of excluding merchant referrals.

[862] The Bureau also believes that covered persons may be more familiar with the term ''incidental,'' which is used in a separate but related context in Regulation B. *See* 12 CFR 1002.3(c)(1) (defining the term ''incidental credit'').

[863] For example, some lead generators may take credit applications from consumers. *See* Fed. Trade Comm'n, ''Follow the Lead'' Workshop, Staff Perspective,'' at 4 (Sept. 2016), *available at https://www.ftc.gov/system/files/documents/reports/staff-perspective-follow-lead/staff_perspective_follow_the_lead_workshop.pdf. See also* section-by-section analysis of § 1040.3(a)(3) below (discussing comments on lead generators more broadly).

[864] These comments are discussed in more detail in the section-by-section analysis of § 1040.3(a)(4) below.

of these commenters urged that furnishing should be covered in particular when carried out in connection with the servicing of an extension of consumer credit. A consumer advocate urged the Bureau to cover certain types of electronic funds transfer activity, including those involving payments on loans.[865] In contrast, an industry trade association commenter argued that furnishing is not part of servicing because servicing can occur without furnishing. This commenter asserted that if the Bureau were to cover furnishing by servicers, the burdens of the rule would create a disincentive to engage in furnishing, and the corresponding reduction in furnishing would be detrimental to the overall credit reporting system insofar as fewer instances of credit activity would be reported.

Another industry trade association stated in its comment that entities affiliated with merchants often engage in servicing of consumer credit extended by such merchants. In the view of this commenter, the rule's exclusions for merchants engaging in certain types of credit transactions (*see* proposed § 1040.3(b)(4)–(5)) should also apply to affiliates of these merchants as well. This commenter explained its understanding that the decision to use an affiliate for servicing, rather than the merchant itself, is typically made for reasons, such as tax, cash flow, and other considerations, that have nothing to do with consumer access to remedies and do not affect consumers.

The Bureau is adopting § 1040.3(a)(1)(iv) and (v) as proposed. With regard to comments that requested that the Bureau separately cover furnishing of information on covered consumer credit accounts to a consumer reporting agency, the Bureau reiterates that it did not propose to identify furnishing separately as a covered product or service because it believes these activities are commonly carried out by servicers.[866] With regard to comments that requested that the Bureau cover processing of funds transfers to make payments on consumer credit accounts, the Bureau similarly believes these activities also are commonly carried out by servicers. The Bureau therefore believes that when these activities are carried out by servicers in connection with servicing activity, they would be part of the servicing activity covered by § 1040.3(a)(1)(v). The Bureau disagrees with the industry commenter's view that only activities that always occur in the course of servicing can be treated as part of servicing in this rule. This rule covers servicing regardless of whether a servicer engages in furnishing. When a servicer does furnish on a consumer credit account it services, that furnishing is part of the servicing.[867] In any event, to the extent a servicer is furnishing, its furnishing activities must comply with FCRA, and the Bureau believes this coverage will promote increased compliance by better ensuring a remedy for any FCRA non-compliance. The Bureau also disagrees that considering furnishing to be a part of servicing for purposes of this rule would create a disincentive for servicers to engage in furnishing. The Bureau is not aware, for example, of any difference in the level of furnishing between servicers on accounts with arbitration agreements and servicers on accounts without arbitration agreements, nor did commenters provide any data suggesting such a difference.

With regard to the industry trade association that requested an exemption for merchant affiliates, the Bureau does not believe an exemption is warranted. Regardless of a firm's motivation for utilizing an affiliate for servicing of an extension of consumer credit (as opposed to having the originating creditor handle servicing in-house), that affiliate must comply with applicable laws in its servicing activities, and the Bureau believes that consumers should have an effective remedy for any violation of those laws. Any asymmetry in coverage between servicing by merchants and merchant affiliates is a function of the statutory exclusion for merchants pursuant to Dodd-Frank section 1027(a)(2), and not a policy determination by the Bureau that the rule should never apply to consumer financial product or service activity related to merchants. The Bureau believes that merchant affiliates engaged in servicing should be covered for the same reasons that it believes servicing by unaffiliated servicers and servicing of any type of consumer credit should be covered.

3(a)(2)

Proposed § 1040.3(a)(2) would have extended coverage to brokering or extending consumer automobile leases as defined in 12 CFR 1090.108, which applies to leases of automobiles with an initial term of at least 90 days and either of the following two characteristics: (1) The lease is the ''functional equivalent'' of an automobile purchase finance arrangement and is on a ''non-operating basis'' within the meaning of Dodd-Frank section 1002(15)(A)(ii); or (2) the lease qualifies as a ''full-payout lease and a net lease'' within the meaning of the Bureau's Larger Participant rulemaking for the automobile finance market.[868] The Bureau believed that the proposal should reach brokering or extending consumer automobile leases, consistent with the definition of that activity in the Bureau's larger participant rulemaking for the automobile finance market. The proposal noted that the Bureau had explained in that prior rulemaking that, from the perspective of the consumer, many automobile leases function similarly to financing for automobile purchase transactions (which generally would have been covered by proposed § 1040.3(a)(1)) and have a similar impact on the consumer and his or her well-being.[869]

With regard to the proposed coverage of automobile financing, an industry trade association whose members participate in vehicle financing asked whether the rule would cover automobile club memberships.

The Bureau also received a few comments from consumer advocates on proposed § 1040.3(a)(2). One consumer advocate supported coverage of automobile financing including leasing contracts. The commenter cited several risks of harm that consumers face in this market and several examples that the commenter asserted illustrate the importance of class actions in this market.[870] Two other consumer

[865] This comment is discussed in more detail in the section-by-section analysis of § 1040.3(a)(7) below.

[866] 81 FR 32830, 32874 (May 24, 2016).

[867] *See, e.g.,* Defining Larger Participants of the Student Loan Servicing Market, 78 FR 73383, 73400 (Dec. 3, 2013) (noting that supervision of student loan servicing would examine servicing-related activities, such as furnishing).

[868] 12 CFR 1001.2(a). As the proposal noted, in 2015 the Bureau finalized its larger participant rule for automobile financing. Defining Larger Participants of the Automobile Financing Market and Defining Certain Automobile Leasing Activity as a Financial Product or Service, 80 FR 37495 (Jun. 30, 2015). That rule explains the Bureau's approach to defining extending or brokering automobile leasing in accordance with the Bureau's authority under the Dodd-Frank Act. *Id.* The provision at 12 CFR 1001.2(a)(1) covers leases of an automobile where the lease ''[q]ualifies as a full-payout lease and a net lease, as provided by 12 CFR 23.3(a), and has an initial term of not less than 90 days, as provided by 12 CFR 23.11 . . . .'' 81 FR 32830, 32874 n.457 (May 24, 2016).

[869] As noted in the proposal, an automobile as defined in 12 CFR 1090.108(a), means any self-propelled vehicle primarily used for personal, family, or household purposes for on-road transportation and does not include motor homes, recreational vehicles, golf carts, and motor scooters. 81 FR 32830, 32874 n.456 (May 24, 2016).

[870] This commenter also suggested that automobile industry opposition to regulation of consumer arbitration agreements has not always existed. The commenter cited what it described as a statement from 2000 by a national automobile

advocates urged the Bureau to expand this proposed coverage beyond leases of automobiles to include leases for other types of property. They contended that insofar as the proposal would cover consumer credit financing a purchase of goods but not consumer leases of those same types of goods, the proposal could incentivize some creditors to restructure these transactions as leases, and thereby avoid coverage of the rule. One of these commenters asserted that there are many leases of personal property that are the functional equivalent of purchase finance arrangements within the reach of the Bureau's authority under Dodd-Frank section 1002(15)(A)(ii) and they should be covered by this rule. The commenter referred to ''rent-to-own'' leases of real estate (which it stated are often long-term contracts), recreational vehicles, furniture, electronics, alarm systems, and solar panels, and stated a belief that these transactions can create risk of harm to consumers.

The Bureau is adopting § 1040.3(a)(2) as proposed. As discussed in the proposal, the Bureau has identified the market for automobile leases as a significant one to millions of consumers and concluded that it is part of the core consumer finance market for lending money that the Bureau proposed to cover in this rule. The Bureau did not propose to cover forms of consumer leasing other than automobile leasing. The Bureau notes that it is unclear from the comments urging expansion to other forms of leasing, which industry comments did not address, what the impact of expanding coverage to reach all forms of personal property leasing under Dodd-Frank section 1002(15)(A)(ii) would be. The Bureau also notes, with regard to concerns that lack of coverage under the rule would incentivize providers to restructure credit transactions as leases, that the rule's coverage of merchants extending credit is limited anyway [871] and that a variety of other tax, accounting, insurance, and legal title or ownership considerations may affect structuring decisions. In any event, the Bureau can monitor developments in the provision of any consumer leases under Dodd-Frank section 1002(15)(A)(ii), and consider whether to amend this rule to reach those transactions at a future time.

With regard to the question from an industry trade association concerning coverage of automobile club memberships, such memberships are not per se covered by the rule, as the Bureau believes that they would generally be nonfinancial goods or services. This does not necessarily mean, however, that the rule would never apply to claims concerning such products or services. For example, claims concerning the marketing of ''add-on'' products or services by lenders in connection with extending consumer credit could ''concern'' the loan, within the meaning of § 1040.4(a) or (b), depending on the facts and circumstances of the claim.

3(a)(3)

The Bureau's Proposal

As stated in the proposal, the Bureau believed that the proposal should cover debt relief services, such as services that offer to renegotiate, settle, or modify the terms of a consumer's debt.[872] Proposed § 1040.3(a)(3) would have included in the coverage of proposed part 1040 providing services to assist a consumer with debt management or debt settlement, modifying the terms of any extension of consumer credit covered by proposed § 1040.3(a)(1)(i), or avoiding foreclosure. With the exception of the reference to an extension of consumer credit covered by proposed § 1040.3(a)(1)(i), these terms would have derived directly from the definition of this consumer financial product or service in Dodd-Frank section 1002(15)(A)(viii)(II).[873] The Bureau noted that some consumer debts are not consumer credit, which the Bureau proposed to cover in proposed § 1040.3(a)(1)(i). As a result, as explained in proposed comment 3(a)(3)–1, proposed § 1040.3(a)(3)(i) would have reached debt relief services for all types of consumer debts, whether arising from secured or unsecured consumer credit transactions, or consumer debts that do not arise from credit transactions.

Comments Received

Two public-interest consumer lawyer commenters expressed support for the proposal's coverage of debt relief services. These commenters pointed to consumer harms they believe these products have caused, and supported the proposal to cover debt relief not only for unsecured credit, but also for secured credit (including mortgage relief services) and non-credit debts. One commenter said this breadth of coverage would help to prevent circumvention but did not explain how.

One public-interest consumer lawyer commenter urged the Bureau to cover general credit counseling in the rule. The commenter asserted that credit counselors can play an important role in consumers' decisions regarding consumer credit and are therefore a part of this core market. Another public-interest consumer lawyer commenter asserted that these credit counseling services often target low-income individuals. Neither commenter offered a suggestion for how the Bureau can define this market.

Many commenters, including consumer advocates, nonprofits, public-interest consumer lawyers, consumer law firms, and a research center advocated to expand the scope of coverage to reach a particular kind of credit counseling—credit repair services. These commenters asserted that many scams are perpetrated on consumers in the guise of credit repair services. Some of these commenters noted that some credit repair services include neither debt relief nor the provision of consumer reports to consumers and thus would not be covered by the proposal. In addition, an industry commenter described ongoing problems that third-party credit repair companies were creating for consumer reporting agencies.

Some commenters, including consumer advocates, nonprofits, consumer law firms, and others, also urged that the scope of coverage of the rule be expanded to include certain other services that the Bureau can regulate as financial advisory services pursuant to 12 U.S.C. 5481(15)(A)(viii). These commenters referred to a wide range of services, including ''lead generation'' by providing information to facilitate the marketing of a variety of types of consumer financial products or services beyond consumer credit; and technological applications that collect personal financial information of consumers to facilitate delivery of advice on matters of consumer finance, whether budgeting, managing credit, or otherwise. Some of these commenters

industry trade association (which did not file comments on this proposal). According to this commenter, the letter stated that the trade association ''does not support or encourage the use of mandatory binding arbitration in any contract of adhesion, whether a motor vehicle franchise contract between a manufacturer and dealer or a consumer contract.''

[871] As the impacts analysis in the proposal noted, the Bureau believes that merchants rarely offer the type of credit financing that would subject them to the rule in the first place. 81 FR 32830, 32917 (May 24, 2016).

[872] 81 FR 32830, 32874–75 (May 24, 2016).

[873] 12 U.S.C. 5481(15)(A)(viii)(II). For examples of the types of services that would have fallen within this proposed coverage, the proposal (at 32875 n.458) identified the following Bureau enforcement actions: Complaint at ¶ 4, *Consumer Fin. Prot. Bureau* v. *Meracord, LLC,* No. 13–05871 (W.D. Wash. Oct. 3, 2013); Complaint at ¶ 4, *Consumer Fin. Prot. Bureau* v. *Global Client Solutions,* No. 14–06643 (C.D. Cal. Aug. 25, 2014); Complaint at ¶¶ 8–14, *Consumer Fin. Prot. Bureau* v. *Orion Processing, LLC,* No. 15–23070 (S.D. Cal. Aug. 17, 2015).

noted that lead generators can steer consumers to harmful products or services, and that all of these products and services can expose consumers to data breaches. A consumer law firm commenter asserted that unless the Bureau's proposal specifically covered lead generators, they could enter into their own arbitration agreements with consumers and shield themselves from class actions, even when they were generating leads for a covered product or service.[874]

The Final Rule

The final rule adopts proposed § 1040.3(a)(3) as proposed, with an addition to cover providing products or services ''represented to remove derogatory information from, or improve, a person's credit history, credit record, or credit rating.'' The Bureau requested comment on the possibility of separately covering credit repair services and is making this change because it shares commenters' concerns over the potential for consumer harm in the credit repair market.[875] In its experience and expertise, the Bureau believes credit repair services can have an important influence on consumers' participation in the core consumer credit market, and can create significant risks of harm to consumers when not provided in a legally compliant manner. Therefore, the Bureau believes that credit repair services are an appropriate form of credit counseling services to include in the scope of coverage in the final rule.

The final rule's description of credit repair services is based on the description of credit repair services in the Telemarketing Sales Rule (TSR), which the Bureau, together with the FTC, enforces.[876] Unlike the TSR, however, this coverage would not be limited to credit repair services offered only through telemarketing. The Bureau believes that credit repair providers often offer these services via online, radio, billboard, or television advertising platforms, which do not necessarily involve inbound or outbound telemarketing, and thus does not believe it necessary or appropriate to limit the coverage to telemarketing. Accordingly, for the sake of clarity, the Bureau is adding comment 3(a)(3)(ii)–1 to confirm that § 1040.3(a)(3)(ii) includes in the coverage of this rule credit repair products or services not covered by the TSR solely because they were not the subject of telemarketing as defined in 16 CFR 310.2(gg). With regard to the commenters that urged an expansion of coverage to include lead generators, including for credit repair services, the Bureau notes that the case cited by a consumer advocate commenter actually alleged that the defendant company was itself providing credit repair services.[877] The coverage in § 1040.3(a)(4) would reach credit repair services. To the extent a person is not offering or providing a product or services described in § 1040.3(a), however, the Bureau declines to cover them separately as a lead generator for the reasons discussed above in connection with § 1040.3(a)(1)(iii).

With regard to coverage of other types of services that commenters characterized as financial advisory services, the Bureau did not propose in this rulemaking to cover financial advisory services generally. At this time, the Bureau is not expanding the coverage of this rule to include these products or services. The Bureau will continue to monitor the use and impact of arbitration agreements in the provision of financial advisory services as part of its overall role in monitoring consumer finance markets. The Bureau also may determine at a future time that coverage of other forms of credit counseling would be warranted.

The Bureau also recognizes that any number of consumer financial products or services it is not covering in this rule may involve the collection of the personal financial data of consumers, giving rise to a risk of a data breach and potentially identity theft. However, the Bureau in this rule is not seeking to cover providers merely based on their collection of consumer financial data. At the same time, the Bureau recognizes that the collection of such data in connection with a service or product covered by the rule is important to include within the scope of this rule. Accordingly, the Bureau is adopting comment 3(a)–2 to clarify that when a person is a provider, the technological tools they provide in connection with the covered product, such as internet or mobile phone apps, also are covered. This comment applies to all of the covered products and services in § 1040.3(a).

For the reasons described in the proposal and reiterated above, the final rule adopts § 1040.3(a)(3) and comment 3(a)–1 as proposed, renumbers them as § 1040.3(a)(3)(i) and comment 3(a)(3)(i)–1, adds § 1040.3(a)(3)(ii) and comment 3(a)(3)(ii)–1 to cover credit repair services, and adds comment 3(a)–2 as described above.

3(a)(4)

The Bureau's Proposal

As explained in the proposal, the Bureau believed that the proposal should apply to providing consumers with consumer reports and information specific to a consumer from consumer reports, such as by providing credit scores and credit monitoring.[878] Specifically, proposed § 1040.3(a)(4) would have included in the scope of proposed part 1040 providing directly to a consumer a consumer report as defined by the FCRA, 15 U.S.C. 1681a(d), a credit score, or other information specific to a consumer from such a consumer report, except when such consumer report is provided by a user covered by 15 U.S.C. 1681m solely in connection with an adverse action as defined in 15 U.S.C. 1681a(k) with respect to a product or service not covered by any of paragraphs (1) through (3) or paragraphs (5) through (10) of proposed § 1040.3(a).[879]

As the proposal noted, the FCRA, enacted in 1970, defines which types of businesses are consumer reporting agencies.[880] Consumer reporting agencies are the original sources of consumer reports as defined by the FCRA.[881] In general, the consumer reporting agencies provide consumer reports to ''users'' of these reports within the meaning of the FCRA who may in turn provide the consumer reports or information derived from the

[874] This commenter noted an example of a lead generator that had done so, and sought to rely on its arbitration agreement in a class action filed against it for alleged harms arising from the product or service that was the subject of the leads generated. *See Rodriguez* v. *Experian Services Corp.* (9th Cir. 15–56660) (in which the commenter is co-counsel).

[875] *See, e.g.,* Bureau of Consumer Fin. Prot., ''Consumer Advisory, ''How can I avoid a credit repair scam?,'' *available at http://www.consumerfinance.gov/askcfpb/1343/how-can-i-recognize-credit-repair-scam.html* (last visited Jun. 1, 2017); Complaint, Consumer Fin. Prot. Bureau v. *Prime Marketing Holdings,* No. 16–7111 (C.D. Cal. Sept. 22, 2016) (enforcement action under the Telemarketing Sales Rule). *See also* section-by-section analysis of § 1040.3(a)(4) (reciting numerous enforcement activities against credit repair organizations).

[876] 16 CFR 310.4(a)(2); *see, e.g.,* Complaint at ¶¶ 60–80, *Consumer Fin. Prot. Bureau* v. *Prime Marketing Holdings,* No. 16–7111 (C.D. Cal. Sept. 22, 2016).

[877] *Complaint at Count III, Rodriguez* v. *Experian Cred. Svcs. Corp.,* No. 15–3553 (C.D. Cal. May 12, 2015).

[878] 81 FR 32830, 32875–76 (May 24, 2016).

[879] As stated in the proposal, the Bureau believed that it is appropriate to propose covering not only services that provide ''monitoring'' of consumer credit report information, but also that provide such information on a one-off basis. That is, the nature and source of the underlying information is what should define this scope of coverage, and not the frequency with which the information is provided to the consumer. 81 FR 32830, 32875 n.462 (May 24, 2016).

[880] 15 U.S.C. 1681a(f).

[881] 15 U.S.C. 1681a(d).

reports to consumers.[882] The consumer reporting agencies also provide consumer reports directly to consumers. The proposal stated that the Bureau believed that defining this scope of coverage by reference to a statutorily defined type of underlying information, a consumer report, would help providers better understand which types of products and services are covered, and thus facilitate compliance with part 1040 as proposed.[883]

Proposed § 1040.3(a)(4) therefore would have applied to consumer reporting agencies when providing such products or services directly to consumers, as well as to other types of entities that deliver consumer reports or information from consumer reports directly to consumers. For example, proposed § 1040.3(a)(4) would have covered not only credit monitoring services that monitor entries on a consumer's credit report on an ongoing basis, but also a discrete service that transmits a consumer report as defined by the FCRA, a credit score, or other information from a consumer report directly to a consumer.[884] Such discrete services may be provided at the consumer's request or as required by law, such as via a notice of adverse action on a consumer credit application;[885] in connection with a risk-based pricing notice generally required under Regulation V, 12 CFR 1022.72; when a consumer receives materially less favorable terms for consumer credit based on the creditor's use of a consumer report; or in connection with transmission of results of reinvestigation of a dispute from a consumer reporting agency to a consumer pursuant to the FCRA.[886]

Proposed § 1040.3(a)(4) would not have covered users of consumer reports who provide those reports or information from them to consumers solely in connection with adverse action notices with respect to a product or service that is not otherwise covered by proposed § 1040.3(a). For example, a user of a consumer report providing a consumer with a copy of their credit report solely in connection with an adverse action taken on an application for employment would not have been covered by proposed § 1040.3(a)(4).

Comments Received

One consumer advocate urged the Bureau to revise the proposed language to refer to the term ''consumer file disclosure'' from FCRA, and to cover products or services provided by affiliates of consumer reporting agencies to account for recent case law that might otherwise cause confusion or be construed to narrow the scope of coverage from what the proposal intended.

A credit reporting industry commenter and a credit reporting industry trade association, with support from several Members of Congress and another industry trade association, urged the Bureau to structure the rule to avoid creating class action exposure under the CROA for credit monitoring or credit education products and services. CROA was enacted in 1996 for the purpose of ensuring that prospective buyers of services from credit repair organizations can make informed decisions and are protected from unfair or deceptive practices.[887] CROA requires, for example, that credit repair organizations' products and services use certain disclosures; that any written contracts including a performance guarantee, an estimate of service completion or length, a cancellation right, and a three-day waiting period before these products and services can be provided; and that consumers only be charged after any service has been fully performed.[888] In light of the potential for application of CROA, including its provision for disgorgement of all revenues as statutory damages,[889] to credit monitoring and credit education products and services, these commenters urged that credit monitoring and credit education products and services be exempt entirely from the rule or at least from CROA claims. The credit reporting industry commenters asserted that if necessary, an exemption could be limited to consumer reporting agencies (CRAs) providing these products or services so as to distinguish them from the credit repair activities offered by businesses which are not affiliated with CRAs, which are the businesses these commenters believed Congress intended CROA to cover.[890] The commenters challenged the Bureau's view in the proposal that the fact that the FTC administers CROA would be a basis for not excluding CROA claims involving credit monitoring from the rule. In their view, the fact that the Bureau does not administer CROA suggests that the Bureau should be reluctant to apply its rule to it.

In particular, two industry commenters asserted that the Bureau either failed to make findings that applying the rule to credit monitoring would be for the protection of consumers and in the public interest or improperly shifted the burden to industry to establish that applying the rule to credit monitoring does not meet those legal standards in Dodd-Frank section 1028. A nonprofit commenter also objected more broadly to the Bureau's preliminary view in the proposal that it would be more appropriate for issues such as these, which concern particular statutes with high statutory damages, to be dealt with by the Congress and the courts. The nonprofit stated that because the Bureau was exercising discretion to fashion the rule and determine how it should apply, that the Bureau would be the appropriate body to determine how to develop exemptions.

These industry commenters asserted that CROA, which regulates contracts, disclosures, and other practices of credit repair organizations,[891] does not apply

[882] 15 U.S.C. 1681m.

[883] As the proposal noted, to the extent a future Bureau regulation were to further interpret the definition of consumer report under 15 U.S.C. 1681a(d), or other terms incorporated into that definition such as a consumer reporting agency, 15 U.S.C. 1681a(f), the definition in the implementing regulation would be used, in conjunction with the statute, to define this component of coverage of this proposal. 81 FR 32830, 32875 n.465 (May 24, 2016).

[884] *See also* Press Release, Bureau of Consumer Fin. Prot., ''CFPB Orders TransUnion and Equifax to Pay for Deceiving Consumers in Marketing Credit Scores and Credit Products'' (Jan. 3, 2017), *available at https://www.consumerfinance.gov/about-us/newsroom/cfpb-orders-transunion-and-equifax-pay-deceiving-consumers-marketing-credit-scores-and-credit-products/*; Press Release, Bureau of Consumer Fin. Prot., ''CFPB Fines Experian $3 Million for Deceiving Consumers in Marketing Credit Scores'' (Mar. 23, 2017), *available at https://www.consumerfinance.gov/about-us/newsroom/cfpb-fines-experian-3-million-deceiving-consumers-marketing-credit-scores/* (enforcement actions alleging deceptive practices in connection with, among other activities, providing credit scores to consumers).

[885] *See, e.g.,* 15 U.S.C. 1681j(a) (FCRA provision granting consumer right to free annual disclosure from consumer credit report file); 15 U.S.C. 1681g(a) (mandating consumer reporting agency provide information from the consumer's file to the consumer upon request); 15 U.S.C. 1681g(f) (mandating consumer reporting agency provide consumer credit score to the consumer upon request); and 15 U.S.C. 1681m(a) (FCRA provision mandating that user of consumer report to provide adverse action notice that includes credit score, among other information).

[886] *See, e.g.,* 15 U.S.C. 1681i(a)(6) (FCRA provision mandating consumer reporting agency to provide the consumer with notice of results of reinvestigation of disputed information in the consumer's credit report file).

[887] *See* 15 U.S.C. 1679(b).

[888] 15 U.S.C. 1679 *et seq.*

[889] 15 U.S.C. 1697g(a)(1) (providing for damages in the event of a CROA violation in an amount that is the greater of actual damages or any amount paid to the credit repair organization).

[890] These commenters also requested that an exemption also exclude identity theft products. As discussed below, however, the Bureau declines to cover those products per se, whether they are offered on their own or bundled with credit monitoring or credit repair products or services.

[891] In particular, CROA proscribes certain practices and requires certain contractual provisions and disclosures for the purpose of

Continued

to credit monitoring and credit education services offered by CRAs because these services do not meet the definition of such services set forth in CROA.[892] However, the commenters pointed to two Federal appellate court decisions that have held that CROA may apply to credit monitoring and credit education services respectively depending on the facts of the particular product and how it is marketed.[893] They also emphasized that the FTC, which is the only agency charged with enforcing CROA, has never taken an action under CROA against credit monitoring services and has in the past indicated in communications to Congress that it would not be good consumer policy to apply CROA to these products or services.[894] The commenters also explained that, given the industry's disagreement with the Federal appellate court decisions noted above, credit monitoring providers do not treat these products and services as subject to CROA, and instead arbitration agreements insulate them from exposure to class action suits. The commenters indicated that there has been no litigation since 2014 involving the application of CROA to credit monitoring products.

These commenters further asserted that exposure to class action liability for CROA violations could prompt providers to stop offering credit monitoring services. This, the industry commenters believe, would deprive consumers of a product that is valuable and serves an important function of helping consumers prevent or mitigate the impact of identity theft, and could drive consumers to riskier products. They asserted that it would be infeasible for credit monitoring services to comply with several CROA provisions, the application of which they asserted also would be confusing or inconvenient for consumers. For example, the commenters asserted that mandatory disclosure language might be confusing to consumers because it refers to the credit repair organization dealing with consumer reporting agencies, and yet some credit monitoring providers are themselves consumer reporting agencies.[895] The commenters also asserted that consumers would be inconvenienced by certain requirements regarding providing guarantees and obtaining consumer signatures,[896] a prohibition on the provision of services before consumers pay or are charged,[897] and a provision that the FTC and at least one court has interpreted as requiring a three-business-day waiting period before services are provided.[898] These commenters also stated the threat of CROA exposure under the rule would inhibit innovation in credit education products, citing market research that, in their view, supports the contention that consumers are much less willing to subscribe to a product or service when faced with the CROA disclosures and waiting periods.

The consumer reporting industry trade association also asserted that proposed § 1040.3(a)(4) would create an un-level playing field in the market of identity theft prevention products and services. The commenter stated this would occur because some products or services monitor information from a consumer report as defined in FCRA, while others do not use such reports. In the view of this commenter, by basing coverage on whether the consumer report as defined in FCRA is a source of information, the proposal would disadvantage those identity monitoring products that rely upon that source of information. This commenter cited a particular concern with how identity monitoring products that do not rely on FCRA-defined information would be able to use arbitration agreements to prevent exposure to CROA liability.[899]

Other commenters sought an expansion of this category of coverage. Specifically, several commenters, including consumer advocates and advocacy groups, a research center, two trade associations of consumer lawyers, and a small business advocacy group urged the Bureau to expand the coverage in proposed § 1040.3(a)(4) to include identity monitoring services that monitor and provide consumers with information from sources other than consumer reporting agencies. One of these consumer advocates noted that identity monitoring services may monitor the internet for references to consumers' personal financial information, citing a service provided by a consumer reporting agency as an example. This commenter asserted that these services are related to the protection of the financial assets and financial reputation of the consumer, and may monitor financial or banking data of the consumer, bringing them within the authority of the Bureau to regulate.

In response to the request for comment in the proposal on whether the scope of coverage should be expanded to include other activities of consumer reporting agencies, many commenters, including consumer advocates, nonprofits, a consumer law firm, and others, indicated that the Bureau should do so. Several of these comments expressed the view that consumer complaints concerning information in consumer credit files are very common, and collective remedies under FCRA are important to addressing inaccurate consumer credit reporting practices. An industry trade association stated in its comment, however, that arbitration agreements are not and could not be used in the context of consumer reporting agencies carrying out their statutory duties. Therefore, the commenter asserted that there is no support in the Study for this expansion of coverage and the Bureau lacks any rationale for considering it.

A number of consumer advocates, nonprofits, and others also stated in their comments that the final rule should cover furnishing of information to consumer reporting agencies. These comments indicated that the coverage of furnishing should be broader than the proposal and not be limited to furnishing in connection with a

ensuring that prospective buyers of services from credit repair organizations can make informed decisions and are protected from unfair or deceptive practices. *See* 15 U.S.C. 1679(b).

[892] To support their position, they cited to *Hillis* v. *Equifax Consumer Servs. Inc.,* 237 FRD. 491 (N.D. Ga. 2006).

[893] *See, e.g., Stout* v. *Freescore, LLC,* 743 F.3d 680, 687 (9th Cir. 2014), citing *Helms* v. *ConsumerInfo.com, Inc.,* 436 F.Supp.2d 1220, 1224–26 (N.D. Ala. 2005); *Zimmerman* v. *Puccio,* 613 F.3d 60, 72 (1st Cir. 2011) (''[C]redit counseling aimed at improving future creditworthy behavior is the quintessential credit repair service.''). Industry comments also described the *Stout* case as an example of a class action that drove a defendant out of business.

[894] Letter from Donald S. Clark, Sec'y, Fed. Trade Comm'n, to Hon. Hon. Edward R. Royce (July 1, 2005), attached to industry comment letter (same).

[895] 15 U.S.C. 1679c. In the commenter's view, the disclosure indicates that the credit repair organization is separate from the consumer reporting agency. Yet when consumer reporting agency affiliates are providing credit monitoring, they are not separate.

[896] 15 U.S.C. 1679d.

[897] 15 U.S.C. 1679b(b).

[898] *United States* v. *Cornerstone Wealth Corp., Inc.,* 2006 WL 522124 (N.D. Tex. 2006) (unpublished Federal district court opinion affirming FTC position that 15 U.S.C. 1679d requires both a three-day waiting period and specified contract language). The consumer reporting agency commenter also stated that State laws concerning credit repair products may require longer waiter periods, such as five business days that are required under California and Florida laws. A consumer reporting trade association commenter noted that the California law includes disgorgement-based damages provisions (as do other credit services organization statutes in Texas and New York), but that the Florida law excludes consumer reporting agencies.

[899] The commenter did not explain how identity monitoring products that do not rely on FCRA-defined information could be subject to CROA, which applies to products with the purpose of ''improving any consumer's credit record, credit history, or credit rating.'' 15 U.S.C. 1679a(3)(A)(i).

consumer credit transaction. One consumer advocate seeking this expansion noted that check collection, automobile leasing, and deposit accounts can lead to furnishing.

The Final Rule

After consideration of the comments, the Bureau is adopting revisions to proposed § 1040.3(a)(4) with minor wording modifications to clarify the intended scope of coverage by referring not only to the provision to consumers of ''consumer reports'' and ''credit scores'' as defined in FCRA,[900] but also to other information derived from a ''consumer file,'' as defined in FCRA. The Bureau also is making a minor modification to the exception for certain adverse action notices.[901]

As discussed above, in proposed § 1040.3(a)(4) the Bureau sought to cover credit monitoring as well as services providing consumers with their credit reports or a credit score. These types of products and services all provide consumers with information that ultimately originates from a consumer reporting agency as defined in FCRA. In response to the comments suggesting that providing information to a consumer from a ''consumer file'' as defined in FCRA should be separately covered, in an abundance of caution, the Bureau is revising the terminology in the final rule to clarify this activity is covered by § 1040.3(a)(4). The Bureau is clarifying that § 1030.3(a)(4) covers providing information derived from a consumer's ''file,'' which FCRA, 15 U.S.C. 1681a(g), defines as ''all of the information on [the] consumer recorded and retained by a consumer reporting agency . . .''

However, the Bureau is not adopting the consumer advocate commenter's suggestion of referring to a ''consumer file disclosure,'' as that is not a defined term in FCRA and relying on that term could raise doubt over the coverage of products or services whose information comes from a consumer's ''file'' but not as a result of the consumer file disclosure. Instead, the Bureau's revision to § 1030.3(a)(4) reaches more broadly, to information ''derived from the consumer's file.'' [902] For example, this would cover a person that obtains information from a third-party who obtained or derived the information from the consumer's file.[903]

The Bureau has carefully considered the comments relating to potential class liability for credit monitoring services under CROA, but does not agree that an exemption is warranted. In enacting CROA, Congress included a definition of the term credit repair organization in the statute.[904] The Bureau is not taking a position on whether or when credit monitoring products or services provided by consumer reporting agencies are subject to CROA.[905] However, based on its experience and expertise with respect to the credit repair market generally, the Bureau believes that if providers of credit monitoring products or services are subject to CROA because they are credit repair organizations, it is appropriate for this rule to apply to those products without an exemption.

At the outset, the Bureau notes that it disfavors exemptions to the class rule for claims under a particular statute. For the Bureau to decide a Congressionally-created private right of action does not protect consumers would amount to reconsideration by the Bureau of legislative policy choices. Further, the Bureau is concerned about taking actions that would be construed as allowing companies to avoid complying with applicable law. Indeed, such a result would be contrary to the goals of this rulemaking including deterring violations of the law and promoting the rule of law. And for the reasons discussed below, the Bureau does not believe commenters have presented persuasive evidence that compliance with or the remedial scheme established by the statute creating that private right of action is against the public good.[906]

With regard to CROA specifically, as the proposal indicated, the Bureau's Study covered class actions involving CROA and the Bureau has conducted pre-proposal outreach and research concerning CROA. The Bureau subsequently received a number of industry comments, which are discussed above. These inputs did not provide evidence that CROA, on the whole, fails to promote the public good and protection of consumers.

In adopting CROA, Congress sought to protect consumers in the credit repair market as a whole, which it covered comprehensively, with limited exceptions.[907] In the Bureau's experience and expertise, this market has been fraught with products that pose significant risks to consumers.[908] In the more than two decades since the enactment of CROA, the agencies charged with enforcing the statute, the FTC and State law enforcement officials, have brought numerous CROA enforcement actions.[909] The Bureau's

[900] The Bureau is clarifying in the final rule that the term credit scores in § 1030.3(a)(4) means credit scores as defined in FCRA. 15 U.S.C. 1681g(f)(2)(A).

[901] The proposed exception would only have applied to certain adverse action notices provided by a user covered by FCRA. 15 U.S.C. 1681m. The term ''user'' is not defined in FCRA, however, and the Bureau did not intend for the exemption to turn on the identity of the person directly providing the notice to the consumer. By deleting the reference to this term, the exception applies regardless whether the notice is provided directly to the consumer by a user covered by 15 U.S.C. 1681m or a third party contracted by such a person. The Bureau also is shortening the description of the exception.

[902] The phrase ''derived from'' is consistent with existing regulations implementing certain FCRA provisions. *See* 16 CFR 682.1(b) (defining coverage of FTC rule on disposal of consumer report information and records by reference to information ''derived from'' such materials).

[903] The scope of this provision remains limited, however, by the focus on the source of the information being the consumer's file as defined in FCRA. A person that provides a consumer with information that also is kept in a consumer file would not be covered, unless the information provided actually came, directly or indirectly, from the consumer's file.

[904] *See* 15 U.S.C. 1679a(3) (notwithstanding exclusions not relevant here, defining a ''credit repair organization'' as ''any person who uses any instrumentality of interstate commerce or the mails to sell, provide, or perform (or represent that such person can or will sell, provide, or perform) any service . . . for the express or implied purpose of— (i) improving any consumer's credit record, credit history, or credit rating; or (ii) providing advice or assistance to any consumer with regard to any activity or service described in clause (i)'').

[905] If they are not, then the exemption the commenters have requested would be unnecessary.

[906] The Bureau disagrees with the industry commenters that the proposal shifted a burden to them or that the Bureau has otherwise neglected to make required findings in the rule in support of the coverage of credit monitoring products and services, including CROA claims to which they may be subject. As is discussed above in Part VI, the Bureau has made findings regarding the application of laws with private remedies to covered products and services and has found such application to be in the public interest and for the protection of consumers. These findings apply to CROA, which is one such law. The Bureau solicited comment on its preliminary findings in the proposal. The Bureau has carefully considered those comments, including comments raising concerns with the application of particular statutes in class actions. And for the reasons discussed herein, the Bureau disagrees that these findings are undermined with respect to providers of credit monitoring by the potential application of CROA to them. Comments regarding other particular statutes are discussed in Part VI. In addition, in the Bureau's Section 1022(b)(2) Analysis, the Bureau discusses the potential alternative raised by industry trade associations of excluding a broad set of statutes—those that provide for statutory damages or recovery of attorney's fees.

[907] Congress excluded the following three entities from the definition of credit repair organization in CROA: Nonprofit organizations, creditors assisting with debts owed to them, and depository institutions and credit unions. 15 U.S.C. 1679a(3)(B). For the purposes of CROA, see Public Law 104–208, 2451 (1996) (adopting CROA, and making findings in the statute that the statute seeks to protect consumers from certain credit repair business practices that have ''worked a financial hardship upon consumers, particularly those of limited economic means and who are inexperienced in credit matters.'').

[908] Some of the most recent actions are described in the section-by-section analysis of the coverage of credit repair firms under § 1040.3(a)(3)(ii) above.

[909] *See, e.g.,* Press Release, Fed. Trade Comm'n, ''At FTC's Request, Court Shuts Down Credit Repair Scam that Impersonates FTC,'' (Mar. 27, 2015)

Continued

Study also identified six Federal class action settlements based on CROA claims finalized between 2008 and 2012.[910] Indeed, as discussed above, the Bureau believes it is important that the final rule cover credit repair services, and it has added credit repair services based on coverage in the TSR to the coverage in § 1040.3(a)(3)(ii).

Moreover, the Bureau notes that concerns about whether and when the statute applies to credit monitoring and (if so) whether the statute should be scaled back raise difficult policy and legal issues. Specifically, the Bureau notes that since 2005, there have been a number of efforts in Congress to determine whether CROA could be improved by clarifying the CROA credit monitoring coverage issue that commenters raised here.[911] No consensus has been reached to date. In connection with these efforts, the FTC has twice expressed concern about the difficulty in structuring a revision to CROA that would distinguish between products that may pose significant risks to consumers and those that may not.[912] This history suggests that the author of CROA (Congress) and its enforcer (the FTC) are not certain CROA should be revised, or how. Particularly given that an exception to the class rule would need to grapple with these same questions about distinguishing between different types of products, the Bureau is hesitant to decide them ahead of these primary actors.

With regard to the industry commenters' claims that compliance with CROA is infeasible or would result in substantial price increases, the Bureau is not persuaded of these claims based on the record before it.[913] Even if CROA's disclosure requirements apply, the Bureau believes that they could be bundled with a contract and/or provided electronically.[914] And if CROA bars collecting payment until the end of a service period, such as a monthly subscription period, it is unclear why providers could not make such a price structure work. Indeed, the Bureau notes that all three major consumer reporting agencies already forgo some or all revenues during an introductory period by offering credit monitoring at a discounted or even free price during that time.[915] The commenters also did not demonstrate the infeasibility of complying with other CROA requirements.[916] Thus, the Bureau does not find that the record supports a conclusion that these products or services cannot comply with CROA (if they are, in fact, subject to CROA). As to potential price increases, the Bureau believes that competition in this product market, including from depository institutions, which are exempt from CROA under 15 U.S.C. 1679a(3)(B)(iii), might be a limiting factor.[917]

Commenters also contended that application of CROA to credit monitoring products could potentially

(announcing CROA enforcement action), *available at https://www.ftc.gov/news-events/press-releases/2015/03/ftcs-request-court-shuts-down-credit-repair-scam-impersonates-ftc*; Press Release, Fed. Trade Comm'n, ''FTC Asks Court to Shut Down Phony Debt Relief and Credit Repair Scheme,'' (Aug. 22, 2014), *available at https://www.ftc.gov/news-events/press-releases/2014/08/ftc-asks-court-shut-down-phony-debt-relief-credit-repair-scheme*; Press Release, Fed. Trade Comm'n, ''FTC Charges Credit Repair Operators with Misleading Credit Bureaus and Charging Consumers Illegal Up-Front Fees,'' (Oct. 13, 2011) (same), *available at https://www.ftc.gov/news-events/press-releases/2011/10/ftc-charges-credit-repair-operators-misleading-credit-bureaus*; Press Release, Fed. Trade Comm'n, '' 'Operation Clean Sweep': FTC and State Agencies Target 36 'Credit Repair' Operations,'' (Oct. 23, 2008) (announcement of Federal and State actions against 33 credit repair operations), *available at https://www.ftc.gov/news-events/press-releases/2008/10/operation-clean-sweep-ftc-and-state-agencies-target-36-credit*; Press Release, Fed. Trade Comm'n, ''Project Credit Despair Snares 20 Credit Repair Scammers,'' (Feb. 2, 2006) (announcement of Federal and State actions against 20 credit repair operations), *available at https://www.ftc.gov/news-events/press-releases/2006/02/project-credit-despair-snares-20-credit-repair-scammers*; Press Release, Fed. Trade Comm'n, ''List of Law Enforcement Actions: Operation New ID—Bad Idea,'' (Feb. 2, 1999) (announcement of more than 30 actions), *available at https://www.ftc.gov/news-events/press-releases/1999/02/list-law-enforcement-actions.*

[910] Study, *supra* note 3, section 8 at 13 fig. 1.

[911] *See* H. Rept. 114–903 (2017) (describing hearing held Sept. 27, 2016, as part of legislative history of including H.R. 347, Facilitating Access to Credit Act (Bill to exclude consumer reporting agencies from CROA and commission FTC study on whether other entities should be excluded, introduced Jan. 14, 2015)); Facilitating Access to Credit Act, H.R. 5446, 113th Cong. (2014) (Bill to exclude consumer reporting agencies from CROA and commission FTC study on whether other entities should be excluded, introduced Sept. 10, 2014); ''An Overview of the Credit Reporting System,'' Hearing on the Fair Credit Reporting Act before the Subcomm. on Fin. Insts., and Consumer Credit, H. Comm. on Fin. Servs., 113th Cong, (2014) (industry representative urging amendments to CROA concerning credit monitoring); ''Examining the Need for H.R. 2885, The Credit Monitoring Clarification Act,'' Hearing on H.R. 2885 before the H. Comm. on Fin. Servs., 110th Cong. (2008) (examining bill to amend CROA to provide a disclosure requirement and right to cancel for credit monitoring); Credit Monitoring Clarification Act, H.R. 6129, 109th Cong. (2006) (Bill to amend CROA to provide a disclosure requirement and right to cancel for credit monitoring, introduced Sept. 20, 2006); Credit Monitoring Enhancement Act, S. 3662, 109th Cong. (2006) (Bill to amend CROA to provide a disclosure requirement and right to cancel for credit monitoring, introduced July 14, 2006); Credit Repair Organizations Act Technical Corrections Act, H.R. 5445, 109th Cong. (2006) (Bill to amend CROA to provide a disclosure requirement and right to cancel for credit monitoring, introduced May 22, 2006); H.R. 4127, Financial Data Protection Act (Bill to amend CROA to provide a disclosure requirement and right to cancel for credit monitoring, introduced Oct. 25, 2005, and reported out by three House committees); Data Accountability and Trust Act, H.R. 3997, 109th Cong. (2005) (Bill to amend CROA to provide a disclosure requirement and right to cancel for credit monitoring, introduced Oct. 6, 2005, reported by three House committees as described in H. Rept. 109–454).

[912] *See* ''Oversight of Telemarketing Practices and the Credit Repair Organizations Act,'' Hearing before the S. Comm. on Commerce, Sci., and Transp., 110th Cong. (2007) (testimony by FTC Bureau of Consumer Protection Director citing prior proposals to amend CROA and concern that fraudulent credit repair firms could use exemptions to evade CROA, and urging further Congressional review); Letter from Donald S. Clark, Sec'y, Fed. Trade Comm'n, to Hon. Edward R. Royce (July 1, 2005), attached to industry comment letter (same).

[913] With respect to the industry commenter's assertion that the *Stout* decision shows that CROA would drive credit monitoring providers out of business, the Bureau disagrees with this claim. To the extent credit monitoring is subject to CROA, credit monitoring firms could prevent substantial CROA class exposure by complying with CROA. The *Stout* decision does not reflect efforts by the defendant to comply with CROA.

[914] *See* 15 U.S.C. 1679c(a) (requiring only that written disclosure be provided ''before'' execution of the contract); Electronic Signatures in Global and National Commerce (ESIGN) Act, 15 U.S.C. 7001(c) (proscribing standards permitting electronic delivery of disclosures that are required to be provided in writing). This sort of disclosure is among the least costly types of mandated disclosures. *See generally* Bureau of Consumer Fin. Prot., ''Understanding the Effects of Certain Deposit Regulations on Financial Institutions' Operations,'' at 98 (2013), *available at http://files.consumerfinance.gov/f/201311_cfpb_report_findings-relative-costs.pdf.*

[915] *See, e.g.,* Equifax, ''Get your Equifax 3-Bureau Credit Scores with your Free 7-day Trial,'' *http://www.equifax.com/freetrial/* (last visited May 23, 2017) (offering free 7-day trial then $19.95 per month); Experian, ''Credit Monitoring, Try Experian CreditWorks for $4.99/first month,'' *available at http://www.experian.com/consumer-products/credit-monitoring.html* (last visited May 23, 2017) (offering $4.99 price for the first month and $24.99 for each month thereafter); TransUnion, ''Get all 3 bureau scores for FREE, Begin monitoring your credit reports when you start a 30 day trial for $4.95,'' *https://www.transunion.com/ppc-credit-report-495* (last visited May 23, 2017) (offering 30-day trial for $4.95). *See also, e.g., Ducharme* v. *Heath,* 2010 WL 5211502 at *6 (N.D. Cal.) (Slip Op. of Dec. 16, 2010) (holding that CROA does not prohibit billing on a monthly basis for a service performed during the prior month).

[916] Specifically, in particular, the commenters also have not demonstrated that it would be infeasible to provide a guarantee of performance (based on whatever service is being offered), to provide an estimate of the period necessary for performing services (such as a subscription period), or to obtain a signature of a consumer (which may be obtained electronically).

[917] The Bureau also understands that the credit monitoring market includes dozens of competitors and that competition may reduce the degree to which CROA compliance costs would be passed through to consumers. WalletHub, ''2017's Best Credit Monitoring Service,'' *https://wallethub.com/best-credit-monitoring-service/* (last visited May 23, 2017) (An industry Web site that lists nearly 30 providers.). *See also* Gov't Accountability Office, ''Identity Theft Services: Services Offer Some Benefits but are Limited in Preventing Fraud,'' at 5 (Mar. 2017) (Report to Congressional Requesters), *available at http://www.gao.gov/assets/690/683842.pdf* (finding about 50 to 60 companies providing identity theft services in 2015 and 2016).

inconvenience consumers and confuse them. The Bureau has not seen support for commenters' concern about the potential for consumer confusion, which is based on disclosures referring to the credit monitoring provider and consumer reporting agency as separate persons. These disclosures would appear to remain accurate in the credit monitoring context, since the Bureau understands that credit monitoring providers are not the same entities as consumer reporting agencies. In addition, to the extent CROA might alter how credit monitoring is offered and that this may inconvenience consumers, the Bureau notes that consumers have other options in lieu of or in addition to credit monitoring products if such inconvenience would in fact be significant. With respect to credit monitoring itself, a brief cancellation period of a few days before commencing the product or service under CROA would not necessarily lead to many cancellations. The commenters did not contend that consumers were likely to cancel the product or service in this time period, and to the extent any consumers voluntarily choose not to use a product or service, this does not mean that the product or service is not accessible to them. Consumers also have a number of potential alternatives to credit monitoring. For example, consumers may place a freeze on the release of information from their consumer files in the first place [918] or place a fraud alert on their consumer report in order to obtain alerts from potential creditors of potential new accounts before they are actually opened,[919] and they may obtain free copies of their consumer report each year and in a number of other circumstances described in FCRA.[920] In addition, depository institutions issuing credit cards have become a common provider of free credit scores to consumers.[921] Additionally, the Bureau notes, as confirmed by the industry commenters, that a variety of identity theft prevention and remediation products or services may be bundled with credit monitoring, such as identity monitoring from non-FCRA sources, identity restoration services, and identity theft insurance. These products and services would not be covered by § 1040.3(a)(4) if they do not involve providing information from the consumer's report,[922] and, in the case of identity theft insurance, it may be excluded pursuant to § 1040.3(b)(6) as the business of insurance.[923]

Relatedly, with respect to credit education services, the Bureau notes that the commenters' principal concern seems to be that consumers may not elect to use a CROA-compliant service. Although the commenters speculated that a brief waiting period before commencement of the service was a reason for this, the record did not establish that. In any event, as noted above, to the extent consumers voluntarily choose not to use a product or service, this does not mean that the product or service is not accessible to them.

Insofar as compliance is not infeasible and cost increases are unlikely, commenters' primary concern appears to be that the disgorgement remedy available under CROA makes it difficult—if not impossible—for providers to irreversibly pass any increased costs on to consumers. This is because no matter how high a provider raises its prices, it may not be able to retain that increase to cover CROA liability in the event that all revenue must be returned to injured consumers. The Bureau is not persuaded for several reasons. First, the Bureau recognizes, as confirmed by the industry commenters, that a variety of identity theft prevention and remediation products or services may be bundled with credit monitoring, such as identity monitoring from non-FCRA sources, identity restoration services, and identity theft insurance. As noted above, these products and services would not be covered by § 1040.3(a)(4) if they do not involve providing information derived from the consumer's file maintained by the consumer reporting agency, and in the case of identity theft insurance may be excluded pursuant to § 1040.3(b)(6) as the business of insurance. Thus the impact of disgorgement would not necessarily fall on the entire bundled suite of services, but generally only on the credit monitoring component of those services (to the extent CROA applies and a violation occurs). The commenters did not assert that the CROA exposure that the provider of a bundled suite of services may face would be based on the fees consumers paid for the bundled suite of services. Accordingly, the Bureau believes this exposure, to the extent it exists, may be more limited for bundled services. Second, the Bureau further understands that, under CROA,[924] the disgorgement remedy only applies to the amount paid by the person against whom a violation was committed. Thus, when a consumer receives credit monitoring for free from a firm in the event of a data breach, there are no consumer payments to be disgorged in a CROA class action.[925] The Bureau notes that, increasingly, tens of millions of consumers receive free credit monitoring as the result of such breaches.

For all of the reasons discussed above, the Bureau does not believe that it would be appropriate, in this rule, for the Bureau to substitute its judgment for that of Congress, which has so far not acted to restructure the scope of CROA in this area.

With regard to other concerns raised by some commenters that the scope of proposed § 1040.3(a)(4) was too narrow, the Bureau disagrees that the scope should be expanded. For example, the Bureau is not expanding the scope of proposed § 1040.3(a)(4) to reach forms of identity monitoring services that do not involve providing consumers with consumer reports, credit scores, or information derived from consumer files at this time. Given the limited nature of the comments received, the Bureau has insufficient information in this rulemaking to develop a legal definition of this type of product or service. At the same time, however, the Bureau

[918] *See* Bureau of Consumer Fin. Prot., "What Does it Mean to Place a Security Freeze on My Credit Report?," (reporting that 47 States have laws governing these freezes and the major consumer reporting agencies also provide credit freezes to consumers in the other States), *https://www.consumerfinance.gov/askcfpb/1341/what-security-freeze-my-credit-report.html* (Updated June 1, 2017).

[919] 15 U.S.C. 1681c–1(a)–(b).

[920] 15 U.S.C. 612(a)–(d).

[921] 15 U.S.C. 1679a(3)(B)(iii). Those depository institutions issuing credit cards have become a common provider of free credit scores to consumers. *See* Bureau of Consumer Fin. Prot., Notice of Public List of Companies Offering Existing Customers Free Access to a Credit Score, 81 FR 69046 (Oct. 5, 2016); Maria Jaramillo, "Check Our New List to See if Your Credit Card Offers Free Access to One of Your Credit Scores," CFPB Blog Post (Mar. 2, 2017) (providing list of credit card issuers offering free credit scores), *https://www.consumerfinance.gov/about-us/blog/check-our-new-list-see-if-your-credit-card-offers-you-free-access-one-your-credit-scores/*.

[922] The Bureau similarly notes that credit education services (whether existing now or in the future) would not be covered by § 1040.3(a)(4) if they do not involve providing information from the consumer's report.

[923] For example, identity theft insurance may be regulated under applicable State insurance laws. *See, e.g.,* N.Y. Consol. State. § 28–1113 (authorizing burglary and theft insurance to include identity theft insurance) & § 28–3451 (regulating identity theft group insurance policies); Ariz. Rev. Stat. § 20–1694 (regulating identity theft group insurance policies); Code of Maine Rules part 02–31 Ch. 375 § 3.4 (authorizing writing of group identity theft insurance).

[924] 15 U.S.C. 1679g(a)(1).

[925] *Cf. FTC* v. *Gill,* 71 F.Supp.2d 1030, 1048 (C.D. Cal. 1999) (observing that the plain language of the damages provision of CROA does not allow the FTC to recover damages incurred by consumers). One of the industry commenters discussed above stated that over 130 million consumers received some form of identity theft protection, which can include credit monitoring, in the previous year.

disagrees with the industry association commenter that by focusing its coverage in § 1040.3(a)(4) on information derived from CRA records, the Bureau is creating an un-level playing field by generating CROA class liability exposure for those market participants but not identity monitoring firms that rely on information from sources other than FCRA-regulated consumer reporting agencies. This commenter noted, for example, that its product also scans the internet in addition to consumer reports; providing information derived from a general search of the Internet would not be subject to the rule, whether it is done by a person whose other products or services are covered, or by a person who is not covered by the rule at all. Where a product or service bundles together activities that are covered with activities that are not, the rule (§ 1040.4(a)(1), (a)(2), and (b)) still only applies to activities that are covered. Thus, participants in the market are being treated equally in that the rule equally excludes products or services outside its scope, regardless of who provides them. In any event, to the extent different types of identity monitoring products or services face different risks of being covered by CROA, that is a function of the scope of CROA.

The Bureau also is not expanding the scope of proposed § 1040.3(a)(4) to include consumer reporting agency activities beyond those that involve providing consumer reports, credit scores, or information derived from a consumer file under FCRA. The Bureau is not persuaded that arbitration agreements affect these activities, and agrees with the industry association comment that it is unclear how a consumer reporting agency would be able to enter into an arbitration agreement with a consumer in this context. The Bureau may inquire into this question in its supervision and monitoring of the consumer reporting market. If arbitration agreements did appear to be limiting the ability of consumers to obtain relief from a consumer reporting agency in a FCRA class action, the Bureau could address that issue at a future time.

With regard to the comments seeking an expansion of scope to cover furnishing, independent of other proposed coverage, the Bureau is not persuaded that it should do so at this time. The examples these commenters described pertained to furnishing by persons as part of a product or service that is already covered by the rule, such as debt collection (§ 1040.3(a)(10)) and servicing consumer credit (§ 1040.3(a)(1)(v)). As stated in the section-by-section analyses of those provisions, furnishing in connection with these products or services already would be covered as part of the coverage of those products or services. For debt collection, this would be true whether the collection is on an extension of consumer credit, an automobile lease, a check, or a deposit account. Thus, the Bureau does not believe separately covering furnishing is necessary at this time.

3(a)(5)

As explained in the proposal, the Bureau believed the proposal should apply to deposit and share accounts.[926] Proposed § 1040.3(a)(5) would have included in the coverage of proposed part 1040 accounts subject to the Truth in Savings Act (TISA), 12 U.S.C. 4301 *et seq.,* and its implementing regulations, 12 CFR part 707, which applies to credit unions, and Regulation DD, 12 CFR part 1030, which applies to depository institutions.

TISA created uniform disclosure requirements for deposit and share accounts.[927] TISA has existed since 1991 and the Bureau believes that banks and credit unions are familiar with TISA's application to accounts that they may offer. Accordingly, as explained in the proposal, the Bureau believed that defining the accounts the Bureau proposes to cover by reference to terms in TISA, and its implementing regulations, Regulation DD and 12 CFR part 707 would facilitate compliance with proposed part 1040.

The Bureau did not receive comments on proposed § 1040.3(a)(5).[928] The final rule adopts this provision as proposed.

3(a)(6)

As explained in the proposal, in addition to coverage of deposit and share accounts as defined by (or within the meaning set forth in) TISA in proposed § 1040.3(a)(5), the Bureau believed the proposal should cover other accounts as well as remittance transfers subject to the EFTA.[929] EFTA applies generally to ''consumer asset accounts,'' including those provided by nonbank companies as well as to most if not nearly all of the deposit and share accounts provided by depository institutions. Thus, proposed § 1040.3(a)(6) would have included in the coverage for proposed part 1040 both accounts and remittance transfers subject to EFTA, including its implementing regulation, Regulation E, 12 CFR part 1005. EFTA, first adopted in 1978, provides a basic framework establishing the rights, liabilities, and responsibilities of participants in electronic fund and remittance transfer systems and creates rules specific to consumer asset accounts and remittance transfers.[930] As explained in the proposal, the Bureau believed that defining this coverage by reference to accounts and remittance transfers subject to EFTA as implemented by Regulation E would facilitate compliance with proposed part 1040.

The Bureau noted in the proposal that it had separately proposed a rule to extend the Regulation E definition of ''account'' to include ''prepaid accounts.''[931] As the Bureau further noted, where the proposal on arbitration agreements references terms from another statute or its implementing regulations, to the extent that term is redefined or the subject of a new interpretation in the future, that new definition or interpretation would have applied to the use of that term in proposed § 1040.3. Here, for example, any new definition of account that would include prepaid products would have been incorporated into proposed § 1040.3(a)(6).

In the proposal, the Bureau noted that EFTA also regulates preauthorized electronic fund transfers (PEFTs) and store gifts cards and gift certificates. The Bureau had not proposed to include those activities as covered products or services under proposed § 1040.3(a)(6). The Bureau noted that certain gift cards and gift certificates redeemable only at a single store or affiliated group of merchants, while subject to Regulation E,[932] are payment devices that merchants use to help consumers pay for their own goods or services, which as noted above and discussed in more detail below, the Bureau was not

[926] 81 FR 32830, 32876 (May 24, 2016).

[927] 12 U.S.C. 4301(b).

[928] Some comments from providers of products and services covered by this proposed provision, such as credit union and community bank industry comments, sought an exemption from the rule. Because this request was not specific to these types of products, those comments are discussed separately, in the section-by-section analysis of § 1040.4(b) below.

[929] 81 FR 32830, 32876 (May 24, 2016).

[930] *See* 15 U.S.C. 1693(b); 12 CFR 1005.2(b) (defining ''account'') and 12 CFR 1005.30(e) (defining ''remittance transfer'').

[931] Prepaid Accounts Under the Electronic Fund Transfer Act (Regulation E) and the Truth in Lending Act (Regulation Z), 79 FR 77101 (Dec. 23, 2014) (proposing to define a new term, ''prepaid accounts,'' to include certain categories of accounts that were already subject to Regulation E as well as to certain categories that had historically been treated as excluded from the regulation). In the proposal for this rule concerning arbitration agreements, the Bureau sought comment on whether the products that would be included in Regulation E by that proposed rule should be included in proposed § 1040.3(a)(6). 81 FR 32830, 32876 n.470 (May 24, 2016).

[932] *See* 12 CFR 1005.20(a).

proposing to cover except in limited circumstances. In addition, PEFTs, while not described as a separate category of coverage, generally would have been covered when offered as part of a covered product or service. For example, the Bureau understands that PEFTs are often offered by creditors and servicers of consumer credit under proposed § 1040.3(a)(1), providers of TISA or EFTA accounts or remittance transfers under proposed § 1040.3(a)(5) or (6), funds transmitting services under proposed § 1040.3(a)(7), payment processing under proposed § 1040.3(a)(8), or debt collection under proposed § 1040.3(a)(10).

The Bureau received several comments related to proposed § 1040.3(a)(6). Some consumer advocates and nonprofits urged the Bureau to apply the rule to stored value products, regardless of whether they are accounts under Regulation E. One commenter noted that the enumerated laws do not evolve as quickly as the markets, leaving gaps in coverage. Two commenters raised specific concerns with prison release cards. One commenter stated that, regardless of whether they are covered as accounts under Regulation E, the rule should cover general use gift cards, non-merchant rewards cards, Supplemental Nutrition Assistance Program (SNAP) cards, and cards linked to health savings accounts, noting that some of these are network branded just like other types of cards that are covered under Regulation E.

An industry trade association commenter in the consumer payments sector also stated that clarifications in the final rule should address the coverage of prepaid and stored value cards. The commenter did not say, however, whether the rule should include or exclude these products.

The Bureau adopts § 1040.3(a)(6) as proposed. Since the close of the comment period, the Bureau has adopted changes to the definition of ''account'' in Regulation E in its final prepaid accounts rule that it issued in October 2016. That rule, the relevant provisions of which are scheduled to take effect on April 1, 2018, expands the definition of account under Regulation E to include certain types of prepaid products not previously covered.[933] Those types of prepaid accounts would therefore be included within the scope of coverage of accounts under Regulation E, upon the latter of the compliance date of this rule or the prepaid accounts rule. When prison release cards and general-use gift cards meet the definition of prepaid account in that rule,[934] they would be covered by this rule. With respect to rewards programs, food stamp programs, and health savings accounts, these are generally not covered as accounts under Regulation E as revised by the prepaid accounts rule. The Bureau does not believe it would be necessary or appropriate to use this final rule as a vehicle for defining coverage of these types of products or services under the Dodd-Frank Act. The Bureau will continue to monitor the markets for stored value products and services not covered by this rule and may, at a future time, determine to adjust the scope of coverage of these markets in this rule.

3(a)(7)

The Bureau's Proposal

As explained in the proposal, the Bureau believed that the proposal should apply to transmitting or exchanging funds.[935] Proposed § 1040.3(a)(7) would have included in the coverage of proposed part 1040 transmitting or exchanging funds, except when integral to another product or service that is not covered by proposed § 1040.3. Dodd-Frank section 1002(29) defines transmitting or exchanging funds to mean:

> receiving currency, monetary value, or payment instruments from a consumer for the purpose of exchanging or transmitting the same by any means, including transmission by wire, facsimile, electronic transfer, courier, the Internet, or through bill payment services or through other businesses that facilitate third-party transfers within the United States or to or from the United States.

For example, a business that provides consumers with domestic money transfers generally would have been covered by proposed § 1040.3(a)(7). As noted above, however, proposed § 1040.3(a)(7) would not have applied to transmitting or exchanging funds where that activity is integral to a non-covered product or service. Thus, proposed § 1040.3(a)(7) generally would not have applied, for example, to a real estate settlement agent, an attorney, or a trust company or other custodian transmitting funds from an escrow or trust account that are an integral part of real estate settlement services or legal services. By contrast, a merchant who offers a domestic money transfer service as a stand-alone product to consumers would have been covered by proposed § 1040.3(a)(7). In addition, the Bureau believed that mobile wireless third-party billing services that engage in transmitting funds would have been covered by proposed § 1040.3(a)(7), as the Bureau understood that such services would not typically be integral to the provision of wireless telecommunications services.

Comments Received

A consumer advocate commenter generally expressed support for the coverage in proposed § 1040.3(a)(7). This commenter stated support for the view that this provision may apply to mobile wireless third-party billing, asserting that cramming is a serious consumer protection problem and that arbitration agreements impede relief. This commenter urged the Bureau to narrow the proposed exclusion for transfers that are integral to a product or service not covered by the rule, to prevent evasion. The commenter stated that only transfers that are necessary and essential for a non-covered service should be excluded.

An industry trade association commented, however, that, in their view, mobile wireless third-party billing is not a consumer financial product or service and therefore should not be cited as an example that would be covered by the rule.[936] The commenter stated that any transmission of funds by a wireless telecommunications service provider is done for the third-party recipient of the funds and not for consumer, household, or family purposes within the meaning of the Dodd-Frank Act. The commenter also stated that the rule should exclude mobile wireless third-party billing on policy grounds, in addition to legal authority concerns. Otherwise, the commenter asserted, providers would be required to engage in a nuanced and ongoing evaluation of each of their third-party relationships to determine whether those relationships give rise to coverage under the rule. In the commenter's view, because third-party billing services provide a relatively small revenue stream for mobile wireless companies and are merely incidental to its members' core wireless business, providers may choose to discontinue offering third-party billing services, which, in the commenter's

[933] *See* 81 FR 83934 (Nov. 22, 2016); 82 FR 18975 (Apr. 25, 2017) (setting effective date of April 1, 2018). *See also* Prepaid Accounts Under the Electronic Fund Transfer Act (Regulation E) and the Truth in Lending Act (Regulation Z), 82 FR 29630 (June 29, 2017) (proposal seeking comment on whether the effective date should be further delayed).

[934] *Id.* at 83968 (discussing coverage of prison release cards as prepaid accounts) and 83977 (discussing coverage of gift cards as prepaid accounts depending on several factors, including the nature of their marketing and labelling).

[935] 81 FR 32830, 32876–77 (May 24, 2016).

[936] *See also* discussion of § 1040.3(a)(1) above and § 1040.3(a)(8) below.

view, are desirable to consumers. The commenter explained that the covered product or service may be abandoned because, in its view, it would be infeasible for its member companies to create a compliance system and endure class action exposure just for this activity given that is so incidental and minor to the overall suite of products and services the companies provide to their customers. In addition, the commenter stated that if mobile wireless third-party billing were not excluded from the rule, then the Bureau should articulate the particular features of third-party billing that make it a product or service a covered by the rule.

The Final Rule

The Bureau is finalizing § 1040.3(a)(7) as proposed, but changing the exclusion in two ways to prevent evasion and uncertainty. First, the Bureau sought comment on whether the Bureau should define the limitation on coverage in a different way, including whether the Bureau should adopt ''necessary or essential to a non-covered product or service'' as the limitation. Consistent with the consumer advocate's comment described above, as revised in the final rule, the limitation would apply only for transmitting or exchanging funds when necessary to a product or service that is not covered by the rule (which could include, for example, another consumer financial product or service that is not listed in § 1040.3(a) or a nonfinancial good or service). The Bureau also is replacing the term ''integral,'' with the term ''necessary,'' which the Bureau believes is a narrower term.[937] Second, the Bureau is clarifying that this limitation only applies when the non-covered products and services and the transmitting or exchanging funds are done by the same person. The Bureau is making this clarification to prevent confusion over whether arranging payments for goods or services sold by a third party is ''necessary'' to that sale. As clarified, § 1040.3(a)(7) will cover transmitting or exchanging funds by one person to pay for a non-covered product or service provided by a third party, without regard to whether the funds transmitting or exchanging activity is ''necessary'' to the non-covered product or service.[938]

With regard to the industry trade association comment that stated that mobile wireless third-party billing is not a service undertaken for consumer, household, or family purposes within the meaning of the Dodd-Frank Act, the Bureau notes that the where the provider is acting as a bill payment service provider like other financial services providers,[939] the Bureau believes this typically would be a service provided for consumer purposes. On the other hand, where the provider is simply acting as a merchant collecting funds for its own nonfinancial goods or services, that conduct generally would not be covered by § 1040.3(a)(7). Thus, the coverage of § 1040.3(a)(7) will depend on the nature of a person's funds transmitting and exchange activities.

The Bureau recognizes that, to comply with the final rule, mobile wireless providers engaged in providing third-party billing services would need to analyze the extent to which their products or services include transmitting or exchanging funds for consumer purposes. The Bureau further recognizes that the scope of transmitting and exchanging funds under the Dodd-Frank Act has not been interpreted by regulation. Nonetheless, the Bureau is not persuaded by the suggestion in the comment that for providers to determine whether they are covered would be particularly burdensome. As noted in the proposal, the phrase transmitting and exchanging funds is defined in the Dodd-Frank Act.[940] The elements of this financial product or service are therefore laid out there, including the reference to bill payment services, which the Bureau believes provides useful guidance.

In addition, to the extent the application of the rule creates an incentive for the provider to develop a compliance system and creates class action exposure for providers who fail to meet their legal obligations in delivering consumer financial services, these are the chief goals of this rulemaking. The findings in Part VI and the Bureau's Section 1022(b)(2) Analysis account for the fact that, on the margins, providers may forgo offering a product because they do not want to invest in compliance and make private aggregate relief available to consumers for that product. In addition, applying the rule to an incidental product or service would not create coverage for the provider's core product. If the provider included an arbitration agreement for the products and services that are not covered by the rule, the rule would not prohibit the provider from relying on that arbitration agreement for those products and services in a class action. Relatedly, as noted below, the provider would have the option, under the final rule, of including contract language that clarifies that some products or services provided are not covered by the rule, which would limit the impact of the § 1040.4(a)(2) of the rule. Thus, the impact of the rule on the provider would presumably be in proportion to the importance that the covered product or service has to the provider.

3(a)(8)

The Bureau's Proposal

As explained in the proposal, the Bureau believed that the proposal should cover certain types of payment and financial data processing.[941] Proposed § 1040.3(a)(8) therefore would have included in the coverage of proposed part 1040 any product or service in which the provider or the provider's product or service accepts financial or banking data directly from a consumer for the purpose of initiating a payment by a consumer via a payment instrument as defined by 15 U.S.C. 5481(18)[942] or initiating a credit card or charge card transaction for a consumer, except when the person accepting the data or providing the product or service accepting the data is selling or marketing the nonfinancial good or service for which the payment, credit card, or charge card transaction is being made. Proposed comment 3(a)(8)–1 would have clarified that the definitions of the terms credit card and charge card in Regulation Z, 12 CFR 1026.2(a)(15), apply to the use of these terms in proposed § 1040.3(a)(8).

The coverage of proposed § 1040.3(a)(8) would not have included all types of payment and financial data processing, but rather only those types that involve accepting financial or banking data directly from the consumer for initiating a payment, credit card, or charge card transaction. An entity would have been covered, for example, by providing the consumer with a mobile phone application (or app, for short) that accepts this data from the

[937] *See* ''Merriam-Webster Online Dictionary'' (''necessary'' generally defined as ''absolutely needed,'' while ''integral'' may describe one thing that is ''formed as a unit with another part''), *available at https://www.merriam-webster.com/dictionary* (last visited May 30, 2017).

[938] For example, proposed § 1040.3(a)(8) included a limitation for processing payments for a product or service that the provider itself sold or marketed. This clarification to limitations in this rule on the coverage of transmitting and exchanging funds in § 1040.3(a)(7) therefore is consistent with the approach to the limitations in this rule on the coverage of payment processing in proposed § 1040.3(a)(8).

[939] *See* 12 U.S.C. 5481(29) (defining ''transmitting or exchanging funds'' to include such activities carried out ''through bill payment services'').

[940] *Id.*

[941] 81 FR 32830, 32877 (May 24, 2016).

[942] As noted in the proposal, Dodd-Frank section 1002(18) defines a ''payment instrument'' as ''a check, draft, warrant, money order, traveler's check, electronic instrument, or other instrument, payment of funds, or monetary value (other than currency).'' *Id.* at n.472.

consumer and transmits it to a merchant, a creditor, or others. An entity also would have been covered by itself accepting the data from the consumer at a storefront or kiosk, by electronic means on the internet or by email, or by telephone. For example, a wireless, wireline, or cable provider that allows consumers to initiate payments to third parties through its billing platform would have been covered by proposed § 1040.3(a)(8).

The Bureau notes that the breadth of proposed § 1040.3(a)(8) would have been limited in several ways. First, the coverage of proposed § 1040.3(a)(8) would not have included merchants, retailers, or sellers of nonfinancial goods or services when they are providing payment processing services directly and exclusively for the purpose of initiating payment instructions by the consumer to pay such persons for the purchase of, or to complete a commercial transaction for, such nonfinancial goods or services. Those types of payment processing services are excluded from the type of financial product or service identified in Dodd-Frank section 1002(15)(A)(vii)(I). As a result, they would not be a consumer financial product or service pursuant to 12 U.S.C. 5481(5), which is a statutory limitation on the coverage of proposed § 1040.3(a). For the sake of clarity, proposed § 1040.3(a)(8) would have stated that it would not apply to accepting instructions directly from a consumer to pay for a nonfinancial good or service sold by the person who is accepting the instructions. In addition, proposed § 1040.3(a)(8) would not have applied to accepting instructions directly from a consumer to pay for a nonfinancial good or service marketed by the person who is accepting the instructions. As a result of this proposed exception, proposed § 1040.3(a)(8) would not have reached, for example, a sales agent, such as a travel agent, who accepts an instruction from a consumer to pay for a nonfinancial good or service that is marketed by the agent on behalf of a third party that provides the nonfinancial good or service.

The Bureau further notes that certain forms of payment processing also would have been covered by other provisions of proposed § 1040.3(a). This may include, for example, proposed § 1040.3(a)(1)(v) (servicing of consumer credit), § 1040.3(a)(3) (debt relief services), § 1040.3(a)(5) (deposit and share accounts), § 1040.3(a)(6) (consumer asset accounts and remittance transfers), § 1040.3(a)(7) (transmitting or exchanging funds), or § 1040.3(a)(10) (debt collection).

Comments Received

A public-interest consumer lawyer commenter stated that the exclusion in proposed § 1040.3(a)(8) should not exclude sellers of automobiles, in particular when the payment being processed is for a loan to finance the purchase of the dealer's automobiles.

A consumer advocate commenter recommended that the Bureau expand the scope of payment and financial data processing coverage in three ways. First, this commenter stated that the rule should explicitly cover electronic funds transfers (EFTs) and preauthorized electronic funds transfers (PEFTs) as those terms are defined in Regulation E. Second, this commenter stated that transfers of funds between accounts at the same financial institution, which are not EFTs under Regulation E, should be covered. Third, this commenter stated that the Bureau should remove the word ''directly'' from proposed § 1040.3(a)(8), so that the rule would reach persons who work behind the scenes to arrange debiting funds from consumer accounts as part of work-at-home schemes, fake dating apps, or other schemes perpetrated by third parties who are not offering consumer financial products or services.

This consumer advocate commenter also expressed support for coverage that would regulate mobile wireless third-party billing, asserting that cramming is a serious consumer protection problem and that arbitration agreements impede relief to consumers harmed by cramming practices. As noted above, an industry trade association, however, disagreed with the Bureau's observation that proposed § 1040.3(a)(8) could apply to mobile wireless third-party billing.[943] This commenter stated that, in its view, mobile wireless third-party billing would not be covered by proposed § 1040.3(a)(8) because the nonfinancial goods or services of the third party are virtually always marketed by the mobile wireless provider whether because of the scope of the provider's activities, or simply due to the nature of payment processing itself. For example, mobile wireless providers engage in promotional activities or distribute the nonfinancial good or service for which payment is made. The commenter also asserted that simply by making their payment channel available to pay for a given nonfinancial good or service, mobile wireless providers are marketing the nonfinancial goods or service because doing so promotes that good or service.

[943] *See also* section-by-section analysis of § 1040.3(a)(1) and (a)(7) above.

The Final Rule

For the reasons described in the proposal, and explained below, the final rule adopts § 1040.3(a)(8) and comment 3(a)(8)–1 as proposed with minor edits for clarity. The proposal described the payment processing activity excluded from § 1040.3(a)(8) based on whether it was to process a payment or card transaction for a nonfinancial good or service sold or marketed by the processor. Rather than using the term nonfinancial good or service, which is not defined, the Bureau believes it would be clearer to refer to goods and services that are not covered by § 1040.3(a).[944]

With regard to the public-interest consumer lawyer comment that stated that automobile dealers should not be excluded when processing payments on their loans, the Bureau does not believe an adjustment to § 1040.3(a)(8) is necessary. As discussed in the proposal and further below with regard to § 1040.3(b)(6), the Bureau's jurisdiction over certain automobile dealers and other merchants is constrained by the Dodd-Frank Act.[945] The Bureau has conformed the scope of the rule to these limitations. Except when persons are excluded under § 1040.3(b), however, the final rule treats providers that process payments on their own extension of consumer credit with a finance charge as engaged in servicing,[946] debt collection, or both.

The Bureau disagrees with the consumer advocate commenter that any of the changes it seeks are necessary. The Bureau notes that EFTs and PEFTs will typically be covered pursuant to § 1040.3(a)(5) or (a)(6) because they are made to or from an account as defined under EFTA or TISA and/or pursuant to § 1040.3(a)(8) because they also are processed by persons who accept data directly from the consumer to initiate payments for services these persons neither sold nor marketed. Similarly, a transfer of funds between accounts need not be defined as covered payment processing, since the underlying accounts are already themselves covered, for example, by § 1040.3(a)(5) and (a)(6).

With regard to the commenter's suggestion to remove ''directly'' from proposed § 1040.3(a)(8), the Bureau believes that limiting the scope of

[944] This revision is consistent with the wording of other limitations in § 1040.3(a), including its paragraphs (1)(iii), (4), and (7).

[945] *See* Dodd-Frank sections 1027 and 1029.

[946] *See, e.g.,* Complaint at ¶ 97, *Consumer Fin. Prot. Bureau* v. *Navient Corp.*, No. 17–00101 (M.D. Pa. Jan. 18, 2017) (alleging student loan servicer engaged in payment processing as part of its servicing activity).

§ 1040.3(a)(8) to situations involving the acceptance ''directly'' from the consumer is important because it helps to distinguish consumer-focused products and services from third-party, back-office operations.[947] This term therefore increases clarity of coverage under this provision, facilitating implementation of the rule.

The Bureau agrees with the industry trade association comment that, when a mobile wireless provider markets its own nonfinancial goods or services, then any payment processing the mobile wireless provider provides to the consumer in the course of purchasing the nonfinancial good or service it has marketed to the consumer would not be covered by § 1040.3(a)(8) because this provision specifically excludes such situations. However, the Bureau disagrees with the commenter's view that merely providing payment processing services constitutes marketing of the goods or services for which the payments are being processed so as to warrant categorically excluding third-party billing from the scope of the rule. In the Bureau's experience, this view is overbroad and could render the coverage in § 1040.3(a)(8) meaningless because an exception for simply facilitating payment of goods or services would swallow the rule. While it is true that making a payment method available can facilitate sales of a product, the Bureau does not believe that act by itself would constitute marketing as the Bureau interprets that term in the context of this regulation. To be eligible for the marketing exclusion, a payment processor would need to be engaged in marketing activity for the nonfinancial good or service independent of the payment processing activity itself.[948]

3(a)(9)

As stated in the proposal, the Bureau believed that the proposal should apply to cashing checks for consumers as well as to associated consumer check collection and consumer check guaranty services. Proposed § 1040.3(a)(9) would have included in the coverage of proposed part 1040 check cashing, check collection, or check guaranty services, which are types of consumer financial products or services identified in Dodd-Frank section 1002(15)(A)(vi).

The Bureau did not receive comments on its proposal to cover cashing checks for consumers and associated check collection and check guaranty services. The final rule adopts proposed § 1040.3(a)(9) as proposed. The Bureau also notes that, as discussed below in the section-by-section analysis of § 1040.3(a)(10), furnishing in connection with debt collection would be covered as a collection activity. This also would be true for furnishing in connection with covered check collection or check guaranty activity.

3(a)(10)

The Bureau's Proposal

As explained in the proposal, the Bureau believed that the proposal should apply to debt collection activities arising from consumer financial products and services covered by paragraphs (1) through (9) of proposed § 1040.3(a).[949] Dodd-Frank section 1002(15)(A)(x) identifies debt collection as a type of consumer financial product or service that is separate from, but related to, other types of consumer financial products or services. In the proposal, the Bureau was similarly proposing to include a separate provision specifying the coverage of activities relating to debt collection in proposed § 1040.3(a)(10). In addition to collections on consumer credit as defined under ECOA, other products and services that would have been covered by proposed § 1040.3(a) may lead to collections; the Bureau was concerned that if any of these collection activities were not separately covered, collectors in these cases could seek to invoke arbitration agreements.

As the proposal explained, the Bureau believed that collections coverage was particularly important because the Study showed that class actions alleging violations of the FDCPA were the most common type of class actions filed across the six significant markets that the Bureau studied. Debt collection class settlements were also by far the most common type of class action settlement in all of consumer finance,[950] which in turn suggested that debt collection is an activity in which it is especially important to allow for private enforcement, including class actions, to guarantee the consumer protections afforded by the FDCPA, among other applicable laws. The proposal added that, particularly in light of the fact that collectors often bring suit against consumers and the history discussed in Part II of the proposal concerning serious fairness concerns raised in connection with the filing of numerous debt collection claims with a particular arbitration administrator, the Bureau believed that application of the proposal to collection activities may be one of the most important components of the rule.

Specifically, proposed § 1040.3(a)(10) would have applied the requirements of proposed part 1040 to collecting debt that arises from any of the consumer financial products or services covered by any of paragraphs (1) through (9) of proposed § 1040.3(a). For clarity, proposed § 1040.3(a)(10) would have identified the specific types of entities that the Bureau understands typically are engaged in collecting these debts: (i) A person offering or providing the product or service giving rise to the debt being collected, an affiliate of such person, or a person acting on behalf of such person or affiliate; (ii) a purchaser or acquirer of an extension of consumer credit covered by proposed § 1040.3(a)(1)(i), an affiliate of such person, or a person acting on behalf of such person or affiliate; and (iii) a debt collector as defined by the FDCPA, 15 U.S.C. 1692a(6). The proposed coverage of each of these types of entities engaged in debt collection is described separately below.

Proposed § 1040.3(a)(10)(i) would have applied to collection by a person offering or providing the covered product or service giving rise to the debt being collected, an affiliate of such person,[951] or a person acting on behalf of such person or affiliate. This coverage would have included, for example, collection by a creditor extending consumer credit. The Bureau noted in the proposal, however, that as with proposed § 1040.3(a)(1) discussed above, proposed § 1040.3(a)(10)(i) would not have extended coverage to collection directly by a merchant of debt arising from credit it extends for the purchase of its nonfinancial goods or services in circumstances where the merchant is exempt under proposed § 1040.3(b). Similarly, collection directly by governments or government

[947] The Bureau acknowledges section 1002(15)(A)(vii) does not include that term in defining data processing services that can be a type of consumer financial product or service, and that the Bureau's authority under the statute reaches more broadly than does § 1040.3(a)(8). However, in this rule, the Bureau does not believe it is necessary to incorporate the entire scope of Dodd-Frank section 1002(15)(A)(vii). To the extent a back-office processor is an affiliated service provider to a provider of a product or service covered by § 1040.3(a), that back-office processor may still be covered by the rule as a provider pursuant to § 1040.2(d)(2).

[948] More broadly, for the reasons already discussed in the response to this comment in the section-by-section analysis of § 1040.3(a)(7) above, the Bureau does not agree that a blanket exemption for mobile wireless third-party billing is warranted. For the reasons the industry trade association commenter noted, to the extent mobile wireless third-party billing providers are processing payments for nonfinancial goods or services they market, § 1040.3(a)(8) would not apply to them.

[949] 81 FR 32830, 32878–79 (May 24, 2016).

[950] *See* Study, *supra* note 3, section 6 at 19 and section 8 at 12.

[951] As proposed comment 3(a)(10)–2 would have clarified, Dodd-Frank section 1002(1) defines the term affiliate as ''any person that controls, is controlled by, or is under common control with another person.''

affiliates on credit they extend would have been exempt in the circumstances described in proposed § 1040.3(b).

In addition, proposed § 1040.3(a)(10)(ii) would have covered collection activities by an acquirer or purchaser of an extension of consumer credit covered by proposed § 1040.3(a)(1), an affiliate of such person, or a person acting on behalf of such person or affiliate. This coverage would have reached such persons even when proposed § 1040.3(b) would have excluded the original creditor from coverage. For example, such collection activities by acquirers or purchasers would have been covered even when the original creditor, such as a government or merchant, would have been excluded from coverage in circumstances described in proposed § 1040.3(b). As a result, collection by an acquirer or purchaser of an extension of merchant consumer credit covered by Regulation B, such as medical credit, would have been covered by proposed § 1040.3(a)(10)(ii), even in circumstances where proposed § 1040.3(b)(5) would have excluded the medical creditor from coverage.[952] In other words, although hospitals, doctors, and other service providers extending incidental ECOA consumer credit would not have been subject to the requirements of § 1040.4 to the extent proposed § 1040.3(b)(5) would have excluded them from coverage because the Bureau lacks rulemaking authority over them under Dodd-Frank section 1027 or they would have been excluded under another provision of proposed § 1040.3(b), an acquirer or purchaser of such consumer credit generally would have been subject to proposed § 1040.4.[953]

The proposal explained that the Bureau believed that many activities involved in the collection of debts arising from extensions of consumer credit would also constitute servicing under proposed § 1040.3(a)(1)(v). However, the Bureau was proposing the coverage of collection activities by any other person acting on behalf of the provider or affiliate in proposed § 1040.3(a)(10)(i) and (ii) to confirm that collection activity by such other persons would have been covered even when such other persons do not meet the definition of a debt collector under the FDCPA (*see* proposed § 1040.3(a)(10)(iii) described below) because they are not collecting on an account obtained in default.[954] By proposing coverage of debt collection by such other persons, the Bureau also sought to confirm that collection activity would be covered even in contexts in which industry may sometimes differentiate between the terms servicing and debt collection. For example, the proposal explained that in some contexts ''servicing'' may be used in the industry to refer to activities involving seeking and processing payments on a debt from a consumer who is not in default, while ''collections'' may sometimes be used by industry to refer to post-default activities.[955] Both types of collection activity would have been covered under the proposal.

As discussed in the proposal as described above, some debt collection activities are carried out by persons hired by the owner of a debt to collect the debt. The FDCPA generally considers such persons to be debt collectors and subjects them to its various statutory requirements and prohibitions against abusive collection practices. Allegations of violation of the FDCPA by debt collectors also were among the most common type of consumer claim identified in the Study, whether in class actions, individual arbitration, or individual litigation. Proposed § 1040.3(a)(10)(iii) therefore would have included in the coverage of proposed part 1040 collecting debt by a debt collector as defined by the FDCPA, 15 U.S.C. 1692a(6),[956] when the debt arises from any consumer financial products and services described in proposed § 1040.3(a)(1) through (9).

As discussed in the proposal as described above, the Bureau believed it is important to cover collection on all of the consumer financial products and services covered by the rule, since all of these products can generate fees that, if not paid, lead to collection activities by debt collectors as defined in the FDCPA. Of course, one of the most common types of debt collected by FDCPA debt collectors arises from consumer credit transactions. Accordingly, proposed § 1040.3(a)(10)(iii) would have extended coverage, for example, to collection by a third-party FDCPA debt collector acting on behalf of the persons extending credit who are ECOA creditors and thus subject to proposed § 1040.3(a)(1)(i) or their successors and assigns who are subject to proposed § 1040.3(a)(1)(iv). The Bureau believed that proposed § 1040.3(a)(10)'s references to these existing regulatory regimes would facilitate compliance, since the Bureau expected that industry has substantial experience with existing contours of coverage under the FDCPA and ECOA. As discussed above, proposed § 1040.3(a)(10)(ii) would have applied proposed part 1040 to purchasers of consumer credit extended by persons over whom the Bureau lacks rulemaking authority under Dodd-Frank section 1027 or 1029 or who are otherwise exempt under proposed § 1040.3(b). Similarly, proposed § 1040.3(a)(10)(iii) would have applied to FDCPA debt collectors when collecting on this type of credit as well as other debts arising from products or services covered by proposed § 1040.3(a)(1) through (9) provided by persons over whom the Bureau lacks rulemaking authority under Dodd-Frank section 1027 or 1029 or who otherwise would have been exempt under proposed § 1040.3(b).

The Bureau recognized that FDCPA debt collectors do not typically become

[952] As noted in the proposal, ECOA credit includes incidental credit pursuant to Regulation B and the commentary specifically notes that hospitals and doctors can provide such incidental credit. *See* 12 CFR 1002.3(c), comment 1 (''If a service provider (such as a hospital, doctor, lawyer, or merchant) allows the client or customer to defer the payment of a bill, this deferral of debt is credit for purposes of the regulation, even though there is no finance charge and no agreement for payment in installments.''). 81 FR 32830, 32878 n.475 (May 24, 2016).

[953] As the proposal further noted, the Bureau also explained in its Debt Collection Larger Participant Rulemaking, in analyzing what type of transactions are ''credit'' under the Dodd-Frank Act, that ''[i]n some situations, a medical provider may grant the right to defer payment after the medical service is rendered. In those circumstances, the transaction might involve an extension of credit.'' Defining Larger Participants of the Consumer Debt Collection Market, 77 FR 65775, 65779 (Oct. 31, 2012). In this connection, the proposal also noted, that other regulatory guidance in the past has indicated that a ''health care provider'' is a creditor under ECOA if it ''regularly bill[s] patients after the completion of services, including for the remainder of medical fees not reimbursed by insurance. Similarly, health care providers who regularly allow patients to set up payment plans after services have been rendered are creditors . . . .'' *See* Steven Toporoff, ''The ''Red Flags'' Rule: What healthcare providers need to know,'' Modern Medicine Network (Jan. 11, 2010), *available at http://www.modernmedicine.com/modern-medicine/news/modernmedicine/modern-medicine-feature-articles/red-flags-rule-what-healthcare-*. The Bureau stated in the proposal that it was not interpreting ECOA or Regulation B. 81 FR 32830, 32878 n.476 (May 24, 2016).

[954] *See* 15 U.S.C. 1692a(6)(F)(iii) (defining a debt collector to exclude a person collecting on an account ''not in default at the time it was obtained'').

[955] *See* Fed. Trade Comm'n, ''The Structure and Practices of the Debt Buying Industry,'' at 13 n.57 (Jan. 2013), *available at https://www.ftc.gov/sites/default/files/documents/reports/structure-and-practices-debt-buying-industry/debtbuyingreport.pdf* (''Creditors consider consumers who are late in paying as being 'delinquent' on their debts. Creditors may continue to collect on delinquent debts, but after a period of time creditors consider consumers to be in 'default' on their debts.'').

[956] As the proposal explained, to the extent a future Bureau regulation were to implement the definition of debt collector under 15 U.S.C. 1692a(6), the definition in the implementing regulation would be used, in conjunction with the statute, to define this component of coverage of this proposal. 81 FR 32830, 32879 n.479 (May 24, 2016).

party to agreements with consumers for the provision of debt collection services; they instead collect on debt incurred pursuant to contracts between consumers and creditors or other providers. As the proposal explained, however, there are a number of ways in which the proposal would have regulated or otherwise affected the conduct of debt collectors. First, under proposed § 1040.4(a)(1), described below, the debt collector would have been prohibited from invoking a pre-dispute arbitration agreement in a class action dispute concerning such collection activities. Second, if a pre-dispute arbitration agreement is the basis for an individual arbitration filed by or against the debt collector related to its collection activities that would have been covered by the proposal, then the debt collector may be required to submit to the Bureau the records specified in proposed § 1040.4(b). Finally, to the extent that a collector becomes party to a contract with individual consumers in the course of settling debts, such as a payment plan agreement, and that contract includes a pre-dispute arbitration agreement, then proposed § 1040.4(a)(2) would have required the collector to include the prescribed language in that pre-dispute arbitration agreement.[957]

Proposed comment 3(a)(10)–1 would have further clarified that collecting debt by persons listed in § 1040.3(a)(1) would have been covered with respect to the consumer financial products or services identified in those provisions, but not for other types of credit or debt they may collect, such as business credit.

Comments Received

A debt collection industry trade association challenged the Bureau's findings generally, mostly echoing other industry comments criticizing the proposal and the class rule in particular, as discussed above in Part VI. In addition, this commenter asserted that individual arbitration was superior to class litigation in consumer disputes. Some of the reasons it offered in support of this claim were specific to debt collection. For example, the commenter stated that in debt collection disputes, consumers place a particularly high value on confidentiality, which it believed arbitration better preserves. It also stated that debt collection claims are simpler to adjudicate, and thus suited to a simpler dispute process, which it believed arbitration offers. The commenter also noted that debt collectors, and small entities in particular, can use creditors' arbitration agreements to avoid the burdens of challenging flawed class litigation.

Three public-interest consumer lawyer commenters and a consumer advocate commenter supported the proposed coverage of debt collection, which in their view was one of the most important components of the proposed coverage. One of the public-interest consumer lawyers stated that a significant portion of the complaints these commenters have seen pertain to unfair debt collection practices. The consumer advocate commenter also noted the prevalence of class actions addressing debt collection problems as providing support for coverage of debt collection in the proposal. A public-interest consumer lawyer commenter also expressed support in particular for the coverage in proposed § 1040.3(a)(10)(i) and (ii), noting its understanding that these provisions would apply even when the covered person is not a debt collector as defined in the FDCPA, and also when the debt being collected arises from other covered activities beyond extending consumer credit. Another public-interest consumer lawyer commenter asserted that recourse to class actions for violation of debt collection laws is critically important for the protection of consumers. This commenter also stated that coverage of collection by third parties on consumer credit extended by exempt persons, such as medical providers, was particularly important. It stated that it has seen a number of instances of improper medical billing or collection practices, indicating that coverage in this rule is important.

The consumer advocate commenter also urged the Bureau to clarify that, with regard to proposed § 1040.3(a)(10)(iii), the FDCPA applies to debt buyers. For example, collectors may collect on debts they have purchased arising from deposit accounts, automobile leases, or check collection activities.[958] In addition, this commenter urged the Bureau to confirm that furnishing is among the debt collection activities included within the scope of proposed § 1040.3(a)(10). This commenter similarly urged that the rule explicitly cover consumer financial products that are ancillary to a covered product, such as payment processing that is ancillary to debt collection.

Finally, the consumer advocate commenter urged the Bureau to clarify that proposed § 1040.3(a)(10)(i) covers third parties acting on behalf of an exempt creditor or its affiliate when collecting on a debt arising from a covered consumer financial product or service. As an example, this commenter referred to a third-party collector of a medical credit account.

The Final Rule

The Bureau adopts § 1040.3(a)(10) and its commentary in comments 3(a)(10)–1 and 3(a)(10)–2 as proposed.

The industry trade association commenter's criticisms of the class rule were principally directed at the findings in support of rule as a whole, and are therefore addressed in Part VI above and, to the extent they relate to small entities, in the discussion of the potential alternative of a small entity exemption in Part IX below. With regard to the commenter's assertion that individual arbitration is superior to class litigation of debt collection disputes, the Bureau emphasizes that, as discussed in Part VI, creditors may continue to make individual arbitration available, which may also make it available for disputes with debt collectors. In addition, with regard to its claim that arbitration better protects consumer confidentiality, the Bureau notes that arbitration also depends on courts for enforcing awards, which may expose consumers to the same confidentiality concerns as individual litigation (indeed, the Bureau understands that many of the debt collection arbitrations in NAF discussed in Part II led to court actions to enforce arbitral awards in debt collection) and further that, according to the Study, the majority of arbitration agreements did not have confidentiality provisions.[959] In any event, 87 percent of the individual lawsuits in Federal court analyzed in the Study asserted FDCPA claims,[960] indicating that individual litigation is most often used in consumer finance markets for debt collection claims. This data suggests that for those consumers intent on bringing suit, litigation is a viable alternative.

The Bureau agrees with the consumer advocate comment that, as proposed, § 1040.3(a)(10) would apply to a third party collecting on consumer credit originated by an exempt person, such as a medical provider exempt in circumstances described in proposed § 1040.3(b)(6).[961] The rule confirms this in comment 2(c)–1.i, discussed above.

[957] *See* proposed comment 4–1.

[958] One public-interest consumer lawyer commenter also stated that the rule should apply to this type of collection activity.

[959] Study, *supra* note 3, section 2 at 52 tbl. 10.

[960] *Id.* section 2 at 27 fig. 6.

[961] *See, e.g.,* Syndicated Office Systems, LLC, 2015–CFPB–0012, Consent Order (June 18, 2015), *available at http://files.consumerfinance.gov/f/201506_cfpb_order-syndicated.pdf* (Bureau finding that affiliate of hospital chain engaged in collection

With regard to the consumer advocate commenter's request that this rule clarify the coverage of debt buyers under the FDCPA, the Bureau is not, in this rulemaking, interpreting the scope of the FDCPA. The scope of that statute as it stands now therefore determines the scope of § 1040.3(a)(10)(iii). The Bureau also notes, however, that the Supreme Court recently issued a decision holding that a debt buyer collecting on its own behalf debts that it purchased was not collecting or attempting to collect, directly or indirectly, debts owed or due or asserted to be owed or due to another within the meaning of the FDCPA.[962] In any event, any future interpretation of the FDCPA will be automatically incorporated by reference into the scope of this rule, as described above. Moreover, a debt buyer engaged in collection on a consumer credit account they purchase generally would be covered by § 1040.3(a)(10)(ii), which covers collecting debt by a purchaser of consumer credit, even when the purchaser is not a debt collector under the FDCPA.[963] Therefore, the Bureau declines to address, at this time, the commenter's request concerning the FDCPA's coverage of debt buyers.

With regard to the consumer advocate commenter's request to confirm that furnishing is a debt collection activity, when a person is collecting debt within the meaning of § 1040.3(a)(10), the Bureau agrees that if that person furnishes information on that debt in the course of that debt collection, then furnishing falls within the scope of the rule. The relevant factor is therefore whether the furnishing is done in the course of the debt collection, and not whether the debt collector is required to engage in the furnishing. However, the only commenter to address this question was this consumer advocate; the Bureau did not receive any other comments indicating uncertainty over the coverage of furnishing by debt collectors as a debt collection activity. Therefore, the Bureau believes this clarification is sufficient.

With regard to the consumer advocate comment concerning coverage of payment processing that may be ancillary to debt collection activities, the Bureau agrees that this would be covered by § 1040.3(a)(10) regardless of whether it is also covered by any other provision in § 1040.3(a). The Bureau interprets the term debt collection to include processing payments made by consumers as part of debt collection activity (*i.e.,* processing payments consumers make to satisfy a debt). However, the only commenter to address this question was this consumer advocate; the Bureau did not receive any other comments indicating uncertainty over the coverage of payment processing that may be ancillary to debt collection activities. The Bureau does not believe this example supports the commenter's broader claim that the rule should cover any consumer financial product or service that is ancillary to another covered product. The Bureau is concerned that that type of coverage definition could lead to uncertainty and would not facilitate compliance and administration of the rule.

3(b) Exclusions From Coverage

Proposed § 1040.3(b) would have identified the set of conditions under which certain persons would have been excluded from the coverage of proposed part 1040 when providing a certain products or services that were otherwise covered by proposed § 1040.3(a).[964] As discussed above, if an exclusion in proposed § 1040.3(b) did not apply to a person that offers or provides a product or service described in proposed § 1040.3(a), that person would have met the definition of a provider in proposed § 1040.2(c) and would have been subject to the proposal. The exclusion was structured to be specific to the provision of particular products and services listed in 1040.3(a). In other words, even if an exclusion in proposed § 1040.3(b) would have applied to a person offering or providing one particular product or service, that person still would have been covered by part 1040 when providing a different product or service described in proposed § 1040.3(a) if an exemption in proposed § 1040.3(b) would not have applied to that second product or service.

For illustrative purposes, the Bureau noted in the proposal that persons offering or providing consumer financial products or services covered by proposed § 1040.3(a) described above would have included, without limitation, banks, credit unions, credit card issuers, certain automobile lenders, automobile title lenders, small-dollar or payday lenders, private student lenders, payment advance companies, other installment and open-end lenders, loan originators and other entities that arrange for consumer loans, providers of certain automobile leases, loan servicers, debt settlement firms, foreclosure rescue firms, certain credit service/repair organizations, providers of consumer credit reports and credit scores, credit monitoring service providers, debt collectors, debt buyers, check cashing providers, remittance transfer providers, domestic money transfer or currency exchange service providers, and certain payment processors.[965]

Some commenters sought exclusions for certain persons, rather than certain products or services. Comments concerning a possible small entity exemption are discussed in Part IX below. In addition, a number of credit union and community bank industry commenters sought an exemption from the rule, for a variety of reasons. For example, credit union commenters cited their member-owned, not-for-profit cooperative structure[966] as providing adequate accountability incentives to comply with the law, such that class actions are not necessary. A community bank commenter similarly stated that community banks are relationship-oriented, and the need to develop customer relationships and retain customers provided an adequate incentive to comply with the law. Credit union commenters also generally

on debts originated by the hospital and other non-affiliated medical providers was a ''covered person'' subject to the Bureau's enforcement jurisdiction).

[962] *Henson, et al.* v. *Santander Consumer USA, Inc.,* No. 16–349 (Slip Op. June 12, 2017).

[963] As discussed in the proposal, servicing and collection activity may overlap. As a result, the debt buyer also may be covered under § 1040.3(a)(1)(iv)–(v) which generally cover purchasing and servicing consumer credit accounts.

[964] As the proposal noted, certain additional limitations would have been inherent in proposed § 1040.3(a). 81 FR 32830, 32879–80 (May 24, 2016). These limitations arise not only from the terms chosen for proposed § 1040.3(a) in general, but also from the fact that in a number of places proposed § 1040.3(a) referenced terms from other enumerated consumer financial protection statutes and their implementing regulations. For example, a transaction is ''credit'' as defined by Regulation B implementing ECOA only if there is a ''right'' to defer payment. *See* Regulation B comment 2(*j*)–1 (''Under Regulation B, a transaction is credit if there is a right to defer payment of a debt . . . .''). These limitations would have been incorporated into the coverage of proposed part 1040, regardless of whether they were explicitly mentioned in the text of the regulation or the commentary of the proposal.

[965] 81 FR 32830, 32880 (May 24, 2016). The Bureau discussed the examples as well as other types of entities that would have been covered in certain circumstances in the section-by-section analysis to proposed § 1040.3 described above. In addition, the Bureau noted in the proposal that, as part of its broader administration of the enumerated consumer financial protection statutes and title X of the Dodd-Frank Act, the Bureau continues to analyze the nature of products or services tied to virtual currencies. *Id.* at n.482.

[966] *See generally* Nat'l Credit Union Admin. ''Is a Credit Union Right For Me,'' *https://www.mycreditunion.gov/about-credit-unions/Pages/Is-a-Credit-Union-Right-for-Me.aspx* (last visited June 22, 2017) (''Credit unions are democratically run financial institutions providing each credit union member one vote. Members vote on those from the membership who are running for the credit union's board of directors, as well as any other credit union official positions open for election at the annual membership meeting.'').

asserted that their customers are more likely to experience higher costs from the proposal because their customers are owners who would experience reduced dividends as a result of increased costs from the rule.[967]

Other comments on the proposed exemptions and the Bureau's analysis of those comments are discussed in the section-by-section analysis of each proposed exclusion below.[968]

The Bureau is adopting the text in the introductory paragraphs of § 1040.3(b) as proposed, with a minor clarification to account for the fact that some exclusions apply more broadly to particular parties, rather than simply with regard to specific consumer financial products or services.[969]

With regard to the exemptions requested by credit union and community bank commenters, the Bureau is not adopting such exemptions in the rule as discussed further in Part VI above and the Section 1022(b)(2) Analysis below. As discussed in the section-by-section analysis of § 1040.3(b)(2) below, the Bureau has determined in the final rule that democratic accountability structures are an insufficient basis for excluding governments from the rule. With regard to an exemption for credit unions, the Bureau similarly believes that shareholder ownership, while providing a form of democratic shareholder accountability over the credit union, is not a sufficient compliance incentive to replace a right to enforce the laws on a class basis. The Bureau further believes that the presence of a financial institution in a community, such as a credit union or community bank, with the interest of developing and retaining customers in that community, also is not a sufficient compliance incentive to replace a right to enforce those laws on a class basis.[970] With regard to the potential for pass through of costs of the rule to consumers who also have ownership interests in credit unions, as discussed in the Bureau's Section 1022(b)(2) Analysis below, the member-ownership structure for credit unions may make it slightly more likely that consumers would face reduced earnings as owners, if costs are not passed through to them as customers. Nonetheless, the Bureau has already considered the potential for pass through of costs of the rule to customers in its Section 1022(b)(2) analysis. The fact that credit unions may pass through costs to consumers as owners, even when costs are not passed through by way of product pricing, does not change the nature of its findings in Part VI above.

3(b)(1)

The Bureau's Proposal

Proposed § 1040.3(b)(1) would have excluded from the coverage of proposed part 1040 broker-dealers to the extent they are providing any products or services covered by proposed § 1040.3(a) that are also subject to specified rules promulgated or authorized by the SEC prohibiting the use of pre-dispute arbitration agreements in class litigation and providing for making arbitral awards public. The term ''broker-dealers'' generally refers to persons engaged in the business of effecting securities transactions for the account of others or buying and selling securities for their own account.[971] Broker-dealers may provide products that were described in proposed § 1040(a). For example, broker-dealers may extend credit to allow customers to purchase securities. Securities credit is subject to ECOA as recognized in Regulation B, 12 CFR 1002.3(b). The Bureau proposed to exclude such persons from coverage to the extent they were providing products and services described in proposed § 1040.3(a) because they are already covered by existing regulations that limit the application of pre-dispute arbitration agreements to class litigation and provide for making arbitral awards public.

As discussed above and in the proposal,[972] since 1992, FINRA, a self-regulatory organization overseen by the SEC, has required pre-dispute arbitration agreements adopted by broker-dealers to include language disclaiming the application of the arbitration agreements to class actions filed in court.[973] The SEC, which must authorize FINRA rules, authorized the original version of this rule in 1992.[974] The Bureau also noted that claims in FINRA arbitration between customers and broker-dealers are filed with FINRA,[975] which is overseen by the SEC, and all awards between customers and broker-dealers under FINRA rules must be made public.[976] Proposed comment 3(b)(1)–1 would have clarified that § 1040.3(b)(1)'s reference to rules authorized by the SEC would include those promulgated by FINRA and approved by the SEC, as described above, in order that products and services covered by those FINRA rules would have been excluded from the coverage of proposed part 1040.

The proposal also identified a CFTC regulation requiring that pre-dispute arbitration agreements in customer agreements for certain products and services regulated by the CFTC be voluntary, such that the customer receives a specified disclosure before being asked to sign the pre-dispute arbitration agreement, is not required to sign the pre-dispute arbitration agreement as a condition of receiving the product or service, and is only subject to the pre-dispute arbitration

[967] Two credit union industry trade associations also noted that there may be impacts on credit unions engaged in the indirect automobile lending market where automobile dealers originating the loans use arbitration agreements. Those comments are discussed in the Bureau's Section 1022(b)(2) Analysis. In addition, another credit union industry commenter stated that credit unions not currently using arbitration agreements still needed an option of using arbitration agreements in the future to block TCPA class actions in light of concerns over uncertainties or ambiguities in the TCPA. As explained in Part VI, the Bureau finds that the class rule is in the public interest and for the protection of consumers notwithstanding that there may be questions regarding legal interpretations of laws that can be enforced through class actions.

[968] As discussed further below, the Bureau also received some comments that requested exemptions from the rule on bases other than the identity of the provider. The Bureau does not consider these requests to be requests for exemptions from the scope of coverage per se, but instead as requests for the Bureau to consider certain alternatives to or limitations on the substantive regulation itself. For example, a request to exclude certain causes of action providing for statutory damages or recovery of attorney's fees from the class proposal is discussed in Part VIII. In addition, the Bureau's consideration of other potential alternatives raised by commenters, such as not applying the class proposal to matters that providers self-report to regulators, is discussed in the analysis of impacts of the rule in Part VIII.

[969] Rather than referring to the exclusions as for persons to the extent they are providing consumer financial products or services specified in § 1040.3(b), the introductory paragraph in the final rule states that the exclusions apply in the circumstances described in § 1040.3(b). This is more accurate because some of the exclusions do not refer to particular consumer financial products or services.

[970] The Bureau's response to these comments is further detailed in Part VI.C.1 above.

[971] *See* 15 U.S.C. 78c(4)–(5) (defining the terms broker and dealer under the Securities Exchange Act).

[972] 81 FR 32830, 32880–81 (May 24, 2016).

[973] FINRA, ''Requirements When Using Predispute Arbitration Agreements for Customer Accounts,'' at Rule 2268(f). FINRA, formerly the National Association of Securities Dealers, also serves as an arbitral administrator for disputes concerning broker-dealers and its rules further prohibit broker-dealers from enforcing an arbitration agreement against a member of a certified or putative class case. FINRA, ''Class Action Claims,'' at Rule 12204(d).

[974] Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Order Approving Proposed Rule Change Relating to the Exclusion of Class Actions from Arbitration Proceedings, Exchange Act Release No. 31371, 1992 WL 324491, (Oct. 28, 1992).

[975] FINRA, ''Filing an Initial Statement of Claim; Filing Claim with the Director,'' at Rule 12302(a) (providing that claimant must file an initial claim with the Director of the FINRA Office of Dispute Resolution).

[976] FINRA, ''Awards,'' at Rule 12904(h) (''All awards shall be made publicly available.'').

agreement if he or she separately signs it, among other requirements.[977] That regulation, however, does not ensure consumers have access to private remedies in class actions and does not provide for transparency of arbitral awards. The Bureau therefore stated in the proposal its belief that the proposal could have provided important consumer protections for providers that might also be subject to the CFTC's regulation. The Bureau also believed that complying with both rules would not be unduly burdensome for any affected providers, given the limited nature of the CFTC rule. The Bureau therefore did not propose an exemption for those persons, and instead sought further comment on the approach to CFTC-regulated persons.

Thus, under the proposal, any product or service that would be subject to both the Bureau's proposal and the CFTC rule[978] therefore would have needed to meet the requirements of both rules. For example, any pre-dispute arbitration agreement subject to both rules would have needed to satisfy the CFTC requirements to ensure the contract is voluntary and contain the provision mandated by proposed § 1040.4(a)(2).[979]

Comments Received

The Bureau consulted with the SEC and CFTC prior to issuing the proposal and after the close of the comment period and received a formal comment letter from the staff of the CFTC. In addition, the Bureau received comments from an industry trade association whose members include both broker-dealers and investment advisers regulated by the SEC, an investment adviser industry trade association, and an industry trade association representing futures commission merchants regulated by the CFTC. These comments generally expressed an opinion that the Bureau lacks any authority under the Dodd-Frank Act to promulgate rules governing the conduct of SEC- or CFTC-regulated persons when acting in a regulated capacity. The commenters referenced provisions in Dodd-Frank section 1027 and in the Act's legislative history that, in their view, support that position.

With respect to broker-dealers and investment advisers, the broker-dealer and investment adviser trade association commenters also stated that their position was further supported by language in Dodd-Frank section 1002(15)(A)(vii), which excludes ''services related to securities'' from the general definition of financial advisory products or services that are subject to the Bureau's Dodd-Frank Act jurisdiction.[980] With respect to futures commission merchants, the CFTC and futures industry trade association stated that the CEA confers exclusive jurisdiction on the CFTC over CFTC-regulated products or services.[981] As a result, these commenters asserted that the final rule need not exempt these persons because the Bureau cannot regulate them in this rulemaking. Instead, commenters requested that the Bureau, in the final rule, state that it has no regulatory authority over these persons under Dodd-Frank section 1028 and title X of the statute more broadly.[982]

The industry trade associations also observed that the Bureau's Study did not analyze the use of arbitration agreements by their members. The commenters also did not identify any consumer financial products or services provided by their investment adviser or futures commission merchant members that could be subject to this rule. With respect to broker-dealers, a securities industry trade association, whose members include broker-dealers who are also registered investment advisers, stated that broker-dealers provide margin loans to purchase securities, and may also provide payment processing or remittances in certain circumstances. In the view of this industry trade association, however, these products or services were related to securities within the meaning of Dodd-Frank section 1002(15)(A)(vii), and, as a result of this relationship, excluded from the rulemaking authority of the Bureau. The commenter asserted that this would be the case regardless of whether the services relating to securities were financial advisory in nature, but further asserted that the products or services do relate to financial advisory services that broker-dealers provide. The industry trade association asked the Bureau to identify what covered products and services that, in the Bureau's view, broker-dealers provide. This commenter also stated that neither it nor its members were aware of any covered products or services that investment advisers provide, and asked the Bureau to specifically identify any such covered products or services of which it was aware.

A trade association of consumer lawyers stated in its comment letter that the Bureau should not exempt any products or services covered by the proposal that are subject to the CFTC's jurisdiction because CFTC arbitration rules are limited and ineffective, do not guarantee the option for participation in class actions, and do not provide for the transparency of arbitral awards. This commenter did not identify, however, any consumer financial products or services provided by CFTC-regulated entities.

An association of lawyers who represent investors also urged the Bureau to not exempt investment advisers providing a covered product or service because there is currently no regulation of the use of arbitration agreements related to these products or services by investment advisers, and the SEC, in its view, has no current plan to exercise its authority to regulate investment adviser arbitration agreements under Dodd-Frank section 921. This commenter did not identify, however, any consumer financial products or services provided by investment advisers.

The Final Rule

The Bureau adopts § 1040.3(b)(1)(i), an exemption for persons regulated by the SEC as defined in Dodd-Frank section 1002(21), which includes broker-dealers and investment advisers, as well as their employees, agents, and contractors, to the extent regulated by the SEC. This exemption also applies to persons acting in other SEC-regulated capacities as defined in Dodd-Frank section 1002(21), such as stock

[977] 17 CFR 166.5.

[978] The Bureau noted in the proposal its understanding that foreign currency spot transactions are not covered by the CFTC rule. 81 FR 32830, 32881 n.492 (May 24, 2016). *See* 17 CFR 166.5(a)(ii) (applying CFTC rule to ''retail fore[ign]ex[change]''); *but see* 7 U.S.C. 2(c)(2)(B)(i)(I) (Commodity Exchange Act covering retail foreign exchange contracts that provide for ''future delivery'') and CFTC and SEC, Further Definition of ''Swap,'' ''Security-Based Swap,'' and ''Security-Based Swap Agreement''; Mixed Swaps; Security-Based Swap Agreement Recordkeeping; Final Rule, 77 FR 48208, 48256 (Aug. 13, 2012) (''The CEA generally does not confer regulatory jurisdiction on the CFTC with respect to spot transactions.'').

[979] If a provider offers products or services that would have been covered by the proposal, such as consumer credit, and others that would not have been covered, the provider would have been permitted to use contract language that is tailored to such a circumstance. *See* proposed § 1040.4(a)(2)(ii).

[980] Section 1002(15)(A)(vii) covers ''providing financial advisory services'' as defined in that provision, which specifically excludes ''services related to securities provided by a person regulated by the [Securities and Exchange] Commission or a person regulated by a State securities Commission, but only to the extent that such person acts in a regulated capacity) . . .''

[981] 7 U.S.C. 1 *et seq.*

[982] One of these trade associations also stated that, if the Bureau pursued the contrary view and sought to cover any of these persons, there also may be confusion over which types of claims relate to the covered products or services, and which ones relate to other products or services they provide. To address this, they requested that the final rule clarify when a claim is ''related'' to a covered product or service. That comment is discussed in the section-by-section analysis of § 1040.4(a) below.

exchanges, self-regulatory organizations, and others. Under Dodd-Frank section 1002(21), persons regulated by the SEC can only meet this definition ''to the extent'' that they are acting in an SEC-regulated capacity.[983] Thus, it is not placing a condition on the exemption, such as the condition it had in the proposal for the broker-dealer exemption. The Bureau finalizes the exemption as described given that the SEC has authorities to regulate the use of arbitration agreements by SEC-regulated persons, including Dodd-Frank Act section 921 in which Congress delegated authority to the SEC to engage in its own rulemaking concerning the use of arbitration agreements by broker-dealers and investment advisers.[984] In light of the fact that the Bureau has not received comments indicating that any other SEC-regulated persons provide consumer financial products or services that would otherwise be covered by proposed § 1040.3(a), the Bureau has concluded, based on further consideration, that incidental provision of a consumer financial product or service performed by a person when acting in an SEC-regulated capacity should not be covered, just as the Bureau does not seek generally to regulate merchants or employers in this rule, as discussed in the section-by-section analysis for § 1040.3(a)(1)(iii) above and § 1040.3(b)(5) below, respectively. Moreover, an exclusion for SEC-regulated persons is consistent with the rule's exclusion of CFTC-regulated persons, as described below. For clarity, in light of the above factors, the Bureau believes that when a person is acting in an SEC-regulated capacity as described in Dodd-Frank section 1002(21), the final rule does not need to apply to them.

In addition, the exemption in § 1040.3(b)(1)(ii) applies to any person to the extent regulated by a State securities commission as a broker-dealer or investment adviser. For example, some smaller investment advisers have assets under management that fall below registration thresholds for SEC oversight but that are required to register in the States in which they operate. Similarly, some broker-dealers operating exclusively within a State or only with respect to excluded and exempted securities may not be required to register with the SEC but may be regulated by a State securities commission. The Bureau has decided not to apply the rule only to smaller investment advisers or broker-dealers not registered with the SEC, as it sees no reason to target only this one segment of the market for coverage in this rule and doing so may create confusion in the marketplace. The exclusion in § 1040.3(b)(1)(ii) does not reach more broadly than broker-dealers and investment advisers, however. The Bureau does not confer a blanket exemption on persons regulated by State securities commissions because unlike the term person-regulated by the SEC, there is no definition of this term in the Dodd-Frank Act. In some States, an agency that is a State securities commission regulates securities firms as well as banks and other providers that regularly provide consumer financial products or services.[985] A blanket exclusion could therefore inadvertently exclude State-regulated banks.

Thus, as revised, this exclusion applies to a broker-dealer or investment adviser who falls into either or both of the following categories: (1) Is a person regulated by the SEC as defined in Dodd-Frank section 1002(21); or (2) to the extent the person is regulated by a State securities commission as described in Dodd-Frank section 1027(h). It also applies to any other person regulated by the SEC as defined in Dodd-Frank section 1002(21).

With respect to persons regulated by the CFTC, the Bureau is similarly adding an exemption in the final rule to exclude persons regulated by the CFTC as defined in 12 U.S.C. 5481(20) or a person with respect to any account, contract, agreement, or transaction to the extent subject to the jurisdiction of the Commodity Futures Trading Commission under the CEA, 7 U.S.C. 1 *et seq.* The Bureau recognizes that the CFTC has authority to issue arbitration rules for persons regulated by the CFTC, as demonstrated by the CFTC arbitration rules discussed above, which have been in place for over four decades.[986] In addition to excluding a person regulated by the CFTC as that term is defined in Dodd-Frank section 1002(20), the exemption separately applies to accounts, contracts, agreements, and transactions subject to CFTC jurisdiction under the CEA. The Bureau understands such activities generally would be carried out by persons registered or required to register with the CFTC, who therefore already would meet the definition of a person regulated by the CFTC in 12 U.S.C. 5481(20). Nonetheless, for the sake of clarity, the Bureau is separately referring to those activities as being excluded. Finally, both the definition of a person regulated by the CFTC in the Dodd-Frank Act and the additional reference to the exclusion CFTC-regulated accounts, contracts, agreements, and transactions only apply to the extent an activity is regulated by the CFTC under the CEA.[987]

3(b)(2)

The Bureau's Proposal

Proposed § 1040.3(b)(2) would have excluded from the coverage of proposed part 1040 governments and their affiliates, as defined by 12 U.S.C. 5481(1), to the extent such entities provide products and services directly to consumers within their jurisdiction as specified in proposed § 1040.3(b)(2)(i) or (ii). This proposed exclusion would not have applied to an entity that is neither a government nor an affiliate of a government but provides services to a government or an affiliate of a government.[988]

As stated in the proposal, the Bureau believed that private enforcement of consumer protection laws, when provided for by statute, is an important companion to regulation, supervision of, and enforcement against private providers by governments at the local, State, and Federal levels. The Bureau believed, however, that financial products and services provided by governments and their affiliates directly to consumers who reside within territorial jurisdiction of the governments should generally not be covered by proposed part 1040 given the unique position that governments are in with respect to products and services that they and their affiliates provide directly to their own constituents.

Specifically, proposed § 1040.3(b)(2)(i) would have excluded from coverage any products and services covered by proposed § 1040.3(a) when provided directly by the Federal government and its affiliates. In circumstances where proposed

[983] 12 U.S.C. 5481(21) (clarifying that definition applies ''only to the extent that any person described in any of subparagraphs (A) through (K), or the employee, agent, or contractor of such person, acts in a regulated capacity.'').

[984] For example, the Bureau recognizes that the FINRA rules described above already apply to broker-dealers and that the SEC could issue further regulations on this subject under the Dodd-Frank Act.

[985] For example, in the District of Columbia, one agency—the Department of Insurance, Securities and Banking—regulates both banks and securities.

[986] 17 CFR 166.5, originally adopted by 41 FR 42942 (Sept. 29, 1976).

[987] *See* 15 U.S.C. 5481(20) (defining the term ''person regulated by the [CFTC]'' as referring to a person registered or required to register with the CFTC ''but only to the extent that the activities of such person are subject to the jurisdiction of the [CFTC] under the [CEA].'').

[988] Dodd-Frank section 1002(1) defines the term affiliate as ''any person that controls, is controlled by, or is under common control with another person.'' 12 U.S.C. 5481(1).

§ 1040.3(b)(2)(i) would have applied, the Bureau posited that the Federal government and its affiliates may be uniquely accountable through the democratic process to consumers to whom the Federal government and its affiliates directly provide products and services. The Bureau additionally posited that the democratic process may compel the Federal government and its affiliates to treat consumers fairly with respect to dispute resolution over the products and services they provide directly to consumers. For these reasons, the Bureau proposed to exempt from coverage of part 1040 products and services provided directly by the Federal government and its affiliates to consumers. By limiting this exemption to products and services provided directly by the Federal government and its affiliates, proposed § 1040.3(b)(2)(i) would not have exempted nongovernmental entities that provide covered products or services on behalf of the Federal government or its affiliates, such as student loan servicers. Proposed comment 3(b)(2)–1 would have reiterated this point with respect to the exclusions in proposed § 1040.3(b)(2), and also would have noted that the definition of affiliate in Dodd-Frank section 1002(1) would have applied to the use of the term in proposed § 1040.3(b)(2).

Proposed § 1040.3(b)(2)(ii) would have excluded from coverage any State, local, or Tribal government, and any affiliate of a State, local, or Tribal government, to the extent it is providing consumer financial products and services covered by § 1040.3(a) directly to consumers who reside in the government's territorial jurisdiction. The Bureau believed that such governments and their affiliates are persons pursuant to Dodd-Frank section 1002(19) and that a number of such governments and their affiliates may provide financial products and services that could otherwise be covered by proposed § 1040.3(a). In circumstances where proposed § 1040.3(b)(2)(ii) would have applied, the Bureau posited that governments and their affiliates may be uniquely accountable through the democratic process to consumers for products and services the governments and their affiliates provide directly to consumers who reside within their territorial jurisdiction. The Bureau additionally posited that the democratic process may compel governments and their affiliates to treat consumers who reside within the government's territorial jurisdictions fairly with respect to dispute resolution over the products and services the governments and affiliates provide directly to those consumers. For these reasons, the Bureau proposed to exempt from coverage of part 1040 products and services provided directly by governments and their affiliates to consumers who reside within the territorial jurisdiction of these governments.

As with the proposed exclusion for the Federal government and its affiliates, proposed § 1040.3(b)(2)(ii) would not have excluded from the coverage of part 1040 nongovernmental entities that provide covered products or services on behalf of State, local, or Tribal governments or their affiliates, such as a bank that issues a payroll card account for State, local, or Tribal government employees or a private debt collector that collects on consumer credit extended by a State, local, or Tribal government. This proposed exemption also would not have extended to State, local, or Tribal governments or their affiliates providing products or services to consumers who reside outside the territorial jurisdiction of the particular government. The Bureau believed that the democratic process and its accountability mechanisms are not generally as strong in protecting consumers who do not reside in the territory of the government that is itself, or via a government affiliate, providing products or services directly to them. For example, because such consumers do not reside in the government's territorial jurisdiction, they are not likely to be eligible to vote in elections to select representatives in that government or on ballot initiatives or other matters that would bind that government or its affiliates.

Proposed comment 1040.3(b)(2)–2 would have provided examples of consumer financial products and services that are offered or provided by State, local, or Tribal governments or their affiliates directly to consumers who reside in the government's territorial jurisdiction, as well as products and services that would have fallen outside the scope of the proposed exclusion. The use of the term ''affiliated'' in these examples also would have indicated that this exemption would not have applied to services provided by persons who are not affiliates of governments. For example, so-called ''public utilities'' would not have been exempt unless they control, are controlled by, or are under common control with a government or its affiliates. The Bureau requested comment on these proposed examples, and on whether other examples should be included.

The Bureau further noted that the proposal would not have covered any government utility, or other affiliates of governments such as schools, when eligible for other exemptions in proposed § 1040.3(b). For example, a government would have been exempt when providing consumer credit for its own services if the government does this below the frequency specified in proposed § 1040.3(b)(3), or if the credit does not include a finance charge, in which case the exemption in proposed § 1040.3(b)(5) generally would have applied.

Comments Received

A consumer advocate and two public-interest consumer lawyer commenters urged the Bureau not to adopt the proposed exclusions, asserting that democratic processes are insufficient to protect consumers. In particular, they noted that consumers are not necessarily aware of legal harms (as the Bureau had itself noted in the proposal), and thus may be unable to use the democratic process to hold government providers to account. Moreover, even when consumers are aware, the commenters asserted that very few are likely to exercise their vote on this basis alone, particularly over small-dollar harms. The commenters also cited examples of the use of class actions to protect the rights of minorities, who, in their view, have historically faced particular difficulties holding governments accountable.[989]

These commenters separately urged the Bureau not to use the term ''affiliate'' as defined in Dodd-Frank Act section 1002(1) because that definition was developed for the private marketplace and would be ambiguous in this context. One of these commenters also stated that affiliates of governments often have weaker accountability than governments themselves. Instead, the commenters advocated using a more developed test applied by the Internal Revenue Service to determine when entities are governmental in nature such

[989] These commenters also referred to particular products or services that may be provided by governments. One commenter identified an arbitration agreement in a particular home-improvement financing contract used in a PACE (Property Assessed Clean Energy) home improvement financing program, as part of a program that, in the view of the commenter, has led to problems for many consumers. (The Bureau understands that PACE financing is typically supported by local governments and structured to be paid off through the local government tax assessment process.) In addition, another public-interest consumer lawyer commenter expressed concern over the government exemption to the extent it would exclude debt collection by State schools, which, in its view, might add arbitration agreements in the future.

that they are not required to file a Federal tax return.[990] The consumer advocate commenter also stated that the Bureau should not use the term ''arm of the State'' to define which entities are exempt because the application of that term from constitutional immunity law is uncertain, and could lead to the exemption of entities who have only a small amount of capital contribution from governments. Similarly, a public-interest consumer lawyer commenter also stated that the term affiliate in the Dodd-Frank Act should not be used because it was ambiguous, and could reach providers acting as a special counsel to prosecutors in connection with check collection.

As is discussed above in Part IV, the Bureau held a consultation with representatives of Tribal governments in Phoenix, Arizona, on August 22, 2016. Many Tribal government representatives attending the consultation and other Tribal commenters (for convenience, both are referred to here as Tribal commenters, as many of those providing oral input at the consultation also provided written comments) emphasized that, in their view, the proposal would interfere with the sovereign immunity of Tribal governments.[991] Many Tribal commenters also expressed their opinion that the Bureau had no legal authority to regulate Tribal governments for several reasons, including that the reference to regulation of ''persons'' in the statute, 12 U.S.C. 1002(19), did not specifically list Tribal governments. In addition, many of these commenters criticized the Bureau because it did not propose to exempt Tribal governments entirely or otherwise state that the proposal would not apply to them.

In particular, Tribal commenters criticized proposed § 1040.3(b)(2). With regard to the Bureau's focus on democratic accountability, a number of Tribal commenters stated that their governments are sufficiently accountable, whether to residents or non-residents, and that they should be completely exempted from the rule. One Tribal commenter stated that the lack of a similar exemption in the Bureau's proposed rulemaking for small-dollar loans raised questions about the Bureau's rationale for proposing one here.[992] Several Tribal commenters also suggested in their comments that other mechanisms, such as intergovernmental relations with consumer protection regulators (including the Bureau), were a much stronger guarantor of accountability for consumer protection matters, whereas, in their view, the Bureau has not established that democratic accountability is an adequate form of accountability for consumer protection purposes. A Tribal industry trade association stated that the exclusion should be broadened to apply to all Tribal governments, including arms of Tribal governments, that are subject to Tribal regulatory oversight and dispute resolution mechanisms codified in Tribal law. In the view of this commenter, the Bureau did not find that class actions were in the public interest and for the protection of consumers in these contexts. In addition, several Tribal commenters noted that the proposal's concept of residency could be difficult to apply to all Tribes. Commenters explained that many Tribes may have members that do not reside on Tribal lands, whether because the Tribe has little or no land or because the Tribal members reside elsewhere (and thus these Tribes would not be able to qualify for the exception even when dealing with their own members), while others may have complicated interpretations of what land is considered their territory (and thus who are their residents).

Several Tribal commenters also stated that the proposal would interfere with Supreme Court and other appellate precedent recognizing that consumers who are not members of a Tribe and not resident in Tribal territory nonetheless can consent to Tribal jurisdiction.[993]

Several Tribal commenters further asserted that there was no basis for applying the proposal to Tribal governments, since they have sovereign immunity from private lawsuits including class actions.[994] One Tribal commenter also stated that Tribal governments may need to spend significant funds, and that based on its experience litigating immunity issues in a recent class action, those could be in excess of $100,000 per case. This commenter suggested that arbitration agreements may reduce this cost, though this commenter also stated that its Tribal lending operation did not use arbitration agreements.

Finally, two Tribal commenters urged the Bureau to expand its proposed exemption to include a service provider that acts on behalf of a government, asserting that these service providers enjoy the same legal status as the government itself. In support of their position, these commenters asserted that contractors may manage Tribal casinos without violating Federal gambling law, and contractors that run lotteries on behalf of State governments enjoy the same immunities that are conferred on the State government itself.[995]

The Final Rule

After consideration of the comments and the Bureau's further analyses, the Bureau has decided to shift away from an exemption for governments based on where their consumers reside, as the Bureau had proposed. The Bureau also understands the concerns raised by commenters about democratic accountability being potentially insufficient to protect consumers in some situations. At the same time, the Bureau also does not see a need, in general, for the rule to apply to persons who cannot be sued in class actions in any event because they are immune from suit. The Bureau is therefore adopting a status-based exemption in § 1040.3(b)(2) for (i) Federal government agencies as defined in the Federal Tort Claims Act, 28 U.S.C. 2671, and (ii) any State, Tribe, or other person to the extent the person qualifies as an arm of the State or Tribe within the meaning of Federal law concerning sovereign immunity and the person's immunities have not been abrogated by the U.S. Congress. The Bureau is adding comment 3(b)(2)(ii)–1 to clarify that, when the rule uses the term State, this includes any State, territory, or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, Guam, American Samoa, and the United States Virgin Islands.[996] The Bureau also is adding comment 1040.3(b)(2)(ii)–2 to clarify that the term ''Tribe'' in this exemption is a reference to any federally recognized Indian Tribe, as defined by the Secretary of the Interior under section 104(a) of the

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[990] *See* I.R.S. Rev. Proc. 1995–48.

[991] These commenters' disagreement with the class proposal are addressed in Part VI above.

[992] *See generally* Payday, Vehicle Title, and Certain High-Cost Installment Loans, 81 FR 47864 (July 22, 2016).

[993] *See, e.g., Montana* v. *United States,* 450 U.S. 544, 565 (1981) (holding that a Tribe may regulate dealings with nonmembers based on consent); *Dollar Gen. Corp.* v. *Mississippi Band of Choctaw Indians,* 746 F.3d 167, 177 (5th Cir. 2014) (applying *Montana* consent-based test), *aff'd per curiam,* 579 U.S. ___, 136 S.Ct. 2159 (2016).

[994] Some of the comments cited authority, including *C&L Enterprises, Inc.* v. *Citizen Bandpotawatomi Tribe of Okla.,* 532 U.S. 411 (2001).

[995] Many Tribal commenters also objected to the language in Bureau's proposed mandatory provision for arbitration agreements. Those comments are discussed in the section-by-section analysis of § 1040.4(a)(2) below.

[996] This definition mirrors the definition of State in Dodd-Frank section 1002(27), except, however, for purposes of this rule the Bureau is separately using the term ''Tribe'' for clarity, given that the rule also separately refers to the arm of the State and arm of the Tribe immunity law standards.

Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. 479a–1(a).[997]

The Bureau recognizes that certain government actors generally enjoy blanket immunities from private suit except when the immunity is lawfully abrogated by an act of Congress. These actors include not only States and Tribes, but also entities that are determined to be an ''arm of a State,'' and similarly, an arm of a Tribe.[998] The Federal government, including its agencies, also generally enjoys immunity from private suit, again unless waived by Congress for particular Federal law claims.[999] The Bureau does not believe it is necessary for the rule to apply to persons who cannot be sued on any claims in a private lawsuit because they enjoy sovereign immunity and that immunity has not been abrogated. The Bureau believes that, in part because of their general immunities, such entities do not tend to use arbitration agreements in the first instance.[1000] Accordingly, the Bureau is adopting in § 1040.3(b)(2) exemptions for these persons. With respect to the consumer advocate commenter that stated that an exemption based on an arm of a State or an arm of a Tribe could lead to the exclusion of entities that have only a small amount of capital contribution from governments, the Bureau does not believe that would be a reason to subject such persons to the rule when they would be immune from private suit anyway. To the extent the reduced capital contribution raises a genuine belief about whether the person truly is an arm of the State or an arm of a Tribe, the person may insert the optional language in § 1040.4(a)(2)(vi).

Insofar as U.S. sovereign immunity law allows for the immunities of a State or Tribe (and by extension, their arms) to be, in some circumstances, abrogated by Congress, the Bureau does not intend for its rule to permit arbitration agreements to block class actions in these instances.[1001] In those circumstances, an entity that may be a State, Tribe, or an arm of a State or Tribe, may be subject to private suit, including a class action. Therefore, the exemption adopted in § 1040.3(b)(2) is not available to an entity to the extent its immunity has been abrogated by Congress.[1002]

The Bureau also recognizes that the existence and nature of sovereign immunity from suit is not always fully certain. If a question or uncertainty were to arise, the final rule provides tailored language for entities to include in their contracts to preserve any immunity claims. Specifically, as discussed in the section-by-section analysis for § 1040.4(a)(2)(vi) below, if a person has a genuine belief that sovereign immunity from private suit under applicable law may apply to a person that may seek to assert the pre-dispute arbitration agreement, the person may voluntarily include a specified provision in its arbitration agreement that is designed to preserve any claim to that immunity that the person may have. This option allows providers covered by the rule to deal with any uncertainty they may perceive concerning the status of their immunities, without taking the risk that a court ultimately would disagree with their reliance on the exemption in § 1040.3(b)(2), and potentially subjecting them to a risk of penalties for violation of this rule.

The Bureau also recognizes that some governmental entities may not be eligible for the exemption in § 1040.3(b)(2)(ii). For example, some local governments may not be an arm of the State in which they are located. These governments would be subject to the rule to the extent they use arbitration agreements in connection with offering or providing a covered product or service to consumers and no other exemption applies. The rulemaking record does not establish that such situations are common.[1003] Alternatively, some entities may not be an arm of the State and may be subject to Federal law claims, but may be afforded a governmental status and associated immunities under State law. While those persons would not be eligible for the exemption in § 1040.3(b)(2)(ii), they may still use immunity preserving language permitted by § 1040.4(a)(2)(vi). Finally, the Bureau recognizes that some entities may be affiliated loosely with a State or Tribal government, but in a manner insufficient to create immunity from private suit. The Bureau does not believe that an exemption for these entities would be warranted. The Bureau thinks the case for an exemption is weakest under the logic of either the proposal or the final rule with regard to entities with such loose governmental relationships, and has concluded on balance that it would be beneficial to subject them to the final rule.

The Bureau further notes that the exemption in § 1040.3(b)(2)(ii) applies to an entity that qualifies as an arm of the State or arm of the Tribe under U.S. law, regardless of whether it has waived its immunity. Under sovereign immunity law, States, Tribes, or arms of a State or Tribe may become amenable to private suit by voluntarily consenting to private suit.[1004] After substantial consideration, however, the Bureau believes that there would be undue complications with basing eligibility for the exemption in § 1040.3(b)(2)(ii) of this rule on whether an entity has voluntarily waived its immunities. First, if a State, Tribe, or other person that is an arm of the State or Tribe uses an arbitration agreement, this may establish a formal dispute mechanism where one did not otherwise exist—unlike for other providers, which are generally amenable to a suit in court absent an arbitration agreement. As a result, the Bureau is concerned that eliminating the exemption in the case of a waiver, such as may occur by use of an

[997] This definition repeats the definition used in Dodd-Frank section 1002(27). These are the Tribal entities recognized and eligible for funding and services from the Bureau of Indian Affairs (BIA) of the U.S. Department of Interior by virtue of their status as Indian Tribes. *See, e.g.,* Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 81 FR 5019 (Jan. 29, 2016).

[998] *Alden* v. *Maine,* 527 U.S. 706, 713 (1999) (State sovereign immunity); *People ex. rel. Owen* v. *Miami Nation Enterprises,* 2016 WL 7407327 (Cal. 2016) (summarizing national jurisprudence on the ''arm of the Tribe'' doctrine).

[999] *Glidden Co.* v. *Zdanok,* 370 U.S. 530 (1962) (holding that Article III courts exercise jurisdiction over claims against the United States under jurisdiction conferred by Congress).

[1000] One Tribal entity commenter stated that the rule would have a number of effects on Tribal economic development including job growth. This commenter clarified, however, that it does not use arbitration agreements. As a result, it was unclear why the commenter foresaw this result. In any event, the exemption in § 1040.3(b)(2) should prevent any unintended consequences from the rule on Tribal governmental bodies that are immune from private suit as arms of a Tribe.

[1001] *C&L Enterprises,* 532 U.S. 411, 418 (2001) (affirming that abrogation of Tribal immunities under U.S. law is a matter for Congress alone); *Florida Prepaid Postsecondary Educ. Board* v. *College Svgs. Bank,* 527 U.S. 627, 634 (1999) (limiting, but not abandoning, abrogation powers of Congress with respect to States).

[1002] With regard to the Tribal industry association commenter's request for an exemption for Tribal governments and arms of Tribal governments when subject to Tribal regulatory oversight and Tribal dispute resolution processes, the exemption the Bureau is adopting in § 1040.3(b)(2) would apply to these persons when they are immune from private suit under Federal sovereign immunity law. To the extent these persons' immunity from private suit in non-tribal courts is abrogated by Congress, the Bureau believes this rule should not restrict consumers' access to non-tribal courts in disputes with these persons.

[1003] A consumer advocate identified an arbitration clause in one consumer agreement for a home improvement program funded through tax assessments. The commenter did not establish whether the agreement entails an extension of consumer credit under Regulation B, or whether the provider of the financing is an arm of the State, however. Whether such a program is covered will depend on the facts and circumstances, and the application of these legal standards.

[1004] *See, e.g., College Svgs. Bank* v. *Florida Prepaid Postsecondary Educ. Board,* 527 U.S. 666, 673 (1999) (describing voluntary waiver doctrine).

arbitration agreement, could discourage all forms of dispute resolution. Second, issues of waiver—including the extent of any waiver—are often fact-dependent, and in some cases may only be resolved through litigation. For example, a State legislature may waive immunities of an arm of the State for certain State law purposes, but leave unresolved whether immunity from Federal law claims has been waived. Thus, conditioning the exemption on the absence of a voluntary waiver may create undue uncertainty. Accordingly, the Bureau is not conditioning the exemption on the absence of a voluntary waiver. An entity that is an arm of the State or Tribe whose attendant immunity from suit has not been abrogated by Congress is eligible for the exemption in § 1040.3(b)(2)(ii), even if the entity is found to have voluntarily waived the immunities that flow from its status as an arm of the State or Tribe. Similarly, even if Tribal law allowed certain claims against an entity that was an arm of the Tribe under Federal law, if that entity's sovereign immunity from private suit under Federal law was not abrogated by Congress, then it would be eligible for the exemption as well. Through monitoring the provision of consumer financial products or services provided by governments, however, the Bureau could at a future point condition the exemption on the absence of a waiver of immunities.[1005]

3(b)(3)

The Bureau proposed in § 1040.3(b)(3) an exemption for a person in relation to any product or service listed in a paragraph under proposed § 1040.3(a) that the person and any affiliates collectively provide to no more than 25 consumers in the current calendar year and that it and any affiliates have not provided to more than 25 consumers in the preceding calendar year.[1006] For example, a person who, together with its affiliates, provides a covered product or service to 26 or more consumers in the current calendar year or in the previous calendar year would not have been eligible for this proposed exemption and generally would have been required to comply with all applicable provisions of the proposal.

As stated in the proposal, the Bureau believed that a threshold of the type described above (based upon provision of a product or service to only 25 or fewer persons annually) may have been appropriate to exclude covered products and services from coverage when they are not offered or provided on a regular basis for several reasons.[1007] First, the Bureau believed that services and products provided to only 25 or fewer consumers per year are unlikely to cause harms that are eligible for redress in class actions under the ''numerosity'' requirement of Federal Rule 23 governing class actions or State analogues, as discussed above in Part II. Second, when covered products or services are provided so infrequently, the likelihood of an individual claim in arbitration also is especially low. Therefore, the Bureau believed that applying the proposal to persons who engage in so little activity involving a covered product or service is unlikely to have a significant impact on consumers. Third, the Bureau believed that excluding covered products and services that entities provide so infrequently would relieve these entities of the burden of complying with the proposal for those products and services.

As also explained in the proposal, the Bureau was aware that some of the terms in statutes or their implementing regulations referenced in proposed § 1040.3(a) have their own exclusions for persons who do not regularly engage in covered activity. Except for the definition of remittance transfer in Regulation E subpart B, which is incorporated into proposed § 1040.3(a)(6),[1008] the underlying statutes and regulations incorporated by reference do not specify particular numeric thresholds.[1009]

For purposes of the proposal, the Bureau believed that a single uniform numerical threshold may facilitate compliance and reduce complexity, particularly given that application of the proposal would not just affect consumers' ability to bring class claims under specific Federal consumer financial laws, but also other types of State and Federal law claims. The proposed 25-consumer threshold also would have been generally consistent with the threshold for ''regularly extend[ing] consumer credit'' under 12 CFR 1026.2(a)(17)(v), which applies certain TILA disclosure requirements to persons making more than 25 non-mortgage credit transactions in a year. The Bureau emphasized that it was proposing this uniform standard in the unique context of this proposal, and that it expected to continue to interpret thresholds under the enumerated consumer financial protection statutes and their implementing regulations according to their specific language, contexts, and purposes. The Bureau further noted that basing an exemption on the level of activity in the current and preceding calendar year would have been consistent with the threshold under 12 CFR 1026.2(a)(17)(v).

The Bureau received one comment on this proposed exemption from a consumer advocate that supported the proposed exemption as appropriate. In this commenter's opinion, the exemption would have minimal impact on consumers in light of the numerosity requirement for class actions. The commenter noted that the similar exemption in Regulation Z has been well understood and implemented.

The final rule adopts § 1040.3(b)(3) and comment 3(b)(3)–1 as proposed, with two minor clarifications. First, rather than framing the exemption as applying ''when'' the person provides products or services below the specified threshold frequency, the final rule states that the exemption applies ''with respect to'' the products or services provided below that frequency. This revision seeks to emphasize more

[1005] Although no commenters raised this concern, the Bureau also notes that it is in theory possible that a State law does not afford immunities to an entity that nonetheless has arm of the State status under Federal law and is immune from Federal law claims. This could occur, for example, because the entity is not treated as part of the State government for purposes of the State immunity law, or the immunity such an entity may typically enjoy under State law has been abrogated. The Bureau believes, however, that it would be rare for State law to allow for claims against a body so closely connected with the State that Federal law deems it is an arm of the State. The Bureau also believes it would be impractical to condition the exemption on an entity having immune status under both Federal and State law. This could often implicate complex questions under laws of multiple States and Federal law merely to determine eligibility for the exemption. Accordingly, the Bureau is adopting a simpler approach. If such an entity were an arm of the State under Federal law, then it would be eligible for the exemption in § 1040.3(b)(ii). The Bureau notes that if a similar scenario occurred in which a Tribal law does not afford immunities to a Tribal entity that nonetheless qualifies as an arm of the Tribe under U.S. Federal sovereign immunity law, the entity would, likewise, still be eligible for the exemption.

[1006] As proposed comment 3(b)(3)–1 would have clarified, Dodd-Frank section 1002(1) defines the term affiliate as ''any person that controls, is controlled by, or is under common control with another person.'' 12 U.S.C. 5481(1).

[1007] 81 FR 32830, 32882 (May 24, 2016).

[1008] The definition of remittance transfer in Regulation E is limited to transactions conducted by a remittance transfer provider in the normal course of its business. 12 CFR 1005.30(f)(1). *See also* Regulation E comment 30(f)–2 (''[w]hether a person provides remittance transfers in the normal course of business depends on the facts and circumstances''). Regulation E further provides a safe harbor whereby persons providing 100 or fewer transfers in the current and prior calendar years are deemed not to be remittance transfer providers. 12 CFR 1005.30(f)(2). Thus, the proposal would not apply to transfers provided by persons who are not remittance transfer providers, because such transfers are not ''remittance transfers'' as defined by Regulation E.

[1009] For example, the definition of creditor in ECOA and Regulation B and debt collector in the FDCPA refer to regular activity but do not specify a numeric threshold.

clearly that, if a person provides two products or services covered by § 1040.3(a), one with a frequency that is below the threshold and the other with a frequency that exceeds the threshold, then the exemption only applies to the first product or service and not the second. Second, comment 3(b)(3)–1 is revised to clarify that although the number of times a product is offered is not relevant for purposes of determining eligibility for this exemption, participating in a credit decision with regard to consumer credit in circumstances described in § 1040.3(a)(ii) would count. In particular, this activity constitutes providing a product or service covered by § 1040.3(a), even if an application for consumer credit is denied. The clarification in comment 3(b)(3)–1 is important to prevent confusion over what constitutes providing a covered product or service in the context of consumer credit, because the number of times a person and its affiliates offer a product or service is not relevant to eligibility for the exemption.[1010]

The Bureau also adopts new comment 3(b)(3)–2 to clarify the obligations of a person providing a covered product or service upon becoming ineligible for the exemption. The Bureau notes that the exclusion in § 1040.3(b)(3) is based on the frequency with which a person and its affiliates collectively ''provide'' a product or service. That standard is in the present tense so the exemption is available so long as the criteria in the exemption are met. Accordingly, comment 3(b)(3)–2 clarifies that, if, during a calendar year, a person to that point excluded by § 1040.3(b)(3) for a given product or service described in § 1040.3(a) provides that product or service to a 26th consumer, then that person ceases to be eligible for this exclusion at that point in time with respect to that product or service. The provider must begin complying with this part with respect to the covered product or service provided to that 26th consumer. In addition, the provider will not be eligible for the exclusion in § 1040.3(b)(3) whenever it offers or provides that product or service for the remainder of that calendar year and the following calendar year.

[1010] For example, a person and its affiliates collectively may offer a product or service to more than 25 consumers in a given calendar year, but only provide the product or service to 25 or fewer consumers in that calendar year and 25 or fewer consumers in the prior calendar year. In that example, the person would still be excluded by § 1040.3(b)(3).

3(b)(4)

The Bureau's Proposal

As stated in the proposal, merchants, retailers, and other sellers of nonfinancial goods and services extending consumer credit are excluded from the Bureau's rulemaking authority except in certain limited circumstances under Dodd-Frank section 1027(a)(2)(B). Thus, while they are covered persons under the Dodd-Frank section 1002(6), the proposal would have applied to them generally only when they act as creditors as defined by Regulation B by extending consumer credit or participating in consumer credit decisions, or when they engage in collection on or sale of these consumer credit accounts beyond the scope of the exclusion in Dodd-Frank section 1027(a)(2). In particular, because section 1027(a)(2)(A) generally excludes activities by a merchant, retailer, or other seller of nonfinancial goods or services to the extent such person extends credit directly to a consumer exclusively for the purchase of a nonfinancial good or service directly from that person, the Bureau proposed to reflect that general restriction through language excluding merchants in § 1040.3(b)(5) as discussed further below.

The Bureau also proposed in § 1040.3(b)(4) to exclude merchants from the scope of the rule for an additional type of activity that is generally not excluded from Bureau jurisdiction under section 1027(a)(2). Specifically, proposed § 1040.3(b)(4) would have excluded merchants to the extent they are engaged in certain ''factoring'' transactions and other types of commercial credit in which the merchant collateralizes its interest in its own consumer credit receivables on which no finance charge is imposed. *See* Dodd-Frank section 1027(a)(2)(B)(i). As explained in further detail in the proposal, the Bureau would have limited the exemption in § 1040.3(b)(4) to circumstances where the Bureau would not have other bases for jurisdiction, such as under other parts of Dodd-Frank section 1027(a)(2) that subject certain types of credit transactions by merchants to the rulemaking authority of the Bureau.[1011]

Proposed § 1040.3(b)(4)(i) thus would have excluded from the coverage of part 1040 merchants, retailers, or other sellers of nonfinancial goods or services to the extent providing an extension of consumer credit covered by proposed § 1040.3(a)(1)(i) and described by Dodd-Frank section 1027(a)(2)(A)(i) in connection with a credit transaction pursuant to Dodd-Frank section 1027(a)(2)(B)(i) unless the same credit transactions are also credit transactions pursuant to Dodd-Frank section 1027(a)(2)(B)(ii) or (iii). Thus, a merchant who is a creditor under Regulation B that is extending consumer credit as described in Dodd-Frank section 1027(a)(2)(A)(i) would have been eligible for this exemption with respect to such consumer credit transactions when they are sold, assigned, or otherwise conveyed to a third party, so long as the consumer credit was not extended in an amount that significantly exceeded the value of the good or service (which creates a basis for rulemaking authority under section 1027(a)(2)(B)(ii)) and did not have a finance charge (which creates a basis for rulemaking authority under section 1027(a)(2)(B)(iii) except where the creditor is not engaged significantly in that type of lending under section 1027(a)(2)(C)(i)).

[1011] 81 FR 32830, 32883–84 (May 24, 2016).

In addition, the exclusion in proposed § 1040.3(b)(4)(ii) would have applied to a merchant who purchases or acquires credit extended by another merchant in a sale, assignment, or other conveyance that is subject to Dodd-Frank section 1027(a)(2)(B)(i). As a result, the proposal would not have applied, for example, to a merchant who, in a merger or acquisition transaction, acquires customer accounts of another merchant who had extended credit with no finance charge and not in an amount that significantly exceeded the value of the goods or services (*i.e.,* credit not subject to Dodd-Frank section 1027(a)(2)(B)(ii) or (iii)).

Further, the Bureau noted that proposed § 1040.3(b)(4) would only have exempted a merchant, retailer, or seller of the nonfinancial good or service, but would not have affected coverage of other persons who may conduct servicing, debt collection activities, or provide covered products and services pursuant to proposed § 1040.3(a) in connection with the same extension of consumer credit. As discussed below in the section-by-section analysis to comments 4–1 and 4–2, those providers would have been subject to the proposal.

Comments Received

A public-interest consumer lawyer commenter opposed the proposed exemption in § 1040.3(b)(4) but did not elaborate on the basis for its opposition. A consumer advocate commenter was not opposed to the exemption in proposed § 1040.3(b)(4), stating that some merchant financing arrangements may expose the merchant to risks, but

that these risks generally should not filter down to consumers. This commenter also supported the view that the Bureau expressed in the proposal that only the merchant itself would be eligible for the exemption, and not third parties such as payment processors, servicers, or debt collectors. This commenter urged the Bureau to memorialize this point in the commentary to the final rule.

An industry trade association expressed concern that the scope of the exemption in proposed § 1040.3(b)(4)(i) would be confusing and difficult to analyze for merchants extending consumer credit with no finance charge. This commenter stated that the Bureau should clarify that any merchant extending consumer credit would be exempt from the rule except where extending consumer credit with a finance charge or in an amount that significantly exceeded the value of the nonfinancial good or service being financed. The commenter also stated that the merchant should be excluded, unless the basis for covering the merchant was established by ''clear and convincing evidence.'' Finally, the commenter stated that the exemption in proposed § 1040.3(b)(4)(ii) should not be limited to the act of acquiring or purchasing the extension of consumer credit, but should also include the activities carried out with respect to that account that would have been exempt had they been performed by the selling merchant, such as servicing. Otherwise, in its view, the purchasing or acquiring merchant would be more limited in what it could do without triggering the rule than the original merchant would be—without any basis for that differential treatment.

The Final Rule

The final rule adopts § 1040.3(b)(4) as proposed, with technical changes to refer to the excluded person in the singular instead of plural and to refer to the activity of offering as excluded,[1012] as well as an additional clarification. In particular, in addition to excluding merchants under the circumstances addressed in proposed § 1040.3(b)(4), the Bureau has added a new subparagraph (A) to extend the exclusion also to apply to circumstances in which the merchant is not subject to Bureau rulemaking authority under any component of Dodd-Frank section 1027(a)(2). While both proposed and final § 1040.3(b)(5) (renumbered as § 1040.3(b)(6)) achieve this same effect because they generally exclude parties who are not subject to the Bureau's rulemaking authority, the Bureau believes that including this second element in § 1040.3(b)(4) will help to reduce confusion about whether merchants extending consumer credit with no finance charge would be subject to the rule. Given that proposed § 1040.3(b)(4) already incorporated certain elements of section 1027(a)(2) of the statute, the Bureau believes that, based on the industry trade association comment described above, it would be clearer if this provision also refers to the circumstances where a statutory exclusion in section 1027(a)(2) would apply to the merchant.

Therefore, in light of the addition of subparagraph (A) to § 1040.3(b)(4)(i) to refer to circumstances—*i.e.,* circumstances in which the Bureau does not have rulemaking authority under Dodd-Frank section 1027(a)(2)(B), the Bureau has moved the other references to provisions of section 1027(a)(2)(B) that appeared in the proposal to a new subparagraph (B) of § 1040.3(b)(4)(i). As a result, merchants extending consumer credit with no finance charge would know that, even if they were not eligible for the exemption in § 1040.3(b)(4)(i) as proposed, they may still be excluded from coverage of the rule. However, the Bureau disagrees with the commenter that merchants extending consumer credit with a finance charge, or in an amount that significantly exceeds the value of the nonfinancial goods or services being financed, should only be covered if these circumstances are established with ''clear and convincing evidence.'' Such an approach would set a higher standard for applying the Bureau's rule than for underlying statutes whose compliance the Bureau is seeking to ensure. For example, if a TILA claim were asserted against a merchant extending consumer credit on the basis of a finance charge being present, such a claim would not necessarily be subject to a ''clear and convincing evidence'' standard. Setting such a standard for the scope of the rule would therefore reduce consumer protections the rule is seeking to enhance.

The Bureau is also adding comment 3(b)(4)–1 to clarify that the exemption in § 1040.3(b)(4)(ii) applies not only to the purchase or acquisition itself, but also to any servicing or collection by the merchant purchaser or acquirer.

The Bureau also reaffirms the statement that it made in the proposal concerning the ineligibility of third parties for the statutory exclusion in Dodd-Frank section 1027(a)(2).

3(b)(5) and (b)(6)

The Bureau's Proposal

The proposal would not have applied to persons to the extent they are excluded from the rulemaking authority of the Bureau under Dodd-Frank sections 1027 and 1029. For the sake of clarity, the Bureau proposed to make this limitation an explicit exemption in proposed § 1040.3(b)(5). Proposed § 1040.3(b)(5) thus would have clarified that part 1040 would not have applied to a person to the extent the Bureau lacks rulemaking authority over that person or a product or service offered or provided by the person under Dodd-Frank sections 1027 and 1029 (12 U.S.C. 5517 and 5519).

As the Bureau noted in the proposal, the Bureau had intended that proposed § 1040.3(b)(5) would only restrict application of proposed § 1040.4 with regard to those parties for which the Bureau's authority is constrained by Dodd-Frank sections 1027 and 1029. Accordingly, while merchants and automobile dealers who are not subject to the Bureau's rulemaking authority due to sections 1027 and 1029 would not have been subject to proposed § 1040.4, the Bureau explained that it has Dodd-Frank section 1028 rulemaking authority over other providers who assume or seek to use arbitration agreements entered into by such merchants or automobile dealers. Notably, entities excluded from Bureau rulemaking authority under Dodd-Frank sections 1027 and 1029 may still be covered persons as defined by Dodd-Frank section 1002(6). Thus, the Bureau stated that proposed § 1040.4 may apply to a provider that assumes or seeks to use an arbitration agreement entered into by a covered person over whom the Bureau lacks rulemaking authority under Dodd-Frank sections 1027 and 1029 with respect to the activity at issue.

For example, proposed § 1040.4 may have applied to a provider that is a debt collector, as defined in the FDCPA, collecting on debt arising from a consumer credit transaction originated by a merchant, even if the merchant would have been exempt under proposed § 1040.3(b)(5) because the merchant is excluded from Bureau rulemaking authority under Dodd-Frank section 1027 for the particular extension of consumer credit at issue. As noted in the discussion of proposed § 1040.3(a)(10) described above, for example, hospitals, doctors, and other service providers extending incidental

[1012] The header of Dodd-Frank section 1027(a)(2) indicates that statutory provision relates to ''offering or provision'' of certain consumer financial products. For clarity, the Bureau is similarly revising the scope of the exclusion in § 1040.3(b)(4).

ECOA credit would not have been subject to the requirements of § 1040.4 to the extent the Bureau lacks rulemaking authority over them under Dodd-Frank section 1027. Similarly, proposed § 1040.4 may have applied to a provider that is acquiring an automobile loan originated by an automobile dealer in circumstances where the automobile dealer is exempt by proposed § 1040.3(b)(5) because the automobile dealer is excluded from Bureau rulemaking authority under Dodd-Frank section 1029.

Comments Received

A consumer advocate stated in its comments that the final rule should clarify that the rule applies to buy-here-pay-here automobile lenders, which this commenter described as dealers who provide their own financing to consumers and require the consumers to return to the lot to make payments. This commenter believed that this clarification would help address what, in its view, was a general misimpression held by some in the marketplace that the Bureau did not regulate buy-here-pay-here automobile lenders.

An industry trade association for automobile dealers stated in its comment that, in its view, proposed § 1040.3(b)(5) would be inadequate to truly exempt automobile dealers from the rulemaking and instead that the proposal would conflict with the exclusion in Dodd-Frank section 1029 for certain automobile dealers. The commenter focused specifically on the proposed requirement in § 1040.4(a)(2) that providers include in their pre-dispute arbitration agreements mandatory language explaining that the provisions would not prohibit consumers from participating in class actions. Although proposed § 1040.3(b)(5) would have excluded many automobile dealers from this requirement, the commenter argued that the rule would still effectively require automobile dealers making loans that are assigned to unaffiliated third parties to include the mandatory contract provisions that the unaffiliated third parties would be required to have under the rule. This commenter asserted that automobile dealers are generally required to use the forms created by indirect automobile finance companies. Because indirect lenders would be required to use the Bureau's contract provision, the commenter predicted that they would require as a matter of contract that the dealers include that provision on their standard forms, rather than satisfying the rule either by sending consumers notice of the restriction on use of pre-dispute arbitration agreements or amending the agreement at the time that the indirect lenders acquire the loan contracts.

In addition, an industry commenter sought an express exemption providing that the rule would not apply to employer compensation agreements that relate to consumer financial products and services for employees, for example, employer-provided assistance with the down payment for a home. The commenter asserted that Dodd-Frank section 1027(g) excluded any employee benefit or compensation plan or arrangement from Bureau rulemaking authority, and expressed concern that even if some employer-provided consumer financial products or services were covered by the rule, the rule should not reach broader employment agreements concerning other aspects of the employment relationship. The commenter suggested that an exclusion for employer-provided products and services also would be consistent with the Bureau's decision not to propose covering consumer reports provided by employers under proposed § 1040.3(a)(4). On the other hand, a consumer advocate commenter expressed concerns about certain practices by employers, such as compelled use of a payroll card account, in violation of Regulation E.[1013]

The Final Rule

The Bureau has considered the comments and is adopting proposed § 1040.3(b)(5) with minor technical changes for clarity,[1014] renumbering it as § 1040.3(b)(6), and creating a new § 1040.3(b)(5) to provide an exemption for employer-provided products and services as described further below.

As the Bureau had explained in the proposal, automobile dealers extending consumer credit that is assigned to unaffiliated third parties are generally excluded from the rulemaking authority of the Bureau in the circumstances described in Dodd-Frank section 1029. These automobile dealers are not subject to this rule, as reaffirmed by the explicit reference to section 1029 in § 1040.3(b)(6), and would thus not be obligated to include in their consumer contracts the provisions mandated in the rule. The class rule also would not require indirect automobile finance companies to mandate that automobile dealers with whom they work use contracts with consumers that include the provisions mandated in the rule. Rather, the indirect automobile finance company could amend the contract to include the mandated provisions or send the consumer a notice about the rule at the time the company purchases the credit.[1015] The Bureau therefore disagrees with the commenter's suggestion that the rule would conflict with Dodd-Frank section 1029.

At the same time, the Bureau acknowledges the possibility that, as a business decision and of their own volition, indirect automobile finance lenders may include an arbitration provision consistent with the rule in a form contract they provide to the automobile dealer to use with the consumer. However, even if this were to occur, as discussed below in connection with § 1040.4(a)(2)(iii)(A), these lenders would be free to include in their contracts language to clarify that the rule would not apply to the dealers (to the extent that the dealers are excluded from Bureau rulemaking authority by Dodd-Frank section 1029).

The Bureau does not believe it is necessary in this rule, in either regulation text or commentary, to provide interpretations of the scope of provisions in Dodd-Frank sections 1027 or 1029. With regard to buy-here-pay-here automobile lenders, the Bureau did receive a number of comments on behalf of automobile lenders or automobile dealers, and none suggested the type of confusion that the consumer advocate commenter suggested may exist. The Bureau does not believe it is necessary to restate the statute in this rule.[1016]

With regard to the industry commenter concerned with potential coverage of employers under the rule, the Bureau notes that Dodd-Frank section 1027(g) generally excludes Bureau rulemaking authority over consumer financial products or services that relate to a ''specified plan or arrangement.'' [1017] Whether a consumer

[1013] *See also* Bureau of Consumer Fin. Prot., ''Payroll Card Accounts (Regulation E),'' *CFPB Bulletin* No. 2013–10 (Sept. 12, 2013), *available at http://files.consumerfinance.gov/f/201309_cfpb_payroll-card-bulletin.pdf.*

[1014] Proposed § 1040.3(b)(5) referred to an exclusion for persons and their products or services to the extent ''limitations'' in Dodd-Frank sections 1027 or 1029 ''apply.'' Exclusions from the rulemaking authority of the Bureau, such as exclusions for automobile dealers in certain circumstances, are the type of exclusions that are relevant to this rulemaking. The Bureau is therefore clarifying that § 1040.3(b)(6) excludes persons to the extent providing products or services in circumstances that are excluded from the rulemaking authority of the Bureau.

[1015] *See* § 1040.4(a)(2)(iii).

[1016] *See, e.g.,* Press Release, Bureau of Consumer Fin. Prot., ''CFPB Takes First Action Against 'Buy-Here Pay-Here' Auto Dealer,'' (Nov. 19, 2014), *available at http://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-first-action-against-buy-here-pay-here-auto-dealer/.*

[1017] *See* 12 U.S.C. 5517(g)(4) (defining the phrase ''specified plan or arrangement'' as including certain plans, accounts, or arrangements under the Internal Revenue Code of 1986, any employee

Continued

financial product or service covered by § 1040.3(a) would be excluded pursuant to section 1027(g), when provided under an employment agreement, therefore would depend on whether the product or service relates to a specified plan or arrangement as defined in the statute. Accordingly, section 1027(g) does not preclude rulemaking authority over employer-provided consumer financial products or services that do not relate to a specified plan or arrangement.

Nonetheless, the Bureau recognizes that employee benefits may be subject to employment arbitration agreements and that employment arbitration and the regulation of employment arbitration agreements may function differently from those the Bureau analyzed in the Study, for example because they do not necessarily follow rules designed for consumer arbitration. Thus, the Bureau is adopting an exemption in § 1040.3(b)(5) to exclude employers to the extent they are offering or providing a product or service to an employee as an employee benefit. The Bureau is adopting this approach at this time for the reasons discussed herein, but notes that it also expects to monitor these products and services and could adjust the scope of the rule to reach any that are not excluded from the Bureau's rulemaking authority under Dodd-Frank section 1027(g).

For the sake of clarity, because the term ''employer'' is not defined in the Dodd-Frank Act, § 1040.3(b)(5) incorporates a well-recognized definition of employer from Federal law, in section 203(d) of the Fair Labor Standards Act (FLSA).[1018] The Bureau believes that this well-established definition of an ''employer,'' has been extensively interpreted by courts and is familiar to a wide range of employers. While the rule incorporates the case law interpreting the definition of employer, it does not incorporate other size or industry related restrictions on the coverage of FLSA that are separate from the definition of employer.

The exemption includes two important limitations, however. First, the exemption would only apply to the employer. If, for example, an employer were to partner with a third party that may extend consumer credit to the employee, the employer may be exempt with respect to its activity of referring its employees to the third party (which otherwise may be covered by § 1040.3(a)(1)(iii) in certain circumstances). The third-party lender, however, generally would be covered by § 1040.3(a)(1)(i). Similarly, if an employer extended credit to the employee but hired a third party to administer the loan, that third party generally would still be covered by § 1040.3(a)(1)(v). Likewise, if an employer partners with an unaffiliated bank to provide a network-branded payroll card to its employees that is covered by § 1040.3(a)(6) because it is an account, then the consumer's agreement with the bank generally would be covered because it is entered into by the bank, even if the payroll card also may be part of a general suite of employee benefits such that the employer may be exempt under § 1040.3(b)(5).[1019]

Second, the exemption only applies when the consumer financial product or service is an employee benefit. Whether the product or service is an employee benefit will depend on the facts and circumstances. As clarified in comment 3(b)(5)–1, however, if an employer offers or provides a consumer financial product or service to its employee on terms and conditions that it makes available to the general public, that is not an employee benefit for purposes of the exemption. To the extent that an employer is in the general business of providing covered consumer financial products and services, the Bureau does not believe that employees should be treated differently from other consumers who receive those products and services on the same terms and conditions.

Section 1040.4 Limitations on the Use of Pre-Dispute Arbitration Agreements

Dodd-Frank section 1028(b) authorizes the Bureau to prohibit or impose conditions or limitations on the use of an agreement between a covered person and a consumer for a consumer financial product or service providing for arbitration of any future dispute between the parties, if the Bureau finds that doing so is in the public interest and for the protection of consumers. Section 1028(b) also requires that the findings in any such rule be consistent with the Study conducted under Dodd-Frank section 1028(a). Dodd-Frank section 1028(d) states that any regulation prescribed by the Bureau under section 1028(b) shall apply to any agreement between a consumer and a covered person entered into after the end of the 180-day period beginning on the regulation's effective date. (The final rule refers to this date—the date after the end of the 180-day period beginning on the effective date—as the ''compliance date.'' [1020]) Pursuant to this authority and the findings set forth in greater detail in Part VI above, the Bureau is finalizing § 1040.4, which sets forth conditions or limitations on the use of pre-dispute arbitration agreements between providers and consumers entered into on or after the compliance date.[1021]

Section 1028(b) of the Dodd-Frank Act allows the Bureau to regulate the ''use'' of the pre-dispute arbitration agreements covered by this rule. The Bureau believes that, under the ordinary meaning of this provision, a provider's ''use'' of a pre-dispute arbitration agreement broadly encompasses the inclusion of such an agreement in an agreement for a consumer financial product or service, the content of such an agreement, and the reliance on or invocation of such an agreement (for example, a motion to compel arbitration of a claim filed as a class action). To the extent that the term ''use'' in Section 1028(b) is ambiguous, the Bureau believes that interpreting it to cover all these circumstances would promote the

benefit or compensation plan or arrangement, including a plan that is subject to title I of the Employee Retirement Income Security Act of 1974, and a prepaid tuition program offered by a State). *See also id.* 5517(g)(3)(A) (generally excluding Bureau authority over consumer financial products or services that ''relate to'' any specified plan or arrangement, absent specified interagency proceedings with the IRS and the Department of Labor).

[1018] The FLSA defines the term ''employer'' as ''includ[ing] any person acting directly or indirectly in the interest of an employer in relation to an employee, and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.'' 29 U.S.C. 203(d). ''Employ'' is in turn defined as ''includ[ing] to suffer or permit to work.'' 29 U.S.C. 203(g).

[1019] *See* Prepaid Accounts Final Rule, 81 FR 83934, 83940 (Nov. 22, 2016) (explaining that payroll card accounts are issued to consumers by financial institutions that partner with employers). In addition, a consumer advocate commenter urged the Bureau to apply the rule to claims against employers for violating the Regulation E prohibition against compulsory use of payroll accounts, 12 CFR 1005.10(e)(2), which applies to persons other than the financial institution where an account is held. Employers are not subject to § 1040.3(a)(6)'s coverage of providers of accounts subject to EFTA and Regulation E, which generally applies to financial institutions where the accounts are held. *See* 12 CFR 1005.2(b)(1) (defining an ''account'' as one ''held by a financial institution''). As a result, the employer exemption in § 1040.3(b)(5) would not reduce the coverage of these claims, as employers are not subject to this rule in connection with the provision of accounts under Regulation E in the first place. Consistent with the Bureau's approach in adopting § 1040.3(b)(5), the Bureau declines to expand the scope of § 1040.3(a)(6) to apply to more parties at this time, although it expects to continue to monitor employer activities in this regard.

[1020] For additional discussion regarding the compliance date provision, see the section-by-section analysis for § 1040.5(a) below.

[1021] Under § 1040.5(a), compliance with part 1040 is required for any pre-dispute arbitration agreement entered into ''on or after'' the compliance date. In this section-by-section analysis, the Bureau uses the phrases ''on or after the compliance date'' and ''after the compliance date'' interchangeably.

consumer protection, fair competition, and other objectives of the Dodd-Frank Act. As explained in Part VI.C, the Bureau's rule—which prohibits a provider from including a pre-dispute arbitration agreement in a consumer contract that would allow it to block a class claim and also prohibits a provider from relying on a pre-dispute arbitration agreement to block such a claim—is for the protection of consumers and in the public interest.

Accordingly, final § 1040.4 contains three provisions. Final § 1040.4(a)(1) prohibits providers from relying on pre-dispute arbitration agreements entered into after the compliance date in class actions concerning consumer financial products covered by § 1040.3.[1022] Final § 1040.4(a)(2) requires providers, upon entering into pre-dispute arbitration agreements for covered products after the compliance date, to include a specified plain-language provision in their pre-dispute arbitration agreements disclaiming the agreement's applicability to class actions or provide notices to consumers when they enter into a pre-existing agreement. Final § 1040.4(b) requires providers that include pre-dispute arbitration agreements in their consumer contracts or enter into existing contracts with pre-dispute arbitration agreements after the compliance date to submit specified arbitral and court records to the Bureau.

The Bureau notes that providers may respond to the Bureau's rule by removing these provisions and adopting provisions in the agreement for the covered financial product or service that waive consumers' rights to participate in a class action. Providers could attempt to block consumers from pursuing class actions by including them in product agreements. Of course, the Bureau's rule would not apply to such waivers because they would not be part of a contract with a pre-dispute arbitration agreement and outside the scope of Section 1028. The Bureau will actively monitor consumer financial markets for this practice—and for other practices that might function in such a way as to deprive consumers of their ability to meaningfully pursue their claims—and will assess whether such practices could constitute unfair, deceptive, or abusive acts or practices under Dodd-Frank section 1031.

4(a)(1) Use of Pre-Dispute Arbitration Agreements in Class Actions

The Bureau's Proposal

The Bureau proposed § 1040.4(a)(1) in accordance with its authority under section 1028(b) of the Dodd-Frank Act and in furtherance of its goal to ensure that class actions are available to consumers who are harmed by providers of consumer financial products and services. Proposed § 1040.4(a)(1) would have stated that a provider shall not seek to rely in any way on a pre-dispute arbitration agreement entered into after the rule's compliance date with respect to any aspect of a class action that is related to any of the consumer financial products or services covered by proposed § 1040.3 including to seek a stay or dismissal of particular claims or the entire action, unless and until the presiding court has ruled that the case may not proceed as a class action and, if that ruling may be subject to appellate review on an interlocutory basis, the time to seek such review has elapsed or the review has been resolved.[1023]

Proposed § 1040.4(a)(1) would have barred providers from relying on a pre-dispute arbitration agreement entered into after the compliance date, as described above, even if the agreement did not include the provision required by proposed § 1040.4(a)(2). In the preamble to the proposal, the Bureau gave several examples of such scenarios, such as where a third-party debt collector obtained the right to collect on an agreement entered into after the compliance date by a creditor that was covered by proposed § 1040.3(a) but excluded from coverage under proposed § 1040.3(b). The proposal's section-by-section analysis for proposed § 1040.3(a)(10) contained additional examples, specific to debt collection by merchants, of scenarios where proposed § 1040.4(a)(1) would have applied even where the pre-dispute arbitration agreement itself was not required to contain the provision outlined in proposed § 1040.4(a)(2).

Proposed § 1040.4(a)(1) would have prevented providers from relying on a pre-dispute arbitration agreement in a class action unless and until the presiding court ruled that the case may not proceed as a class action, and, if the ruling may have been subject to interlocutory appellate review, the time to seek such review elapsed, or the review was resolved. For example, if a case was filed as a putative class action and a court had not yet ruled on a motion to certify the class, proposed § 1040.4(a)(1) would have prohibited a motion to compel arbitration that relied on a pre-dispute arbitration agreement. If the court denied a motion for class certification and ordered the case to proceed on an individual basis, and the ruling may have been subject to interlocutory appellate review—pursuant to Federal Rule 23(f) of the Federal Rules of Civil Procedure or an analogous State procedural rule—proposed § 1040.4(a)(1) would have prohibited a motion to compel arbitration based on a pre-dispute arbitration agreement until the time to seek appellate review elapsed or appellate review was resolved. If the court denied a motion for class certification—and the ruling was either not subject to interlocutory appellate review, the time to seek review elapsed, or the appellate court determined that the case could not proceed as a class action—proposed § 1040.4(a)(1) would have no longer prohibited a provider from relying on a pre-dispute arbitration agreement.

Proposed comment 4(a)(1)–1 would have provided a non-exhaustive list of six examples of impermissible reliance under proposed § 1040.4(a)(1). Proposed comments 4(a)(1)–1.i through iii would have described conduct by a defendant in a class action lawsuit, and proposed comments 4(a)(1)–1.iv through vi described conduct in arbitration. In the preamble to the proposal, the Bureau stated that one purpose of proposed comments 4(a)(1)–1.iv through vi was to prevent providers from evading proposed § 1040.4(a)(1) by filing an arbitration claim against a consumer who had already filed a claim on the same issue in a putative class action in order to resolve that issue in arbitration and stop the class action. The Bureau noted that proposed § 1040.4(a)(1) would not have prohibited a provider from continuing to arbitrate a ''first-filed'' arbitration claim—*i.e.,* an arbitration claim that was filed before the consumer filed a class action—although the provider would not be permitted to invoke the pre-dispute arbitration agreement to block the class action.

Proposed comment 4(a)(1)–2 would have stated that where a class action concerns multiple products or services, and only some of the products or services were covered by proposed § 1040.3, the prohibition in proposed § 1040.4(a)(1) applied only to claims that concern the covered products or services.

[1022] While Dodd-Frank section 1028 refers to ''consumer financial products or services,'' the Bureau uses the term ''products'' in this section for the sake of brevity.

[1023] In the proposal, the Bureau noted that the prohibition in proposed § 1040.4(a)(1) would apply to providers when relying on provisions in pre-dispute arbitration agreements, as well as on the overall agreement.

Comments Received

The Bureau received a wide range of comments on proposed § 1040.4(a)(1). Some of the comments addressed whether the Bureau's attempt to restrict the use of arbitration agreements in proposed § 1040.4(a)(1) was authorized by section 1028(b)—specifically, whether proposed § 1040.4(a)(1) was in the public interest, for the protection of consumers, and consistent with the Study. The Bureau responds to these comments in Part VI, above, and finds that § 1040.4(a)(1), as discussed below, satisfies the requirements of section 1028(b). Below, the Bureau responds to the remaining comments, which generally addressed technical aspects of the regulatory text and commentary.

Commenters recommended changes to the regulatory text that they thought would clarify when providers may rely on pre-dispute arbitration agreements in class actions. A consumer advocate commenter suggested that the Bureau add the phrase ''such that a class action may not proceed'' to the end of proposed § 1040.4(a)(1) in order to clarify that the prohibition on reliance applies until interlocutory appellate review has been resolved ''such that a class action may not proceed''—and that providers may *not* rely on pre-dispute arbitration agreements where review has been resolved such that a class action *may* proceed. An industry commenter suggested that the Bureau add the word ''interlocutory'' prior to each use of the word ''review'' in the final clause of proposed § 1040.4(a)(1) to help clarify that the waiting period being imposed relates to interlocutory review by the court.

Several commenters requested that the Bureau revise proposed § 1040.4(a)(1) to accomplish different policy outcomes based on various objectives. An individual commenter requested that the Bureau revise proposed § 1040.4(a)(1) to permit providers to block class actions as long as they allow for class arbitration. This commenter believed class arbitration might provide a lower-cost option in some cases. An industry commenter suggested that the Bureau further evaluate whether class arbitration could achieve the objectives of the rule and suggested that such an inquiry might lead the Bureau to formulate a rule permitting providers to block class actions as long as class arbitration is available. This commenter also believed that class arbitration might be more cost effective than class litigation. Another industry commenter stated that, because the proposal would ''prohibit an institution from inserting a class waiver in its arbitration provision,'' the proposal represents an endorsement of class arbitration. An individual commenter suggested that the Bureau extend proposed § 1040.4(a)(1) to ban providers from relying on pre-dispute arbitration agreements in individual lawsuits brought by military servicemembers and spouses of servicemembers. The commenter noted that the MLA bars many types of creditors from enforcing arbitration agreements against members of the armed forces on active duty or active Guard and Reserve duty (and their families); however, the commenter pointed out that the Bureau's rule would cover a wider range of consumer financial products and services than the MLA and its implementing regulations.[1024]

A few commenters requested that the Bureau clarify the application of proposed § 1040.4(a)(1). A trade association of defense lawyers stated that the Bureau should clarify whether invoking arbitration against an absent class member would constitute impermissible reliance under proposed § 1040.4(a)(1). In the commenter's view, if invoking arbitration under these circumstances would be impermissible, providers would face great difficulty complying with the rule, because class action complaints often include vague class definitions that can make it hard to know, at the outset of a case, which consumers are part of the proposed class. The same commenter also requested that the Bureau clarify whether, in the case of a first-filed arbitration—*i.e.,* where there is an ongoing arbitration regarding the same issue when the consumer files a class action—a provider can plead that arbitral award as binding under the FAA and raise res judicata and mootness defenses to seek a dismissal of the class action. An industry commenter asked the Bureau to confirm that proposed § 1040.4(a)(1) would only preclude a broker-dealer from enforcing an arbitration agreement in a class action against a consumer to the extent that the relevant class action ''related to'' a covered consumer financial product or service. Another industry commenter asked the Bureau to clarify whether a provider would be required to comply with proposed § 1040.4(a)(1) where a pre-dispute arbitration agreement does not apply to a covered product or service, but where the pre-dispute arbitration agreement was part of a transaction that involved some covered products or services. The commenter expressed concern that proposed § 1040.4(a)(1)'s prohibition on reliance on a pre-dispute arbitration agreement in a class action ''related to any of the consumer financial products or services covered by § 1040.3'' could include pre-dispute arbitration agreements for non-covered products that were entered into as part of a transaction involving some covered products. An individual commenter requested that the Bureau clarify that the rule would not preclude a consumer from filing an individual arbitration if the consumer so desires.

In addition, a trade association of defense lawyers asserted that proposed § 1040.4(a)(1) would exceed the Bureau's legal authority. According to the commenter, the prohibition in proposed § 1040.4(a)(1) would raise separation-of-powers concerns under the Constitution, because it could be viewed as regulating a defendant's conduct in court, and would also exceed the Bureau's authority under the Dodd-Frank Act, because the Act does not grant the Bureau authority to regulate parties' conduct in judicial proceedings.

An industry commenter requested that the final rule state that a company does not violate the rule simply by pursuing its legal rights in good faith. The commenter expressed concern that if a company moves to compel arbitration based on a good faith belief that the relevant product is not covered, and the court determines that the product is covered, the company will have violated proposed § 1040.4(a)(1)—and could face penalties under title X of the Dodd-Frank Act—for doing nothing more than asserting what it believed to be its legitimate interpretation of the rule and the Act. The commenter expressed concern that the proposal would chill defendants from invoking arbitration agreements where they had a good faith basis to believe they could do so without violating part 1040. Similarly, the trade association of defense lawyers stated that, under the proposal, it was unclear whether a defendant would violate the rule by moving to compel arbitration or seeking to plead its right to arbitrate in the event that class certification is ultimately denied. The commenter also expressed concern that arguing, in opposition to class certification, that individual arbitration is a superior alternative to class litigation for resolving the dispute could be construed as ''relying'' on an arbitration agreement in a class action and therefore would be a violation of the rule.[1025] The commenter did not cite to examples of such pleadings.

[1024] *See* MLA, 10 U.S.C. 987, and its implementing regulations, 32 CFR part 232.

[1025] To certify a case as a class action, a Federal court must find, among other things, that a class

Finally, a consumer advocate commenter expressed support for comment 4(a)(1)–1—the non-exhaustive list containing examples of conduct that would constitute impermissible reliance on a pre-dispute arbitration agreement under § 1040.4(a)(1)—as drafted.

The Final Rule

Pursuant to the Bureau's authority under Dodd-Frank section 1028(b) to impose conditions or limitations on the use of pre-dispute arbitration agreements between covered persons and consumers for consumer financial products and services, the Bureau is finalizing § 1040.4(a)(1) with limited modifications as described below. For the reasons described above in Part VI, the Bureau finds that § 1040.4(a)(1) satisfies the requirements of section 1028(b) because it is in the public interest and for the protection of consumers, and because the related findings are consistent with the Study that the Bureau conducted pursuant to section 1028(a).

Similar to what was proposed, the Bureau is finalizing § 1040.4(a)(1) to state that a provider shall not rely in any way on a pre-dispute arbitration agreement entered into after the rule's compliance date with respect to any aspect of a class action concerning any of the consumer financial products or services covered by § 1040.3, including to seek a stay or dismissal of particular claims or the entire action, unless and until the presiding court has ruled that the case may not proceed as a class action and, if that ruling may be subject to appellate review on an interlocutory basis, the time to seek such review has elapsed, or such review has been resolved such that the case cannot proceed as a class action.

Final § 1040.4(a)(1) differs from proposed § 1040.4(a)(1) in several respects. First, instead of using the phrase ''related to'' to describe the nexus between the class action and the covered consumer financial service or product that triggers application of the rule, the final rule uses the phrase ''concerning.'' The Bureau is making this change for consistency with other provisions in the rule that use the phrase ''concerning'' to describe this nexus, including in § 1040.2(c) (definition of pre-dispute arbitration agreement), § 1040.4(a)(2) (contract provisions), and § 1040.4(b) (monitoring rule). Second, the Bureau has added the phrase ''such that the case cannot proceed as a class action'' to the end of proposed § 1040.4(a)(1). In the Bureau's view, the prohibition in proposed § 1040.4(a)(1) would have applied if review had been resolved such that a case may proceed as a class action. However, the Bureau agrees with the consumer advocate commenter's assertion that this phrase more precisely conveys the scope of the provision's prohibition on reliance in a class action. Third, in response to the industry commenter that requested that the Bureau clarify that both uses of the word ''review'' in the final clause of proposed § 1040.4(a)(1) refer to interlocutory review, the Bureau has revised the phrase ''or the review has been resolved'' to read ''or such review has been resolved.'' Fourth, instead of prohibiting seeking to rely on an arbitration agreement in a class action, the rule prohibits relying on the arbitration agreement in a class action. The Bureau believes the term ''seek'' is not needed. A motion that seeks to compel arbitration, for example, relies on an arbitration agreement, as clarified in comment 4(a)(1)–1.i.

The commentary to the final rule also includes new comment 4(a)(1)–1.ii, which contains an example of conduct that does not constitute reliance. The comment 4(a)(1)–1.ii states that reliance on a pre-dispute arbitration agreement does not include seeking or taking steps to preserve a class action defendant's ability to seek arbitration after the trial court has denied a motion to certify the class and either an appellate court has affirmed that decision on an interlocutory appeal of that motion, or the time to seek such an appeal has elapsed. This comment is intended to address the concern raised by the trade association of defense lawyers' comment that a defendant could violate the rule by moving to compel arbitration, or seeking to assert its contingent right to arbitrate in the future in the event that the case cannot proceed as a class action (*e.g.,* because class certification is denied).

The commentary to the final rule also includes new comment 4(a)(1)–2. This comment is intended to address the industry commenter's concern that § 1040.4(a)(1) would chill defendants from moving to compel arbitration when they have a good faith basis to believe that they could do so without violating the rule. The Bureau believes that, in the vast majority of cases, providers will know whether the rule applies—particularly because the Bureau has defined coverage primarily in relation to existing statutes and, where applicable, their implementing regulations. However, the Bureau acknowledges that, at the margins, some cases will raise questions about whether the rule covers particular persons, particular agreements, or particular consumer financial products and services. In some instances, a person may be genuinely uncertain about the rule's application in a particular class action case. New comment 4(a)(1)–2 clarifies that a class action defendant does not violate § 1040.4(a)(1) by, for example, relying on a pre-dispute arbitration agreement where it has a genuine belief that either it is not a provider pursuant to § 1040.2(d) or that none of the claims asserted in the class action concern any of the consumer financial products or services covered pursuant to § 1040.3.

The Bureau intends comment 4(a)(1)–2 to mirror the *Noerr-Pennington* doctrine and therefore is using the term ''genuine'' to reflect the meaning of that term in the context of the *Noerr-Pennington* doctrine. Under the *Noerr-Pennington* doctrine, where a statute does not provide otherwise, it is presumed not to penalize conduct that implicates the protections afforded by the First Amendment's Petition Clause. But parties do not enjoy immunity for ''sham'' petitioning, that is, petitioning that is not ''genuine.'' [1026] The Court has held that litigation is a ''sham'' when (1) it is objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits, and (2) the litigant's subjective motivation conceals an attempt to use the governmental process in a manner that violates the relevant Federal law.[1027] Comment 4(a)(1)–2 mirrors the *Noerr-Pennington* doctrine in clarifying that a class action defendant does not violate § 1040.4(a)(1) where it relies on a pre-dispute arbitration agreement—such as by filing a motion to compel arbitration—in a manner that constitutes ''genuine'' petitioning under this two-part *Noerr-Pennington* test. However, where a defendant relies on a pre-dispute arbitration agreement (such as by filing a motion to compel arbitration) in a manner that constitutes ''sham'' petitioning—because the motion is objectively baseless and subjectively in bad faith—a *Noerr-Pennington* defense does not apply and the defendant violates § 1040.4(a)(1).

The Bureau has also made a technical corrections to comment 4(a)(1)–1

action is superior to other available methods for fairly and efficiently resolving the controversy. *See* FRC.P. 23(b)(3).

[1026] *See BE & K Const. Co.* v. *N.L.R.B.,* 536 U.S. 516, 524–26 (2002) (''The right of access to the courts is . . . but one aspect of the right of petition . . . [yet] while genuine petitioning is immune from antitrust liability, sham petitioning is not.''), quoting *California Motor Transport Co.* v. *Trucking Unlimited,* 404 U.S. 508 (1972).

[1027] *See BE & K Const. Co.,* 536 U.S. at 526, *quoting Professional Real Estate Investors, Inc.* v. *Columbia Pictures Industries, Inc.,* 508 U.S. 49, 60–61 (1993).

including to conform the language more closely to the regulation text in § 1040.4(a)(1) and (a)(2).[1028]

The Bureau declines to revise proposed § 1040.4(a)(1) to permit providers to block class actions as long as they allow for class arbitrations. The Bureau believes that allowing consumers to seek class action relief is in the public interest, for the protection of consumers, and consistent with the Study.[1029] Consumers have brought consumer financial class actions under Federal Rule 23 of the Federal Rules of Civil Procedure for approximately 50 years, and they are a proven mechanism by which consumers can enforce their legal rights and obtain redress when those rights are violated. In contrast, the Bureau has not seen—and commenters did not offer—evidence to demonstrate that class arbitration would be able to accomplish these objectives as effectively. The Bureau believes that, compared with consumer finance class actions, consumer finance class arbitration is less proven, and may even be characterized as mostly untested, as a procedure for adjudicating consumer finance disputes. The Study identified only two consumer finance class arbitrations filed between 2010 and 2012; one was still pending on a motion to dismiss as of September 2014, and the other class arbitration contained no information other than the arbitration demand that followed a State court decision granting the company's motion seeking arbitration.[1030] Further, as the proposal noted, industry groups have heavily criticized class arbitration on the ground that it lacks procedural safeguards. For example, arbitrator decisions in class arbitrations—such as decisions to certify a class or award damages—are generally subject to limited judicial review.[1031] Consumer advocates have also criticized several aspects of class arbitration, including its lack of procedural safeguards.[1032] The Bureau received similar feedback from stakeholder groups during the extensive outreach the Bureau conducted during the Study process and during the pre-proposal stage of the rulemaking process.[1033] Without further evidence, the Bureau cannot conclude that class arbitrations provide a viable alternative to class actions. For this reason, the Bureau is not revising proposed § 1040.4(a)(1) to allow providers to block class actions as long as they allow for class arbitration.

The Bureau notes, however, that § 1040.4(a)(1) would not preclude the use of class arbitration as a forum. Final § 1040.4(a)(1) would permit an arbitration agreement that allows for class arbitration, if it also allowed a consumer the option of pursuing class litigation instead. In other words, a pre-dispute arbitration agreement that allows a consumer to choose whether to file a class claim in court or in arbitration would be permissible under proposed § 1040.4(a), although an arbitration agreement that permits the claim to only be filed in class arbitration would not be permissible. The Bureau expects that, if class arbitration proves to be an efficient procedure through which consumers can enforce their rights and obtain redress, providers will make the option available to consumers and consumers will choose it over class litigation in court. Additionally, as with individual arbitration and as discussed in greater detail below in the section-by-section analysis of § 1040.4(b), the Bureau will monitor any class arbitrations that do occur.

With respect to the industry commenter's assertion that the proposal represents an endorsement of class arbitration because it would prohibit institutions from inserting class waivers into their arbitration agreements, the Bureau believes the commenter misunderstood the proposal. Final § 1040.4(a)(1)—like proposed § 1040.4(a)(1)—would prohibit providers from relying on pre-dispute arbitration agreements in class action lawsuits. It would not prohibit providers from adopting terms preventing class arbitration.

With respect to the trade association of defense lawyers' comment that requesting clarification of the application of the rule to a litigant's possible opposition to class certification on the grounds that individual arbitration is superior, the Bureau disagrees that such a clarification is needed. The Bureau does not understand from the comment how a company could assert that individual arbitration pursuant to an arbitration agreement is superior to a class action if the company could not actually, under the rule, be permitted to compel individual arbitration in a class action. Because individual arbitration of the named plaintiff's claims in a class action could not be compelled under the arbitration agreement, it appears speculative that a company could assert superiority of such a method of dispute resolution in the context of a class action governed by the Bureau's rule. In any event, the Bureau's rule does not prohibit a defendant from arguing that a class action would not be superior to individual resolution generally based on the facts at issue in a particular case. The Bureau therefore does not believe the issue warrants clarification in the final rule. The Bureau intends to monitor any specific practices that may emerge in this regard, however, and may exercise its statutory authorities as appropriate to clarify the rule or to take other appropriate action in order to prevent circumvention or evasion of the rule.

In response to the individual commenter's request regarding the MLA, the Bureau notes, as an initial matter, that the final rule will not supersede the MLA's protections because the final rule and the MLA's prohibition on enforcing arbitration agreements do not conflict. The MLA bans certain categories of creditors from using pre-dispute arbitration agreements in certain consumer credit agreements and from enforcing existing pre-dispute arbitration agreements.[1034] Because those consumer credit agreements are prohibited from having pre-dispute arbitration agreements going forward, there would be no such agreements that would trigger application of the Bureau's rule. Thus, where a particular agreement is covered by both part 1040 and the MLA's prohibition, providers need not be concerned that the two legal regimes create conflicting obligations because the MLA bars the provider from using a pre-dispute arbitration agreement altogether.

[1028] To reflect the fact that the provisions specified in § 1040.4(a)(2) now use the term ''rely on,'' the prefatory sentence for comment 4(a)(1)–1 now states that both § 1040.4(a)(1) and (a)(2) use the term ''rely on.'' Comment 4(a)(1)–1.i also is revised to clarify that the conduct that constitutes reliance is in relation to a pre-dispute arbitration agreement.

[1029] *See supra* Part VI (the Bureau's findings that the final rule is in the public interest and for the protection of consumers).

[1030] *See* Study, *supra* note 3, section 5 at 86–87.

[1031] In an amicus curiae filing, the U.S. Chamber of Commerce argued that ''[c]lass arbitration is a worst-of-all-worlds Frankenstein's monster: It combines the enormous stakes, formality and expense of litigation that are inimical to bilateral arbitration with exceedingly limited judicial review of the arbitrators' decisions.'' Brief of the Chamber of Commerce of the United States of America as Amicus Curiae in Support of Plaintiffs-Appellants at 9, *Marriott Ownership Resorts, Inc.* v. *Sterman,* No. 15–10627 (11th Cir. Apr. 1, 2015).

[1032] For example, a consumer advocate commenter asserted that all arbitrations, including class arbitrations, are unfair due to—among other things—the alleged repeat-player bias among arbitrators, the more-limited discovery rights of the plaintiff compared to court, and the limited judicial review of arbitrators' decisions.

[1033] *See supra* Parts III.A and III.C (describing stakeholder outreach the Bureau conducted as part of the Study process) and Part IV (describing stakeholder outreach the Bureau conducted following the release of the Study).

[1034] 10 U.S.C. 987(e)(3) and (f)(4); 32 CFR 232.8(c) and 232.9(d).

The Bureau declines to prohibit the enforcement of pre-dispute arbitration agreements against servicemembers and the spouses of servicemembers in the final rule, as requested by the commenter. As described elsewhere in this final rule, the Bureau considered and rejected an alternative under which the Bureau would have prohibited altogether the enforcement of covered pre-dispute arbitration agreements against consumers.[1035] Neither the Study nor the commenters offered evidence demonstrating that individual arbitrations involving servicemembers and their families are inferior to individual litigation in terms of remedying consumer harm or unique from arbitration involving non-servicemembers. Consistent with the Bureau's current consumer protection work involving servicemembers and their families, the Bureau will continue to monitor the offering and provision of consumer financial products and services to servicemembers and their families.

In response to the industry commenter that requested clarification as to whether § 1040.4(a)(1) would ban reliance on a pre-dispute arbitration agreement for a non-covered product or service, where the original transaction involved some covered products or services, the Bureau notes that a provider that offers or provides non-covered products or services must comply with part 1040 only for the products and services it provides that are covered under § 1040.3. The Bureau explains this issue further in comment 2(d)–1.

Regarding the trade association of defense lawyers' comment that requested that the Bureau clarify the rule's application in relation to absent class members of a putative class action, the commenter appears to envision a scenario in which a provider moves to compel arbitration in an individual lawsuit against a plaintiff who is also a putative class member in a pending class action against the provider relating to the same dispute. The commenter asked whether such a motion to compel would constitute impermissible reliance under proposed § 1040.4(a)(1), especially in light of proposed comment 4(a)(1)–1.ii, which would have stated that reliance on an arbitration agreement under § 1040.4(a)(1) includes ''seeking to exclude a person or persons from a class in a class action.'' The Bureau disagrees with the commenter that that comment was ambiguous. That comment refers to exclusions of persons from a class ''in a class action.'' For example, defendants may file motions in a pending class action to strike or reform or narrow the class definition to exclude persons who have pre-dispute arbitration agreements. The example in the comment clarifies that such exclusions are not permitted by the rule. The example does not reach parallel individual litigation. In particular, that example does not apply to individual litigation with consumers who may or may not be covered by alleged class definitions in a pending class complaint or class definitions in a certified class or preliminarily or finally approved class settlement. If a consumer elects to file an individual lawsuit against a provider, that consumer's individual lawsuit will be subject to the rule on the same basis as any individual lawsuit (*i.e.,* a motion to compel arbitration may be permitted and the monitoring rule will apply), without regard to the existence of parallel class litigation that may or may not affect that consumer.

The trade association of defense lawyers' comment also requested clarification as to the preclusive effect of an arbitral award under a ''first-filed'' arbitration—*i.e.,* an arbitration that is ongoing when a consumer files a class action relating to the same dispute. As the Bureau stated in the preamble for proposed § 1040.4(a)(1), where a consumer files a class action, and there is already a pending arbitration claim relating to the same dispute, proposed § 1040.4(a)(1) would not prohibit the provider from continuing with the arbitration, but it *would* prohibit the provider from using an arbitration agreement to block the class action claim. However, if the provider wins the first-filed arbitration, the provider could plead the arbitral outcome as binding under the FAA on any consumer who was a party in the arbitration pursuant to applicable res judicata and claim preclusion law. Final § 1040.4(a)(1) would not prohibit the provider from ''relying on'' the award in this context.

In response to the individual commenter that requested that the Bureau clarify that the rule would not preclude a consumer from filing an individual arbitration, the Bureau confirms that nothing in the rule would preclude this. And in response to the industry commenter that requested that the Bureau confirm that proposed § 1040.4(a)(1) would only preclude a broker-dealer from enforcing an arbitration agreement in a class action against a consumer to the extent that the relevant class action ''related to'' a covered consumer financial product or service, the Bureau notes that the final rule contains an exemption for broker-dealers.[1036] Persons covered by this exemption are not providers and are therefore not subject to any of the requirements of part 1040.[1037]

Finally, the Bureau disagrees with the trade association of defense lawyers' comment asserting that proposed § 1040.4(a)(1) would raise separation-of-powers concerns under the U.S. Constitution and would exceed the Bureau's authority under the Dodd-Frank Act by regulating a defendant's conduct in court (*i.e.,* by limiting a defendant's ability to enforce a pre-dispute arbitration agreement in a class action). The Bureau is not aware of, and the commenter did not provide a legal basis for such a concern. In addition, the Bureau is issuing part 1040 pursuant to a direct grant of statutory authority: Dodd-Frank section 1028(b). That statute authorizes the Bureau to prohibit or impose conditions or limitations on the use of pre-dispute arbitration agreements in contracts for consumer financial products and services. Because parties frequently enforce such agreements through the judicial process, the authority to prohibit or impose conditions or limitations on their use necessarily includes the authority to regulate a defendant's conduct in court.[1038]

4(a)(2) Provision Required in Covered Pre-Dispute Arbitration Agreements

The Bureau's Proposal

The Bureau proposed § 1040.4(a)(2) in accordance with its authority under Dodd-Frank section 1028(b) and in furtherance of its goal to ensure that class actions are available to consumers who are harmed by providers of consumer financial products and services. Proposed § 1040.4(a)(2)(i) would have generally required providers, upon entering into a pre-dispute arbitration agreement for a covered product or service after the compliance date, to ensure that the agreement contained a specified provision stating that neither the provider nor anyone else would use the

[1035] The potential alternative of a complete ban on arbitration agreements is discussed in the Bureau's Section 1022(b)(2) Analysis.

[1036] *See* § 1040.3(b)(1)(i).

[1037] In general, however, as to entities that *are* providers, the commenter's understanding is correct. Section 1040.4(a)(1)'s prohibition applies only with respect to a class action that concerns any of the consumer financial products or services covered by § 1040.3(a). So even where a provider is providing a product or service covered by § 1040.3(a), the provider may still rely on arbitration agreements in class actions that do not concern a product or service covered by § 1040.3(a).

[1038] *See supra* section-by-section analysis of § 1040.4(a)(1) (describing new comment 4(a)(1)–2 clarifying that the rule does not burden conduct protected by the First Amendment's Petition Clause).

agreement to stop the consumer from being part of a class action. Proposed § 1040.4(a)(2)(ii) would have contained an optional, alternative provision that providers could use where a pre-dispute arbitration agreement applied to both covered and non-covered products and services. Where a pre-dispute arbitration agreement existed previously between other parties and did not contain either of these two required provisions, proposed § 1040.4(a)(2)(iii) would have required providers entering into such agreements to either amend them to add a specified provision or send the consumer a notice with specified language. The Bureau summarizes proposed § 1040(a)(2)(i)–(iii) in greater detail below.

Proposed § 1040.4(a)(2)(i) would have stated that, except as permitted by proposed § 1040.4(a)(2)(ii) and (iii) and proposed § 1040.5(b), providers shall, upon entering into a pre-dispute arbitration agreement for a consumer financial product or service covered by proposed § 1040.3 after the compliance date, ensure that the agreement contains the following provision:

> We agree that neither we nor anyone else will use this agreement to stop you from being part of a class action case in court. You may file a class action in court or you may be a member of a class action even if you do not file it.

As noted in the proposal, the Bureau designed this requirement to make consumers, courts, and other relevant third parties (including potential purchasers) aware that the agreement may not be used to prevent a consumer from pursuing a class action. The Bureau intended this provision to be limited to class action cases concerning a consumer financial product or service covered by proposed § 1040.3. In addition, the Bureau intended the phrase ''neither we nor anyone else shall use this agreement'' to inform consumers that the provision also bound third parties that may seek to rely on the agreement.

The proposal noted that the Bureau intended the phrase ''contains the following provision'' in proposed § 1040.4(a)(2)(i) to clarify that the specified text should be included as a contractual provision within the pre-dispute arbitration agreement—as, for instance, the Federal Trade Commission's Holder in Due Course Rule also requires.[1039] Providers would not have been permitted, for example, to include the required language as a separate notice or consumer advisory, except in certain circumstances under proposed § 1040.4(a)(2)(iii). The proposal also noted that, similar to the Bureau's understanding of the provision required by the Holder in Due Course Rule, the Bureau intended the provision to create a binding legal obligation. As a result, if a consumer or attorney were unaware of proposed § 1040.4(a)(1), the Bureau expected that the provision required by proposed § 1040.4(a)(2)(i) would have had a substantially similar legal effect through the operation of applicable contract law.

As the proposal stated, the Bureau designed the § 1040.4(a)(2)(i) provision—as well as the § 1040.4(a)(2)(ii) and (iii)(A) provisions and the § 1040.4(a)(2)(iii)(B) notice—to use plain language. While the Bureau did not believe that disclosure requirements or consumer education could materially increase the filing of individual claims in arbitration or litigation, the Bureau believed that consumers who consulted their contracts should be able to understand their dispute resolution rights.

Where a pre-dispute arbitration agreement was in a contract for multiple products or services, only some of which were covered under proposed § 1040.3, proposed § 1040.4(a)(2)(ii) would have permitted (but not required) providers to include the following alternative contract provision in place of the one required by proposed § 1040.4(a)(2)(i):

> We are providing you with more than one product or service, only some of which are covered by the Arbitration Agreements Rule issued by the Consumer Financial Protection Bureau. We agree that neither we nor anyone else will use this agreement to stop you being part of a class action case in court. You may file a class action in court or you may be a member of a class action even if you do not file it. This provision applies only to class action claims concerning the products or services covered by that Rule.

As the proposal stated, where providers use a single contract for both covered and non-covered products and services, the Bureau believed that the alternative provision would have improved consumer understanding by alerting consumers that the provision may not apply to non-covered products or services.

Proposed § 1040.4(a)(2)(iii) would have set forth how to comply with proposed § 1040.4(a)(2) in circumstances where a provider entered into a pre-existing pre-dispute arbitration agreement that did not contain either the provision required by proposed § 1040.4(a)(2)(i) or the alternative permitted by proposed § 1040.4(a)(2)(ii), presumably because the original agreement was entered into by person that was not a provider and thus was not subject to any of those provisions or because the original agreement was entered into before the compliance date. Under proposed § 1040.4(a)(2)(iii), within 60 days of entering into the pre-dispute arbitration agreement, providers would have been required either to ensure that the agreement was amended to contain the provision specified in proposed § 1040.4(a)(2)(iii)(A) or to provide any consumer to whom the agreement applied with the written notice specified in proposed § 1040.4(a)(2)(iii)(B). For providers that chose to ensure that the agreement is amended, the provision specified by proposed § 1040.4(a)(2)(iii)(A) would have been as follows:

> We agree that neither we nor anyone else that later becomes a party to this pre-dispute arbitration agreement will use it to stop you from being part of a class action case in court. You may file a class action in court or you may be a member of a class action even if you do not file it.

For providers that chose to provide consumers with a written notice, the required notice provision specified by § 1040.4(a)(2)(iii)(B) would have been as follows:

> We agree not to use any pre-dispute arbitration agreement to stop you from being part of a class action case in court. You may file a class action in court or you may be a member of a class action even if you do not file it.

As the proposal stated, the Bureau believed that the notice option afforded by proposed § 1040.4(a)(2)(iii)(B) would have reduced the burden to providers for whom amendment may be impossible, challenging, or costly while preserving the consumer awareness benefits of § 1040.4(a)(2)(iii)(A). The Bureau also noted that, whether the provider elected to ensure that the agreement is amended, chose to provide the required notice, or violated proposed § 1040.4(a)(2)(iii) by failing to do either, the provider would still have been required to comply with proposed § 1040.4(a)(1).

The proposal also described how buyers of medical debt would have needed to perform due diligence, in some cases, to determine how the rule would have applied to the debts they buy. In cases involving incidental credit that is subject to ECOA, debt buyers

[1039] This rule prohibits a person who, in the ordinary course of business, sells or leases goods or services to consumers from taking or receiving a consumer credit contract that fails to contain a provision specified in the regulation stating that any holder of the contract is subject to all claims and defenses that the debtor could assert against the seller. 16 CFR 433.2.

may have faced additional impacts from the rule from additional due diligence to determine which acquired debts arise from credit transactions [1040] or from the additional class action exposure created from sending consumer notices on debts that did not arise from credit transactions (*i.e.,* from potential over-compliance). The Bureau described these impacts in detail in the proposal's Section 1022(b)(2) Analysis.

Proposed commentary. To clarify the application of proposed § 1040.4(a)(2), the proposal contained three proposed comments. Proposed comment 4(a)(2)-1 would have highlighted an important distinction between proposed § 1040.4(a)(2) and proposed § 1040.4(a)(1). In general, proposed § 1040.4(a)(1) would have applied to providers regardless of whether the provider itself entered into a pre-dispute arbitration agreement, as long as the agreement was entered into after the compliance date. For example, if a debt collector had not entered into a pre-dispute arbitration agreement that applied to the debt, proposed § 1040.4(a)(1) would still have prohibited the debt collector from moving to compel a class action case against it to arbitration on the basis of that agreement, so long as the agreement was entered into after the compliance date by a creditor who extended consumer credit as described in § 1040.3(a)(1)(i). This would be the case without regard to whether the creditor was excluded from the rule by § 1040.3(b). In contrast, proposed § 1040.4(a)(2) would have applied to providers only when they entered into a pre-dispute arbitration agreement for a product or service.[1041] Thus, proposed § 1040.4(a)(2) would not have applied to the debt collector in the example cited previously; but it would have applied to a debt buyer that acquired or purchased a product covered by proposed § 1040.3 after the compliance date and became a party to the pre-dispute arbitration agreement.[1042] Proposed comment 4(a)(2)–1 would have clarified this distinction by stating that the requirements of proposed § 1040.4(a)(2) would not apply to a provider that does not enter into a pre-dispute arbitration agreement with a consumer.

Proposed comment 4(a)(2)–2 would have provided an illustrative example clarifying how proposed § 1040.4(a) applied in the context of portfolio mergers and acquisitions. The comment described a hypothetical scenario in which Bank A acquired Bank B after the compliance date and Bank B had entered into pre-dispute arbitration agreements before the compliance date. The comment stated that if, as part of the acquisition, Bank A acquired products of Bank B's that were subject to pre-dispute arbitration agreements (and thereby entered into such agreements), proposed § 1040.4(a)(2)(iii) would have required Bank A to either (1) ensure the account agreements are amended to contain the provision required by proposed § 1040.4(a)(2)(iii)(A) or (2) deliver the notice in accordance with proposed § 1040.4(a)(2)(iii)(B).

Proposed comment 4(a)(2)–3 would have clarified that providers may provide the notice in any way the provider communicates with the consumer, including electronically. The proposed comment would have further explained that providers may either provide the notice as a standalone document or include it in another notice that the customer receives, such as a periodic statement, to the extent permitted by other laws and regulations. The Bureau stated in the proposal that it believes that giving providers a wide range of options for furnishing the notice would accomplish the goal of informing consumers while reducing the burden on providers.

For ease of reference, in this section-by-section analysis, the Bureau refers to the contract provision that would be required by proposed § 1040.4(a)(2)(i) as the ''required 4(a)(2)(i) provision''; the optional, alternative provision permitted by § 1040.4(a)(2)(ii) as the ''optional 4(a)(2)(ii) provision''; and the provisions specified in § 1040.4(a)(2)(iii) as the ''4(a)(2)(iii) amendment'' and the ''4(a)(2)(iii) notice.'' The Bureau also refers to the provisions specified in § 1040.4(a)(2) collectively as the ''4(a)(2) provisions'' or simply ''the provisions.''

Comments Received

The Bureau received a wide range of comments on proposed § 1040.4(a)(2). Several comments addressed the 4(a)(2) provisions as a whole, while the other comments concerned individual provisions.

Several commenters addressed the Bureau's overall approach to § 1040.4(a)(2). An industry commenter requested that the Bureau give providers the flexibility to disclose the provisions ''in substance'' rather than verbatim (as required by the proposal). The commenter argued that providers need such flexibility because the provisions' terminology may not conform to the rest of the provider's agreement. The commenter also stated that such flexibility would also avoid class actions over typographical errors and other minor issues. Another industry commenter expressed concern that plaintiffs could construe the provisions as a waiver by the defendant of its right to assert certain defenses in a class action, such as defenses to class certification. A State regulator commenter requested that the Bureau clarify whether the provisions would apply only to class actions brought under Federal and State consumer protection laws or also to class actions brought under other Federal and State laws. A consumer advocate commenter suggested that the provisions be reframed as a relinquishment of the provider's right to rely on the pre-dispute arbitration agreement in a class action (rather than merely as a binding agreement not to do so).

A trade association of lawyers who represent investors praised the provisions for conveying the consumer's rights in plain language, stating that the proposed language is much simpler than similar language required by FINRA for securities contracts.[1043] This commenter also suggested that the Bureau require that the relevant provision be included in all pre-dispute arbitration agreements; that a separate notice containing the provision be sent to consumers with existing agreements; that the Bureau mandate that the provision be conspicuously placed and not in a smaller font size or otherwise diminished in importance relative to the rest of the agreement; and that covered firms be required to include the provision on their Web sites. A consumer advocate commenter emphasized that, in its opinion, the phrase ''neither we nor anyone else'' in each of the proposed provisions is vital

[1040] As the proposal noted, the Bureau has previously recognized that requiring such determinations across an entire portfolio of collection accounts may be burdensome for buyers of medical debt because whether such debts constitute credit will turn on facts and circumstances that are unique to the health care context and of which the debt buyer may not be aware. As a result, the Bureau exempted medical debt from revenue that must be counted toward larger participant status of a debt collector. *See* 77 FR 65775, 65780 (Oct. 31, 2012).

[1041] *See* proposed § 1040.4(a)(2) (''Upon *entering into* a pre-dispute arbitration agreement for a product or service covered by proposed § 1040.3 after the date set forth in § 1040.5(a) . . .'') (emphasis added).

[1042] *See* proposed comment 4–1.i (providing examples of entering into a pre-dispute arbitration agreement).

[1043] *See* FINRA, ''Requirements When Using Predispute Arbitration Agreements for Customer Accounts,'' at Rule 2268(f).

because it would bind third parties who may be assigned the contract.

A consumer advocate commenter requested that the Bureau revise proposed § 1040.4 to include additional sanctions on providers that violate § 1040.4(a)(2). The commenter requested that the Bureau forbid providers from relying on an arbitration agreement in an individual (*i.e.,* non-class) suit if the provider failed to include the required 4(a)(2)(i) provision. The commenter also requested that the Bureau state that non-compliant agreements may not be severed or reformed after litigation has commenced. In the commenter's view, these provisions would help deter providers from intentionally omitting the required provision. The commenter stated that providers may omit the provision in the hope that plaintiffs or courts may be unaware of the Bureau's rule or with the expectation that, if caught omitting the provision, courts would merely require the provider to reform the agreement, leaving the provider no worse off than if it had initially complied with the rule. The commenter additionally requested that the Bureau add a provision stating that non-compliant arbitration agreements—*e.g.,* agreements that do not include a provision required by § 1040.4(a)(2)—are null and void. Other commenters raised issues specific to automobile lending. An industry commenter expressed concern that automobile finance companies would include one of the 4(a)(2) provisions in retail installment sales contract or lease forms, and that, as a result, the provision would bind dealers otherwise exempt from the Bureau's jurisdiction pursuant to Dodd-Frank section 1029. The commenter suggested that the final rule state expressly that proposed § 1040.4(a)(2) does not apply to any transaction originated by an excluded person pursuant to proposed § 1040.3(b). Another industry commenter stated that, in its view, proposed § 1040.4(a)(2) would require the use of two different contractual provisions (the § 1040(a)(2)(i) provision and the § 1040.4(a)(2)(ii) provision), so lenders would need to use two separate loan agreements: one for loans the lender makes directly and one for loans obtained from dealers or other financial institutions. The commenter asked the Bureau to replace the 4(a)(2)(i) and 4(a)(2)(ii) provisions with a single provision that lenders in its predicament could use. The commenter also asserted that replacing the proposed 4(a)(2)(i) and (ii) provisions with a single provision would reduce consumer confusion.

Further, several Tribal commenters expressed concerns about proposed § 1040.4(a)(2) related to sovereign immunity.[1044] Tribal commenters and participants in the Tribal consultation on the proposal expressed concern that this provision could be misconstrued by plaintiffs, their attorneys, and courts as a waiver of a Tribal government's sovereign immunity from private suit, insofar as they explicitly state that consumers may file class actions even if, notwithstanding that statement, the Tribal government enjoys sovereign immunity from class actions. The commenters stated that requiring Tribal governments to use the proposed provision was an affront to their sovereign immunity. These commenters stated that the rule should, at the very least permit Tribes to use different language that does not impinge on or potentially waive their sovereign immunity claims. One Tribal commenter suggested specific language.[1045]

In addition to comments about § 1040.4(a)(2) generally, the Bureau received numerous comments about specific provisions. The Bureau received one comment specific to the proposed 4(a)(2)(i) provision. A public-interest consumer lawyer commenter recommended that, to improve readability, the Bureau revise the provision to read: ''No one can use this agreement to stop you from being part of a class action case in court. You can file a class action in court or you can be a member of a class action filed by someone else.''

Numerous commenters addressed the optional 4(a)(2)(ii) provision specifically. Many of these commenters expressed concern that the provision would confuse consumers and suggested that the Bureau modify the provision in various ways to make it more understandable. Some commenters requested that, where agreements are for both covered and non-covered products, the Bureau require providers to indicate, in their agreements, which products the Bureau's rule covers and which it does not cover. A consumer advocate commenter requested that the Bureau require providers to furnish two separate product agreements, one for covered products and one for non-covered products. A trade association of consumer lawyers suggested that the Bureau either require providers to identify which products are covered or to provide separate terms for each product. An industry commenter recommended that the Bureau give providers the option to disclose which products are subject to the provision and which are not. A public-interest consumer lawyer commenter requested that, where contracts are for both covered and non-covered products, the optional 4(a)(2)(ii) provision instead be mandatory, because allowing the provider to use the 4(a)(2)(i) provision, which implies that all products are covered, would mislead the consumer.

Commenters expressed additional concerns about the provision that would be required by proposed § 1040.4(a)(2)(ii) apart from concerns related to the potential for consumer confusion. A consumer advocate commenter argued that the provision would hurt class action plaintiffs by highlighting that the rule's coverage was limited in scope, which, according to the commenter, would create a ''roadblock'' in the consumer's prosecution of a class action.

Several comments addressed proposed § 1040.4(a)(2)(iii) specifically. A consumer advocate commenter argued that the phrase ''who later becomes a party'' in the proposed 4(a)(2)(iii)(A) amendment unduly limits the amendment's binding effect, relative to the proposed 4(a)(2)(i) provision, which states that neither the contracting party ''nor anyone else'' may stop the consumer from being part of a class action. The commenter suggested that the Bureau require providers entering into pre-existing contracts that do not contain the required provision to simply insert the proposed 4(a)(2)(i) provision via an amendment. Two commenters—a consumer advocate and a public-interest consumer lawyer—argued that the Bureau should require amendments in certain scenarios where the proposal would otherwise allow providers to send notices. According to the consumer advocate commenter, the Bureau should only allow providers to send the notice where the provider cannot amend the contract unilaterally, while the other commenter similarly thought the Bureau should only permit the notice when amendment is ''contractually impossible.'' These commenters argued that amendments are superior to notices from a consumer protection standpoint because amendments, unlike notices, would bind third parties. An industry

[1044] For a more detailed summary of Tribal comments on sovereign immunity, see the section-by-section analysis for § 1040.3(b)(2), above.

[1045] ''We agree that neither we nor anyone else will use this agreement to stop you from being part of a class action case in court. You may file a class action in court or you may be a member of a class action even if you do not file it; provided, however, this shall not be deemed nor constitute a waiver of the rights, privileges and immunities of the Tribe, its Tribal government or any affiliate of its Tribal government.''

commenter expressed concern that proposed § 1040.4(a)(2)(iii) would cause the Bureau's rule to apply to contracts originally entered into before the compliance date when they are assigned after the compliance date. The commenter asserted that this is problematic because if a pre-dispute arbitration agreement was valid at origination, it should remain valid in perpetuity.

Other commenters suggested revisions that they believed would increase the binding effect of the proposed 4(a)(2)(iii)(B) notice on third parties. Two public-interest consumer lawyer commenters expressed concern that the notice, unlike the amendment, does not contain the phrase ''neither we nor anyone else'' and therefore lacks a prohibition against successors to the contract from blocking consumer involvement in a class action. One of these commenters suggested that the phrase ''neither we nor anyone else'' be included in the notice. The other commenter suggested that the Bureau revise the first sentence of the notice to read: ''No one can use this agreement to stop you from being part of a class action case in court. You can file a class action in court or you can be a member of a class action filed by someone else.'' The commenter also contended that these revisions would improve the notice's readability and, for this reason, the amendment should use the same language. A consumer advocate commenter asked the Bureau to require contracts between providers and third parties to waive the third parties' right to rely on pre-dispute arbitration agreements in class actions; to require providers to consider the notice to be part of the agreement and supply the notice whenever the agreement is requested by a third party; to require providers to store a record of the notice in the same way it would store an amendment, so that the documents, together, would be considered to be the complete agreement; and to add language to the notice stating that the provider considers its promise to not stop the consumer from being part of a class action to be binding on third parties.

The Final Rule

In furtherance of the Bureau's goal to ensure that consumers can seek relief through class actions when they are harmed by providers of consumer financial products and services, and based on the findings discussed above in Part VI made pursuant to the Bureau's authority under section 1028(b), the Bureau is finalizing § 1040.4(a)(2) with the modifications described below.

Final § 1040.4(a)(2)(i) states that, except as permitted by § 1040.4(a)(2)(ii) and (iii) and § 1040.5(b), providers shall, upon entering into a pre-dispute arbitration agreement for a product or service covered by § 1040.3 after the compliance date, ensure that the agreement contains the following provision:

> We agree that neither we nor anyone else will rely on this agreement to stop you from being part of a class action case in court. You may file a class action in court or you may be a member of a class action filed by someone else.

The Bureau has made three minor revisions to § 1040.4(a)(2)(i) and the required 4(a)(2)(i) provision, compared with the proposal. First, the Bureau replaced the term ''use'' with the term ''rely on'' to more closely mirror the language in § 1040.4(a)(1).[1046] As such, use of the term ''rely on'' clarifies that the conduct prohibited by § 1040.4(a)(1) and the conduct specified by § 1040.4(a)(2) are the same.[1047] Second, in response to the public-interest consumer lawyer commenter's suggested revisions to improve readability, the Bureau has revised the final sentence of the required 4(a)(2)(i) provision to state ''You may file a class action in court or you may be a member of a class action filed by someone else'' rather than ''You may file a class action in court or you may be a member of a class action even if you do not file it.'' [1048] Third, the Bureau has corrected a reference to § 1040.5(b) (the temporary exception for providers of pre-packaged general-purpose reloadable prepaid card agreements).

Final § 1040.4(a)(2)(ii) permits providers, where a pre-dispute arbitration agreement is in a contract that applies to multiple products or services, and only some of those products or services are covered under § 1040.3, to include the following alternative contract provision in place of the one required by § 1040.4(a)(2)(i): [1049]

> We are providing you with more than one product or service, only some of which are covered by the Arbitration Agreements Rule issued by the Consumer Financial Protection Bureau. The following provision applies only to class action claims concerning the products or services covered by that Rule: We agree that neither we nor anyone else will rely on this agreement to stop you from being part of a class action case in court. You may file a class action in court or you may be a member of a class action filed by someone else.

Final § 1040.4(a)(2)(iii) sets forth how to comply with § 1040.4(a)(2) where a pre-dispute arbitration agreement existed previously between other parties and does not contain either the required 4(a)(2)(i) provision or the optional 4(a)(2)(ii) provision. Final § 1040.4(a)(2)(iii)(A) states that providers entering into such agreements shall either ensure the agreement is amended to contain the provision specified in paragraph (a)(2)(i) or (a)(2)(ii) of this section or provide any consumer to whom the agreement applies with the following written notice:

> We agree not to rely on any pre-dispute arbitration agreement to stop you from being part of a class action case in court. You may file a class action in court or you may be a member of a class action filed by someone else.

The provider may add to the written notice the following optional language when the pre-dispute arbitration agreement applies to multiple products or services, only some of which are covered by § 1040.3: ''This notice applies only to class action claims concerning the products or services covered by the Arbitration Agreements Rule issued by the Consumer Financial Protection Bureau.'' The Bureau is permitting this optional language in the written notice so that the notice may be structured similarly to the optional contract provision in § 1040.4(a)(2)(ii). Final § 1040.4(a)(2)(iii)(B) states that the provider shall ensure that the pre-dispute agreement is amended or provide the notice to consumers within 60 days of entering into it.

Final § 1040.4(a)(2)(iii) differs from the proposal in one other key respect: While proposed § 1040.4(a)(2)(iii)(A) included specified language for the required amendment that was different from the § 1040.4(a)(2)(i) and (2)(ii) provisions, final § 1040.4(a)(2)(iii)(A) requires providers to ensure their agreements are amended to contain either the § 1040.4(a)(2)(i) or (2)(ii) provisions. The proposed § 1040.4(a)(2)(iii)(A) amendment differed from the proposed § 1040.4(a)(2)(i) and (2)(ii) provisions

[1046] For the same reasons discussed here, the Bureau has made this same revision to the optional 4(a)(2)(ii) provision and the 4(a)(2)(iii) notice, both discussed below.

[1047] *See also* comment 4(a)(1)–1 (provides a non-exclusive list of examples of ''reliance'' within the meaning of § 1040.4).

[1048] For the same reasons discussed here, the Bureau has made this same revision to the optional 4(a)(2)(ii) provision and the 4(a)(2)(iii) notice.

[1049] In this provision, the Bureau has moved the limiting sentence concerning applicability of the rule to covered products. This sentence now appears as the second sentence. The Bureau believes this will improve readability because this sentence is more directly related to the first sentence in the provision.

because it contained the phrase ''who later becomes a party.'' The Bureau had intended for this phrase to prevent the amendment from binding original contracting parties who would not otherwise have been covered by the rule—such as providers who contracted with the consumer before the compliance date or providers excluded under § 1040.3(b). However, the Bureau agrees with the consumer advocate commenter that the phrase ''who later becomes a party'' is unduly limiting, given that the rule could, in some cases, prevent non-parties from relying on pre-dispute arbitration agreements.[1050]

Rather than mandating unique language for the amendment containing the phrase ''who later becomes a party,'' the Bureau is allowing providers to use the § 1040.4(a)(2)(i) or 4(2)(ii) provisions in any amendment pursuant to § 1040.4(a)(2)(iii) and is separately finalizing § 1040.4(a)(2)(iv)—described in greater detail below—which would allow providers to add sentences to the required contract provision stating, for example, that the provision does not apply to parties that entered into the agreement before the compliance date and that the provision does not apply to persons excluded under the rule. The final rule's approach also benefits providers entering into pre-existing agreements for both covered and non-covered products and services, because they can amend the agreement to include the optional § 1040.4(a)(2)(ii) provision. The contractual amendment that would have been required by proposed § 1040.4(a)(2)(iii)(A), in contrast, included no language pertaining to agreements for both covered and non-covered products.

The Bureau also notes that, where a provider is entering into a pre-dispute arbitration agreement that existed previously between other parties and does not contain either the § 1040.4(a)(2)(i) or (2)(ii) provisions, the Bureau expects the provider to comply with § 1040.4(a)(2)(iii) by amending the agreement or providing a notice. For example, where Lender X enters into a loan agreement subject to a pre-dispute arbitration agreement before the compliance date, then sells the account to Buyer A after the compliance date, and Buyer A chooses to provide the notice (instead of amending the agreement), Buyer B—who subsequently purchases the account from Buyer A—must either amend the agreement or send the notice under § 1040.4(a)(2)(iii). This applies to any subsequent buyers as well.

As in the proposal, providers are required to use the exact language of the required 4(a)(2)(i) provision, the optional 4(a)(2)(ii) provision, and the 4(a)(2)(iii) notice as applicable. The final rule, however, contains three limited exceptions to this general rule. Three new provisions—§ 1040.4(a)(2)(iv) through (vi)—describe these limited exceptions.

Final § 1040.4(a)(2)(iv) specifies three sentences that providers are allowed to add at the end of the 4(a)(2)(i) and 4(a)(2)(ii) provisions. Final § 1040.4(a)(2)(iv)(A)(*1*) authorizes providers to include the sentence, ''This provision does not apply to parties that entered into this agreement before [the compliance date].''[1051] The Bureau is allowing providers to use this sentence to make clear that the 4(a)(2)(i) and 4(a)(2)(ii) provisions do not bind parties that entered into the agreement before the compliance date. One scenario, among others, in which providers may wish to use this sentence is when they are entering into a pre-dispute arbitration agreement that existed previously between the consumer and another party, and where the other party entered into that agreement with the consumer before the compliance date. For example, where a creditor and a consumer enter into a loan agreement that includes a pre-dispute arbitration agreement before the compliance date, and a debt buyer purchases the loan agreement after the compliance date, the debt buyer may choose to add the sentence permitted by § 1040.4(a)(2)(iv)(A) to clarify that the phrase ''neither we nor anyone else'' in the 4(a)(2)(i) or 4(a)(2)(ii) provisions does not refer to the original creditor.

The Bureau also is adding § 1040.4(a)(2)(iv)(A)(*2*), which authorizes providers to include the sentence, ''This provision does not apply to products and services first provided to you before [the compliance date] that are subject to an arbitration agreement entered into before that date.''[1052] The Bureau believes this sentence may be useful to align the scope of the 4(a)(2) provision with the reach of the rule as described in comment 4–1.i.A. As that comment clarifies, if a provider became party to a pre-dispute arbitration agreement with a consumer before the compliance date, and then provides the consumer with any new products or services after the compliance date, the rule applies only to these new products or services. The Bureau therefore is allowing providers to use the sentence in § 1040.4(a)(2)(iv)(A)(*2*) to clarify that the rule does not apply to other products and services that are not newly provided after the compliance date.

Final § 1040.4(a)(2)(iv)(B) authorizes providers to also include the sentence, ''This provision does not apply to persons that are excluded from the Consumer Financial Protection Bureau's Arbitration Agreements Rule.'' The Bureau is allowing providers to use this sentence to clarify that the 4(a)(2)(i) or 4(a)(2)(ii) provisions do not bind persons that are excluded under § 1040.3(b). One scenario, among others, in which providers may wish to use this sentence is when entering into a pre-dispute arbitration agreement along with excluded persons. The sentence will clarify that the phrase ''neither we nor anyone else'' in the 4(a)(2)(i) and 4(a)(2)(ii) provisions does not refer to excluded persons.

Final § 1040.4(a)(2)(iv)(C) authorizes providers to also include the sentence, ''This provision also applies to the delegation provision.'' As discussed above, comment 2(d)–2 to the final rule clarifies that a delegation provision is itself a pre-dispute arbitration agreement. However, if a provider has included the 4(a)(2) contract provision in its pre-dispute arbitration agreement already with this additional sentence, the Bureau does not believe it is necessary for the 4(a)(2) provision to be included separately in the related delegation provision. The added sentence already clarifies that the 4(a)(2) provision applies to the delegation provision as well as the broader pre-dispute arbitration agreement. Accordingly, § 1040.4(a)(2)(iv)(C) states that a provider using the sentence specified in paragraph (a)(2)(iv)(C) as part of the 4(a)(2)(i) or 4(a)(2)(ii) provisions in a pre-dispute arbitration agreement is not required to separately insert the 4(a)(2)(i) or 4(a)(2)(ii) provisions into a delegation provision that relates to such a pre-dispute arbitration agreement. Otherwise, as explained in comment 4(a)(2)–4, if the provider uses a delegation provision and does not include the additional sentence in § 1040.4(a)(2)(iv)(C), then the provider would be required to include the 4(a)(2) provision both in the delegation provision as well as in the broader pre-dispute arbitration agreement to which it relates.

Further, the Bureau has added § 1040.4(a)(2)(v) in response to the industry commenter that requested that

[1050] For example, where a provider and consumer enter into a pre-dispute arbitration agreement after the compliance date, § 1040.4(a)(1) prohibits a debt collector from relying on that agreement in a class action, even though the debt collector would not be a party to the arbitration agreement.

[1051] The Bureau will instruct the Office of the Federal Register to insert a date certain upon **Federal Register** publication.

[1052] *Id.*

providers be permitted to disclose the required contract provisions in substance rather than verbatim. The Bureau believes that allowing providers to disclose the required provisions in substance would undermine the consumer protection benefits of the rule. The Bureau has designed the language of the required provisions carefully to convey the consumer's rights accurately and, to the extent possible, in plain language. The Bureau is concerned that slight linguistic changes that may seem innocuous to a provider could dramatically alter the provisions' effect. However, the Bureau also recognizes that the provisions' use of pronouns could cause confusion if they are inconsistent with the way a particular provider uses pronouns in the rest of the contract. For this reason, § 1040.4(a)(2)(v) states that, in any provision or notice required under § 1040.4(a)(2), if the provider uses a standard term in the rest of the agreement to describe the provider or the consumer, the provider may use that term instead of the term ''we'' or ''you.'' The Bureau also notes that one commenter's concern about class action liability for typographical errors in compliance with this provision is misplaced because there is no private right of action for violations of this part. The Dodd-Frank Act authorizes only the Bureau, State attorneys general, and prudential regulators to bring enforcement actions for non-compliance with regulations issued pursuant to section 1028(b).

In response to concerns about Tribal sovereign immunity, the Bureau has also added § 1040.4(a)(2)(vi), which provides that, in any provision or notice required under § 1040.4(a)(2), if a person has a genuine belief that sovereign immunity from suit under applicable law may apply to any person that may seek to assert the pre-dispute arbitration agreement, then the provision or notice may include, after the sentence reading ''You may file a class action in court or you may be a member of a class action filed by someone else,'' the following language: ''However, the defendants in the class action may claim they cannot be sued due to their sovereign immunity. This provision does not create or waive any such immunity.'' The word ''notice'' may be substituted for the word ''provision'' if the language is included in a notice. The Bureau notes that, even without this optional language, none of the 4(a)(2) provisions would limit a Tribe's sovereign immunity from class action lawsuits. Nevertheless, the Bureau is adopting § 1040.4(a)(2)(vi) to address the Tribal government commenters' concern that plaintiffs and courts could misconstrue the 4(a)(2) provisions in this fashion.

As noted above, the Bureau is clarifying that the optional language in § 1040.4(a)(2)(vi) may be used when there is a genuine belief that sovereign immunity under applicable law may apply. This standard—''genuine belief''—is derived from case law governing certain rights to petition a court, which are discussed further in the section-by-section analysis of comment 4(a)(1)–2 above. By using this standard to describe when the optional provision may be used, the Bureau is providing an avenue for persons who may not be certain whether they are eligible for the exemption in § 1040.3(b)(2) to preserve any sovereign immunity to which they may ultimately be entitled. For example, a person may not be certain that that they are entitled to immunities under applicable law (such as an entity that works with a State or Tribe but might not meet the common law test for being an arm of the State or arm of the Tribe), or their immunity might not be based on their status as an arm of the Tribe or arm of the State (such as a local government in circumstances when it is not an arm of the State).

Finally, the Bureau is adding § 1040.4(a)(2)(vii) to clarify that a provider may provide any provision or notice required by § 1040.4(a)(2) in a language other than English if the pre-dispute arbitration agreement is also written in that other language. This clarification is to ensure consumers reading other languages are able to understand the required provision or notice. The Bureau did not receive comment on proposed comments 4(a)(2)–1 through 4(a)(2)–3, but the Bureau is making three technical corrections to these provisions to improve clarity. First, the Bureau has added the phrase ''after the compliance date set forth in § 1040.5(a)'' to the first sentence of comment 4(a)(2)–1, so the comment now provides that § 1040.4(a)(2) sets forth requirements only for providers that enter into pre-dispute arbitration agreements for a covered product or service after the compliance date set forth in § 1040.5(a). Accordingly, the requirements of § 1040.4(a)(2) do not apply to a provider that does not enter into a pre-dispute arbitration agreement with a consumer.'' This edit ensures that the comment accurately reflects the requirements of the Rule by noting that providers are subject to § 1040.4(a)(2) only with respect to pre-dispute arbitration agreements that they enter into after the compliance date. Second, the Bureau has revised the first sentence of comment 4(a)(2)–2 to reflect that § 1040.4(a)(2)(iii)(A) requires providers to amend existing agreements to include either the 4(a)(2)(i) or the 4(a)(2)(ii) provisions—rather than to include an amendment with language unique from those two provisions, as specified in the proposal. Third, the Bureau has removed the phrase ''stating the provision'' from the first sentence of proposed comment 4(a)(2)–3, so the sentence in the comment now provides that § 1040.4(a)(2)(iii) requires a provider that enters into a pre-dispute arbitration agreement that does not contain the provision required by § 1040.4(a)(2)(i) or (ii) to either ensure the agreement is amended to contain a specified provision or to provide any consumers to whom the agreement applies with written notice.'' This revision reflects the fact that the written notice contains different language than the 4(a)(2)(i) and 4(a)(2)(ii) provisions.

Additionally, the Bureau is adding comment 4(a)(2)–4 to clarify the relationship between comment 2(c)–2, which explains that delegation provisions are pre-dispute arbitration agreements within the meaning of § 1040.2(c), and § 1040.4(a)(2), which requires providers to include specified language in their pre-dispute arbitration agreements. Comment 4(a)(2)–4 clarifies that if a provider has included in its pre-dispute arbitration agreement the language required by § 1040.4(a)(2), and the provider's pre-dispute arbitration agreement contains a delegation provision, the provider must include the language required by § 1040.4(a)(2) in the delegation provision itself. Thus the 4(a)(2) provision must be included in two places—in both the delegation provision and the pre-dispute arbitration agreement to which it relates—unless the latter pre-dispute arbitration agreement includes the 4(a)(2) provision and the optional sentence specified in § 1040.4(a)(2)(iv)(C) discussed above. In that case, the provider need not include the 4(a)(2) provision separately within the delegation provision.

As described above, the Bureau received several comments on proposed § 1040.4(a)(2) generally (as opposed to comments on its individual provisions). In response to the State regulator commenter that requested clarification, the Bureau affirms that, based on the plain meaning of the regulatory text, the 4(a)(2) provisions apply not only to class actions brought under Federal and State consumer protection laws, but to any class actions brought against providers concerning covered products and services. In response to the industry

commenter's concern, the Bureau affirms that inclusion of a 4(a)(2) provision in a pre-dispute arbitration agreement should not constitute a waiver of any defenses that a company may assert in a class action, including defenses to class certification, that are unrelated to the pre-dispute arbitration agreement.

In response to the industry commenter that requested that the final rule state expressly that proposed § 1040.4(a)(2) does not apply to any transaction that originated with an excluded person pursuant to proposed § 1040.3(b), the Bureau declines to revise § 1040.4(a)(2) in this manner because it would be inconsistent with the overall framework of the rule. Under the rule, agreements that initially originated between a consumer and an excluded person can become subject to § 1040.4 generally in two situations: First, where an agreement was initially entered into by an excluded person before the compliance date and then entered into by a provider after the compliance date, and second, where an agreement was initially entered into by an excluded person after the compliance date and then relied on by a provider.[1053]

The Bureau also declines, in response to the consumer advocate's comment, to reframe the 4(a)(2) provisions as express relinquishments of a provider's right to use the contract to stop the consumer from being part of a class action. The Bureau notes that it has not framed the required contract provisions in the proposal and final rule in terms of rights; instead, the provisions constitute an agreement not to undertake specified conduct. The Bureau believes that the framing of the rule affords consumers the intended protections and allows for those protections to be stated in plain language.

The Bureau further declines to adopt additional disclosure requirements in response to the comment from the trade association of lawyers who represent investors. In response to the association's recommendations that the Bureau require providers to include a 4(a)(2) provision in all pre-dispute arbitration agreements and send a separate notice containing the language to consumers with existing agreements, the Bureau believes that this requirement would impact some pre-dispute arbitration agreements that are beyond the scope of agreements covered by section 1028. Moreover, the Bureau does not believe that specific disclosure requirements (*e.g.,* for font size) would better protect consumers.[1054] Furthermore, the Bureau has not observed a trend of providers using contract design to diminish the importance of consumer-friendly provisions in arbitration agreements. The Bureau also declines to impose a general requirement that providers include the relevant 4(a)(2) provision on their Web sites. The Bureau believes inclusion of the provision in pre-dispute arbitration agreements is sufficient to effectuate the purposes of § 1040.4(a)(2). Of course, if the provider's pre-dispute arbitration agreement is on a Web site, the rule still applies to a pre-dispute agreement that is posted on a Web site. As explained in comment 2(c)–3, the term pre-dispute arbitration agreement is not specific to any particular form or structure.

The Bureau also declines to require providers to identify in their agreements which products are covered or to provide separate contracts for covered and non-covered products. The Bureau believes that these requirements would be significantly more burdensome than inserting a provision supplied by the Bureau. At the same time, the benefits to consumers from such requirements would be limited. The Bureau acknowledges that, where a contract is for both covered and non-covered products, it may not be immediately apparent to most consumers which products are subject to the provision. However, the Bureau believes that consumers can obtain this information, for example, by reviewing any information the provider voluntarily provides in the agreement about these products (as discussed below), by contacting their provider or by checking the Bureau's Web site for more information about the scope of the rule. The Bureau also notes that the 4(a)(2)(ii) provision is intended to communicate the consumer's dispute resolution rights not only to the consumer, but also courts and third parties such as potential purchasers, which are likely to either know which products are covered or conduct an appropriate analysis to make an informed determination.

The Bureau also declines to make use of the 4(a)(2)(ii) provision mandatory when a contract is for both covered and non-covered products and services. The Bureau believes that most providers will have a strong incentive to use the optional 4(a)(2)(ii) provision instead of the 4(a)(2)(i) provision, because it will make clear to consumers, attorneys, and judges that the provision applies only to class action claims concerning covered products. A provider of a covered and a non-covered product could use the language in 4(a)(2)(i). Although that would not be required by the rule, if they did so, that language may apply to the non-covered product as well. As a result, the Bureau believes that most providers providing covered and non-covered products will use the optional 4(a)(2)(ii) provision.

The Bureau further notes, in response to the industry commenter's recommendation that providers be given the option to disclose which products are subject to the provision and which are not, nothing in § 1040.4(a)(2) would prevent providers from including this information in their arbitration agreements; indeed, the Bureau encourages providers to do so.

The Bureau also declines to replace the 4(a)(2)(i) and 4(a)(2)(ii) provisions with a single provision, as an industry commenter suggested. The Bureau believes that, where a contract is for both covered and non-covered products, the rule should permit providers to use the optional 4(a)(2)(ii) provision because that language is consistent with the scope of the rule as well as the scope of section 1028. The Bureau also does not believe, as the commenter suggested, that § 1040.4(a)(2) would effectively require lenders to use separate loan agreements for loans that lenders make directly and loans obtained from dealers or other financial institutions.

In response to the consumer advocate commenter's concern that the optional 4(a)(2)(ii) provision would create additional hurdles for consumers in class actions by explicitly addressing the issue of coverage, the Bureau disagrees. The Bureau would not characterize the question of coverage as a hurdle for consumers as application of a law or regulation can be an appropriate threshold question in any litigation. Providers may raise it to the extent they deem it relevant and courts will address it regardless of which provision the contracting party uses.

With respect to proposed § 1040.4(a)(2)(iii), the Bureau declines to require providers to amend their agreements—instead of sending the optional notice—wherever providers have the authority to amend their agreements unilaterally or wherever amending the agreement is not ''contractually impossible.'' The Bureau believes this approach would be burdensome to providers, because it may not be clear whether a provider can unilaterally change the terms. The Bureau further notes that, even where providers send the notice instead of

[1053] The Bureau addresses the commenter's broader comment—that the Bureau is exceeding its authority by effectively regulating automobile dealers—in the section-by-section analysis of § 1040.3(a) above.

[1054] *See infra* Part VIII (responding to comments on potential alternatives suggested by commenters).

amending the agreement, many third parties—such as debt collectors—would still be subject to the prohibition in § 1040.4(a)(1). In addition, the Bureau declines to revise proposed § 1040.4(a)(2)(iii) in response to an industry commenter's concern that the requirement to amend contracts or provide the notice effectively makes the rule ''retroactive.'' This rule has no retroactive effect; § 1040.4(a)(2)(iii) would only apply once a provider enters into an agreement after the compliance date.

Additionally, the Bureau declines to take additional steps that several commenters suggested would increase the binding effect of the notice on third parties. The Bureau declines to use the phrase ''neither we nor anyone else'' or ''no one'' in the notice because it is not possible for a notice to bind third parties and it would be misleading to suggest otherwise to consumers. The Bureau also declines to require contracts between providers and third parties to waive the third parties' right to rely on pre-dispute arbitration agreements in class actions, because Dodd-Frank section 1028(b) authorizes the Bureau to regulate the use of an agreement ''between a covered person and a consumer.'' The Bureau further declines to require that providers ''consider the notice to be part of the agreement;'' supply the notice whenever the agreement is requested by a third party; store a record of the notice in the same way the provider would store an amendment so that the documents together would be considered the complete agreement; or add language to the notice stating that the provider considers its promise to not stop the consumer from being part of a class action to be binding on third parties. Such requirements would effectively transform the notice into an amendment, and, for the reasons described in the previous paragraph, the Bureau declines to require providers to amend the agreement in situations where it has permitted a notice.

The Bureau also declines to forbid providers from relying on arbitration agreements in individual suits if the provider has not included the required contract provision or to state that non-compliant arbitration agreements may not be severed or reformed after litigation has commenced. Because the Bureau's Study showed that providers rarely face individual suits, the Bureau does not believe that banning reliance on non-compliant arbitration agreements in such suits would meaningfully change providers' incentives to include the required contract provision. Further, the Bureau believes that title X penalties—which the Bureau and State attorneys general may seek for violations of the rule, including failure to include the required provision—will adequately deter potential violations.[1055]

Finally, the Bureau declines to add a provision stating that non-compliant arbitration agreements are null and void. Where a provider fails to comply with the rule by omitting the contract provision required by § 1040.4(a)(2), § 1040.4(a)(1) still prevents the provider from relying on an arbitration agreement in a class action. For this reason, declaring that a non-compliant pre-dispute arbitration agreement is null and void, and thus unenforceable, would not be necessary because pursuant to § 1040.4(a)(1), the agreement is already unenforceable with respect to class actions. Further, the Bureau believes that providers will be deterred from intentionally omitting the required contract provision because such an omission would violate the rule and subject the provider to title X penalties.

Comments on the Bureau's Interpretation of ''Entered Into''

The Bureau's Proposal

Dodd-Frank section 1028(d) states that any rule prescribed by the Bureau under section 1028(b) shall apply to any pre-dispute arbitration agreement ''entered into'' after the compliance date. Consistent with section 1028(d), proposed § 1040.4(a)(1), § 1040.4(a)(2), and § 1040.4(b) used the term ''entered into'' or ''entering into'' to describe when the requirements imposed by those provisions would begin to apply to a particular agreement.[1056] To aid interpretation of proposed § 1040.4, the Bureau proposed a series of examples in comment 4–1 of what would have and would not have constituted ''entering into'' a pre-dispute arbitration agreement for purposes of the proposal. The Bureau also stated in the proposal that it interpreted the phrase ''entered into'' in section 1028(d) generally to include any circumstance in which a person agrees to undertake obligations or gains rights in an agreement. The Bureau stated in the proposal that it believed that this interpretation best effectuated the purposes of section 1028, was practical and clear in its meaning, and was reasonable.

[1055] *See* 12 U.S.C. 5565.

[1056] As later noted, the phrase ''entered into an agreement'' as used in section 1028 could be interpreted more broadly than the Bureau has proposed to interpret the phrase for purposes of the proposal.

Proposed comment 4–1.i would have provided three illustrative examples of when a provider enters into a pre-dispute arbitration agreement. First, proposed comment 4–1.i.A would have explained that a provider enters into a pre-dispute arbitration agreement where it provides to a consumer a new product that is subject to a pre-dispute arbitration agreement, and the provider is a party to the agreement. The Bureau stated in the proposal that it did not interpret this example to include new charges on a credit card covered by a pre-dispute arbitration agreement entered into before the compliance date. Second, proposed comment 4–1.i.B would have explained that a provider enters into a pre-dispute arbitration agreement where it acquires or purchases a product covered by proposed § 1040.3 that is subject to a pre-dispute arbitration agreement and becomes a party to that agreement, even if the person selling the product is excluded from coverage under proposed § 1040.3(b). Third, proposed comment 4–1.i.C would have explained that a provider enters into a pre-dispute arbitration agreement where it adds a pre-dispute arbitration agreement to an existing product. The Bureau stated in the proposal that it interpreted Dodd-Frank section 1028(b) to authorize the Bureau to require that providers comply with proposed § 1040.4 to the extent they choose to add pre-dispute arbitration agreements to existing consumer agreements after the compliance date.

Proposed comment 4–1.ii would have provided two illustrative examples of when a provider *does not* enter into a pre-dispute arbitration agreement. First, proposed comment 4–1.ii.A would have stated that a provider does not enter into a pre-dispute arbitration agreement where it modifies, amends, or implements the terms of a product that is subject to a pre-dispute arbitration agreement entered into before the compliance date. In the proposal, the Bureau stated that it believed that the phrase ''entered into an agreement'' as used in section 1028 could be interpreted to permit application of a Bureau regulation issued under the provision to agreements modified or amended after the compliance date, in certain circumstances. However, the Bureau proposed to interpret the phrase more narrowly for purposes of the proposal. The Bureau solicited comment on whether, for the purposes of the proposal, it should instead interpret the phrase more broadly to encompass certain modifications or amendments of an agreement after the compliance date

and what the impacts of such an interpretation would be.

The Bureau noted in the proposal that comment 4–1.ii.A would include a provider's modification, amendment, or implementation of the terms of a pre-dispute arbitration agreement itself. The Bureau also stated, however, that a provider enters into a pre-dispute arbitration agreement where the modification, amendment, or implementation constituted the provision of a new covered product.[1057]

Second, proposed comment 4–1.ii.B would have stated that a provider does not enter into a pre-dispute arbitration agreement where it acquires or purchases a product that is subject to a pre-dispute arbitration agreement but does not become a party to that agreement.

Proposed comment 4–2 would have clarified that § 1040.4(a)(1) applies to a provider even where the provider itself does not enter into a pre-dispute arbitration agreement. Proposed comment 4–2.i would have explained that, under § 1040.4(a)(1), a provider cannot rely on a pre-dispute arbitration agreement entered into *by another person* after the compliance date with respect to any aspect of a class action concerning a covered product.[1058] The comment would have then clarified that, under § 1040.4(b), such providers may be required to submit certain specified records related to claims filed in arbitration pursuant to pre-dispute arbitration agreements. The comment then would have cross-referenced comment 4(a)(2)–1, which would have noted that § 1040.4(a)(2) does not apply to providers that do not enter into pre-dispute arbitration agreements.

Proposed comment 4–2.ii would have illustrated comment 4–2.i with an example. The proposed comment would have stated that, where a debt collector collecting on consumer credit covered by § 1040.3(a)(1)(i) has not entered into a pre-dispute arbitration agreement, § 1040.4(a)(1) nevertheless prohibits the debt collector from relying on a pre-dispute arbitration agreement entered into by the creditor after the compliance date with respect to any aspect of a class action filed against the debt collector concerning its covered debt collection products or services. The comment would have then noted that, similarly, § 1040.4(a)(1) prohibits the debt collector from relying with respect to any aspect of such a class action on a pre-dispute arbitration agreement entered into by a merchant creditor who was excluded from coverage by § 1040.3(b)(5) after the compliance date.

Comments Received

The Bureau received several comments on proposed comment 4–1. More than two dozen commenters—primarily consumer advocates, consumer law firms, public-interest consumer lawyers, and nonprofits—urged the Bureau to expand its interpretation of ''entered into'' such that product agreements entered into before the compliance date would be subject to § 1040.4 if modified after the compliance date.[1059] The primary rationale offered by commenters was that this approach would benefit consumers by increasing the number of agreements that would be subject to the rule over time, relative to the approach the Bureau proposed. Commenters offered numerous examples of contractual modifications that they believed should trigger the rule's application, including, among other things, amendments to the pre-dispute arbitration agreement, pricing changes, and the addition of language regarding class actions. Some commenters stated that ''material'' modifications should trigger the rule's coverage, while other commenters referred to contractual modifications generally.[1060] Another commenter, a consumer law firm, requested that the Bureau interpret ''entered into'' such that a provider enters into an agreement when it modifies a pre-dispute arbitration agreement, but not when it modifies the other terms of the contract. The commenter stated that this approach would deter providers from amending their pre-dispute arbitration agreements after the compliance date to add class actions waivers.

A nonprofit commenter and a consumer advocate commenter recommended that the Bureau interpret ''entered into'' yet more expansively. The nonprofit commenter recommended that the Bureau subject all agreements to the rule, regardless of when they were entered into. The consumer advocate commenter stated that after a period of no more than one year, all existing contracts should be subject to the rule.

In contrast, an industry commenter stated that the final rule should adopt the proposal's approach to this issue by retaining comment 4–1.ii.A as proposed. Another commenter, a public-interest consumer lawyer, recommended that the Bureau remove proposed comment 4–1.ii.A and leave the question of whether modifications constitute ''entering into'' to the courts when they have occasion to interpret part 1040.

In addition, a number of commenters addressed the relationship between proposed comments 4–1.i.A and 4–1–ii.A,[1061] including the Bureau's statement in the proposal's section-by-section analysis that a provider enters into a pre-dispute arbitration agreement where a contractual modification constitutes the provision of a new covered product. Some industry commenters asserted that contractual modifications should not cause the rule to apply even if they constitute the provision of a new product. These commenters also asked the Bureau to clarify its view as to what types of contractual modifications would constitute the provision of a new product. One of these industry commenters stated that agreements should not be subject to the rule as long as the underlying product continues to serve the purpose for which the consumer originally entered into the agreement. (The commenter also asserted that, for this reason, agreements should not be subject to the rule when they are sold or assigned, even when modified in a manner that constitutes the provision of a new product.) Further, one industry commenter and one consumer advocate commenter asked the Bureau to clarify whether, if a contract is amended in a manner that

[1057] *See* proposed comment 4–1.i.A (stating that a provider enters into a pre-dispute arbitration agreement where it provides to a consumer a new product or service that is subject to a pre-dispute arbitration agreement, and the provider is a party to the pre-dispute arbitration agreement).

[1058] Proposed comment 4–2 referred to the effective date rather than the compliance date. As discussed below, the Bureau has corrected this error in the final rule.

[1059] Commenters used a variety of terms to refer to the contractual change, including ''modification,'' ''amendment,'' and ''material change.'' Although each of these terms may have discrete meanings under contract law, for the purposes of this rule, the Bureau views these terms as interchangeable and is using the term ''modification'' in this section for the sake of simplicity.

[1060] Commenters offered numerous examples of contractual changes they believed would be ''material,'' including pricing changes, the addition of language regarding class actions, the addition of requirements that the consumer waive legal rights, changes to the State law governing the agreement, and the addition of a new party or co-signer (not just an authorized user). One consumer advocate commenter suggested that the Bureau add to the commentary a non-exhaustive list of amendments that would be considered material.

[1061] Proposed comment 4–1.i.A would have stated that a provider enters into a pre-dispute arbitration agreement where it provides to a consumer a new product or service that is subject to such an agreement, and the provider is a party to that agreement. Proposed comment 4–1.ii.A would have stated that a provider does not enter into a pre-dispute arbitration agreement where it modifies, amends, or implements the terms of a product or service that is subject to a pre-dispute arbitration agreement that was entered into before the compliance date.

constitutes the provision of a new product, the rule would apply only with respect to the new product or whether it would also apply to the existing product. The industry commenter stated that, in this scenario, the rule should apply only with respect to the new product, while the consumer advocate commenter stated that the rule should apply with respect to existing products as well.

Other commenters addressed the proposal's application to acquirers and purchasers of covered products. An industry commenter stated that a provider who was not a party to the original agreement between a company and a consumer should not be subject to the rule, even if the provider acquires or purchases a covered product after the compliance date or if the product agreement states that third parties (such as purchasers and assignees) may enforce the agreement. According to the commenter, such a third party already had rights in the arbitration agreement before the compliance date; therefore, the agreement is not newly entered into as to that third party. Another industry commenter stated that pre-dispute arbitration agreements originally entered into by excluded persons, such as automobile dealers, should not be subject to the rule when entered into by providers after the compliance date because, according to the commenter, the enforceability of a contract provision cannot depend on the identity of the party enforcing it. An industry commenter asked the Bureau to clarify how the rule would apply where a bank acquires another institution after the compliance date and account holders might receive a new account agreement from the acquiring institution. A trade association of consumer lawyers stated that the rule should cover providers that receive assignments of contracts. Another trade association of consumer lawyers stated that it supported the Bureau's proposed application of the rule to acquirers and purchasers.

Other commenters expressed concerns about comment 4–1.ii.B.[1062] Two public-interest consumer lawyers expressed concern that comment 4–1.ii.B would exempt non-party acquirers from § 1040.4 altogether, even though such entities seek to enforce pre-dispute arbitration agreements. A consumer advocate commenter expressed concern that comment 4–1.ii.B would enable acquirers and purchasers to evade coverage where the original provider ''de-coupled'' its product agreements and arbitration agreements—*e.g.,* by providing the arbitration agreement in a separate document—and transferred only the product agreement to the acquirer or purchaser. The commenter argued that an acquirer or purchaser in this type of transaction could still rely on the pre-dispute arbitration agreement, if the product agreement would remain subject to it. But, the commenter asserted that under proposed comment 4–1.ii.B, the acquirer or purchaser would not enter into the arbitration agreement because it would not become a party to the arbitration agreement—enabling the acquirer or purchaser to avoid coverage (at least where the contract had been entered into before the compliance date).

Finally, a consumer advocate commenter expressed concern about the first sentence of proposed comment 4–1, which prefaced the comment's examples of when providers do and do not enter into agreements for purposes of proposed § 1040.4 by stating, ''Section 1040.4 applies to providers that enter into pre-dispute arbitration agreements after the [compliance date].'' The commenter asserted that this sentence is inaccurate because proposed § 1040.4(a)(1) would have applied to providers that do not themselves enter into pre-dispute arbitration agreements.[1063] The commenter suggested that the Bureau remove the phrase ''providers that enter into'' from this sentence. The same commenter also requested that the final rule adopt each of the examples in proposed comments 4–1.i and 4–2. Additionally, a public-interest consumer lawyer stated that it agreed with the Bureau's statement in the proposal's preamble that the Bureau interprets the phrase ''entered into'' generally to include any circumstance in which a person agrees to undertake obligations or gains rights in an agreement.

The Final Rule

Having considered the issues raised by commenters, the Bureau is finalizing comments 4–1 and 4–2, containing its interpretation of the term ''entered into'' in this Part with certain modifications as described below.

The Bureau continues to interpret the phrase ''entered into'' in Dodd-Frank section 1028(d) as generally including circumstances in which a person agrees to undertake obligations or gains rights in an agreement. However, the Bureau notes that the rule does not treat every conceivable circumstance in which a person gains rights in a pre-dispute arbitration agreement to constitute entering into the agreement. For example, a person who is not a party to an agreement but is entitled to use the agreement may gain third-party beneficiary rights, but as discussed in the section-by-section analysis of comments 4–1 and 4–2 below, that person would not generally be entering into the pre-dispute arbitration agreement for purposes of the rule.

The Bureau is adopting the examples in comment 4–1 largely as proposed, but with some additional clarifications as described below. As in the proposal, comment 4–1.i provides three illustrative examples of when a provider enters into a pre-dispute arbitration agreement after the compliance date for purposes of § 1040.4. Comment 4–1.i.A explains that a provider enters into a pre-dispute arbitration agreement when it provides to a consumer, after the compliance date, a new product or service covered by § 1040.3(a) that is subject to a pre-existing agreement to arbitrate future disputes between the parties, and the provider is a party to that agreement, regardless of whether that agreement predates the compliance date.[1064] The comment further clarifies that, in such cases, § 1040.4 applies only with respect to the new product or service. Comment 4–1.i.B explains that a provider enters into a pre-dispute arbitration agreement where it acquires or purchases a covered product or service after the compliance date that is subject to a pre-dispute arbitration agreement and becomes a party to that pre-dispute arbitration agreement or to the agreement for the consumer financial product or service, even if the seller is excluded from coverage under § 1040.3(b) or the pre-dispute arbitration agreement was entered into before the compliance date. Comment 4–1.i.C explains that a provider enters into a pre-dispute arbitration agreement where it adds a pre-dispute arbitration agreement after the compliance date to an existing product or service.[1065]

Further, as in the proposal, comment 4–1.ii provides two illustrative

[1062] Proposed comment 4–1.ii.B would have stated that a party does not enter into a pre-dispute arbitration agreement where it acquires or purchases a product that is subject to such an agreement but does not become a party to that agreement.

[1063] *See* proposed comment 4–2 (describing how proposed § 1040.4 would have applied to providers that do not enter into pre-dispute arbitration agreements).

[1064] As the Bureau stated in the proposal, it does not interpret this example to include new charges on a credit card covered by a pre-dispute arbitration agreement entered into before the compliance date.

[1065] *See also* comment 2(c)–2 (clarifying that a delegation provision is a pre-dispute arbitration agreement). If a provider adds a delegation provision to a pre-existing pre-dispute arbitration agreement, the rule would apply to the delegation provision.

examples of when a provider does not enter into a pre-dispute arbitration agreement for purposes of § 1040.4. Comment 4–1.ii.A states that a provider does not enter into a pre-dispute arbitration agreement where it modifies, amends, or implements the terms of a product or service that is subject to a pre-dispute arbitration agreement without engaging in the conduct described in comment 4–1.i after the compliance date. The comment clarifies that a provider does enter into a pre-dispute arbitration agreement, however, when the modification, amendment, or implementation constitutes the provision of a new product or service. Comment 4–1.ii.B states that a provider does not enter into a pre-dispute arbitration agreement where it acquires or purchases a product or service that is subject to a pre-dispute arbitration agreement but does not become a party to any pre-dispute arbitration agreement that applies to the product or service.

Final comment 4–1 differs from the proposal in several respects. First, the Bureau has deleted the first sentence of proposed comment 4–1 (''Section 1040.4 applies to providers that enter into pre-dispute arbitration agreements after the [compliance date].''). The Bureau agrees with the consumer advocate commenter that the sentence would be inaccurate, given that § 1040.4(a)(1) applies to providers that do not themselves enter into pre-dispute arbitration agreements.[1066]

Second, the Bureau is adding additional clarifying language to comments 4–1.i.A and 4–1.i.B. This language clarifies an important aspect of the rule: That, for purposes of the rule, a provider enters into an agreement in the scenarios described in those comments even if the arbitration agreement was originally entered into before the compliance date. Therefore, final comment 4–1.i.A explains that when a person, before the compliance date, enters into an agreement to arbitrate future disputes with a consumer, and then provides the consumer with a new product that is subject to that agreement after the compliance date, the provider would be considered to be entering into that arbitration agreement for the new product after the compliance date for purposes of § 1040.4. Similarly, under final comment 4–1.i.B, when a person and consumer enter into a pre-dispute arbitration agreement for a product described in § 1040.3(a) before the compliance date, and a provider acquires or purchases the product after the compliance date (and becomes a party to that arbitration agreement), the acquiring or purchasing provider would be considered to be entering into the pre-dispute arbitration agreement for purposes of § 1040.4.

The Bureau is adopting these interpretations to clarify that providers cannot avoid application of the rule after the compliance date by linking new products or newly-acquired or newly-purchased products with arbitration agreements that predate the compliance date and purport to govern the provider's future relationship with the consumer. This language clarifies that when providing new products after the compliance date, providers will need to review their product agreements that predate the compliance date to determine whether the new product agreement is subject to a pre-existing pre-dispute arbitration agreement that was not subject to the rule. The Bureau notes that providers can alleviate any burden with respect to this review either by inserting language in the new product agreement stating that the new product agreement is not subject to arbitration, or by including the rule's required contract provision with respect to that new product so that, in effect, the provider is amending the application of any earlier arbitration agreement to the new product or service.

Third, the Bureau has revised comment 4–1.ii.A to clarify the relationship between comments 4–1.i.A and 4–1.ii.A. In the preamble to the proposal, the Bureau noted that, even though a provider does not enter into a pre-dispute arbitration agreement where it modifies the terms of a product, a provider *does* enter into a pre-dispute arbitration agreement where the modification constitutes the provision of a new product. The Bureau believes this explanation would better aid compliance if it is in the commentary because it addresses what some commenters viewed as an apparent conflict between two other provisions of the commentary. To address concerns raised by commenters, final comment 4–1.i.A also includes an additional sentence clarifying that, where a contractual modification constitutes the provision of a new product, § 1040.4 applies only with respect to the new product. The Bureau believes this interpretation strikes the appropriate balance between preserving the consumer protections available for new products and preserving reliance and expectations with respect to existing products.

The Bureau declines to adopt commenters' recommendation that contractual modifications should not constitute ''entering into'' even if they constitute the provision of a new product. The Bureau does not agree with the industry commenter that stated that agreements originally entered into before the compliance date should always continue to be exempt, even if modified after the compliance date, as long as the underlying product continues to serve the purpose for which the consumer originally entered into the agreement. Dodd-Frank section 1028(d) authorizes any regulation issued by the Bureau under section 1028(b) to apply to any agreement between a consumer and covered person entered into after the compliance date. The Bureau believes that, when a provider provides a new product or service after the compliance date, the pre-dispute arbitration agreement for that product is entered into at that time with respect to that new product or service, regardless of whether the pre-dispute arbitration agreement had been entered into previously with respect to other products or services. Thus, section 1028(d) authorizes the Bureau to apply the rule, as to that new product or service, at that time. Further, the approach recommended by the industry commenter would undermine coverage of new agreements. Were the Bureau to adopt the approach recommended by the three industry commenters, providers could potentially evade the rule in perpetuity, with respect to existing consumers, by providing new products to their existing consumers through what such providers would assert are modifications of existing contracts. With respect to the comments that asked the Bureau to clarify what types of contractual modifications would, in its view, constitute the provision of a new product, the Bureau believes that such modifications include, without limitation, those that result in the provision of a new account (such as a deposit account or credit card account) or a new closed-end credit transaction.[1067]

Fifth, to conform to the rest of the regulatory text and commentary, the Bureau has revised comment 4–1.i.B and 4–1.ii.B to use the term ''product or service''—not simply ''product,'' as in the proposal.

[1066] *See* Comment 4–2 (describing how § 1040.4 applies to providers that do not enter into pre-dispute arbitration agreements).

[1067] For instance, Regulation Z sets out rules for when a new closed end consumer credit transaction occurs for purposes of determining whether new disclosures are required. *See, e.g.,* 12 CFR 1026.20(a) and comment 20(a)–1 (''A refinancing is a new transaction requiring a complete new set of disclosures. Whether a refinancing has occurred is determined by reference to whether the original obligation has been satisfied or extinguished and replaced by a new obligation, based on the parties' contract and applicable law.'').

The Bureau declines to expand its interpretation of ''entered into'' for purposes of § 1040.4 to include situations where a provider purchases or acquires a product that is subject to a pre-dispute arbitration agreement, but does not become party to the pre-dispute arbitration agreement. The Bureau recognizes that sellers of loans may place two separate agreements into two different documents—a product agreement and a pre-dispute arbitration agreement. The Bureau understands this ''de-coupling'' may be common in automobile finance, for example. The Bureau also recognizes that buyers may purchase or acquire the product agreement and become a party to that agreement, without purchasing the pre-dispute arbitration agreement or becoming party to that agreement. In these circumstances, the buyer may become a third-party beneficiary to the pre-dispute arbitration agreement. However, the Bureau disagrees that, by not treating such a buyer to be entering into the pre-dispute arbitration agreement, the rule encourages evasions. Such a buyer does not, in fact, evade the rule. The buyer, though not entering into the pre-dispute arbitration agreement, nonetheless remains subject to the rule against reliance in a class action in § 1040.4(a)(1), which generally applies to a provider regardless of whether it has entered into the pre-dispute arbitration agreement. The provider would also be required to submit certain specified records concerning claims filed in arbitration pursuant to such pre-dispute arbitration agreements. While such a buyer would not be subject to the contract provision or notice requirements in § 1040.4(a)(2), the Bureau does not believe that is an evasion of the rule. That outcome is, rather, a natural reflection of the position the buyer is in vis-à-vis the pre-dispute arbitration agreement. Moreover, making the buyer subject to § 1040.4(a)(2) in these circumstances would be inconsistent with the rule's overall approach to coverage of third parties, such as debt collectors who are hired by a creditor and may acquire third-party beneficiary rights under a pre-dispute arbitration agreements.

The Bureau also declines to expand its interpretation of ''entered into'' for purposes of § 1040.4 such that agreements entered into before the compliance date would become subject to the rule if modified in ways that do not constitute the provision of a new product. As discussed above, numerous commenters asserted that that this approach would benefit consumers by increasing the number of agreements that would be subject to the rule over time, relative to the Bureau's proposed approach. The Bureau believes, however, that this would not yield such significant consumer protection benefits to warrant the additional complexity and uncertainty that such a standard would create.

First, this approach would not benefit consumers in markets for most covered products. The Bureau understands that product agreements for many covered products are not typically modified after they are entered into. (For example, agreements for closed-end credit products are rarely modified, and products that are provided on a one-time basis do not allow for an opportunity to amend the agreement). For the remaining products—among which credit cards and checking accounts are the most significant in terms of market size—the Bureau lacks data on the frequency of contractual modifications (and commenters did not cite any such data). However, regardless of how frequently modifications occur, the Bureau believes that the rule will apply to a significant majority of consumer agreements within a relatively brief period, even if the Bureau does not expand its interpretation of ''entered into'' to include modifications, due to the frequency of account turnover in these markets.[1068] Further, the Bureau believes that even those consumers who maintain older accounts to which the rule does not apply will benefit from the rule because of the rule's deterrent effect. Due to the frequency of account turnover, it often will not be long before a critical mass of a provider's consumers would be able to participate in any class actions relating to a given product line. The Bureau believes that, once this occurs for a given product line, the provider will have the incentive provided by class exposure to avoid potentially illegal practices in relation to that product, and that these actions will generally benefit all consumers, even those who cannot participate in a class action.

For these reasons, the Bureau believes that expanding its interpretation of ''entered into'' for purposes of § 1040.4 to include modifications generally (even when there is no provision of a new product) would not yield significant consumer benefit. At the same time, such an approach would increase the rule's complexity and uncertainty by requiring providers, the Bureau, other regulators, and the courts to determine, for purposes of the rule, what types of modifications of existing products constitute entering into and which do not. For example, determining what modifications are sufficiently ''material'' would be a complicated line-drawing process. For these reasons, the Bureau is not expanding its interpretation of ''entered into'' for the purposes of § 1040.4 to include modifications of existing contracts after the compliance date that do not represent the provision of a new product or service.

Similarly, the Bureau declines to expand its interpretation of ''entered into'' for purposes of § 1040.4 such that agreements entered into before the compliance date would be subject to the rule if the provider modifies the pre-dispute arbitration agreement (but not the overall product agreement after the compliance date). As described above, a commenter asserted that this approach would deter providers from amending their pre-dispute arbitration agreements after the compliance date to add class actions waivers and thus expand the reach of the proposal. The Bureau believes that some of the same considerations about complexity and uncertainty, described above, that warranted not expanding its interpretation of ''entered into'' to include modifications to product agreements also apply in the context of modifications to arbitration agreements themselves. Additionally, in response to the consumer law firm's comment that interpreting ''entered into'' to include modifications to arbitration agreements would deter providers from amending their pre-dispute arbitration agreements after the compliance date to add class action waivers, the Bureau does not believe that providers covered by the rule will have an incentive to add class

[1068] For example, in the credit card market, the number of new accounts opened per year since 2011 has ranged from approximately 80 million to approximately 100 million, and the number of open credit card accounts has held steady since 2011 at approximately 600 million. *See* Bureau of Consumer Fin. Prot., ''The Consumer Credit Card Market,'' at 89 fig. 2 (Dec. 2015), *available at http://files.consumerfinance.gov/f/201512_cfpb_report-the-consumer-credit-card-market.pdf* (number of new accounts opened per year) and at 33 fig. 4 (number of open accounts over time). As a result, the Bureau estimates that, within five years, about 80 percent of credit card accounts would be covered by the rule, even if contractual modifications do not subject an agreement to the rule. In the checking account market, attrition data indicate that consumers close about half of all checking accounts within three years and two-thirds of all accounts within five years. *See* Harland Clarke, ''State of the Industry 2012 Financial Services Benchmarking Analysis,'' (2012), *available at http://harlandclarke.com/solutions/docs/industry-benchmarking-report.* Thus, assuming that consumers continue to open new accounts at about the same rate, the Bureau estimates that, within five years, about two-thirds of checking accounts will be covered by the rule, even if contractual modifications do not subject an agreement to the rule. (If consumers open new accounts at a higher rate than the rate at which they close old accounts, an even higher share of accounts would be covered by the rule.).

action waivers to their arbitration agreements, because part 1040 will render such provisions ineffective.

The Bureau also declines to subject all agreements to the rule regardless of when they were entered into (as requested by the nonprofit commenter) and to subject all existing contracts to the rule after a period of one year (as requested by the consumer advocate commenter). Section 1028(d) requires that any regulation prescribed by the Bureau shall apply to agreements entered into after the compliance date, and both of these approaches would cause the Bureau's rule to apply to some agreements not entered into after the compliance date. The Bureau also declines to adopt the public-interest consumer lawyer's recommendation to delete comment 4–1.ii.A. The Bureau believes the comment promotes a uniform approach to the application of the rule, which will thus facilitate compliance and reduce burden and uncertainty.

Moreover, the Bureau declines to adopt the interpretation requested by industry commenters that a provider does not enter into a pre-dispute arbitration agreement where, after the compliance date, it acquires or purchases a covered product that predated the compliance date. The Bureau disagrees with the industry commenter's assertion that an agreement is not entered into in this scenario because the acquirer or purchaser already had rights under the agreement. Even where an agreement states that it is enforceable by a purchaser, a *particular* purchaser generally does not gain rights in a product agreement until it actually purchases—or enters into—the product agreement. That is, such a person does not become a purchaser until it engages in purchasing.[1069] If the industry commenter was asserting that a particular third party could acquire some rights in a pre-dispute arbitration agreement before the compliance date, and then additional rights after the compliance date, it provided no concrete details as to when such a scenario would occur. If such a third party is engaged in providing the same product or service, such as debt collection, to the same consumer on the same consumer credit account before and after the compliance date, then the rule generally would not apply.

With respect to the assertion by a different industry commenter that acquirers or purchasers should not be subject to the rule because the enforceability of a contract provision cannot depend on the identity of the party enforcing it, the Bureau does not believe that this is accurate. Different parties to a contract may be subject to different regulatory requirements, some of which may limit their ability to enforce certain provisions. Thus, if a party has in fact entered into a contract after the compliance date, then that party may be subject to this rule, even if a different person entered into the contract before the compliance date and is not subject to the rule.

In response to the industry commenter that requested that the Bureau clarify how the rule applies in the context of bank acquisitions, the Bureau notes that, as comment 4–1.i.B explains, an acquiring bank enters into an acquired bank's pre-dispute arbitration agreements for purposes of § 1040.4 where it becomes a party to the acquired bank's arbitration agreements (or product agreements subject to arbitration agreements) after the compliance date, even if the agreements were entered into by the acquired bank before the compliance date.[1070] As comment 4–1.ii.B clarifies, the acquiring bank does not enter into the acquired bank's pre-dispute arbitration agreements for purposes of § 1040.4 where it does not become a party to the acquired bank's pre-dispute arbitration agreements or product agreements, even if the agreements were entered into before the compliance date. In response to the trade association of consumer lawyers' comment that the final rule should state expressly that assignees enter into pre-dispute arbitration agreements (in addition to acquirers and purchasers), the final rule uses the terms acquiring and purchasing because those are the terms used in the Dodd-Frank Act's definition of financial product or service.[1071] The Bureau believes that whether a particular assignment constitutes an acquisition or purchase will depend on the particular facts and circumstances of the relevant transaction.

The Bureau is finalizing comment 4–2 largely as proposed. The Bureau has revised comment 4–2 to refer to the compliance date (instead of the effective date) and has made other minor modifications to improve readability.

4(b) Submission of Arbitral Records

As discussed above in Part VI, while proposed § 1040.4(a) would have prevented providers from relying on pre-dispute arbitration agreements in class actions, it would not have prohibited covered entities from maintaining pre-dispute arbitration agreements in consumer contracts generally; nor would it have prevented providers from still invoking such agreements to compel arbitration in cases not filed as putative class actions. Thus, the Bureau separately considered in the proposal whether regulatory interventions pertaining to these ''individual'' arbitrations would be in the public interest and for the protection of consumers, as well as whether the findings for such interventions are consistent with the Bureau's Study. The Bureau ultimately decided not to propose to prohibit specific practices in individual arbitration, but rather to propose an ongoing monitoring regime in light of historical precedent suggesting that there could be risks to consumers in certain circumstances from biased arbitration administrators or other practices.

Accordingly, pursuant to its authority under sections 1028(b) and 1022(c)(4) of the Dodd-Frank Act, the Bureau proposed § 1040.4(b), which would have required providers to submit copies of certain arbitral records to the Bureau. Specifically, proposed § 1040.4(b)(1) would have required providers, for any pre-dispute arbitration agreement entered into after the compliance date, to submit copies to the Bureau of claims, judgments or awards, and certain other records concerning specific arbitration proceedings, as well as certain decisions by an arbitration administrator concerning the fairness of the underlying arbitration agreements. The Bureau explained in the proposal that it intended to develop, implement, and publicize an electronic submission process before the compliance date if proposed § 1040.4(b) were adopted. Proposed § 1040.4(b)(2) addressed the timing of records submissions, while proposed § 1040.4(b)(3) would have set forth the information that providers shall redact before submitting records to the Bureau.[1072]

Using the records collected and other sources, the Bureau stated that it intended to continue to evaluate the

[1069] For instance, where there is a contract between a lender and a consumer, a debt buyer cannot enforce an arbitration agreement in that product agreement before it acquires or purchases the product agreement, even if the product agreement confers rights on third-party beneficiaries.

[1070] *See also* comment 4(a)(2)–2 (explaining how § 1040.4(a)(2) applies in the context of bank acquisitions).

[1071] *See* 12 U.S.C. 5481(15)(A).

[1072] Pursuant to Dodd-Frank section 1022(c)(4)(C), the Bureau may not obtain information under its section 1022(c)(4) authority ''for the purposes of gathering or analyzing the personally identifiable financial information of consumers.''

impacts on consumers of arbitration and arbitration agreements and draw upon all of its statutorily authorized tools to address conduct that harms consumers to the extent necessary and appropriate. The Bureau also noted its willingness to consider conducting additional studies on consumer arbitration pursuant to Dodd-Frank section 1028(a) to evaluate whether further rulemaking would be in the public interest and for the protection of consumers,[1073] improving its consumer education tools, or, where appropriate, undertaking enforcement or supervisory actions.

Proposed comment 4(b)–1 would have clarified that providers are not required to submit records themselves if they arrange for another person, such as an arbitration administrator or an agent of the provider, to submit the records on the providers' behalf, but that the obligation to comply with § 1040.4(a) nevertheless remains on the provider. The provider must ensure that the person submits the records in accordance with § 1040.4(b).

Proposed comment 4(b)(3)–1 would have clarified that providers are not required to perform the redactions themselves and may arrange for another person, such as an arbitration administrator, or an agent of the provider, to redact the records. The obligation to comply with § 1040.4(b) nevertheless remains on the provider and thus the provider must ensure that the person redacts the records in accordance with § 1040.4(b).

As set forth in more detail below, the Bureau is finalizing § 1040.4(b)(1) through (b)(3) largely as proposed with the addition of two additional categories of records. In addition the Bureau is finalizing new provisions § 1040.4(b)(4) through (b)(6), which require the Bureau to redact and then publish to the internet the records received by the Bureau pursuant to § 1040.4(b)(1) through (b)(3).

The Bureau finalizes comment 4(b)–1, having received no comments on this specific commentary. The Bureau also finalizes proposed comment 4(b)(3)–1, renumbered as 4(b)–2, having received no comments on this specific commentary.

4(b)(1) Records To Be Submitted

As stated above, proposed § 1040.4(b) would have required that, for any pre-dispute arbitration agreement entered into after the compliance date, providers submit a copy of the arbitration records specified by proposed § 1040.4(b)(1) to the Bureau, in the form and manner specified by the Bureau.[1074] Proposed § 1040.4(b)(1) would have listed the arbitral records that providers would be required to submit to the Bureau. Compliance with this provision would have been required for pre-dispute arbitration agreements entered into after the compliance date. The Bureau received a number of comments on the structure and content of the various subparts of proposed § 1040.4(b)(1) (from proposed § 1040.4(b)(1)(i) through new § 1040.4(b)(1)(iii)), which are addressed further below. The Bureau also received several comments on proposed § 1040.4(b)(1) more generally.

An industry commenter pointed to a reference in the proposal to section 1021(b) of the Dodd-Frank Act, which defines the Bureau's objectives to include ''ensuring . . . [that] Federal consumer financial law is enforced consistently.'' The commenter asserted that this section may grant the Bureau the authority to determine if Federal consumer financial law is being applied consistently, but does not grant the Bureau authority to determine whether arbitrators are applying Federal consumer financial law consistently thus this part of the proposal exceeded the Bureau's authority. Some commenters argued that the Bureau lacked authority to collect arbitration materials. One industry commenter argued that the monitoring proposal created a new and direct ''channel'' of supervision by the Bureau for small entities, which are generally not subject to the Bureau's examination authority. Another industry commenter expressed doubts over whether the Bureau could collect documents from financial institutions for which it was not the primary regulator. Another industry commenter argued that arbitration is not a consumer financial product or service and, therefore, cannot be regulated by the Bureau under its authority under section 1022(c), which permits market monitoring as to the ''offering or provision of'' consumer financial products.

Section 1040.4(b)(1) is largely finalized as proposed, with several additions set out below in § 1040.4(b)(1)(i) through (b)(1)(iii).

As to the comment that Dodd-Frank section 1021(b) does not give the Bureau authority to determine whether arbitrators are enforcing consumer financial laws consistently, the Bureau disagrees with the comment's premise. The Bureau cites provisions other than section 1021(b) as legal authority for the monitoring requirement.[1075] Here, the Bureau cites section 1021(b) because it expresses one of several public interest goals that the Bureau is charged with furthering. The Bureau finds that monitoring enables more consistent enforcement of the consumer financial laws by permitting the Bureau and public to review provider behavior in arbitration proceedings and business practices that may give rise to such proceedings.

As to various commenters that challenged the Bureau's authority to adopt the rule, the Bureau relies on sections 1028 and 1022 of the Dodd-Frank Act as set out in greater detail in the Parts V and VI.D, above. Those provisions authorize the Bureau to collect documents from providers of consumer financial products, even with regard to entities for which it does not exercise supervisory authority under sections 1024 through 1026. The Bureau finds that its market monitoring authority under section 1022 encompasses the dispute resolution mechanisms that providers of consumer financial products adopt to resolve conflicts with their customers. Contrary to the commenters' assertions, monitoring does not create a new de facto ''channel'' for examining small entities not subject to the Bureau's larger participant rulemakings. Monitoring simply permits the Bureau to understand fairness and quantity of the specific arbitration proceedings that arise. In any case, many providers that are not subject to the Bureau's supervision authority otherwise are subject to the Bureau's market monitoring authority and the Bureau's enforcement authority for unfair, deceptive, and abusive acts and practices. The Bureau believes consumers will benefit if records pertaining to individual arbitration proceedings are submitted to the Bureau. Further, as to the industry comment that arbitration is not a consumer financial product for purposes of collecting data under 1022(c) of the Dodd-Frank Act, the Bureau interprets its market monitoring under 1022(c)(1)), which authorizes ''monitor[ing] for risks to consumers in the *offering or provision* of consumer financial products or services''

[1073] The Bureau interprets section 1028 to allow it, as appropriate, to further study the use of pre-dispute arbitration agreements and, if appropriate, to promulgate rules that would prohibit or impose conditions or limitations on the use of a pre-dispute arbitration agreement or to amend any rule that it would finalize pursuant to this proposal.

[1074] The Bureau stated in the proposal that it anticipated that it would separately provide technical details pertaining to the submission process.

[1075] As set out above in Part V, the Bureau relies on sections 1028(b) and 1022 of the Dodd-Frank Act as legal authority to promulgate a rule requiring the submission and publication of documents.

(emphasis added) by the Bureau, broadly to include documents that assist the Bureau in understanding markets and mechanisms (such as dispute resolution tools) that providers use to administer consumer financial products. In any case, the Bureau is not using its authority to monitor arbitrators or arbitration administrators, but rather the providers that use arbitration.

With regard to the commenter that expressed doubts over whether the Bureau could collect documents from financial institutions for which it was not the primary regulator, the Bureau disagrees, given the affirmative grant of authority to the Bureau under sections 1022 and 1028 of the Dodd-Frank Act. The Bureau has routinely interpreted its section 1022 market monitoring authority to reach all entities covered by the Dodd-Frank Act.

4(b)(1)(i)

Proposed § 1040.4(b)(1)(i) would have required, in connection with any claim filed by or against the provider in arbitration pursuant to a pre-dispute arbitration agreement entered into after the compliance date, that providers submit: (A) The initial claim form and any counterclaim; (B) the pre-dispute arbitration agreement filed with the arbitrator or administrator; (C) the judgment or award, if any, issued by the arbitrator or arbitration administrator; and (D) if an arbitrator or arbitration administrator refuses to administer or dismisses a claim due to the provider's failure to pay required filing or administrative fees, any communication the provider receives from the arbitrator or an arbitration administrator related to such a refusal.

Specific comments relating to each of the individual proposed categories of records are discussed separately below. Separately, the Bureau received several general comments that suggested expansions in the categories of records subject to the submission requirement of proposed 1040.4(b)(1)(i) and urged the Bureau to exclude some providers from complying with the proposed requirement.[1076]

One consumer advocate commenter suggested that the Bureau should require providers to submit a number of other documents or data related to the timing of arbitration proceedings (including the date on which the statement of claim was filed, the date on which the provider paid administration or arbitration fees, the date on which the arbitration hearing was held, and the date on which the award was issued) to permit the Bureau to understand how often providers delayed arbitration proceedings. The consumer advocate commenter also suggested that the Bureau should require providers to submit information on the relationship of the administrator with the parties, including any *ex parte* communications between a provider and an arbitrator or arbitral administrator to see if the provider made any attempts to influence the outcome of arbitration proceedings,[1077] and records of any financial relationship between a provider and the arbitrator or arbitral administrator, citing NAF's conflict issues as an example.[1078] This consumer advocate commenter suggested that these materials would help the Bureau and other groups monitor the extent of specific arbitration harms, including the use of delay as a tactic in arbitration proceedings to prevent consumers from obtaining relief, and the use of influence or pre-existing financial connections with arbitrators and administrators by providers to change the outcome of arbitration awards.

Another consumer lawyer commenter suggested that the Bureau should require providers to submit information to the Bureau on the protected group status of consumers—including race, ethnicity and gender—subject to pre-dispute arbitration agreements, whether or not the consumers were parties to an arbitration proceeding, so that the Bureau and others can analyze the disparate impact of such agreements on protected groups. The consumer lawyer commenter noted that, in its experience, pre-dispute arbitration agreements are used to deter formal claims by consumers before they are raised generally, that this deterrence has a disparate impact on protected groups, and that the Bureau should thus collect data on protected group status to analyze this. The commenter suggested that such data on the protected group status of consumers should be collected in such a way that it is not disclosed inappropriately to the arbitrator, such that the arbitrator could make decisions without access to the protected group status of consumer participants to arbitrations. The commenter admitted that it was unsure, practically, how the Bureau could collect this information and avoid disclosure to the arbitrator.

A Tribal commenter requested that the Bureau exclude Tribal entities from complying with the formal aspects of the monitoring proposal and suggested instead that the Bureau could receive similar information by collaborating with Tribal regulatory bodies to potentially engage in information sharing.

Based on the Bureau's responses to more general comments on arbitral records, and for the more specific reasons set out below in the section-by-section analyses of § 1040.4(b)(1)(i)(A) through (i)(E), the Bureau is finalizing § 1040.4(b)(1)(i). Section 1040.4(b)(1)(i) sets forth what arbitration related documents providers must submit, largely as proposed, with the addition of one new category of arbitration-related record in new (b)(1)(i)(B), which requires the submission of answers to initial claims and counterclaims.

The Bureau disagrees that the final rule should require providers to submit additional types of documents suggested by commenters, other than one category of document set out in § 1040.4(b)(1)(i)(B) below. The Bureau believes that the documents required by § 1040.4(b)(1)(i) capture significant data on the timing of arbitration proceedings and any delays. Specifically, the documents the Bureau will receive—claims, answers to claims, and awards—will themselves show dates and permit the Bureau to determine the time between filing and awards in many cases. The submission of additional documents on timing would likely increase burden on providers without a clear benefit to consumers, the policymaking of the Bureau, or others.

The Bureau also disagrees with the consumer advocate commenter that the final rule should require the submission of records, information or *ex parte* communications pertaining to potential conflicts of interests (including financial relationships between providers and an arbitrator or arbitral administrator), or attempts to influence arbitrators or administrators. The Bureau believes such requirements would be redundant in that attorneys and arbitrators in arbitral proceedings are already subject to ethical or professional rules requiring the disclosure of any relationships or communications that may create the appearance of a conflict of interest or

[1076] The Bureau addressed comments regarding its preliminary finding that the monitoring proposal was in the public interest and for the protection of consumers above in Part VI.B.

[1077] Specifically, the consumer advocate commenter referred to an example outside of the context of consumer finance in which a company put pressure on the arbitration administrator to overrule or reverse an arbitrator who had determined that the relevant pre-dispute arbitration agreement permitted classwide arbitration. According to the commenter, such communications between the company and the arbitration administrator were not disclosed to the consumer.

[1078] Specifically, the consumer advocate referred to the example, discussed above, of the relationship between the NAF and a debt collection company, both of which were owned by the same parent company.

unfairness.[1079] The Bureau believes that the commenter's suggestion could involve complicated questions as to what types of records fall within the scope of the requirement and heighten burdens on all providers subject to the monitoring rule. The Bureau believes that § 1040.4(b)(i) will substantially increase transparency into arbitration proceedings. The Bureau intends to continue to monitor arbitration proceedings going forward for conflicts of interest, and other issues, and may consider further measures or requirements as needed.

The Bureau agrees with a consumer advocate commenter that the receipt of information on the protected group status of consumers subject to pre-dispute arbitration agreements, whether or not the consumers were parties to an arbitration proceedings, could be potentially useful in analyzing the disparate impact of such agreements on protected groups. However, the Bureau views the collection of such data about consumers that were deterred from making claims at all as impracticable in the context of this rulemaking. The consumer lawyer admitted in its comment the difficulties of devising a practicable means to obtain such information without drawing the attention of arbitrators to the protected group status of the consumer.

The Bureau disagrees with the comment that Tribal entities should be excluded from the monitoring proposal because the Bureau could instead collaborate with Tribal regulatory bodies to engage in information sharing. The Bureau believes that practically speaking, this part of the proposal should have no or minimal impact on most Tribal entities, given that the final rule's exemption. The Bureau also believes that those entities that do use arbitration agreements should find it simpler and less time-consuming to comply with the relatively simple provisions of the rule, rather than waiting for collaborations between different Tribal regulatory bodies and the Bureau to develop *ad hoc* information-sharing schemes with each Tribal regulator and lender subject to that regulator.

4(b)(1)(i)(A)

Proposed § 1040.4(b)(1)(i)(A) would have required providers to submit any initial claims filed in arbitration pursuant to a pre-dispute arbitration agreement and any counterclaims. By ''initial claim,'' the Bureau meant the filing that initiates the arbitration, such as the initial claim form or demand for arbitration.

One industry commenter suggested that proposed § 1040.4(b)(1)(i) should be modified to require that providers submit only the ''substance of'' initial statements of claims and any counterclaim in arbitration. The industry commenter reasoned that consumers often submit additional documents as attachments to statements of claim, such as bank statements, that would require extensive and burdensome redactions.

Section 1040.4(b)(1)(i)(A) is finalized as proposed. The Bureau concludes that a statement of claim is necessary to understand the nature of a dispute. As discussed in detail above, the Bureau believes that collecting claims will permit the Bureau to monitor arbitrations on an ongoing basis and identify trends in arbitration proceedings, such as changes in the frequency with which claims are filed, the subject matter of the claims, and who is filing the claims. Based on the Bureau's expertise in handling and monitoring consumer complaints as well as monitoring private litigation, the monitoring of claims will also help the Bureau identify business practices that harm consumers.

The Bureau disagrees that providers should be permitted to summarize the ''substance of'' initial statements of claims simply because consumers may attach additional documents to statements of claim that may require redaction before submission. The Bureau believes that any redaction burden will be limited in cost, even for lengthier additional documents, based on its experience of having reviewed statements of claim in the course of the Study,[1080] and that writing a summary could be more burdensome than redacting text. Further, the Bureau believes that a provider's summary of a consumer's statement of claim may not fully express the consumer's understanding of a dispute. In any case, new § 1040.4(b)(1)(i)(B), described below, requires providers to submit answers to statements of claim, giving providers the opportunity to address any potentially erroneous or misleading statements made by consumers.

4(b)(1)(i)(B)

In the final rule, the Bureau is adopting new § 1040.4(b)(1)(i)(B) (proposed § 1040.4(b)(1)(i)(B) is renumbered as § 1040.4(b)(1)(i)(C)), which requires that providers should also submit answers to arbitration statements of claim.

The Bureau is adopting § 1040.4(b)(1)(i)(B) in response to several commenters' concern that the original proposal, which only required the submission of initial claims and counterclaims, could result in a one-sided presentation of the facts in an arbitration proceeding, especially where no award was issued. Specifically, the Bureau adopts the suggestion by one Tribal commenter that providers be required to submit answers to initial claim filings.

As the Study demonstrated, most arbitration proceedings do not result in a final award or judgment issued by a neutral arbitrator.[1081] Under the Bureau's original proposal, in the absence of an award, the only information on the substantive dispute at issue in most arbitration proceedings would have been the initial claims and counterclaims. The Bureau believes that requiring providers to submit answers to initial claims and counterclaims will result in a more balanced understanding of arbitration proceedings and that the additional burden will be minimal. The Bureau believes that § 1040.4(b)(1)(i)(B) should alleviate the concerns of industry commenters noted above. Section 1040.4(b)(1)(i)(B) also requires the submission of consumers' answers to statements of claim filed against them. This will similarly help offer a more balanced view of provider-filed statements of claims (or counterclaims).

4(b)(1)(i)(C)

Proposed § 1040.4(b)(1)(i)(B) would have required providers to submit, in connection with any claim filed in arbitration by or against the provider, the pre-dispute arbitration agreement filed with the arbitrator or arbitration administrator. The Bureau noted in the proposal that, due to concerns relating

[1079] *See, e.g.,* American Bar Ass'n, ''Model Rules of Professional Conduct,'' at Rule 3.5 (A lawyer shall not: (a) Seek to influence a judge . . . or other official by means prohibited by law; (b) communicate *ex parte* with such a person during the proceeding unless authorized to do so by law or court order . . . .''); AAA, ''Code of Ethics for Arbitrators in Commercial Disputes,'' at Canon II (''An arbitrator should disclose any interest or relationship likely to affect impartiality or which might create an appearance of partiality.''); JAMS, ''Arbitrator Ethics Guidelines,'' at V.A. (''An Arbitrator should promptly disclose, or cause to be disclosed all matters required by applicable law and any actual or potential conflict of interest or relationship or other information, of which the Arbitrator is aware, that reasonably could lead a Party to question the Arbitrator's impartiality.'').

[1080] *See* Study, *supra* note 3, section 5 at 19–32 (analyzing 1,847 individual consumer arbitration claims before the AAA).

[1081] *Id.* section 5 at 11 (''As with other systems of dispute resolution, only a minority of consumer financial arbitrations reached the point where there was a decision on the merits of the parties' claims. Specifically, arbitrators resolved less than a third (32.2 percent) of the consumer financial arbitration disputes on the merits.'').

to burden on providers and the Bureau itself, the Bureau did not propose to collect all pre-dispute arbitration agreements that are provided to consumers. Instead, it proposed only to require submission in the event an arbitration filing occurs.[1082] By collecting the pre-dispute arbitration agreement in such situations, the Bureau would have been able to monitor the impact that particular clauses in the agreement have on the conduct of an arbitration. For example, collecting pre-dispute arbitration agreements pursuant to which arbitrations were filed—combined with collecting awards pursuant to proposed § 1040.4(b)(1)(i)(C)—would have permitted the Bureau to gather information on whether clauses specifying that the parties waive certain substantive rights when pursuing the claim in arbitration affect outcomes in arbitration.

A nonprofit commenter and a consumer advocate commenter suggested that all entities covered by the rule should submit all pre-dispute arbitration agreements covered by the rule to the Bureau. The same nonprofit commenter suggested that all amendments to pre-dispute arbitration agreements should also be subject to the submission requirement, and that any information on pre-dispute arbitration agreements that require hearings in fora inconvenient to consumers should be submitted to the Bureau. Another consumer advocate suggested that entities supervised by the Bureau that are also providers under the rule be required to submit all of their covered pre-dispute arbitration agreements to the Bureau. These commenters argued that such additional steps were warranted because they believed that individual arbitration proceedings themselves were problematic and unfair to consumers, that smaller providers were not likely to drop their pre-dispute arbitration agreements, and that pre-dispute arbitration agreements themselves could be reviewed for unfairness to consumers.

Proposed § 1040.4(b)(1)(i)(B), renumbered in this final rule as § 1040.4(b)(1)(i)(C), is finalized as proposed. By collecting the pre-dispute arbitration agreement in filed arbitrations, the Bureau will be able to monitor the impact that particular clauses in an agreement have on the conduct of arbitrations. The Bureau disagrees with consumer advocate commenters that this provision should be expanded to require all providers to submit pre-dispute arbitration agreements to the Bureau. The Bureau noted in its proposal that, due to concerns relating to burden on providers and the Bureau itself, the Bureau did not propose to collect all pre-dispute arbitration agreements that are provided to consumers. None of the comments suggested ways to mitigate such burdens. Further, the Bureau believes that many providers that use pre-dispute arbitration agreements, but will not be required by § 1040.4(b)(1)(i)(C) to submit such agreements to the Bureau because they are not a party to an arbitration proceeding, may be required by other Bureau regulations to submit pre-dispute arbitration agreements in any case. Pursuant to Regulation Z, credit card issuers are already required to submit their consumer agreements to the Bureau. *See* 12 CFR 1026.58. The Bureau also will require the collection of prepaid account agreements. *See* 12 CFR 1005.19(b) (effective October 1, 2018). Further, the Bureau may monitor the arbitration activities and review the arbitration records of the providers subject to the Bureau's supervision authority in examinations.

4(b)(1)(i)(D)

Proposed § 1040.4(b)(1)(i)(C) would have required providers to submit the judgment or award, if any, issued by the arbitrator or arbitration administrator in an arbitration subject to proposed § 1040.4(b). This proposed requirement was intended to reach only awards issued by an arbitrator that resolved an arbitration and not settlement agreements that are not incorporated into an award. The Bureau believes that the proposed submission of these awards would aid the Bureau in its ongoing review of arbitration and help the Bureau assess whether arbitrations are being conducted fairly and without bias.

An industry commenter suggested that the Bureau should not collect awards or judgments for a number of reasons, including that the proposal would discourage arbitrators from making explicit findings, knowing that the Bureau might subject the provider to further scrutiny, and that the proposal would put the onus on arbitrators to assess the fairness of arbitration agreements when it is the role of courts to analyze the fairness of such agreements.

Proposed § 1040.4(b)(1)(i)(C), renumbered as § 1040.4(b)(1)(i)(D), is finalized as proposed. As discussed in detail in Part VI.D, the Bureau disagrees with the industry commenter that argued that this provision of the rule may disincentivize arbitrators from making certain findings. Indeed, the Bureau believes publication will make arbitrators more deliberative in their decision-making, and that this is in the public interest and for the protection of consumers. The Bureau agrees with the commenter that suggested that this provision may also subject some providers to further Bureau scrutiny, especially if they are repeatedly involved in arbitrations. The Bureau believes that such an outcome is a potential benefit. The Bureau believes that it is in the public interest and for the protection of consumers to subject certain providers—especially those that have multiple final awards against them from consumers on the same issue—to further scrutiny from the Bureau, other regulators, and the public regarding the providers' business and compliance practices. Overall, the Bureau believes that the submission of awards will aid the Bureau in its ongoing review of arbitration and help the Bureau assess whether arbitrations are being conducted fairly and without bias.

4(b)(1)(i)(E)

Proposed § 1040.4(b)(1)(i)(D) would have applied where an arbitrator or arbitration administrator refuses to administer or dismisses a claim due to the provider's failure to pay required filing or administrative fees. If this were to occur, proposed § 1040.4(b)(1)(i)(D) would have required the provider to submit any communication the provider receives from the arbitration administrator related to such a refusal or dismissal. As the proposal explained with regard to communications relating to nonpayment of fees, the Bureau understands that arbitrators or administrators, as the case may be, typically refuse to administer an arbitration proceeding if filing or administrative fees are not paid. The Bureau understands that arbitrators or administrators will typically send a letter to the parties indicating that the arbitration has been suspended due to nonpayment of fees.[1083] Pre-dispute arbitration agreements often mandate that the provider, rather than the consumer, pay some of the consumer's arbitration fees.[1084]

Where providers successfully move to compel a case to arbitration (and obtain its dismissal in court), but then fail to pay the arbitration fees, consumers may be left unable to pursue their claims in

[1082] As noted below, credit card and prepaid account issuers are already required to submit their consumer agreements to the Bureau.

[1083] *See* AAA, Consumer Arbitration Rules, *supra* note 137, at 32; JAMS Streamlined Arbitration Rules, *supra* note 139, at 9.

[1084] Study, *supra* note 3, section 5 at 58.

either forum. The Study identified at least 50 instances of such nonpayment of fees by companies in cases filed by consumers.[1085] The Bureau had proposed § 1040.4(b)(1)(i)(D) to permit it to monitor nonpayment of fees by providers whose consumer contracts include pre-dispute arbitration agreements and whether particular entities appear to be not paying fees as part of a tactical effort to avoid arbitration, which essentially forecloses a consumer's ability to bring a claim if the claim is governed by a pre-dispute arbitration agreement. The Bureau had further expected that requiring submission of communications related to nonpayment of fees would discourage providers from engaging in such activity.

Proposed § 1040.4(b)(1)(i)(D) would have required providers to submit communications from arbitration administrators related to the dismissal or refusal to administer a claim for nonpayment of fees even when such nonpayment is the result of a settlement between the provider and the consumer. The Bureau believed this requirement would have prevented providers who engage in strategic nonpayment of arbitration fees to claim, in bad faith, ongoing settlement talks to avoid the disclosure to the Bureau of communications regarding their nonpayment. The Bureau had anticipated that companies submitting communications pursuant to proposed § 1040.4(b)(1)(i)(D) could indicate in their submission that nonpayment resulted from settlement and not from a tactical maneuver to prevent a consumer from pursuing the consumer's claim. Further, as stated above in the discussion of proposed § 1040.4(b)(1)(i)(C), the Bureau would have required submission of the underlying settlement agreement or a notification that a settlement has occurred.

One consumer advocate commenter suggested that the Bureau should require providers to submit a number of other documents or data related to costs and fees in arbitration proceedings, including documents on the arbitration and administrative costs paid by providers and consumers in arbitration to ensure that the Bureau would be aware of general cost levels, documents relating to requests or grants of a reduction in arbitration costs for the consumer to see how often providers helped make arbitration proceedings affordable for consumers.

Proposed § 1040.4(b)(1)(i)(D), renumbered as § 1040.4(b)(1)(i)(E), is finalized as proposed. The Bureau believes this provision will provide transparency as to fee practices generally, and that companies submitting communications pursuant to final § 1040.4(b)(1)(i)(E) can indicate in their submission that nonpayment resulted from settlement. The Bureau believes that the general attention to this issue will discourage providers from claiming in bad faith that the nonpayment of fees is due to ongoing settlement talks when in fact they are engaged in a tactical maneuver to prevent a consumer from pursuing the consumer's claim.

The Bureau disagrees with consumer advocate commenters that it should require that providers submit additional records on the cost of the arbitration. The Bureau does not believe that the additional data commenters have suggested collecting would be useful enough to justify the additional burden it would pose to collect and analyze such documents. The final rule already addresses the most serious cost-related issue identified in the Study and § 1040.4(b)(1)(i)(E) requires the submission of records pertaining to a party's refusal to pay required arbitrator or administrator costs or fees. There may be some incremental benefit to receiving further documents detailing costs, such as documents on *in forma pauperis* applications or hardships requests consumers make to arbitration administrators for exceptions from paying filing fees. However, the Bureau believes that § 1040.4(b)(1)(i)(E) will alert the Bureau to certain cost-related issues identified in the Study that can stop consumers from pursuing claims completely while keeping the burden on providers of submitting records relatively low.[1086] The Bureau further believes that it may be possible to estimate such cost data from arbitration administrator rules and documents it will collect, including pre-dispute arbitration agreements and arbitrators' awards, which will inform the Bureau on general cost structures, indicate whether fee-shifting is allowed, and document fee awards. The Bureau understands that the cost structure of many arbitration provisions is potentially burdensome on many consumers, and that other cost provisions such as fee-shifting can exacerbate this potential burden. The collection of many pre-dispute arbitration agreements giving rise to specific arbitration proceedings pursuant to § 1040.4(b)(1)(i)(C) will permit the Bureau to review fee structures and fee-shifting provisions faced by consumers while limiting additional burden on providers.

4(b)(1)(ii)

The Bureau's Proposal

Proposed § 1040.4(b)(1)(ii) would have required providers to submit to the Bureau any communication from an arbitrator or arbitration administrator related to a determination that a provider's pre-dispute arbitration agreement does not comply with the administrator's fairness principles, rules, or similar requirements. The Bureau was concerned about providers' use of arbitration agreements that may violate arbitration administrators' fairness principles or rules. Several of the leading arbitration administrators maintain such principles or rules, which the administrators use to assess the fairness of the company's pre-dispute arbitration agreement.[1087] These administrators may refuse to hear an arbitration if the company's arbitration agreement does not comply with the relevant fairness principles or rules.[1088] At least one administrator will also review a company's agreement preemptively—before an arbitration claim has been filed—to determine if the agreement complies with the relevant fairness principles or rules.[1089]

The Bureau believed that requiring submission of communications from administrators concerning agreements that do not comply with arbitration administrators' fairness principles or rules would allow the Bureau to monitor which providers could be attempting to harm consumers or discourage the filing of claims in arbitration by mandating that disputes be resolved through unfair pre-dispute arbitration agreements. The Bureau also believed that requiring submission of such communications could further discourage covered entities from inserting pre-dispute arbitration agreements in consumer contracts that do not meet arbitrator fairness principles or rules.

Proposed comment 4(b)(1)(ii)–1 would have clarified that, in contrast to the other records the Bureau proposes to collect under proposed § 1040.4(b)(1), proposed § 1040.4(b)(1)(ii) would have required the submission of communications both when the

[1085] *Id.* section 5 at 66 n.110. The Bureau has similarly received consumer complaints involving entities' alleged failure to pay arbitral fees.

[1086] *See id.* section 5 at 76.

[1087] *See* AAA Consumer Due Process Protocol, *supra* note 142; JAMS Policy on Consumer Arbitrations, *supra* note 140.

[1088] *See* AAA Consumer Arbitration Rules, *supra* note 137, at 10; JAMS Streamlined Arbitration Rules, *supra* note 139, at 6.

[1089] *See* AAA Consumer Arbitration Rules, *supra* note 137, at 16.

determination occurs in connection with the filing of a claim in arbitration as well as when it occurs if no claim has been filed. Proposed comment 4(b)(1)(ii)–1 would have stated further that, if such a determination occurs with respect to a pre-dispute arbitration agreement that the provider does not enter into with a consumer, submission of any communication related to that determination is not required. The Bureau proposed this comment because it had understood that providers may submit pre-dispute arbitration agreements to administrators before incorporating the agreements into actual contracts.[1090] The proposed comment would have stated that, if the provider submits a prototype pre-dispute arbitration agreement for review by the arbitration administrator and never actually includes it in any consumer agreements, the pre-dispute arbitration agreement would not be entered into by a consumer and thus submission to the Bureau of communication related to a determination made by the administrator concerning the pre-dispute arbitration agreement would not be required. The Bureau believes that this clarification is needed to avoid discouraging providers from submitting prototype pre-dispute arbitration agreements to administrators for their review.

Proposed comment 4(b)(1)(ii)–2 would have clarified that what constitutes an administrator's fairness principles or rules pursuant to proposed § 1040.4(b)(ii)(B) should be interpreted broadly. Further, that comment would have provided current examples of such principles or rules, including the AAA's Consumer Due Process Protocol and the JAMS Policy on Consumer Arbitrations Pursuant to Pre-Dispute Clauses Minimum Standards of Procedural Fairness.[1091]

Comments Received

The Bureau did not receive specific comments addressing the requirement in proposed § 1040.4(b)(1)(ii) that providers submit communications related to non-compliance with an arbitration administrator's fairness protocols. The Bureau received comments that implicated proposed § 1040.4(b)(1)(ii) from a consumer advocate that argued that the Bureau should promulgate specific due process or fairness standards for the content of pre-dispute arbitration agreements or the actual actions of providers in the course of arbitration proceedings rather than relying on the administrators to do so. The consumer advocate commenter asserted that individual arbitration itself is unfair and systematically favors providers and urged that if the Bureau is not going to prohibit arbitration altogether it should prescribe minimum standards for arbitration.

The Final Rule

The Bureau finalizes § 1040.4(b)(1)(ii) as proposed. For the reasons set out above in Part VI.B, the Bureau disagrees that it should adopt due process or fairness standards or should otherwise regulate provider conduct in arbitration proceedings. In the absence of additional data presented by commenters showing systematic unfairness in individual arbitrations, the Bureau believes that requiring providers to submit correspondence from administrators on the non-compliance of pre-dispute arbitration agreements with administrator due process or fairness rules will aid the Bureau in identifying potential widespread unfairness to consumers while imposing minimal burden. In addition, the Bureau expects to use its supervisory function and may review other data—including credit card agreements and prepaid account agreements that providers are or will be required to submit to the Bureau[1092]—to further aid its efforts to review providers' pre-dispute arbitration agreements for potential fairness issues.

The Bureau is also finalizing comments 4(b)(1)(ii)–1 and –2 as proposed, having received no comments on this specific commentary.

4(b)(1)(iii)

Prior to the publication of the monitoring proposal, consumer advocates and some other stakeholders had expressed concern that a proposal under consideration similar to proposed § 1040.4(b) that the Bureau described in its SBREFA Outline would allow the Bureau to monitor certain arbitration trends, but not to monitor or quantify the claims that consumers may have been deterred from filing because of the existence of a pre-dispute arbitration agreement. In particular, consumer advocates and some other stakeholders had expressed concern that pre-dispute arbitration agreements discourage consumers from filing claims in court or in arbitration and discourage attorneys from representing consumers in such proceedings.

After the publication of proposed § 1040.4(b), other consumer lawyer and consumer advocate commenters suggested that the Bureau require providers to submit records anytime they rely on a pre-dispute arbitration agreement, specifically in the context of court filings in which, for instance, a party invokes a pre-dispute arbitration agreement to compel arbitration. The commenters asserted that requiring providers to submit litigation filings that rely on pre-dispute arbitration agreements would be an important means of monitoring the extent to which providers were using such filings to block individual litigation from proceeding (insofar as they could no longer be used to block class actions). More specifically, commenters suggested that the addition of such data would make it clear whether providers filed such motions to move consumers to arbitration as a preferred forum for formal dispute settlement instead of litigation, or whether providers were filing motions to compel arbitration to discourage consumers from proceeding at all. According to commenters, the absence of arbitration proceedings corresponding to motions made in litigation to compel arbitration would suggest that providers may have used arbitration agreements as a means to suppress claims outright, thus discouraging consumers from filing any type of formal claim.

In response to these comments and other concerns, the Bureau adopts new § 1040.4(b)(1)(iii), which requires providers to submit certain records that providers file in court. Specifically, new § 1040.4(b)(1)(iii)(A) requires that a provider submit to the Bureau any motion or filing sent by that provider to a court that relies on a pre-dispute arbitration agreement. Pursuant to this provision, providers are required to submit motions attempting to dismiss, defer, or stay any aspect of a case in court where such motions rely in whole or in part on an arbitration agreement. The Bureau believes that collecting materials related to the invocation of an arbitration agreement will aid it in determining the frequency with which providers compel arbitration in response to individual litigation claims, the content of such motions to compel, and whether such claims actually end up being heard in arbitration rather than simply disappearing. The Bureau also agrees with the concern expressed by consumer advocates and some other

[1090] A business that intends to provide the AAA as a potential arbitrator in a consumer contract must notify the AAA at least 30 days before the planned effective date of the contract and provide a copy of the arbitration agreement to the AAA. AAA Consumer Arbitration Rules, *supra* note 137, at 16.

[1091] AAA Consumer Due Process Protocol, *supra* note 138; JAMS Policy on Consumer Arbitrations, *supra* note 140. The Bureau notes that it would be offering these specific principles or rules merely to assist providers with compliance; this comment does not represent an endorsement by the Bureau of these specific principles or rules.

[1092] *See* 12 CFR 1026.58; 12 CFR 1005.19(b).

stakeholders that a requirement like proposed § 1040.4(b) would not have permitted the Bureau to monitor or quantify the claims that consumers may have been deterred from filing because of the existence of a pre-dispute arbitration agreement. The Bureau believes that the collection of motions to compel arbitration, in conjunction with the other arbitral records it will receive, will help track whether such claims are ultimately heard in arbitration rather than being dropped entirely, which could in turn shed more light on the extent to which consumers are deterred from pursuing individual claims more generally because of arbitration agreements.

The Bureau also finalizes new § 1040.4(b)(1)(iii)(B), which requires that the provider submit to the Bureau the pre-dispute arbitration agreement relied on in the provider's motion to dismiss, defer or stay a case, which the provider is required to submit pursuant to § 1040.4(b)(1)(iii)(A). The Bureau believes that § 1040.4(b)(1)(iii)(B) is needed to capture all pre-dispute arbitration agreements relied on in documents responsive to new § 1040.4(b)(1)(iii)(A). While such pre-dispute arbitration agreements are often attached to motions to dismiss or stay that are filed to compel arbitration, the Bureau has noted, in reviewing such records during the course of the Study, that occasionally some documents are simply cross-referenced to other documents filed in the litigation. The Bureau believes that it is important to gather data on the frequency of filings relying on pre-dispute arbitration agreements, and whether the content of such arbitration agreements discourages or induces a consumer (or her attorney) to file the same claim against the provider in arbitration rather than litigation.

The Bureau also adopts new commentary to clarify the application of § 1040.4(b)(1)(iii). Comment 4(b)(1)(iii)–1 clarifies that § 1040.4(b)(1)(iii)(A) requires the submission of court filings only if they rely on pre-dispute arbitration agreements entered into after the compliance date set forth in § 1040.5(a). Providers are only required to submit the initial motion relying upon a pre-dispute arbitration agreement; they need not submit later response documents, such as a consumer's opposition to the motion, or a provider's reply.[1093]

New comment 4(b)(1)(iii)–2 sets out examples of certain types of court documents that do not trigger the obligation under § 1040.4(b)(1)(iii)(A) to submit records to the Bureau because they are not relying upon an arbitration agreement in support of an attempt to seek dismissal, deferral, or stay of any aspect of a case.[1094] New comment 4(b)(1)(iii)–2.i clarifies that § 1040.4(b)(1)(iii)(A) does not require providers to submit to the Bureau objections to discovery requests or motions seeking a protective order in response to a discovery request if either relies on an arbitration agreement, since such motions would not shed light on whether individual litigation claims are refiled in arbitration or are dropped completely. New comment 4(b)(1)(iii)–2.ii clarifies that under § 1040.4(b)(1)(iii)(A), providers are not required to submit answers to a complaint or the answers to a counterclaim if those materials only refer to an arbitration agreement. New comment 4(b)(1)(iii)–2.iii clarifies that under § 1040.4(b)(1)(iii)(A), providers are not required to submit motions or filings that have as attachments a consumer's contract that contains a pre-dispute arbitration agreement if the provider does not rely on or cite to the arbitration agreement in the motion.

4(b)(2) Deadline for Submission

Proposed § 1040.4(b)(2) would have stated that a provider shall submit any record required by proposed § 1040.4(b)(1) within 60 days of filing by the provider of any such record with the arbitration administrator and within 60 days of receipt by the provider of any such record filed or sent by someone other than the provider, such as the arbitration administrator or the consumer. The Bureau proposed a 60-day period for submitting records to the Bureau to allow providers a sufficient amount of time to comply with these requirements. The Bureau proposed what it believed to be a relatively lengthy deadline because it expected that providers would continue to face arbitrations infrequently,[1095] and, as a result, might not have a regularized process for redacting and submitting the required records. This proposed 60-day period is consistent with feedback the Bureau received from the SERs during the Small Business Review panel process who expressed concern that a short deadline might burden companies given the relative infrequency of arbitration and, thus, their potential unfamiliarity with this particular requirement.

A group of State attorneys general commenters agreed generally with proposed § 1040.4(b)(2), stating that some manner of timing obligation was needed to ensure that providers did not delay submitting required records to the Bureau. The group of State attorneys general also suggested that the Bureau establish a penalty regime for providers that fail to comply with proposed § 1040.4(b)(2). An industry commenter requested a good cause exception from proposed § 1040.4(b)(2) in the event of natural disasters or unforeseen technical errors, on the grounds that any inadvertent non-compliance would result in further class action liability.

The Bureau finalizes § 1040.4(b)(2) as proposed. The Bureau does not agree with the group of State attorneys general that a new penalty regime is necessary to obtain the compliance of providers. The Bureau believes that the Dodd-Frank Act already contains sufficient penalty mechanisms to incentivize compliance with the deadlines set by § 1040.4(b)(2).[1096]

The Bureau also disagrees with the industry commenter that said that an explicit ''good cause'' exception is necessary given the time providers have to submit records required by § 1040.4(b)(1). The commenter did not explain why a 60-day period was insufficient to cope with unexpected delays in complying with a relatively simple requirement—to electronically send a small quantity of documents to the Bureau. As to the industry commenter's concern that late-filing records in violation of § 1040.4(b)(2) could lead to class action liability, there is no private right of action for a

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[1093] To limit the potential burden on providers, the Bureau will only require providers to submit the initial motion relying on an arbitration agreement. The Bureau expects to be able to collect other related documents, such as the order ruling on the motion or opposition or reply briefs by taking the docket number set out in the initial motion and searching for other documents in public sources or databases available to the Bureau. By contrast, the Bureau cannot obtain arbitration records on its own.

[1094] The comment is intended in part to emphasize that the focus of inquiry under § 1040.4(b)(1)(iii) is whether a provider is relying upon an arbitration agreement in support of an attempt to seek dismissal, deferral, or stay of any aspect of a case, in order to assist the Bureau in tracking whether such individual cases are eventually refiled in arbitration. In contrast, § 1040.4(a) focuses on whether providers rely on arbitration in any aspect of class litigation, which is a broader focus for different purposes.

[1095] *See* Study, *supra* note 3, section 5 at 9 (stating that, from 2010 to 2012, 1,847 individual AAA cases, or about 616 per year, were filed for six consumer financial product markets).

[1096] *See* Dodd-Frank Act Section 1055(a)(1) (''The court (or the Bureau, as the case may be) in an action or adjudication proceeding brought under Federal consumer financial law, shall have jurisdiction to grant any appropriate legal or equitable relief with respect to a violation of Federal consumer financial law, including a violation of a rule or order prescribed under a Federal consumer financial law'').

provider's failure to comply with this Part.

4(b)(3) Redaction

The Bureau's Proposal

Proposed § 1040.4(b)(3) would have required providers to redact certain specific types of information that can be used to directly identify consumers before submitting arbitral records to the Bureau pursuant to proposed § 1040.4(b)(1). The Bureau endeavors to protect the privacy of consumer information. Additionally, as discussed more fully above, the Bureau had proposed § 1040.4(b), in part, pursuant to its authority under Dodd-Frank section 1022(c)(4), which provides that the Bureau may not obtain information ''for purposes of gathering or analyzing the personally identifiable financial information of consumers.'' The Bureau stated that it had no intention of gathering or analyzing information that directly identifies consumers. At the same time, the Bureau sought to minimize the burden on providers by providing clear instructions for redaction.

Accordingly, the Bureau had proposed § 1040.4(b)(3), which would require that providers, before submitting arbitral records to the Bureau pursuant to proposed § 1040.4(b), redact nine specific types of information that directly identify consumers. The Bureau believed that these nine items would be easy for providers to identify and, therefore, that redacting them would impose minimal burden on providers. Proposed comment 4(b)(3)–1 would have clarified that providers are not required to perform the redactions themselves and may assign that responsibility to another entity, such as an arbitration administrator or an agent of the provider.

Pursuant to proposed § 1040.4(b)(3)(i) through (v), the Bureau would have required providers to redact names of individuals, except for the name of the provider or arbitrator where either is an individual; addresses of individuals, excluding city, State, and zip code; email addresses of individuals; telephone numbers of individuals; and photographs of individuals from any arbitral records submitted to the Bureau. The Bureau noted that, with the exception of the names of providers or arbitrators where either are individuals, information related to *any* individuals—not merely the consumer to whom the consumer financial product is offered or provided—would have been required to be redacted pursuant to proposed § 1040.4(b)(3)(i) through (v). This would have included names or other items of information relating to third-party individuals, such as individual employees of the provider.

Proposed § 1040.4(b)(3)(ii) would have required redaction of street addresses of individuals, but not cities, States, and zip codes. The Bureau believes that collecting such high-level location information for arbitral records could, among other things, help the Bureau match the consumer's location to the arbitral forum's location in order to monitor issues such as whether consumers are being required to arbitrate in remote fora, and could assist the Bureau in identifying any local or regional patterns in consumer harm as well as arbitration activity. The Bureau believes that collecting city, State, and zip code information would pose limited privacy risk, and that any residual risk would be balanced by the benefit derived from collecting this information.

Proposed § 1040.4(b)(3)(vi) through (ix) would have required redaction from any arbitral records submitted to the Bureau, of account numbers, social security and tax identification numbers, driver's license and other government identification numbers, and passport numbers. These redaction requirements would not have been limited to information for individual persons because the Bureau believes that the privacy of any account numbers, social security, or tax identification numbers should be maintained to the extent they may be included in arbitral records.

The Bureau noted that it did not broadly propose to require providers to redact all types of information that could be deemed to be personally identifiable financial information (PIFI). Because Federal law prescribes a broad definition of PIFI,[1097] the Bureau believed that generally requiring redaction of all PIFI could impose a significant burden on providers while affording few, if any, additional protections for consumers relative to the redactions the Bureau proposed to require. As such, the list of items in proposed § 1040.4(b)(3)(i) through (ix) identified the examples of PIFI that the Bureau anticipated were likely to exist in the arbitral records that would be submitted under § 1040.4(b)(1). The Bureau's preliminary view was that the list of items struck the appropriate balance between protecting consumer privacy and imposing a reasonable redaction burden on providers, particularly given that the Bureau proposed to conduct further review and redaction prior to any public release as discussed in the proposal and what is now new § 1040.4(b)(5).

Comments Received

The Bureau did not receive comments that addressed the specific categories of redactions set out in § 1040.4(b)(3)(i) through (ix). Some comments expressed more general privacy concerns about the Bureau's proposed collection of materials, although these comments did not explicitly acknowledge that the Bureau had proposed to require redactions or state whether the proposed redactions actually addressed their concerns. Some industry commenters expressed general concerns that the submission of arbitration records would expose consumers to a risk of privacy and data security violations. These comments did not detail the nature of this risk. Another industry commenter expressed concern that the Bureau was forcing the exposure of the private data of consumers without their consent. Another industry commenter argued that the submission requirement compromised the privacy of the provider's employees.

Final Rule

The Bureau finalizes § 1040.4(b)(3)(i) through (ix) as proposed. The more general comments concerning privacy, data security, and employee confidentiality are addressed in Part VI.D. No comments suggested specific additional redactions to further minimize privacy risks to consumers or other parties, or suggested that additional categories of PIFI are likely to be included in records submitted under § 1040.4(b)(1). The Bureau continues to believe that the redaction requirements substantially reduce privacy and data security risks. To address the concern one industry commenter expressed about the privacy of its employees' names, the Bureau affirms that § 1040.4(b)(3)(i), which requires the redaction of the names of all individuals other than the arbitrator or the provider, applies to the names of providers' employees.

The Bureau also finalizes proposed comment 4(b)(3)–1, now renumbered as comment 4(b)–2, as set out above. The Bureau received no comments on whether providers should be permitted to have another entity perform redactions, such as an arbitration

[1097] Federal regulations define ''personally identifiable financial information'' as ''any information: (i) A consumer provides to you to obtain a financial product or service from you; (ii) About a consumer resulting from any transaction involving a financial product or service between you and a consumer; or (iii) You otherwise obtain about a consumer in connection with providing a financial product or service to that consumer.'' 12 CFR 1016.3(q)(1).

administrator or an agent of the provider.

4(b)(4) Internet Posting of Arbitration-Related Records

The Bureau's Proposal

The Bureau stated in the proposal that it intended to publish arbitral records collected pursuant to proposed § 1040.4(b)(1). The Bureau had considered whether to publish such records individually or in the form of aggregated data. Prior to publishing such records, the Bureau stated that it would have ensured that they had been redacted, or that the data was aggregated, in accordance with applicable law, including Dodd-Frank section 1022(c)(8), which requires the Bureau to ''take steps to ensure that proprietary, personal, or confidential consumer information that is protected from public disclosure under [the Freedom of Information Act or the Privacy Act] or any other provision of law[] is not made public under this title.''

The Bureau sought comment on the publication of the records that would have been required to be submitted by proposed § 1040.4(b)(1), including whether it should limit publication of particular items even after redaction based on particular consumer privacy concerns or whether commenters had other confidentiality concerns. Along similar lines, in the past some plaintiff's attorneys had noted their frustration with arbitral privacy. Some plaintiff's attorneys had noted in the past, for example, that arbitration did not allow them to file cases that can develop the law (because the outcomes are usually private and do not have precedential effect).[1098] In addition, the Bureau sought comment on whether it should publish arbitral records individually or in the form of aggregated data. The Bureau also sought comment on whether there were alternatives to publication by the Bureau—such as publication by other entities—that would have furthered the purposes of publication described above.

Comments Received

A number of commenters expressed general support for the Bureau's stated intention to publish the records it would receive. Academic, State attorneys general, and nonprofit commenters agreed that the Bureau should publish records it received. Specifically, academic commenters supported the publication of arbitration-related records and noted the importance of the publication of such records to academic research on consumer arbitration, which otherwise relied on the limited amount of data that arbitral administrators permitted non-parties to review. Academic, State attorneys general, and consumer advocate commenters also noted that the importance of such records to help regulators, including the Bureau and other State and Federal entities, analyze the impact of arbitration agreements on consumers. Consumer advocate commenters also suggested that the transparency created by publishing records would improve the quality of arbitrator decisions because arbitrators would know that their decisions would be scrutinized, would help providers that were not parties to the arbitration understand what activities might run afoul of the law, and might help consumers themselves learn to avoid harms.

A number of other commenters generally opposed the Bureau's stated intention of publishing records received. Several industry commenters expressed the concern that plaintiff's attorneys would review the published arbitration-related records and file frivolous claims, including class action litigation and individual arbitration proceedings regarding the claims made in the published records. A commenter that is an association of State regulators opposed the publication of records on the grounds that it would lead to more class action cases, which would exacerbate the difficulties of regulators' assessing the risks posed by class actions to providers. An industry commenter expressed the concern that the published records themselves would be the subject of class action litigation against providers that made any errors in redacting submitted records as required by proposed § 1040.4(b)(1), or that failed to include the language required by proposed § 1040.4(a)(1) in pre-dispute arbitration agreements. The commenter also suggested that the Bureau itself pursue any important information derived from the records rather than permitting third parties to review and exploit such information.

Another industry commenter suggested that the Bureau should not publish arbitral records because the Bureau's existing consumer complaint database already serves a similar function in publishing data on consumer disputes.

A commenter that is an association of State regulators opposed the Bureau's publication of records on the grounds that such a rule may conflict with State laws regarding the confidentiality of arbitral records. Industry commenters opposed the publication of records on the grounds that the rule would disregard confidentiality as a standard feature of arbitration.

Finally, some industry commenters requested an additional round of notice and comment on the Bureau's intent to publish records, especially to comment on the particulars of the process by which the Bureau intends to collect, secure, and disseminate arbitration data.

The Final Rule

The Bureau is finalizing new § 1040.4(b)(4), under which the Bureau shall establish and maintain on its Web site a central repository of the records collected pursuant to § 1040.4(b)(1). Section 1040.4(b)(4) requires that the Bureau make the arbitration-related records it collects from providers easily accessible and retrievable by the public on its Web site. In practice, the Bureau expects to comply with this rule by publishing the records, further redacted, if necessary, in accordance with new § 1040.4(b)(5), as discussed below, as PDF files. The Bureau expects that such records will be made searchable by the text of the records, as well as by date, the name of the arbitration administrator, the name of the provider and the type of consumer financial product or service at issue.

As discussed in detail in Part VI.D, the Bureau continues to believe it is important to publish the records it collects, with appropriate redactions. The Bureau believes that its experience with the Study and other market monitoring efforts has clarified the importance of publishing arbitration records to assist research (by academics and policymakers) on consumer finance arbitration and to help regulators, including the Bureau and other State and Federal bodies, to analyze consumers' experiences with arbitration and determine if further action is needed. The Bureau agrees that the publication of these records—including records on the resolution of arbitrations (many of which will not be available in published litigation records)—will also assist parties in arbitration and litigation more accurately determine whether their claims or defenses are likely to succeed or fail. The Bureau understands from the Study that most records pertaining to consumer financial arbitrations are kept private. However, such privacy is not inherent to arbitration, given that other arbitration fora publish individual arbitration records by default (such as FINRA), and

[1098] *See, e.g.,* ''Arbitration: Is It Fair When Forced?,'' Hearing before the S. Comm. on the Judiciary, 112th Cong. 177 (2011) (Prepared Statement of F. Paul Bland, Senior Attorney, Public Justice), at 81–82.

that AAA has begun to publish records of some consumer arbitrations.[1099]

As discussed above in connection with final § 1040.4(b)(1)(i)(D), the Bureau agrees with consumer advocate commenters that suggested that collecting and publishing records might improve the quality of some arbitrators' decisions because they know that their decisions may be more broadly scrutinized. The records that the Bureau reviewed in the Study suggested that arbitration awards were short or summary in nature at least compared to reasoned decisions in litigation; the Bureau believes that if publication results in more fulsome arbitrator decisions, this would be an added benefit of the rule.

The Bureau further agrees with the consumer advocate commenter that suggested that the publication of records will likely help providers understand what activities might run afoul of the law, and would help consumers learn about certain harmful practices resulting in arbitral awards for consumers. For example, the AAA consumer arbitration records the Bureau reviewed in the course of its Study contained filings on subjects that were not found in individual litigation. The Bureau agrees with industry commenters that the publication of records may lead to some class action litigations, but the Bureau disagrees that any increase is necessarily detrimental, as set out in its analysis of class actions in the findings section above. The Bureau disagrees that the act of producing the records themselves would be the subject of class action litigation against providers. While providers may make errors in redacting records as required by § 1040.4(b)(3) or may make errors in inserting into pre-dispute arbitration agreements the language required under § 1040.4(a)(1), the rule is not privately enforceable and the Bureau will further review and redact records before publishing. In any event, the Bureau does not expect such class actions could occur given the low number of arbitrations per company. The Bureau agrees that it should pursue and further investigate important information derived from the records it receives. The Bureau disagrees however that this information should be limited to the Bureau alone rather than to the public and other enforcement agencies. Making arbitration records transparent via publication would permit third parties—including private litigants and other regulators—to also monitor arbitration for fairness issues.

The Bureau disagrees with the industry commenter that suggested that the Bureau's existing consumer complaint database can serve the same function as a dedicated page or area on the Bureau's Web site focused on arbitral records and that an arbitration database would be duplicative of the complaint database. The complaint database is not designed to receive or publish the variety of arbitration records that providers are required to submit pursuant to this rule.

The Bureau disagrees with industry commenters as it does not believe that the Bureau's publication of records would conflict with State laws on the confidentiality of arbitral records. Published records will be redacted, by providers and by the Bureau, and thus the Bureau will take steps to appropriately reduce re-identification risk to individuals who are parties to the arbitrations. The Bureau also disagrees with industry commenters that confidentiality is standard in consumer arbitration. As noted above, many other arbitration administrators publish their decisions, most notably AAA and FINRA, which publishes records in all arbitrations without redacting the names of individuals. The AAA, further, already publishes some case-level information on individual consumer arbitrations.[1100] Further, prevailing parties in arbitrations routinely make such awards public in their filings to enforce them in court.[1101] In any event, to the extent that there is a conflict with State law and the rule, the Bureau finds that rule would govern and would be in the public interest.

The Bureau disagrees with the industry commenter that an additional round of notice and comment is necessary to detail the process by which the Bureau intends to collect, secure and disseminate arbitration data. The proposal specifically solicited comments on the Bureau's intention to publish arbitration-related records, and sought comments on how the Bureau should publish arbitration-related records it received.[1102] Many providers offered comments on the scope of the Bureau's monitoring proposal, as summarized above. Further, new provisions discussed below offer details on the collection and submission of documents, including deadlines for providers to submit documents, deadlines for the Bureau to publish documents, and the address where redacted records will be posted.

The Bureau expects to release details of how providers should comply with the requirements of § 1040.4(b) in due course. The Bureau expects that such instructions will be published in the **Federal Register,** the Bureau's Web site, and in a small business compliance guide the Bureau will publish to assist companies redact and submit in accord with the final rule.

4(b)(5) Further Redaction Prior to Internet Posting

The Bureau sought comment on the publication of the records that would have been required to be submitted by proposed § 1040.4(b)(1), including whether it should limit publication of particular items even after redaction based on particular consumer privacy concerns or whether commenters had other confidentiality concerns.

Industry commenters asserted that the collection of both public and non-public information by financial regulators poses a threat to consumer privacy. One industry commenter argued that the collection of even redacted records, combined with other publicly available information, could be used to re-identify consumers. One industry commenter expressed skepticism about permitting government regulators to collect data because of data security issues at financial regulators and reports about data security at the Bureau.[1103]

For the reasons provided below, the Bureau is finalizing new § 1040.4(b)(5),

[1099] FINRA, ''Awards,'' at Rule 12904(h) (''All awards shall be made publicly available.''); AAA Consumer Arbitration Statistics, *supra* note 804.

[1100] AAA Consumer Arbitration Statistics, *supra* note 804.

[1101] *See, e.g.,* 9 U.S.C. 9 (Federal Arbitration Act provision setting out procedures for the enforcement of awards).

[1102] 81 FR 32830, 32893 (May 24, 2016) (''[T]he Bureau seeks comment on its plan to make an electronic submission process operational before the compliance date, including what features of such a system would be useful to providers, their agents, or the general public.''); *see also id.* (''The Bureau seeks comment on the publication of the records that would be required to be submitted by proposed § 1040.4(b)(1), including whether it should limit any publication based on consumer privacy concerns arising out of the publication of such records after their redaction pursuant to proposed § 1040.4(b)(3) or if providers would have other confidentiality concerns. In addition, the Bureau seeks comment on whether it should publish arbitral records individually or in the form of aggregated data. The Bureau also seeks comment on whether there are alternatives to publication by the Bureau—such as publication by other entities—that would further the purposes of publication described above.'').

[1103] The commenter referred to an Office of the Inspector General report on the security of the Bureau's complaints database. *See* Office of the Inspector General, ''Security Control Review of the CFPB's Data Team Complaint Database,'' (July 23, 2015), *available at https://oig.federalreserve.gov/reports/cfpb-dt-complaint-database-summary-jul2015.htm* (finding overall that the Bureau had taken steps to secure the Complaint Database, identifying needed improvements, and acknowledging that the Bureau agreed with OIG's recommendations and would take steps to make improvements).

which will require the Bureau to make such further redactions as are needed to comply with applicable privacy laws. In particular the Bureau will review records submitted by providers to ensure that providers' redactions were made in compliance § 1040.4(b)(3). In addition, before publishing records pursuant to § 1040.4(b)(4), the Bureau will, to the extent necessary, make further redactions to records to appropriately reduce the risk of re-identification.

The Bureau disagrees with the industry commenter that said that the Bureau's collection of public and non-public information by financial regulators poses a threat to consumer privacy. Section 1040.4(b)(3) will require providers to redact personal and financial information before the records ever reach the Bureau. In addition, the Bureau will employ the same data security measures that it employs for other sensitive data that it currently maintains.

4(b)(6) Deadline for Internet Posting of Arbitral and Court Records

The Bureau adopts final § 1040.4(b)(6), under which the Bureau shall begin to make records submitted to the Bureau by providers under final § 1040.4(b)(1) accessible and retrievable by the public on the Bureau's Web site no later than July 1, 2019, and at least annually each year thereafter for documents received by the end of the prior calendar year.

The Bureau believes that making records available on a timely basis will make them most useful to third parties. For instance, State and Federal regulators may need access to recent records if they are to be effectively responsive to potentially problematic business practices or unfairness in arbitration proceedings early in their existence. Similarly, private attorneys may need access to recent records to more effectively guide their forecasting of the success of claims and defenses in arbitration and litigation. Were the Bureau to delay such action, the information could become stale and less useful. The Bureau believes based on its experience with other data posting that an annual cycle strikes an appropriate and practicable balance in light of Bureau resources.

Section 1040.5 Compliance Date and Temporary Exception

Proposed § 1040.5 would have set forth the compliance date for part 1040 as well as a limited and temporary exception to compliance with proposed § 1040.4(a)(2) for certain consumer financial products and services. Below, the Bureau addresses the comments received on these proposed provisions.

5(a) Compliance Date

Dodd-Frank section 1028(d) states that any regulation prescribed by the Bureau under section 1028(b) shall apply to any agreement between a consumer and a covered person entered into ''after the end of the 180-day period beginning on the effective date of the regulation, as established by the Bureau.'' As the proposal stated, the Bureau interprets this language to mean that the rule may begin to apply on the 181st day after the effective date, as this day would be the first day ''after the end of'' the 180-day period starting on the effective date as is required by section 1028(d). Given that the Bureau proposed an effective date of 30 days after publication of the rule in the **Federal Register**, compliance with the proposal would have been required starting on the 211th day after publication of the rule in the **Federal Register**. Proposed § 1040.5(a) would have adopted the term ''compliance date'' to refer to this date and would have stated that compliance with part 1040 is required for any pre-dispute arbitration agreement entered into after the date that is 211 days after publication of the rule in the **Federal Register**.[1104]

The Bureau proposed a 30-day effective date based on Administrative Procedure Act (APA) section 553(d), which requires that, with certain enumerated exceptions, a substantive rule be published in the **Federal Register** not less than 30 days before its effective date.[1105] As the Bureau explained in the proposal, the Bureau did not believe that a longer period for the effective date was needed to facilitate compliance, given that section 1028(d) mandates an additional 180-day period between the effective date and the compliance date. The Bureau stated in the proposal that it believes that a 211-day period between **Federal Register** publication and the compliance date (referred to herein as the ''compliance period'') would afford providers sufficient time to comply.[1106]

Three commenters—a consumer advocate, an individual, and a research center—urged the Bureau to adopt § 1040.5(a) as proposed. An industry trade association commenter stated that it supported § 1040.5(a) as long as the rule ''is not retroactive to accounts opened prior to the implementation date.'' Other commenters requested that the Bureau modify the compliance period. Two industry commenters urged the Bureau to adopt a longer compliance period. One of these industry commenters, a trade association representing the consumer credit industry, requested a compliance period of 18 months, which would be an additional 11 months beyond what the Bureau had proposed. The commenter asserted that the Bureau had underestimated how time-consuming the required contractual changes would be for some providers. For example, according to the commenter, many States have a single document rule that limits the ability of vehicle finance companies to modify contracts with an addendum or side letter, so that such companies need sufficient time to modify the agreements themselves and provide them to dealers well before the effective date. The commenter also stated that one of its members had more than 200 forms that the provider would need to revise, check, correct, review, and approve. According to the commenter, finance companies typically modify contracts in batches; each batch can take three to five months; and that printing, distribution, and implementation would take additional time. The commenter also asserted that removing a ''Notice of Arbitration'' signature box would cause programming issues for automobile dealers. Additionally, the commenter also stated that if the Bureau does not extend the compliance date, it should adopt a safe harbor within which providers would not face potential consequences for having non-compliant agreements so long as the provider does not enforce the arbitration agreements in a class action.

The other industry commenter, a small-dollar lender, requested a compliance period of 452 days. This commenter stated that it would need to revise its agreements to include the contract provision required by proposed § 1040.4(a)(2) and that it may also remove its arbitration provisions. The commenter noted that it had at least 113 separate consumer agreements or disclosure documents containing arbitration agreements. According to the commenter, 211 days is not enough time to program, test, and deploy 113 new agreements, especially given that it uses four different point-of-sale software systems (in addition to its primary software package). The commenter also noted that it would need to destroy non-complaint hard-copy agreements at each

[1104] Proposed § 1040.5(a) would have instructed the Office of the Federal Register to insert a specific date upon publication in the **Federal Register**.

[1105] 5 U.S.C. 553(d).

[1106] Proposed § 1040.5(b) would have created a limited, temporary exception for certain pre-packaged general-purpose reloadable prepaid card agreements.

of its storefronts and replace them with new hard-copy agreements. Additionally, one consumer advocate commenter urged the Bureau to shorten the compliance period to 90 days or 180 days.

The Bureau is finalizing § 1040.5(a) as Proposed except that it is extending the effective date by an additional 30 days, to 60 days after publication in the **Federal Register**, and is making one technical correction. While the proposal stated that compliance with part 1040 is required for any pre-dispute arbitration agreement entered into *after* the compliance date, the final rule states that compliance with part 1040 is required for any pre-dispute arbitration agreement entered into *on or after* the compliance date.[1107] The Bureau intended proposed § 1040.5(a) to convey that providers would be required to comply starting on the compliance date. The Bureau believes the phrase ''on or after'' the compliance date better captures this intent.[1108]

Regarding the industry trade association's comment about retroactivity, the Bureau notes that the rule would not have retroactive effect. As is explained above in the section entitled ''Comments on the Bureau's Interpretation of *Entered Into*,'' this part will only apply to agreements entered into after the compliance date. Regarding the consumer advocate's comment that urged the Bureau to adopt a shorter compliance period, the Bureau declines to adopt a compliance period of 90 or 180 days because it believes that a compliance period that includes a 180-day period after the effective date is most consistent with its authority under section 1028(d) of the Dodd-Frank Act and the APA.[1109]

The Bureau is adopting a compliance period that is one month longer than the compliance period in the proposal, for a total of approximately eight months, and declines to adopt a longer compliance period because the Bureau does not believe that the contractual change required by this rule will take more than eight months to implement (except for certain prepaid providers, as is discussed below). The Bureau acknowledges—as noted by the industry trade association commenter and small-dollar lender commenter—that some providers will need to implement revisions to a large number of consumer agreements and related forms. However, the Bureau believes that the revisions required for each document will be modest, and the Bureau notes that providers do not provide evidence to the contrary. The rule requires only that providers insert either the provision mandated by § 1040.4(a)(2)(i) or the alternative provision permitted by § 1040.4(a)(2)(ii)—and the Bureau has already provided the specific language for these provisions with a view toward reducing burden. Because both of these revisions are modest, the Bureau believes that making them will not impose a substantial burden, even where providers have multiple agreements. And by making the effective date 30 days later than it had proposed, the Bureau is providing additional time for this to be completed. The Bureau believes that providers can make these modest revisions and update their software or deliver hard copies of agreements, as needed, within 241 days.[1110]

The Bureau has carefully considered whether providers of certain products may have difficulty complying within 241 days and is adopting a temporary exception for pre-packaged general-purpose reloadable prepaid card agreements under § 1040.5(b). In addition, the Bureau expects that the vast majority of providers could continue to provide non-compliant hard-copy agreements as long as they simultaneously gave consumers a notice or amendment including the required provision as part of the agreement. The Bureau is aware, as the industry trade industry commenter noted, that providers subject to a single-document rule will not be able to use a separate notice or amendment. For this reason, the Bureau has considered whether such providers should be eligible for the temporary exception in § 1040.5(b). The Bureau has decided not to make such providers eligible for the § 1040.5(b) exception, because the Bureau believes—for the reasons stated in the paragraph above—that the compliance period affords enough time to update consumer agreements while complying with applicable single-document rules. As a result, the Bureau does not believe a safe harbor is needed.

5(b) Exception for Pre-Packaged General-Purpose Reloadable Prepaid Card Agreements

As described above, § 1040.5(a) states that compliance with part 1040 is required starting on the 241st day after publication of the final rule in the **Federal Register**. As of this date, providers would, among other things, be required to ensure that their pre-dispute arbitration agreements contain the provision required by § 1040.4(a)(2)(i) or the alternative provision permitted by § 1040.4(a)(2)(ii). As stated above, the Bureau believes this period generally affords providers sufficient time to comply.

As the proposal stated, however, the Bureau assessed whether this compliance period may pose special difficulties for providers of certain types of products. The Bureau was concerned that providers of certain types of GPR prepaid cards may not be able to ensure that only compliant products are offered for sale or provided to consumers after the compliance date. Prepaid providers typically enclose cards in a package that contains a card and a cardholder agreement.[1111] Providers typically print these packages well in advance of sale and are distributed to consumers through third-party retailers such as drugstores, check cashing stores, and convenience stores. To comply with the rule by the compliance date, providers of such products would need to search each retail location that sells their products for any non-compliant packages; remove them from the shelves; and print new packages. The Bureau believes that this process would involve considerable expense and that this represents a unique situation not present with other products and services that proposed part 1040 would have covered.

For these reasons, proposed § 1040.5(b) would have established a limited exception from proposed § 1040.4(a)(2)'s requirement that the provider's pre-dispute arbitration agreement contain a specified provision by the compliance date. Proposed § 1040.5(b) would have stated that proposed § 1040.4(a)(2) shall not apply to a provider that enters into a pre-dispute arbitration agreement for a general-purpose reloadable prepaid card if certain conditions are met. For a provider that could not contact the consumer in writing, proposed § 1040.5(b)(1) would have set forth the following conditions: (1) The consumer

[1107] Like the proposal, final § 1040.5(a) would instruct the Office of the Federal Register to insert a specific date upon publication in the **Federal Register**.

[1108] In this preamble, the Bureau uses the terms ''on or after the compliance date'' and ''after the compliance date'' interchangeably.

[1109] *See* Dodd-Frank section 1028(d) (stating that any rule prescribed by the Bureau under section 1028(b) shall apply to agreements entered into after the end of the 180-day period beginning on the effective date of the regulation) and APA section 553(d) (stating that, in general, the required publication or service of a substantive rule shall be made not less than 30 days before its effective date).

[1110] Regarding the industry trade association's comment that removing a ''Notice of Arbitration'' signature box would cause programming issues for automobile dealers, the rule does not require providers to remove it, because the rule does not ban the use of pre-dispute arbitration agreements.

[1111] *See* 81 FR 83934 (Nov. 22, 2016).

acquires the card in person at a retail store; (2) the agreement was inside of packaging material when it was acquired; and (3) the agreement was packaged prior to the compliance date of the rule. For a provider that had the ability to contact the consumer in writing, proposed § 1040.5(b)(2) would have imposed the previous three conditions as well as one additional requirement: Within 30 days of obtaining the consumer's contact information, the provider would have been required to provide to the consumer an amended pre-dispute arbitration agreement that is compliant with proposed § 1040.4(a)(2). Proposed comment 5(b)(2)–1 would have clarified that the 30-day period would not begin to elapse until the provider is able to contact the consumer and would also have stated that a provider is able to contact the consumer when, for example, the provider has the consumer's mailing address or email address.

As the proposal stated, this exception would have permitted prepaid card providers to avoid the considerable expense of pulling and replacing packages at retail stores while adequately informing consumers of their dispute resolution rights, where feasible, due to the notification requirement in proposed § 1040.5(b)(2). The proposal also noted that proposed § 1040.5(b)(2) would not have imposed on providers an obligation to obtain a consumer's contact information. Where providers *are* able to contact the consumer in writing, the Bureau expected that they could satisfy proposed § 1040.5(b)(2) by, for example, sending the compliant agreement to the consumer when the consumer called to register the account and provided a mailing address or email address; sending the revised terms when the provider sent a personally-embossed card to the consumer; or communicating the new terms on the provider's Web site.

In the proposal, the section-by-section analysis clarified that providers availing themselves of the exception in proposed § 1040.5(b) would still have been required to comply with proposed § 1040.4(a)(1) and proposed § 1040.4(b) as of the compliance date. Pursuant to proposed § 1040.4(a)(1), such providers would still have been prohibited, as of the compliance date, from relying on a pre-dispute arbitration agreement entered into after the compliance date with respect to any aspect of a class action concerning any of the consumer financial products or services covered by proposed § 1040.3. The amended pre-dispute arbitration agreement submitted by providers in accordance with proposed § 1040.5(b)(2)(ii) would have been required to include the provision required by proposed § 1040.4(a)(2)(i) or the alternative permitted by proposed § 1040.4(a)(2)(ii). In addition, providers would still have been required to submit certain arbitral records to the Bureau, pursuant to proposed § 1040.4(b), in connection with pre-dispute arbitration agreements entered into after the compliance date. The Bureau also stated in the proposal that it did not anticipate that permitting prepaid providers to sell existing card stock containing non-compliant agreements would affect consumers' shopping behavior, as, currently, consumers are typically unable to review the enclosed terms and conditions before purchasing a GPR prepaid product (although the Bureau would expect that corresponding product Web sites would contain an accurate arbitration agreement).

The Bureau received several comments on proposed § 1040.5(b). A consumer advocate commenter urged the Bureau not to adopt proposed § 1040.5(b), expressing concern that the provision would give providers an incentive to package a large supply of cards before the compliance date in an effort to use misleading agreements for as long as possible after the compliance date. The commenter requested that, if the Bureau adopts § 1040.5(b), the Bureau should (1) add commentary stating that, even for providers covered by § 1040.5(b), proposed § 1040(a)(1) continues to apply; (2) limit the exception to GPR prepaid cards not in the provider's possession after the compliance date (as opposed to GPR prepaid cards packaged before the compliance date); (3) limit the exception to GPR prepaid cards packaged 60 days after **Federal Register** publication, not 211 days; and (4) require providers to deactivate non-compliant card packages that have not been activated six months after the compliance date. The commenter also stated that it supported proposed § 1040.5(b)(2)(ii)'s requirement that providers able to contact the consumer in writing provide the consumer with an amended pre-dispute arbitration agreement.

Additionally, a research center commenter stated that the Bureau should craft the exception narrowly and apply it only where necessary. The commenter pointed out that, even though proposed § 1040.4(a)(1) would still apply, it may be unclear whether a given agreement is covered by § 1040.4(a)(1), as there may not be evidence of whether the consumer purchased the prepaid card (and thereby entered into the agreement) before or after the compliance date.

The Bureau also received a comment from an industry trade association representing prepaid card providers. This commenter expressed concern that the proposal would be burdensome for providers in combination with the Bureau's prepaid account rule (which, after the close of the comment period for this rule, the Bureau published in November 2016).[1112] The commenter asserted that, even with the proposed temporary exception, providers would ''incur the double expense'' of having to update their disclosures and related materials a second time to comply with the Bureau's arbitration rule. The commenter also stated that GPR prepaid providers may have to pull products off retail store shelves on multiple occasions within a relatively short period.

The Bureau adopts § 1040.5(b) and comment 5(b)(2)–1 as proposed with a minor revision to comment 5(b)(2)–1 for clarity.[1113] As stated above, the Bureau believes the exception is warranted because it would allow prepaid card providers to avoid the considerable expense of pulling and replacing packages at retail stores.[1114] At the same time, the impact of the exception on consumers would be limited, because § 1040.4(a)(1) would continue to apply, and because § 1040.5(b)(2)(ii) would require providers to provide amended agreements to consumers where feasible.

The Bureau is persuaded that adding a comment clarifying that § 1040.4(a)(1) remains in effect, even where the temporary exception applies, would help consumers better understand their rights, and providers better understand their obligations, under the rule. For this reason, the final rule includes new comment 5(b)–1, which states that, where § 1040.4(a)(2) does not apply to a provider that enters into a pre-dispute arbitration agreement on or after the compliance date by virtue of the temporary exception in § 1040.5(b)(2), the provider must still comply with § 1040.4(a)(1), which generally prohibits reliance on a pre-dispute arbitration agreement in a class action related to a covered consumer financial product or service. The Bureau declines to limit the

[1112] 81 FR 83934 (Nov. 22, 2016).

[1113] The comment gives a more specific example of when the provider has the consumer's mailing or email address, referring to when the consumer registers the card and gives that information to the provider.

[1114] In the Prepaid Rule, the Bureau similarly adopted a disclosure regime that does not require providers to pull non-compliant materials from store shelves. *Id.*

exception to GPR prepaid cards not in the provider's possession after the compliance date. The Bureau believes that when an agreement is packaged is a clearer compliance standard than whether a package is in the provider's possession. Further, the Bureau believes that any incentive to package large quantities of cards before the compliance date (a form of potential evasion suggested by one commenter) will be limited because the incremental benefit of doing so is limited, as § 1040.4(a)(1) would continue to apply; and because many providers will be required to contact their customers and provide the consumer an amended agreement (pursuant to § 1040.5(b)(2)(ii)).

The Bureau also declines to limit the exception to GPR prepaid cards packaged no more than 60 days after publication in the **Federal Register**. This approach could be construed to impose a 60-day compliance period on GPR prepaid card providers after which they would have to pull-and-replace non-compliant agreements at significant expense, and the Bureau does not believe a shorter compliance period for GPR prepaid card providers—compared with the 241 days afforded other providers—is legally permissible under section 1028(d). In addition, the Bureau declines to require providers to deactivate non-compliant, un-activated card packages six months after the compliance date. Such a requirement would be quite costly and the Bureau does not believe such a requirement is necessary, because limiting the exception to cards packaged before the compliance date will have the same overall effect; once that stock of agreements dissipates, only compliant agreements will be available on store shelves. Further, such a rule would effectively require providers to identify non-compliant products at retail locations and remove them—the very burden that the temporary exception was designed to alleviate.

The Bureau disagrees with the research center's comment that it may be unclear whether a given prepaid card agreement is subject to § 1040.4(a)(1) because there may not be evidence of when the consumer purchased the card (and, consequently, whether the consumer entered into it before or after the compliance date). Based on its knowledge of the prepaid card market, the Bureau believes that, while the provider may not know the identity of the consumer unless the card is registered, the provider does know, for a particular card, when the consumer purchased it (and, accordingly, whether that occurred before or after the compliance date).

Regarding the industry trade association commenter's concern about compliance burden due to the Bureau's final prepaid account rule, the Bureau believes these concerns are misplaced. As stated above, the Bureau recognizes that compliance with part 1040 may be more difficult or costly for some prepaid providers because of the way some prepaid products are packaged and sold. For this reason, the Bureau is adopting § 1040.5(b). However, the Bureau does not believe that compliance with part 1040 will impose a substantial burden on prepaid providers in conjunction with the Bureau's finalization of the prepaid account rule. Both rules require revisions to account agreements. However, both rules also contain lengthy compliance periods (approximately 18 months for the prepaid account rule, including an additional six months the Bureau provided industry to give it sufficient time to implement the rule,[1115] and approximately eight months for part 1040). Further—for the reasons described in detail in the section-by-section analysis for § 1040.5(a), above—the Bureau believes that the contractual change required by part 1040 is modest, especially because the Bureau is providing the language for the required contract provision. The Bureau also notes that, contrary to the commenter's assertion, part 1040 would not require providers to pull and replace products from store shelves (indeed, as stated above, the purpose of § 1040.5(b) is to prevent providers from having to do so).

VIII. Dodd-Frank Act Section 1022(b)(2) Analysis

A. Overview

In developing this final rule, the Bureau has considered the potential benefits, costs, and impacts as required by section 1022(b)(2) of the Dodd-Frank Act. Specifically, section 1022(b)(2) calls for the Bureau to consider the potential benefits and costs of a regulation to consumers and covered persons, including the potential reduction of access by consumers to consumer financial products or services, the impact on depository institutions and credit unions with $10 billion or less in total assets as described in section 1026 of the Dodd-Frank Act, and the impact on consumers in rural areas.

In the proposal, the Bureau set forth a preliminary analysis of these effects, and the Bureau requested comments and submissions of additional data that could inform the Bureau's analysis of the benefits, costs, and impacts of the proposal. In response, the Bureau received a number of comments on the topic. The Bureau has consulted, or offered to consult with, the prudential regulators, the Federal Housing Finance Agency, the Federal Trade Commission, the U.S. Department of Agriculture, the U.S. Department of Housing and Urban Development, the U.S. Department of the Treasury, the U.S. Department of Veterans Affairs, the U.S. Commodity Futures Trading Commission, the U.S. Securities and Exchange Commission, and the Federal Communications Commission. The consultations regarded consistency with any prudential, market, or systemic objectives administered by such agencies. The Bureau has chosen to consider the benefits, costs, and impacts of the final provisions as compared to the status quo in which some, but not all, consumer financial products or services providers in the affected markets (see § 1040.2(c), defining the entities covered by this rule as ''providers'') use arbitration agreements.[1116] The baseline considers economic attributes of the relevant markets and the existing legal and regulatory structures applicable to providers. The Bureau requested

[1115] Prepaid Accounts Under the Electronic Fund Transfer Act (Regulation E) and the Truth in Lending Act (Regulation Z). 82 FR 18975 (Apr. 25, 2017).

[1116] The Bureau has discretion in each rulemaking to choose the relevant provisions to discuss and to choose the most appropriate baseline for that particular rulemaking. A potential alternative baseline for this rulemaking is the baseline of a hypothetical future state of the world where ''class actions against businesses would be all but eliminated.'' *See* Brian Fitzpatrick, ''The End of Class Actions?,'' 57 Ariz. L. Rev. 161 (2015). Such a baseline could be justified because the use of class-eliminating arbitration agreements may continue to grow over time. *See also* Myriam Gilles, ''Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action,'' 104 Mich. L. Rev. 373 (2005); Jean Sternlight, ''As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?,'' 42 Wm. & Mary L. Rev. 1 (2000–2001). Indeed, in Section 2 of the Study, the Bureau documented a slight but gradual increase in the adoption of arbitration agreements by industry in particular markets. *See generally* Study, *supra* note 3, section 2. *See also* Peter Rutledge & Christopher Drahozal, ''Sticky Arbitration Clauses—the Use of Arbitration Clauses after Concepcion and Amex,'' 67 Vand. L. Rev. 955 (2014). The Bureau believes that this trend is likely to continue. Nonetheless, for simplicity and transparency, the Bureau assumed that, in the absence of a final rule, the prevalence of arbitration agreements would remain constant. As a result, the baseline that the Bureau used assumes that a significant amount of class litigation would remain regardless of whether the proposal was finalized. If the Bureau had instead used the hypothetical future state of universal adoption of arbitration agreements as the baseline, the estimated impact, both of benefits and costs would be significantly larger.

comment on this baseline, and did not receive any suggesting an alternative.

The Bureau invited comment on all aspects of the data that it has used to analyze the potential benefits, costs, and impacts of the proposed provisions.[1117] However, the Bureau notes that in some instances, the requisite data are not available or are quite limited. In particular, with the exception of estimating consumer recoveries from Federal class settlements, data with which to quantify the benefits of the final rule are especially limited. As a result, portions of this analysis rely in part on general economic principles and the Bureau's experience and expertise in consumer financial markets to provide a qualitative discussion of the benefits, costs, and impacts of the final rule.

The Bureau also discussed and requested comment on several potential alternatives, including ones that would be applicable to larger entities as well as smaller entities, which it listed in the proposal's Initial Regulatory Flexibility Analysis (IRFA) and also referenced in its Section 1022(b)(2) Analysis. A further detailed discussion of potential alternatives considered is provided in Section G of this Section 1022(b)(2) Analysis and in the Final Regulatory Flexibility Analysis (FRFA) in Part IX below.

In this analysis, the Bureau focuses on the benefits, costs, and impacts of the two major elements of the final rule: (1) The requirement that providers with arbitration agreements include a provision in the arbitration agreements they enter into 180 days after the effective date of the rule stating that the arbitration agreement cannot be invoked in class litigation, and the related prohibition that would forbid providers from relying on such an agreement in a case filed as a class action; and (2) the requirement that providers using pre-dispute arbitration agreements submit certain records relating to arbitral proceedings and certain court records to the Bureau.

The impact of submitting arbitral and court records to the Bureau is expected to be minor, as identified in this analysis and the Bureau's PRA analysis further below. This impact is slightly higher than the PRA impact estimated in the proposal, principally due to the addition of § 1040.4(b)(1)(i)(B) and (b)(1)(iii), which requires providers to submit answers to arbitration claims and arbitration motions filed in court to the Bureau.

Given that the Bureau takes the status quo as the baseline, the analysis below focuses on providers that currently have arbitration agreements. Providers that currently use arbitration agreements can be divided into two categories. The first category is comprised of providers that currently include arbitration agreements in contracts they enter into with consumers. For these providers, which constitute the vast majority of providers using arbitration agreements, the Bureau believes that the final class rule will result in the change from virtually no exposure to class litigation to at least as much exposure as is currently faced by those providers with similar products or services that do not use arbitration agreements.

The second category includes providers that use arbitration agreements contained in consumers' contracts entered into by another covered person, such as another provider. This category includes, for example, debt collectors and servicers who, when sued by a consumer, invoke an arbitration agreement contained in the original contract formed between the original provider and the consumer. For these providers, the additional class litigation exposure caused by the final rule will be somewhat less than the increase in exposure for providers of the first type because the providers in this second category are not currently uniformly able to rely on arbitration agreements in their current operations. For example, debt collectors typically collect both from consumers whose contracts contain arbitration agreements and from consumers whose contracts do not contain arbitration agreements. Thus, these debt collectors already face class litigation risk, but this risk will increase, at most, in proportion to the fraction of the providers' consumers whose contracts contain arbitration agreements.[1118] The actual magnitude by which debt collectors' risk will increase is likely to be lower because even when a consumer's contract contains an arbitration agreement today, the ability of the debt collector to rely upon it varies across arbitration agreements and depends on the applicable contract and background law.[1119]

The analysis below applies to both types of providers. For additional clarity and to avoid unnecessary duplication, the discussion is generally framed in terms of the first type of provider (which faces virtually no exposure to class claims today), unless otherwise noted. The Bureau estimates below the number of additional Federal class actions and putative class proceedings that are not settled on a class basis for both types of providers.

Description of the Market Failure and Economic Framework

Before considering the benefits, costs, and impacts of the proposed provisions on consumers and covered persons, as required by section 1022(b)(2), the Bureau provided the economic framework through which it considered those factors in order to more fully inform the rulemaking, and in particular to describe the market failure that is the basis for the final rule.[1120] This framework is set forth below, followed by a discussion of related comments.

The Bureau's economic framework assumes that when Congress and States have promulgated consumer protection laws that are applicable to consumer financial products and services ("the underlying laws") they have done so to address a range of market failures, for example, asymmetric information. The underlying laws need enforcement mechanisms to ensure providers conform their behavior to these laws. In analyzing and finalizing both the class proposal and the requirement to submit arbitral records, the Bureau is focusing on a related market failure: Reduced incentives for providers to comply with the underlying laws, due to an insufficient level of enforcement.

While the Bureau assumes that the underlying laws address a range of

[1117] The estimates in this analysis are based upon data obtained and statistical analyses performed by the Bureau. This included much of the data underlying the Study and some of the Study's results. The collection of the data underlying the Study was described in the relevant sections and appendices of the Study. Some of the data was collected from easily accessible sources, such as the data underlying the Bureau's analysis of Federal class settlements. Other data was confidential, such as the data underlying the Bureau's analysis of the pass-through of costs of arbitration onto interest rates for large credit card issuers. The Bureau also collected additional information from trade groups on the prevalence of arbitration agreements used in markets that were not analyzed in Section 2 of the Study. The collection of data from trade groups was discussed further below in Parts VIII and IX.

[1118] For example, if half of consumers on whose debts a debt collector collects have arbitration agreements in their contracts, then the debt collector's class litigation risk would at most double under the final rule.

[1119] A research center commenter asserted that debt collectors are never able to rely on arbitration agreements between consumers and creditors. In fact, the Study contradicted this assertion, as 17 of 94 putative class cases with motions to compel arbitration involved FDCPA claims. *See* Study, *supra* note 3, section 6 at 56 n.94. *See also* SBREFA Report, *supra* note 419, at 17 (summarizing comments from representatives of debt collectors who stated that, in some instances, debt collectors can rely on arbitration agreements). As is further noted below, at least one trade association representing debt collectors also said the ability of debt collectors to rely on creditor arbitration agreements was more uncertain.

[1120] Although Dodd-Frank section 1022(b)(2) does not require the Bureau to provide this background, the Bureau does so as a matter of discretion to more fully inform the rulemaking.

market failures, it also recognizes that compliance with these underlying laws requires some costs. There are out-of-pocket costs required to, *e.g.,* distribute required disclosures or notices, investigate alleged errors, or resolve disputes. There are opportunity costs in, for example, forgoing adjustments in interest rates, limiting penalty fees, or limiting calling hours for debt collections. In addition, there are costs associated with establishing a compliance management system which, *e.g.,* trains and monitors employees, reviews communications with consumers, and evaluates new products or features.

The Bureau believes, based on its experience and expertise in overseeing consumer finance markets, that in general the current incentives to comply are weaker than the economically efficient levels. That is, in general, the economic costs of increased compliance are currently less than the economic benefits stemming from compliance. Thus, increased compliance due to the additional incentives provided by the final rule would, in general, be justified by the economic benefits of this increased compliance. It may be, however, that in some particular cases or particular markets compliance is already at or above the optimal level, such that the increased compliance due to the final rule will lower economic welfare. The data and methodologies available to the Bureau do not allow for an economic analysis of the optimal level of compliance on a law-by-law or market-by-market basis.[1121] However, for purposes of this discussion, the Bureau assumes that the current level of compliance in consumer finance markets is generally sub-optimal.

The Bureau also believes it may be useful to clarify what this rulemaking is not intended to address. In particular, contrary to the view expressed by several commenters, the Bureau is not attempting to address any lack of transparency surrounding arbitration agreements per se. The Bureau is in general concerned about consumer awareness of contract terms and the ability of consumers to make informed choices about consumer financial products and services. However, the Bureau does not at this time have a basis to believe that any such lack of transparency leads to harm for consumers in this specific context, as it does not have a basis to believe that individual arbitration is inferior to individual litigation. As discussed in Part VI, the data on this issue from the Study was inconclusive. Instead, the Bureau in this rulemaking is focused on a concern that the lack of an effective class mechanism inherent in arbitration agreements provides insufficient deterrence, which the Bureau believes leads to sub-optimal levels of compliance.[1122]

A research center commenter argued that the Bureau does not have an empirical basis to conclude that current levels of deterrence are sub-optimal. An association of State regulators also stated that it was troubled by the fact that the Bureau had not quantified current levels of providers' investment in compliance in order to determine whether those investments are inadequate, and believed a study of that issue would provide a stronger foundation for rulemaking. A debt collection industry trade association asserted that its members already have substantial incentives to comply with the law, in part because there is uncertainty as to whether they can rely upon creditors' arbitration agreements.

The Bureau acknowledged in the proposal and acknowledges again here that the existing degree of compliance is difficult to quantify, and the Bureau does not have data available to quantify the level of compliance or the current level of investments in compliance. The Bureau requested data on these subjects, but commenters did not provide additional data as to either of these. The Bureau recognizes that existing compliance incentives may be stronger in markets where providers do not contract directly with consumers and thus there may be uncertainty as to whether providers can rely on a given creditor's arbitration agreements. At the same time, to the extent certain markets already have greater incentives to comply, the impact of the final rule on those markets will be correspondingly less. In any event, as noted above in the section 1028 findings, from its own experience and expertise the Bureau believes the level of compliance is generally less than optimal, despite the fact that providers face existing consequences for illegal behavior separate from class action exposure.

The Bureau likewise acknowledges that it does not have data to quantify the level of investment in compliance across the 50,000 firms affected by this rule. As discussed further below, the Bureau's experience indicates that quantifying compliance costs is challenging for any individual firm as these costs tend to be diffused across multiple parts of financial institutions and are also hard to distinguish from costs that are incurred to enhance customer service, mitigate reputational risks, and related activities. The Bureau does not believe it is feasible to quantify these costs across all of the affected firms. The Study showed that class litigation is currently the most effective private enforcement mechanism for most claims in markets for consumer financial products or services in providing monetary incentives (including forgone profits due to in-kind or injunctive relief) for providers to comply with the law.[1123] During the years covered by the Study, providers paid out hundreds of millions of dollars per year in class relief and related litigation expenses in consumer finance cases.[1124] Class actions also resulted in substantial but difficult to quantify prospective relief. This compares to the purely retrospective relief and other expenses related to about 1,000 individual lawsuits in Federal courts filed by consumers with respect to five of the largest consumer finance markets, a similar number of individual arbitrations, and a similar number of small claims court cases filed by consumers.[1125] Individual consumer

[1121] The Bureau sought comment and data that would allow further analysis of how to determine the point at which strengthening incentives might become inefficient. While some commenters asserted that current levels of compliance (and thus incentives) are efficient, they did not provide data nor any means of analyzing that assertion.

[1122] In addition to the comments discussed here, an industry trade association commenter argued that the rule was unnecessary because consumers could switch providers if they did not want to be bound by an arbitration agreement, noting that not all providers have arbitration agreements in most markets. Even if some consumers are aware of arbitration agreements and decided to switch providers, this still would not resolve the market failure described here, as providers would still be insufficiently deterred with respect to the consumers who do not switch.

[1123] As discussed further below, if class litigation is generally meritless then it does not provide an incentive for providers to comply with the law.

[1124] *See generally* Study, *supra* note 3, section 8. As discussed further below, with regard to providing monetary incentives to increase investment in complying with the law, both relief to consumers and litigation expenses serve to increase the strength of deterrence incentives. *See* Richard Posner, ''Economic Analysis of Law'' at 785–92 (Wolters Kluwer L. & Bus. 2011). In particular, effectively evoking the logic of Pigouvian taxes, he notes, ''what is most important from an economic standpoint is that the violator be confronted with the costs of his violation—this preserves the deterrent effect of litigation—not that he pays them to his victims.''

[1125] *See* Study, *supra* note 3, section 1 at 11, 15–16. The Bureau could not quantify providers' spending on individual adjudications for a variety of reasons, most importantly that settlement terms of these cases are most often private. An industry commenter cited a study that found more individual litigation per year than the Bureau's Study, which was focused on specific markets. For more discussion of this study and how it relates to the Bureau's Study, see Part VI above. The Bureau notes that even if the volume of cases cited by the commenter is more reflective of the overall level of individual litigation involving providers covered by

finance lawsuits filed in State courts (other than small claims courts) add some additional modest volume, but the Bureau does not believe that they change the magnitude of the differential between class and individual relief. In other words, the monetary incentives for providers to comply with the law due to the threat of class actions are substantially greater than those due to the threat of consumers bringing individual disputes against providers.

The relative efficacy of class litigation—as compared to individual dispute resolution, either in courts or before an arbitrator—in achieving these incentives is not surprising. As discussed in Part VI, the potential legal harm per consumer arising from violations of law by providers of consumer financial products or services is frequently low in monetary terms. Moreover, consumers are often unaware that they may have suffered legal harm. For any individual, the monetary compensation a consumer could receive if successful will often not be justified by the costs (including time) of engaging in any formal dispute resolution process even when a consumer strongly suspects that a legal harm might have occurred. This is confirmed by the Study's nationally representative survey of credit card holders.[1126] In economic terms, these legal claims have negative expected value (*i.e.,* the costs of pursuing a remedy do not justify the potential rewards). The Bureau refers to such legal claims as ''negative value claims'' below. When thousands or millions of consumers may have individual negative-value claims, class actions can provide a vehicle to combine these negative-value claims into a single lawsuit worth bringing.[1127]

An automotive dealer industry commenter argued that the market failure described here does not apply to large-value transactions, such as motor vehicle sales, because the amount of alleged injury in such markets is large enough that consumers' claims will not be negative-value. It is true that individual claims are less likely to have a negative expected value in arbitration if the consumer harm is larger. However, in the Bureau's experience, small dollar claims can arise even for larger-balance loans, and in other markets, such as deposits, the balance in the account is not necessarily correlated with the amount of harm. For example, misconduct involving miscellaneous fees on a loan or deposit account may create a large number of negative-value claims, regardless of the size of the underlying account balance. Commenters did not provide support for the claim that disputes concerning automobile finance transactions are for significantly higher dollar amounts than other credit products. In any event, even a claim valued at several thousand dollars may not be positive-value, depending on the costs in time and legal fees of bringing an action and the probability of success.[1128] Moreover, even with a larger claim, consumers may still be unaware that they have a claim at all.

The Bureau's economic framework also takes into account other incentives that may cause providers to conform their conduct to the law: There are at least two other important mechanisms, which are both described here. The first incentive is the economic value for the provider to maintain a positive reputation with its customers, which will create an incentive to comply with the law to the extent such compliance is correlated with the provider's reputation. As the Study showed, many consumers might consider switching to a competitor if the consumer is not satisfied with a particular provider's performance.[1129] Partly, in response to this and to other reputational incentives (including publicly accessible complaint databases), many providers have developed and administer internal and informal dispute resolution mechanisms.[1130] The second incentive is to avoid supervisory actions or public enforcement actions by Federal and State regulatory bodies, such as the Bureau. In response to this, many providers have developed compliance programs, particularly where they are subject to ongoing active supervision by Federal or State regulators.

However, economic theory suggests that these other incentives (including reputation and public enforcement) are insufficient to achieve optimal compliance.[1131] Given the Bureau's assumptions outlined above, economic theory suggests that any void left by weakening any one of these incentives will not be filled completely by the remaining incentives.

More specifically, reputational concerns will create the incentive for a firm to comply with the law only to the extent legally compliant or non-compliant conduct would be visible to consumers and affect the consumer's desire to keep doing business with the firm, and even then, with a lag.[1132] Thus, there is an incentive for firms to underinvest in compliance if consumers will not notice the non-compliant conduct resulting from underinvestment for some time or may not view the non-compliant conduct as sufficient to affect the consumer's willingness to do business with the firm.[1133] The Bureau discusses the limitations of reputation effects more fully in Part VI above.

Economic theory also suggests that regardless of whether relief is warranted

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the final rule, it is still several orders of magnitude less than the number of consumers who are members of a putative class each year.

[1126] *See generally* Study, *supra* note 3, section 3. In particular, while being presented with a hypothetical situation of a clearly erroneous charge on their credit card bill that the provider is unwilling to remedy, 1.4 percent of consumers surveyed stated that they would seek legal advice or sue using an attorney, and 0.7 percent of consumers stated that they would initiate legal proceedings, without mentioning an attorney. *Id.* section 3 at 18.

[1127] *See, e.g.,* Posner, *supra* note 1124, at 785–92. *See also* Louis Kaplow & Steven Shavell, ''Fairness versus Welfare,'' 114 Harv. L. Rev. 961, 1185 n.531 (2001) (''[C]lass actions are valuable when they allow claims that would otherwise be brought individually to proceed jointly at lower cost due to the realization of economies of scale. In addition, our analysis emphasizes that, when legal costs exceed the stakes, there may be no suits and thus no deterrence; aggregating claims also solves this problem (although it is still possible that the aggregated claim may not be socially desirable if the benefit from improved behavior is sufficiently small).'').

[1128] In the specific context of automobile sales, the Bureau notes the recent Volkswagen Clean Diesel case, where despite wide publicity and very large individual injury caused by Volkswagen's conduct, only a few hundred of the more than 500,000 affected consumers filed individual claims. *See* In re: Volkswagen ''Clean Diesel'', No. 15–2672.

[1129] The survey in the Study focused specifically on the credit card market. *See* Study, *supra* note 3, section 3 at 18. The survey findings might not be generalizable to any market where consumers face a significantly higher cost of switching providers.

[1130] The Bureau notes that an incentive to act to preserve a good reputation with the consumers is not necessarily the same as an incentive to comply with the law, especially when consumers are not even aware of the legal harm.

[1131] *See, e.g.,* Carl Shapiro, ''Consumer Information, Product Quality, and Seller Reputation,'' 13 Bell J. of Econ. 20 (1982) for reputation and Posner, *supra* note 1124, at section 13.1 for complementarity with public enforcement. Note that earlier economic literature suggested that reputation alone, coupled with competitive markets, could lead to an efficient outcome. *See, e.g.,* Benjamin Klein & Keith B. Leffler, ''The Role of Market Forces in Assuring Contractual Performance,'' 89 J. of Pol. Econ. 4 (1981). However, formal modeling of this issue revealed that earlier intuition was incomplete. *See* Carl Shapiro, ''Premiums for High Quality Products as Returns to Reputations,'' 98 Q. J. of Econ. 4 (1983).

[1132] In addition, the non-compliance would have to be sufficiently egregious to cause consumers to want to switch given switching costs, and some consumers might not be able to switch ex-post at all depending on the product in question.

[1133] *See* Shapiro, *supra* note 1131. This underinvestment is a perpetual, rather than a temporary phenomenon: a firm underinvests today because consumers will not become aware of today's underinvestment until tomorrow, but then the firm also underinvests tomorrow because tomorrow's consumers will not become aware of tomorrow's underinvestment until the day after tomorrow, and so on. Moreover, competition is not a panacea in this model: every firm rationally underinvests in compliance.

under the law, the provider has an incentive to correct issues only for the consumers who complain directly about particular practices to the provider—as those are the consumers for whom the provider's reputation is most at risk—and less of an incentive to correct the same issues for other consumers who do not raise them or who may be unaware that the practices are occurring. Accordingly, the providers' incentive to comply due to reputational concerns is, in part, driven by the fraction of consumers who could become aware of the issue. In addition, with such informal dispute resolution, correcting issues for a particular consumer could mean waiving a fee or reducing a charge, in what a provider may call a ''one time courtesy,'' instead of changing the provider's procedures prospectively even with regard to the individual consumer.

Furthermore, economic theory suggests that providers will decide how to resolve informal complaints by weighing the expected profitability of the consumer who raises the complaint against the probability that the consumer will indeed stop patronizing the provider, rather than legal merit per se. In the Bureau's experience, some companies implement this through profitability models which are used to cabin the discretion of customer service representatives in resolving individual disputes. Indeed, providers may be more willing to resolve disputes favorably for profitable consumers even in cases where the disputes do not have a legal basis, than for consumers that are not profitable but whose claims have a legal basis. A research center commenter agreed that firms do this, but argued that this is rational for them to do so. As discussed above in Part VI, this is precisely the market failure the rule is intended to address—that it is not always in the providers' private interest to avoid harming consumers without external enforcement of some kind. By reducing the collective action problem inherent in small claims, class actions provide a source of external enforcement that is currently missing for providers using arbitration agreements.

Public enforcement could theoretically bring some of the same cases that would not be brought by private enforcement absent the rule. However, public enforcement resources are limited relative to the thousands of firms in consumer financial markets. Public enforcement resources also focus only on certain types of claims (for instance, violations of State and Federal consumer protection statutes but not the parties' underlying contracts).[1134] In addition, other factors may be at play; public prosecutors could be more cautious or have other, non-consumer finance priorities. For all these reasons, public enforcement cannot and will not entirely fill the void left by a lack of private enforcement. The Study's analysis was consistent with this prediction, indicating that there is limited overlap between the two types of enforcement.[1135]

An industry commenter argued that individual arbitration itself can solve the market failure by strengthening incentives to resolve disputes informally before providers have to pay arbitration filing fees. The commenter noted that such agreements generally contain fee-shifting provisions that require providers to pay consumers' upfront filing fees, and that this gives providers an incentive to provide an informal resolution to claims below the value of the filing fee. The Bureau notes that such incentives would only be relevant if consumers have an incentive to file arbitration claims in the first place. The commenter did not assert that consumers would have such incentives,[1136] but theoretically it is possible that the ease and low upfront cost of arbitration may change some negative-value individual legal claims into positive-value arbitrations, which in turn create an additional incentive for providers to resolve matters internally.[1137] In principle, if arbitration agreements had the effect of transforming enough negative-value claims into positive ones, that would affect not just providers' incentives to resolve individual cases but also their incentives to comply with the law *ex ante*.

As noted above, however, there is little if any empirical support for such an argument. The Bureau has only been able to document several hundred consumers per year actually filing arbitration claims,[1138] and the Bureau is unaware that providers have routinely concluded that considerably more consumers were likely to file absent taking action to resolve informal complaints. Neither did any commenter provide empirical evidence supporting this claimed linkage.

Additionally, the Bureau believes that this argument is flawed conceptually as well. The Bureau disagrees that, even for consumers who are aware of the legal harm, the presence of arbitration agreements changes many negative-value individual legal claims into positive-value arbitrations and, in turn, creates additional incentives for providers to resolve matters internally. As discussed in more detail in Part VI, above, consumers weigh several other costs besides filing fees before engaging in any individual dispute resolution process, including arbitration. It still takes time for a consumer to learn about the process, to prepare for the process, and to go through the process. There is also still a risk of losing and, if so, of possibly having initial filing fees shifted back to the consumer. Accordingly, the Bureau is not convinced that the difference in upfront filing fees makes a substantial difference to consumers' overall evaluation. As discussed above, consumers' incentive to pursue an individual claim depends upon the expected value of the claim—the net payoff from success or failure adjusted for the probability of success or failure respectively—not just the payoff from a successful claim.

Some industry trade association commenters expressed doubt that class actions would resolve any market failure of the type described here, due to the small average payments to consumers. In the view of these commenters, consumers will not have sufficient incentive to file claims in class actions because of the small average monetary recovery involved for class members. As discussed in more detail in the section 1028(b) findings, a significant portion of cases resulting in settlements lead to automatic distributions.[1139] Moreover, whether automatic or claims-made, class settlements also lead to costs for companies, including defense costs and plaintiff's attorney fees, which magnify the deterrent effect.

One industry association also pointed to low claims rates in claims-made

[1134] *See* Part VI.

[1135] *See generally* Study, *supra* note 3, section 9.

[1136] A research center commenter made a related argument that some providers have clauses in their arbitration agreements that provide a bonus payment to consumers who receive a favorable arbitration judgment in excess of the provider's last settlement offer. The commenter argued that such payments could increase consumer's incentives to file arbitration claims. However, the commenter acknowledged that these clauses are not commonly in use in consumer finance. In addition, as the Bureau discusses further below in Section G of this 1022(b)(2) Analysis, such clauses are unlikely to materially affect consumers decisions, as the *ex ante* expected value of the bonus payments is significantly lower than the face value.

[1137] Note that a provider does not have to know, for example, during a consumer's call to the provider's service phone line whether this particular consumer will file for arbitration. The provider can wait until the consumer files for arbitration, and then resolve the matter with the consumer without paying any fees related to arbitration.

[1138] *See generally* Study, *supra* note 3, section 5.

[1139] *See also* Study, *supra* note 3, section 8 at 23–29.

settlements, and a low proportion of filed class actions that result in class settlements, as a basis for concern that the rule will not address the market failure. The Bureau has not stated, and does not believe, that cases filed as class actions but which are not resolved in class settlements would address the market failure. The Bureau believes that the market failure is addressed by the availability of classwide relief through the class mechanism, which, as the Study showed, does produce outcomes providing substantial aggregate relief for consumers. In addition, the Bureau notes that the amount of monetary relief and other relief paid in these cases acts as a deterrent, even if some of these class settlements are structured on a claims-made basis with relatively lower percentage of potential class members filing claims. Further, a provider also cannot generally know, ex ante, whether the class exposure it may face would result in an automatic or claims-made settlement (nor how many claims will be submitted). Thus, the prospect of the latter may still serve as a deterrent in many situations.

In general, if the extant laws were adopted to solve some underlying market failures, it means that, by definition, the market could not resolve these failures on its own. Therefore, given the Bureau's assumptions outlined above, a practice that lowers providers' incentive to follow these laws, in this case arbitration agreements, that can be invoked in class litigation, would be a market failure since it would allow the underlying market failures to persist or reappear. The providers, and the market in general, would be unable to resolve this market failure for the same reasons that the providers would not be able to solve the underlying market failures in the first place.[1140]

Overview of Effects of the Final Rule

The final rule requires providers to include language in their arbitration agreements stating that the agreement cannot be used to block a class action with respect to those consumer financial products and services that would be covered by the final rule and prohibits providers from invoking such an agreement in a case filed as a class action with respect to those consumer financial products and services. The final rule also prohibits third-party providers facing class litigation from relying on such arbitration agreements. Finally, the final rule requires that providers using pre-dispute arbitration agreements redact and submit certain records relating to arbitral proceedings to the Bureau.

The Bureau believes that the final class rule will have three main effects on providers with arbitration agreements: (1) They will have increased incentives to comply with the law in order to avoid exposure to class litigation; (2) to the extent they do not act on these incentives or acting on these incentives does not prevent class litigation filed against them, the additional class litigation exposure will ultimately result in additional litigation expenses and potentially additional class settlements; and (3) they will incur a one-time cost of changing language in consumer contracts entered into 180 days after the rule's effective date, or an ongoing cost associated with providing contract amendments or notices in the case of providers who acquire pre-existing contracts that lack the required language in their arbitration agreements. Below, the Bureau refers to these three effects of the final class rule as, respectively, the deterrent effect, the additional litigation effect, and the administrative change effect. In addition, the final monitoring rule may have some effect on compliance through reputational effects, as is discussed in greater detail in Part VI, above.

In this Section 1022(b)(2) Analysis, the Bureau has elected not to discuss further any benefits from certain abstract considerations which the Bureau considers above in Part VI, such as promoting the rule of law. To the extent that individuals value any such impacts to society from the final rule, this would be a part of the benefits of the rule to consumers; however, the Bureau is not in a position to quantify these impacts for purposes of this Section 1022(b)(2) Analysis. The Bureau did not receive any comments disagreeing with this approach. Accordingly, while as discussed in Part VI above, the Bureau believes that the final rule is in the public interest due, in part, to reinforcing the rule of law, the discussion in this section focuses in particular on more concrete impacts on individual consumers and providers for purposes of this Section 1022(b)(2) Analysis.

The Deterrent Effect

As discussed above, class litigation exposure provides a deterrence incentive to providers, above and beyond other incentives they may have to comply with the law. So long as the level of class litigation exposure is related to the level of providers' compliance with laws (that is, so long as class litigation is not always brought randomly without regard to the merits of the individual case, such that higher levels of compliance will result in fewer class action lawsuits), providers would want to ensure more compliance than if there were no threat of class litigation.[1141] As discussed in more detail in Part VI above, even if some class actions were random and without merit, as long as meritorious class claims can be asserted, the threat of those class actions will deter conduct that would give rise to such claims. Leaving aside whether the filing of class actions is random, class action exposure would still incentivize providers to ensure appropriate levels of compliance if the probability of a suit's dismissal, or the finding of merit, is affected by the level of compliance. Given the Bureau's assumptions outlined above, economic theory suggests that providers who are immune from class litigation currently under-comply from an economic welfare perspective, and therefore this

[1140] This argument also illustrates why form language regarding arbitration agreements is fundamentally different from standardized language regarding other contract terms, and is not necessarily efficient. The debate about the efficiency of boilerplate language, from the perspective of law and economics, is whether boilerplate language allows for more efficient contracting between the firm and the customer, thus enhancing both parties' welfares, or whether boilerplate language allows the firm to take advantage of its customer in a welfare-reducing manner, with this advantage potentially remaining even if the market is competitive. The same arguments apply to contracts of adhesion. *See, e.g.,* Symposium, "'Boilerplate': Foundations of Market Contracts," 104 Mich. L. Rev. No. 5 (2006).

Any law restricting two parties' freedom to contract (for example, a mandatory disclosure or a limit on some financing terms in a consumer finance statute) introduces the following friction: To comply with the law, these two parties will agree to a different contract or not contract at all. Each of these options was available to the parties before the law was adopted, but at the time the parties chose to contract more efficiently from the parties' perspectives, at least to the extent that both parties had a choice. However, to the extent that the law was adopted to fix a market failure, this friction is exactly what is preventing that market failure from occurring: The introduction of the contracting friction is necessary for the underlying market failure to be alleviated, as opposed to being a potential source of inefficiency that could be reduced by using boilerplate contracts.

That underlying market failure could be, for example, a negative externality exerted by the firm's and its customer's contract on third parties. In a theoretical model, this would imply that the laws were endogenously chosen to correct pre-existing market failures. And this fact means that an ability to sign an efficient contract from the bilateral perspective that lowers the incentives to comply with the law is welfare-reducing since this law was supposedly passed exactly to ensure that the incentive to comply with the law is there and because this incentive alleviates another market failure.

[1141] *See, e.g.,* Kaplow & Shavell, *supra* note 1127, at 1166 ("In many areas of law . . . a primary reason to permit individuals to sue is that the prospect of suit provides an incentive for desirable behavior in the first instance.").

additional deterrence is beneficial.[1142] For this purpose, both the cost of class relief and the cost of related litigation are counted as contributing to the size of the strengthened compliance incentives.[1143]

At least two sources might inform a provider's determination of its profit-maximizing level of compliance in a regime in which there is potential class action exposure for non-compliance. First, the potential exposure can cause a provider to devote increased resources to monitoring and evaluating compliance, which can in turn lead the provider to determine that its compliance is not sufficient given the risk of litigation. Second, the potential exposure to class litigation can cause a provider to monitor and react to class litigation or enforcement actions (that could result in class litigation) against its competitors, regardless of whether the provider previously believed that its compliance was sufficient.

An industry commenter asserted that most class action claims are frivolous and that this reduces the potential deterrent effect of the rule because if claims are frivolous, no amount of increased compliance could eliminate the risk that a provider would be sued. Many consumer advocate and consumer law firm commenters took the opposite position, arguing that class actions serve to redress real consumer injury from illegal conduct. The Bureau acknowledges that some class actions filed may be frivolous in nature, but believes this would only be true in general if providers were always in full compliance with the law. This is because the ability of class actions to recover for consumers, and reward class action attorneys, bears a relationship to the merits of the cases. Defendants are more likely to procure the dismissal of frivolous claims, and less likely to settle such claims, than meritorious claims. Further, even where frivolous claims are settled, the settlements are likely to be smaller than for meritorious claims. For these reasons and those discussed in Part VI above, a meritorious case is more likely to be pursued than a frivolous one. The fact that class actions can be filed (and are more likely to be filed) for meritorious claims therefore creates a disincentive to break the law.

The Additional Litigation Effect

A class settlement could result in three types of relief to consumers: (1) Cash relief (monetary payments to consumers); (2) in-kind relief (free or discounted access to a service); and (3) injunctive relief (a commitment by the defendant to alter its behavior prospectively, including the commitment to stop a particular practice or follow the law).

When a class action is settled, the payment from the provider to consumers is intended to compensate class members for injuries suffered as a result of actions asserted to be in violation of the law and is a benefit to those consumers. However, this benefit to consumers is also a cost to providers.[1144] This payment from the provider to consumers in and of itself is, in economic terms, a transfer,[1145] regardless of whether this payment is a remedy for a legal wrong or restitution of providers' previous ill-gotten gains from consumers that led to the class action in the first place. To effectuate the transfer there are also other costs involved, such as spending on attorneys (both the plaintiff's and the defendant's) and providers' management and staff time, making any such transfer payment in and of itself (*i.e.,* absent any consideration of its deterrent impact, which the Bureau discuses in the below) economically inefficient.[1146] These transaction costs are incurred both in cases with an eventual class settlement and in cases that ultimately are dismissed by motion, abandoned, or settled on an individual basis, although the magnitude of the costs will vary depending upon how and when in the process a case is resolved.[1147] Thus, economic theory views class actions that result solely in cash relief as inefficient (*i.e.,* absent any consideration of its deterrent impact). More generally, under standard economic theory, any delivery system for formal or informal compensation of victims for violations of law is typically inefficient unless this system of remedies deters at least some of these violations before they occur. The Bureau notes that, as in many cases of economic policy, there may be a trade-off between efficiency and equity, that is, between total output and the distribution of that output. A policy of allowing wrongdoers to keep ill-gotten gains might be efficient in that it avoids costly transfers, but might also lead to a distribution of resources that is inequitable. Although the Bureau's 1022(b)(2) analysis here, in cataloguing the costs and benefits of the rule, abstracts from equity concerns, as a general matter a policy of allowing transfers to compensate injured parties might be justified on equity grounds despite being inefficient absent a deterrent effect or other benefits.

Much of the discussion above also applies to in-kind and injunctive relief. In-kind relief is intended to compensate class members for injuries suffered as a result of actions asserted to be in violation of the law in ways other than by directly providing them with money. Injunctive relief is typically intended to stop or alter the defendant's practices that were asserted to be in violation of law. Both forms of relief benefit consumers. However, this benefit to consumers is also frequently a cost to providers (*e.g.,* if the practice that the provider agrees to halt was profitable, the loss of that profit is a cost to the provider). To effectuate the relief there are some similar transaction costs involved as with monetary relief, such as spending on attorneys (both the plaintiff's and the defendant's) and providers' management time.

Unlike with monetary relief, however, the benefits to consumers of injunctive relief may not be a mirror image of the costs to providers, and the cost of providing the relief might be lower than consumer's value of receiving the relief.[1148] The same can be true in

[1142] *See* Gary Becker, ''Crime and Punishment: An Economic Approach,'' 76 J. Pol. Econ. 169 (1968). *See also* Shapiro, *supra* note 1131; Posner, *supra* note 1124. See the discussion above on why other incentives to comply, such as public enforcement and reputation, are often insufficient or could be made more effective and efficient by introducing private enforcement as well.

[1143] *See* Kaplow & Shavell, *supra* note 1127.

[1144] There might also be an associated increase in prices due to firms passing on the cost of these payments back to consumers. See the discussion on pass-through below.

[1145] ''Benefit and cost estimates should reflect real resource use. Transfer payments are monetary payments from one group to another that do not affect total resources available to society.'' Memorandum to the Heads of Exec. Agencies & Establishments from Off. of Mgmt. & Budget, at 38 (Sept. 17, 2003), *available at https://www.whitehouse.gov/sites/default/files/omb/assets/omb/circulars/a004/a-4.pdf. See* Richard Posner, ''Cost-Benefit Analysis: Definition, Justification, and Comment on Conference Papers,'' 29 J. of Legal Studies 1153, at 1155 (''In the discussion at the conference John Broome offered as a counterexample to the claim that efficiency in the Kaldor-Hicks sense is a social value the forced uncompensated transfer of a table from a poor person to a rich person. I agree that allowing the transfer would not improve social welfare in any intelligible sense. But it would not be Kaldor-Hicks efficient when one considers the incentive effects.'').

[1146] As noted above, these other costs still contribute to the deterrence incentive.

[1147] Given the Bureau's assumptions outlined above, because of these costs, from the perspective of economic theory, the best outcome is the one where the possibility of class litigation results in optimal compliance, and this optimal compliance in turn results in no actual class litigation occurring.

[1148] This is more likely to be the case where there were also pre-existing negotiation frictions that prevented a Coasian outcome. The Coase Theorem, applied to this context, postulates that a firm provides a service to its customer if and only if the customer values the service more than its costs. When the Coase Theorem holds, such a delivery

principle for in-kind relief, although the Bureau believes that the benefits to consumers of such relief are more limited. Thus in some cases involving substantial injunctive relief, litigation could be viewed as efficient from the perspective of economic theory independent of any deterrent effect.

The Administrative Change Effect

The final class rule will mandate that providers with arbitration agreements include a provision in their future contracts stating that the provider cannot use the arbitration agreement to block a class action. This administrative change will require providers to incur expenses to change their contracts going forward, and amend contracts they acquire or provide a notice.[1149] The Bureau acknowledges that, as some industry commenters noted, some providers have a substantial number of distinct agreements, all of which would need to be modified to comply with the rule.

Effects of the Requirement To Submit Arbitral and Court Records

The final rule will also require that providers using pre-dispute arbitration agreements submit certain records relating to arbitral and certain court proceedings to the Bureau. This will require providers to incur additional expenses when such an agreement is invoked, with some one-time expense of establishing a procedure for accomplishing such a task and some recurring expense for each incidence.

B. Potential Benefits and Costs to Covered Persons

Overview

Given that providers using arbitration agreements have chosen to do so and will be limited in their ability to continue doing so by the final rule, these providers are unlikely to experience many notable benefits from the Bureau's final rule.[1150] Rather, the benefits of the final rule will flow largely to consumers, as discussed in detail in the next part of this section.

Providers' costs correspond directly to the three aforementioned effects of the final class rule and to the fourth effect, which arises from the final monitoring rule: (1) Providers will experience costs to the extent they act on additional incentives for ensuring more compliance with the law; (2) providers will spend more to the extent that the exposure to additional class litigation actually materializes; (3) providers will incur a one-time administrative change cost or ongoing amendment or notices costs; and (4) providers will incur ongoing administrative costs from the requirement to submit arbitral and certain court records to the Bureau. The Bureau considers each of these effects in turn. To the extent providers pass these costs through to consumers, providers' costs will be lower. Providers' pass-through incentives are discussed further below.

Covered Persons' Costs Due to Additional Compliance

Persons exposed to class litigation have a significant monetary incentive to avoid class litigation. The final rule prohibits providers from using arbitration agreements to limit their exposure to class litigation. As a result, providers may attempt to lower their class litigation exposure (both the probability of being sued and the magnitude of the case if sued) in a multitude of ways. All of these ways of lowering class litigation exposure will likely require incurring expenses or forgoing profits. The investments in (or the costs of) avoiding class litigation described below, and other types of investments for the same purpose, would likely be enhanced by monitoring the market and noting class litigation settlements by competitors, as well as actions by regulators. Providers will also likely seek to resolve any uncertainty regarding the necessary level of compliance by observing the outcomes of such litigation. These investments might also reduce providers' exposure to public enforcement.

The Bureau has previously attempted to research the costs of complying with Federal consumer financial laws as a general matter, and found that providers themselves often lack data on compliance costs.[1151] Even if basic data were available on how much money providers invest in legal compliance generally—as distinct from investments in customer service, general risk management, and related undertakings and functions—it would be difficult to isolate the marginal compliance costs related to particular deterrence and to quantify any additional investment that would occur in the absence of arbitration agreements. Specifically, any differences in compliance-related expenditures between firms that have and do not have arbitration agreements may be the result of other underlying factors such as a general difference in risk tolerance and management philosophy. Thus, given the data within its possession, or reasonably available to it, the Bureau is unable to quantify these costs. The Bureau requested comment and data on this subject, but no commenters provided relevant data (as opposed to data on overall cost and impact of compliance generally, which one credit union industry commenter estimated).

An association of State regulators expressed concern that the compliance costs of the proposal could be substantial, and that requiring institutions to incur those costs could pose safety and soundness concerns for the depository institutions that the association's members supervise. The commenter urged the Bureau to engage in a more rigorous analysis of current and future compliance costs before

system of formal or informal relief will typically be inefficient, since the efficiency of the interaction between the firm and its consumer would have already been maximized before any relief occurred. As noted in Ronald Coase, ''The Problem of Social Cost,'' 3 J. of L. & Econ. 1 (1960), absent transaction costs, the Coase Theorem holds. However, again as Coase notes, presence of transaction costs might result in such a solution not materializing.

In general, economic theory behind optimal choices by firms in such contexts is ambiguous, at least as long as a solution consistent with the Coase Theorem is not available because of a particular pre-existing market friction (transactions costs). *See, e.g.,* A. Michael Spence, ''Monopoly, Quality & Regulation,'' 6 Bell J. of Econ. 417 (1975). For a somewhat more accessible treatment (at a cost of assuming away several issues), *see* Richard Craswell, ''Passing on the Cost of Legal Rules: Efficiency and Distribution in Buyer-Seller Relationships,'' 43 Stan. L. Rev. 361 (1991).

[1149] As discussed further below, providers like debt buyers or indirect automobile lenders will need to provide notices to consumers upon purchase of consumer debt with an arbitration agreement that adheres to the proposal's mandated provision.

[1150] The Bureau believes that it is possible that some providers without arbitration agreements will benefit from the final rule. Their rivals' costs will increase, and thus providers without arbitration agreements will benefit to the extent that cost increase is passed through to consumers (or to the extent rivals change their aggressive practices). *See* Salop and Scheffman, ''Raising Rivals' Costs,'' 73 Am. Econ. Rev. 267 (1983). However, the Bureau believes that the magnitude of this benefit is relatively low. In addition, the Bureau acknowledges that these providers without arbitration agreements will lose the option going forward to adopt an arbitration agreement that could be invoked in class litigation. As discussed above, economic theory treats a constraint on a party's options as imposing costs on that party, though given that these providers currently do not have arbitration agreements, the Bureau believes that the magnitude of this cost is also relatively low. Thus, for the ease of presentation and due to the low magnitude of these benefits and costs, the Bureau focuses its analysis only on providers that currently have arbitration agreements.

[1151] *See* Bureau of Consumer Fin. Prot.,'' Understanding the Effects of Certain Deposit Regulations on Financial Institutions' Operations,'' (2013), *available at http://files.consumerfinance.gov/f/201311_cfpb_report_findings-relative-costs.pdf* (for challenges in general and for a description of the amount of resources spent collecting compliance information from seven banks with respect to their compliance to parts of four regulations. A significant part of the challenge is that providers typically do not track their compliance costs and it is not possible to calculate them from the standard accounting metrics.).

finalizing the rule. The Bureau notes that arbitration agreements are not universal, such that for the markets covered by the final rule and that are subject to the authority of State regulators, there are depository institutions that do not currently employ such agreements. Indeed, as discussed below, the Bureau estimates that the majority of depository institutions do not use arbitration agreements. It is evident that depository institutions without arbitration agreements are able to remain safe and sound despite their exposure to class action liability. The Bureau has no reason to believe that depository institutions with arbitration agreements are less financially sound than those without or that requiring certain depository institutions to amend their agreements will cause them to become less financially sound. For the reasons above the Bureau believes that increasing class action exposure for depository institutions currently using arbitration agreements will not pose safety and soundness risks. In addition, as discussed in Part III, no class action in the Study went to trial. As further discussed in the findings in Part VI, courts are generally able to consider the financial condition of the defendant when evaluating the reasonableness of class settlements and litigated judgments. In addition, under CAFA, prudential regulators are afforded notice and the opportunity to comment on the proposed class settlement before the court makes a final approval decision. These mechanisms allow for consideration of safety and soundness concerns into the class settlement approval process.

A credit union industry commenter disagreed with the Bureau's analysis of the costs of additional compliance. In the view of this commenter, the costs to credit unions of complying with existing laws and regulations are excessive, and the increase in class action liability for those that now employ arbitration agreements would make these costs worse for credit unions. However, as the commenter noted and as the Study showed, most credit unions currently do not use pre-dispute arbitration agreements. The class provision will not impose costs on entities that do not currently use arbitration agreements.[1152] With respect to those credit unions that do use arbitration agreements, the Bureau does not believe the impact of the rule will be significantly different for them than any other provider whose products have a similar level of compliance with applicable laws.

As noted, the Bureau believes that, as a general matter, the final rule will increase at least some providers' incentives to invest in additional compliance. The Bureau believes that the additional investment will be significant, but cannot predict precisely what proportion of firms in particular markets will undertake which specific investments (or forgo which specific activities) described below.

However, economic theory offers general predictions on the direction and determinants of this effect. Whether and how much a particular provider invests in compliance will likely depend on the perceived marginal benefits and marginal costs of investment. For example, if the provider believes that it is highly unlikely to be subject to class litigation and that even then the amount at stake is low (or the provider is willing to file for bankruptcy if necessary to ward off a case), then the incentive to invest is low. Conversely, if the provider believes that it is highly likely to be subject to class litigation and that the amount at stake would be large if it is sued, then the incentive to invest is high.

Providers' calculus on whether and how much to invest in compliance may also be affected by the degree of uncertainty over whether a given practice is against the law, as well as the size of the stakes and the ability of the provider to mitigate the legal risk. Where uncertainty levels are very high and providers do not believe that they can be reduced by seeking guidance from legal counsel or regulators or by forgoing a risky practice that creates the uncertainty, providers may have less incentive to invest in lowering class litigation exposure under the logic that such actions will not make any difference in light of the residual uncertainty about the underlying law. In the extreme case, if a provider believes that class litigation is completely unrelated to compliance, then the provider will rationally not invest in lowering class litigation exposure at all: The deterrent effect is going to be absent. However, as discussed above, if success in a class action is related to the merit of the claim, there will be an incentive on the part of attorneys to bring claims with merit and therefore an incentive on the part of providers to invest in compliance. Indeed, the Bureau believes that many providers know that class litigation is indeed related to their actual compliance with the law and adherence to their contracts with consumers.[1153] Moreover, because court cases, rulemakings, and other regulatory activities address areas of legal uncertainty over time, the Bureau believes that providers at a minimum would have incentives to respond to class litigation against them and their competitors and to respond to other new legal developments as they occur.

Examples of Investments in Avoiding Class Litigation

Providers who decide to make compliance investments may take a variety of specific actions with different cost implications. First, providers may spend more on general compliance management. For example, upon the effective date of the rule, a provider may decide to go through a one-time review of its policies and procedures and staff training materials to minimize the risks of future class litigation exposure. This review might result in revisions to policies and additional staff training. There may also be an ongoing component of costs arising from periodic review of policies and procedures and regularly updated training for employees, as well as third-party service providers, to mitigate conduct that could create exposure to class litigation.[1154] Moreover, there may be additional costs to the extent that laws change, class litigation cases are publicized, or new products are developed. Both the one-time and the ongoing components could also include outside audits or legal reviews that the provider might perform.

In addition, providers may incur costs due to changes in the consumer

[1152] Credit union industry commenters also argued that their member-owned structure creates incentives to be more consumer-friendly than other financial institutions. The commenters did not generally dispute the Bureau's view that credit unions generally do not use arbitration agreements for most products and services. However, credit union industry commenters also asserted that the rule would impose costs on their members because even though they do not currently use arbitration agreements, they are currently considering doing so. As noted above, any such cost is likely minimal—if the option of adding an arbitration agreement had substantial value for credit unions, presumably more credit unions would have already adopted them.

[1153] This is hard to measure empirically and the Bureau requested comments on or submissions of any empirical studies that have measured the merit of class actions involving consumer financial products or services. The Bureau did not receive any comments relevant to this question. The Bureau is aware of some empirical literature on this question involving securities but does not believe that this literature directly applies in this context. *See, e.g.,* Joel Seligman, ''The Merits Do Matter: A Comment on Professor Grundfest's ''Disimplying Private Rights of Action Under the Federal Securities Laws: The Commission's Authority,'' 108 Harv. L. Rev. 438 (1994).

[1154] The providers that already have a compliance management system with an audit function could, for example, increase the frequency and the breadth of audits.

financial products or services themselves. For example, a provider may conclude that a particular feature of a product makes the provider more susceptible to class litigation, and therefore decide to remove that feature from the product or to disclose the feature more transparently, possibly resulting in additional costs or decreased revenue. Similarly, a provider may update its product features based on external information, such as actions against the provider's competitors by either regulators or private actors. The ongoing component could also include changes to the general product design process. Product design could consume more time and expense due to additional rounds of legal and compliance review. The additional exposure to class litigation could also result in some products not being developed and marketed primarily due to the risk associated with class litigation.

Some of the compliance changes that providers may make are relatively inexpensive changes in business processes that nonetheless are less likely to occur in the absence of class litigation exposure. Three examples of such investments in compliance follow. First, under the FDCPA, debt collectors are not allowed to contact a consumer at an unusual time or place which the collector knows or should know to be inconvenient to the consumer.[1155] However, it is highly unlikely that even a consumer who is aware of this rule will bring an individual lawsuit or an individual arbitration over a single contact because, among other reasons discussed more fully in Part VI, it will require considerable time on the consumer's part, which is likely to be an even higher burden for consumers subject to debt collection than for other types of consumers. To the extent that a debt collector wants to minimize class litigation exposure, however, it could develop a procedure to avoid such contacts.

As a second example, consider a bank stopping an Automated Clearing House (ACH) payment to a third party at a consumer's request. While important to a consumer, absent the possibility of class litigation, the bank's primary incentive to ensure that the ACH payment is discontinued is to maintain a positive reputation with this particular consumer.[1156] It is highly unlikely that a consumer would sue individually if the bank fails to take action, and it might even be unlikely that the consumer would switch to another bank because of that failure, especially given the switching costs entailed in such a move. However, a bank could invest in developing proper procedures to ensure that such payments are stopped at most three business days after a consumer's request as required under prevailing law.

The third example is a creditor sending a consumer an adverse action notice explaining the reasons for denial of a credit application.[1157] While knowing when and why a denial has occurred may be important to an individual consumer, it is unlikely that a consumer would bring an individual suit based on the failure to provide such a notice (some consumers will not even know they are entitled to one) or on its content (consumers will not generally be in a position to know whether the reason given is legally sufficient or accurate). The consumer is more likely to seek credit from another source, or simply to proceed unaware of the reasons why he or she is not able to access credit. However, a creditor could invest in improving its notice procedures and content.

Providers' Costs Due to Additional Class Litigation: Methodology and Description of Assumptions Behind Numerical Estimates

Additional investments in compliance are unlikely to eliminate additional class litigation completely, at least for some providers.[1158] Thus, those providers that are sued in a class action will also incur expenses associated with additional class litigation. The major expenses to providers in class litigation are payments to class members and related expenses following a class settlement, plaintiff's legal fees to the extent that the provider is responsible for paying them following a class settlement, the provider's legal fees and other litigation costs (in all cases regardless of how it is resolved), and the provider's management and staff time devoted to the litigation.

To provide an estimate of costs related to class settlements of incremental class litigation that would be permitted to proceed under the proposal, the Bureau developed preliminary estimates using the data underlying the Study's analysis of Federal class settlements over five years (2008 to 2012), the Study's analysis of arbitration agreement prevalence, and additional data on arbitration agreement prevalence collected by the Bureau through outreach to trade associations in several markets during the development of the proposal.[1159] After considering the comments discussed below, the Bureau is finalizing the estimates from the proposal, which it discusses again here.

To estimate the impact of the rule the Bureau used the Study data to estimate the percentage of providers in each market with an arbitration agreement. The Bureau had classified each case in the Study by the North American Industry Classification System (NAICS) code that most closely corresponded to the consumer financial product or service at issue in the case.[1160] The Bureau assumed that the class settlements that occurred involved providers without an arbitration agreement. The Bureau was then able to calculate the incidence and magnitude of class action settlements for those providers in each market and use these calculations to estimate the impact of the proposal going forward in each market if the providers who currently

[1155] 15 U.S.C. 1692(a).

[1156] The law requires that a bank stop such payments in at most three business days after a consumer's request. *See* 15 U.S.C. 1693e(a).

[1157] A creditor would have to send such a notice. *See* 15 U.S.C. 1681m(a).

[1158] For example, as noted above, some providers might choose to forgo sufficient additional investment in compliance.

[1159] *See generally* Study, *supra* note 3, sections 2 and 8. During the SBREFA process, the Bureau sought and obtained permission from OMB to conduct a survey of trade groups (and potentially providers) in order to assess the prevalence of arbitration agreements in the markets for which prevalence was not reported in the Study. Unless the trade groups had an exact estimate, the Bureau asked the trade group representatives to pick one of four options for the prevalence of arbitration agreements in a given market, with the percentages in the brackets also mentioned: (1) Barely any providers use arbitration agreements [0 percent to 20 percent]; (2) some providers but fewer than half use arbitration agreements [20 percent to 50 percent]; (3) more than half but not the vast majority use arbitration agreements [50 percent to 80 percent]; and (4) the vast majority use arbitration agreements [80 percent to 100 percent]. The Bureau then inquired whether this number would change if the question had been asked to just small providers. For the markets for which prevalence was analyzed in the Study, the Bureau converted the estimate from the Study into one of these four ranges. Finally, the Bureau utilized the midpoint of each range for this quantification exercise (for example, assuming that 35 percent of providers use arbitration agreements if the trade group reported that some, but less than half [20 percent to 50 percent] of providers use arbitration agreements). See Part IX below for further description of the data received from the trade groups.

Any inaccuracy in the prevalence numbers affects the estimates below. For example, if prevalence is actually higher in a particular market than the number used by the Bureau, then the actual costs to providers (and benefits to consumers) will be higher. In this example, the increases in across all markets costs to providers and benefits to consumers (stemming from the relief to class members) are not necessarily symmetric, since the Bureau's estimates are market-by-market.

[1160] *See* U.S. Census Bureau, "North American Industry Classification System," *http://www.census.gov/eos/www/naics/* (last visited June 1, 2017).

have arbitration agreements were no longer insulated from class actions.

The Bureau's estimate of additional Federal class litigation costs is based upon the set of Federal class settlements analyzed in the Study, with adjustments to align those data with the scope of the proposal, which was somewhat narrower.[1161] Specifically the Study sought to identify all class action settlements involving any of the enumerated consumer financial statutes under title X of the Dodd-Frank Act. Due to the narrower scope of both the proposal and the final rule, the Bureau's Section 1022(b)(2) Analysis focuses only on the impact on covered entities when they offer products and services subject to the rule, rather than the broader scope of the research of Federal class actions in the Study. Additionally, the class rule will not have an impact on cases in which arbitration agreements cannot play a role today, either because the law does not allow them to be used for the type of dispute at issue or that type of dispute does not involve a written contract with the consumer on which the defendant in the case could rely to invoke arbitration.[1162] The set of Federal class settlements the Bureau used to estimate the impacts of the rule therefore excludes 117 Federal class settlements analyzed in Section 8 of the Study.[1163] In addition, to avoid underestimating the effects, the estimates in this section also include 10 additional class settlements identified through the Section 8 search methodology which are within the scope of the final rule by it but which had not been counted in the data analyzed in Section 8.

The resulting set of 312 cases used to estimate impact of the proposal on Federal class litigation, as well as the 117 excluded cases described above, were listed in the proposal. The Bureau notes that the total amount of payments and attorney's fees—the two statistics that the Bureau uses for its estimates in this Section 1022(b)(2) Analysis—for the 312 cases are not materially different than the totals for the aforementioned 419 cases used in the Study. That is largely a function of the fact that the additions and subtractions were for the most part relatively small class actions that did not contribute materially to the amount of aggregate gross or net relief.[1164]

Many of the cases not used to estimate the impact of the rule in the Bureau's Section 1022(b)(2) Analysis were EFTA ATM ''sticker'' cases, in which noncustomers had sued ATM operators for failing to comply with the historical requirement in EFTA to post a ''sticker'' on the ATM disclosing certain information concerning ATM fees. A research center commenter argued that a consistent approach would have been to also exclude FDCPA claims against debt collectors, which the Bureau did not exclude. In the commenter's view, both types of cases are not subject to arbitration, and the commenter believes that including FDCPA cases and excluding EFTA ATM sticker cases biases the Bureau's estimates in favor of the rule. The Bureau disagrees with this comment. The Bureau believes that it is not appropriate to include EFTA ATM sticker cases in its analysis because those cases concerned rights of persons using an ATM machine who were not holders of an account at the institution offering the ATM (and which in some cases may have been a merchant). A financial institution providing ATM services to noncustomers is not a product or service covered by the rule. The commenter's analogy between that service and debt collection is not apposite because debt collection is specifically covered by the rule.[1165] *See* 1040.3(a)(10). Furthermore, regarding FDCPA cases, as noted above in its section 1028 findings, and as a number of SERs stated in the SBREFA Panel process[1166] and debt collection industry comments confirmed, the Bureau believes that debt collectors who are subject to class action lawsuits often do rely on arbitration provisions included in contracts between the original creditor and consumers, which specifically provide for the debt collector to be a beneficiary of the arbitration agreement. In contrast, the Bureau is not aware of any cases in which an arbitration clause has been invoked to try to block an ATM sticker case.[1167]

With regard to the Bureau's estimations overall, the accuracy of the estimates is limited by the difficulty that often arises in data analysis of disentangling causation and correlation, namely unobserved factors than can affect multiple outcomes. As noted above, the core assumptions underlying the Bureau's estimates are that the settlements identified in the Study were all brought against providers without an arbitration agreement and that providers with arbitration agreements affected by the rule will be subject to class settlements to the same extent as providers without arbitration agreements today. The first assumption is a conservative one: It is likely that some of the settlements involved providers with arbitration agreements that they either chose not to invoke or failed to invoke successfully, in which event the Bureau's incidence estimates are overstated. On the other hand, similar to issues discussed above with regard to estimating compliance-related expenditures, it may be that some other underlying factor (such as a general difference in risk tolerance and management philosophy) might prompt providers that use arbitration agreements today to take a different approach to underlying business practices and product structures than providers who otherwise appear similar but have never used arbitration agreements. This might make providers who use arbitration agreements today more prone to class litigation than providers who do not, and increase both the costs to providers and benefits to consumers discussed below.

The Bureau also generally assumed for purposes of the estimation that litigation data from 2008 to 2012 were representative of an average five-year period. However, the Bureau recognizes that the Bureau's own creation in 2010 may have increased incentives for some providers to increase compliance investments, although it did not begin enforcement actions until 2012. To the extent that the existence and work of the Bureau, including its supervisory activity and enforcement actions, increased compliance since 2010 in the markets the final rule will affect, the estimates of costs to providers and the benefits to consumers going forward will be overestimates.

[1161] The Study's Section 8 analyzed class settlements of claims under enumerated consumer laws, unless excluded as described in the methodology for Section 8. *See* Study, *supra* note 3, appendix S at 129. In addition, class settlements of claims concerning consumer financial products or services more generally were included, even if claims were not raised under enumerated consumer laws. *Id.* The Bureau notes that although the scope of the final rule differs slightly from that of the proposal, the changes in scope did not affect the estimates presented here.

[1162] Persons offering or providing similar products or services might be covered by the final rule in some circumstances; the Bureau's estimates are not a legal determination of coverage.

[1163] *See* Appendices A and B hereto for additional details on adjustments in three other cases.

[1164] In some markets, such as the payday loan market, there were Federal class settlements related to debt collection practices, which this part classifies as relating to the debt collection market.

[1165] 81 FR 32830, 32929–30 (May 24, 2016).

[1166] SBREFA Report, *supra* note 419, at 21 and appendix A (debt collection industry letters).

[1167] Specifically, the Bureau is not aware of any deposit agreement whose arbitration agreement makes a foreign ATM operator a beneficiary. Nor has the Bureau seen an example of a financial institution seeking to rely on an arbitration agreement to block an EFTA ATM ''sticker'' class action.

To provide a more specific illustration of the Bureau's methodology, suppose for example that out of 1,000 providers in a particular market (NAICS code), 20 percent currently use arbitration agreements, and the Bureau found 40 class litigation settlements over five years. That implies that 800 providers (1,000 − 1,000 * 20 percent) did not use arbitration agreements and the overall exposure for these 800 providers was 40 cases total, for a rate of 5 percent (40/800) for five years. In turn, this implies that the 200 providers (1,000 * 20 percent) that currently use arbitration agreements would be expected to face, collectively, 10 class settlements in five years (200 * 5 percent), or two class settlements per year (10/5).[1168] The Bureau performs similar calculations for the monetary exposure in terms of payments to class members and plaintiff's attorney fees.

In the Study, the Bureau reported both the amount defendants agreed to provide as cash relief (gross cash relief) and the amount that public court filings established a defendant actually paid or was unconditionally obligated to pay to class members because of either submitted claims, an automatic distribution requirement, or a pro rata distribution with a fixed total amount (payments).[1169] The Bureau documented about $2 billion in gross cash relief and about $1.09 billion in payments.[1170] The actual (as opposed to documented by the end date of the Study) payments to consumers from the 419 Federal class settlements in the Study was somewhere between these two numbers. The Bureau uses the documented payments amount ($1.09 billion in total) as an input in calculating payments to class members in the derivations below. However, accounting for the different scope of the proposed and final rule results in the aggregate payment amount changing from $1.09 billion to $1.07 billion.[1171]

The Study documented relief provided to consumers and attorney's fees paid to attorneys for the consumers,[1172] but the Study did not contain data on the defense costs incurred by the providers because these data were not available to the Bureau. The Bureau therefore estimated defendant's attorney fees based on plaintiff's attorney fees with appropriate adjustments.[1173] Specifically, the Bureau believed it was important to account for the fact that while plaintiff's attorneys are compensated in class actions largely on a contingent basis (and thus not only lose the time value of money but, moreover, face the risk of losing the case and earning nothing), the defendant's attorneys and the defendant's staff are often compensated on an hourly or salaried basis, and face considerably lower risk. As discussed at greater length in Part VI, courts review attorney's fees in class action settlements for reasonableness. One way courts do this is to first calculate a ''lodestar'' amount by multiplying the number of hours the attorneys devoted to the case by a reasonable hourly rate, and then adjust that amount by a lodestar multiplier designed to compensate the plaintiff's attorneys for the risk they took in bringing the case with no guarantee of payment.[1174] To the extent that lodestar multipliers incorporate a risk inapplicable to defense costs, the Bureau believes that the proper comparison for the defendant's cost is the unadjusted plaintiff's attorney fees.

By reviewing the cases used in Section 8 of the Study, the Bureau documented lodestar multipliers in about 10 percent of the settlements. The average multiplier across those cases was 1.71, and thus the Bureau uses this number for calculations below.[1175] The Bureau assumes that in all cases the plaintiff's attorney fees awarded were 171 percent of the base amount, including in cases where the Bureau did not find a lodestar multiplier, which also include the cases where attorneys were compensated based on a percentage of the settlement amount. Based on that assumption, and the further assumption that the defense costs were equal to the lodestar (prior to multiplication), the Bureau estimated defense costs.

The Bureau also notes that the estimates provided below are exclusively for the cost of additional Federal class litigation filings and settlements. The Bureau did not attempt to monetize the costs of additional State class litigation filings and settlements because limitations on the systems to search and retrieve State court cases precluded the Bureau from developing sufficient data on the size or costs of State court class action settlements. Based on the Study's analysis of cases filed, the Bureau believes that there is roughly the same number of class settlements in State courts as there is in Federal courts across affected markets; [1176] however, the Bureau

[1168] These calculations were done by NAICS codes and adjusted for the composition of the debt portfolios at debt collectors. According to the comments made by SERs and other anecdotal evidence, debt collectors currently do not differentiate between debt incurred on contracts with and without arbitration agreements when deciding whether to collect on such debt. Many debts in their portfolios do not involve arbitration agreements and their ability to invoke agreements where they are present in the original credit contracts varies depending on the circumstances. *See* SBREFA Report, *supra* note 419, at appendix A. Thus, as discussed above, arguably all debt collectors face the risk of class litigation already. However, as discussed above, they are likely to experience an increase in risk proportional to the share of debt that they are collecting on that currently enjoys arbitration agreement protection. For purposes of this calculation, the Bureau assumed that 53 percent of debt collectors' current portfolios are subject to arbitration agreements based on the Study's estimate that 53 percent of the credit card loans outstanding are subject to arbitration agreements. Study, *supra* note 3, section 2 at 7. Thus, the Bureau assumed that the proportion of debt collectors' general portfolios that would be affected by the proposal has a prevalence of arbitration agreements on par with credit card debt. The prevalence is likely to be different from 53 percent as there are other sources of debt, for example, payday and medical debt. As with other estimates of prevalence, if 53 percent is an underestimate, then debt collectors would incur more costs (and consumers would experience more benefits).

[1169] *See* Study, *supra* note 3, section 8 at 3–5 and 23–29.

[1170] The Bureau notes that the number of class cases litigated, and the corresponding numbers for both gross cash relief and payments vary year-to-year. *See Id.* section 8 at 12, 16, 24, 27.

[1171] The data presented below with respect to a given market is after adding and dropping the aforementioned cases from the 419 used in the Study.

[1172] These fees included other litigation costs such as expert report costs as well as amounts paid for settlement administrator costs. *See* Study, *supra* note 3, appendix B at 137.

[1173] A research center commenter asserted that the Bureau's calculation in the proposal did not account for the costs of discovery and staff time on the part of the provider. The commenter did not provide data on these costs and the Bureau believes that discovery in class actions prior to certification may be limited. In any event the Bureau disagrees that the proposal did not account for any such costs—discovery costs in particular will be borne by plaintiffs' attorneys as well and reflected in the plaintiff's attorney fees that the Bureau used to calculate defense costs. In addition, discovery costs are not necessarily greater for defendants than for plaintiffs, and the commenter provided no data on this subject. With regard to staff costs, the Bureau believes these costs are often fixed costs and is not aware of evidence indicating that companies add staff to defend class actions.

[1174] For this factor, the Bureau averaged lodestar multipliers from a subset of cases from the Study where the Bureau documented a lodestar multiplier. Plaintiff's attorney compensation in a class settlement is frequently computed using the time spent on the case, the per-hour rate of the attorneys, all adjusted by the ''lodestar multiplier''. The multiplier reflects various considerations, for example, the fact that when plaintiff's attorneys do not settle a case, they will frequently not be compensated. *See, e.g.,* Theodore Eisenberg & Geoffrey P. Miller, ''Attorney Fees in Class Action Settlements: An Empirical Study,'' 1 J. of Empirical Legal Studies 27 (2004); Fitzpatrick, *supra* note 709.

[1175] Despite the small sample, this number is consistent with the finding by Professor Fitzpatrick of a 1.65 average. *See* Fitzpatrick, *supra* note 709, at 834.

[1176] The Study found 470 putative Federal class actions filed between 2010 through 2012 versus 92 putative State class actions. However, the State class actions were only for jurisdictions

Continued

generally believes that the amounts at stake are not nearly as large in State courts.[1177] The Bureau notes that while the total number of putative class cases filed might be similar in Federal and State courts, the relative frequency of State and Federal class actions may vary in different markets.[1178] For example, there might be considerably more putative State class actions filed against automobile lenders or smaller payday operators than putative Federal class cases. On the other hand, there might be considerably more putative Federal class actions filed against large national banks than putative State class actions.

An industry commenter argued that some laws result in many more cases being pursued at the State level than the Federal level. The Bureau agrees that some claims involving some laws may be more commonly asserted in one forum or another, but disagrees that this means that the total number of State court class actions is likely to be higher than the total number of Federal class actions. In the Study, the Bureau sampled three States and several additional counties to examine the level of class action litigation in courts in those jurisdictions, and, extrapolating from the sample, found the State class actions were approximately as common as Federal class actions.[1179] Given that the Bureau does not have nationwide data to estimate the number of additional State class actions as a result of the class provision, the Bureau believes that its assumption that there might be a similar number of Federal and State cases remains appropriate in the aggregate; commenters provided no data to the contrary.

The same industry commenter also asserted that State class actions can have more variable litigation costs than Federal class actions. The commenter argued that State courts lacked controls, expertise, and oversight to create consistent outcomes, and this may lead to unpredictable costs. The commenter did not cite data on this point. Congress adopted CAFA to address many of the concerns raised by the commenter. To assess whether CAFA was sufficient to address these concerns, the Bureau would need data post-dating the adoption of CAFA, as CAFA limited the cases that could be maintained in State court. The Bureau is not aware of any data that post-dates the adoption of CAFA. Further, even if costs are more variable, this does not mean that on average they are higher.[1180]

A State regulator commenter argued that State court class actions are more costly to litigate than Federal class actions of similar size. The commenter asserted that differences in State laws regarding the procedure used for class actions could increase the length and complexity of the process to certify a class action under a particular State's laws. The commenter provided no evidence to support this assertion. Moreover, this would only be relevant in cases where the parties are litigating the issue of certification. The commenter also provided no reason to believe that costs would be higher if the matter is resolved in any of a number of other ways, including a class settlement, a non-class settlement, or litigating a dispositive motion. In light of the requirements of CAFA, which generally limit the amount of relief available in multi-state class action claims in State courts to $5 million, the Bureau believes that State court class actions may be more expensive relative to the size of the injury involved, but mainly because there are fixed costs involved in litigating a class action, and State court class actions are likely less complex and involve fewer consumers.[1181] It is likely that Federal cases of similar size are similarly costly to litigate. This is supported by data publicly reported in the Federal Judicial Center survey of defense counsel finding that cost was not a common factor in the decision to remove a case from State court to Federal court.[1182]

A research center commenter made several criticisms of the methodology described above, all relating to the ratio of attorney's fees to consumer recovery in class actions. First, the commenter argued that the Bureau's approach for calculating the average ratio of attorney's fees to consumer payments is flawed because it overweights the impact of certain large settlements involving litigation over depositories' overdraft programs. Second, the commenter questioned the results of the Bureau's aggregate calculation, pointing to a study by one of the comment's authors that found much higher ratios. Finally, the commenter argued the Bureau's decision to include FDCPA cases in its analysis but not EFTA ATM sticker cases, discussed above, biases its calculations.

The Bureau disagrees with the commenter's specific critiques,[1183] but more broadly the Bureau believes that the commenter's focus on the ratio of attorney's fees to consumer payments is misplaced. The relative split of costs between consumers and their attorneys is not relevant to evaluating the overall burden of new class actions on providers, who must pay all costs.[1184]

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representing 18.1 percent of the U.S. population (92/.181 = 508). *See* Study, *supra* note 3, section 6 at 16–17. Note that the Federal and State data in Section 6 of the Study includes size markets, and not all the markets that would be affected.

[1177] Especially due to the CAFA, which in many cases allows defendants to remove class actions to Federal court when $5 million or more are at stake and other jurisdictional requirements are met.

[1178] *See* Study, *supra* note 3, section 6 at 19 tbl. 4.

[1179] *See id.* section 6 at 15.

[1180] In addition, the Study (Section 6 at 36 tbl. 3) showed that those cases that were brought in and remained in State courts (which are the basis for the Bureau's estimate of State court defense costs, since the removed cases are treated as Federal cases), were more likely to include State law claims and no significant Federal claims. The State court judiciary may have even greater expertise on State law than the Federal judiciary. In any event, as the Study (Section 6 at 45 fig. 14) indicated, State class actions took slightly longer to resolve than non-MDL class actions in Federal court, but considerably less time than MDL class actions in Federal court.

[1181] The Bureau discusses the issue of fixed costs in class action litigation more fully in Part VI, above.

[1182] Thomas E. Willging & Shannon R. Wheatman, ''An Empirical Examination of Attorneys' Choice of Forum in Class Action Litigation,'' Federal Judicial Center, at 21 tbl. 3 (2005), *available at http://www.uscourts.gov/file/clact05pdf.*

[1183] Regarding the use of an aggregate average the Bureau disagrees that the aggregate average is an inappropriate metric. In the context of class action litigation, where different cases may have wildly different numbers of consumers involved and similarly variable total claimed injury, taking a case-by-case average will produce misleading results because it weights all cases equally, regardless of the magnitude of the case, thus placing arbitrary significance on a case count instead of on counts of dollars and class members. The Bureau discusses this further, including the effect of the overdraft settlements, above in Part VI.

Regarding the much higher ratios of attorney's fees to consumer payments in the study conducted by one of the authors of the comment compared the Bureau's estimates, the Bureau disagrees that this is due to problems with its analysis. The main portion of the discrepancy between the Bureau's analysis and that of the commenter is in the set of cases used for analysis. As noted above in Part VI, if the study cited by the commenter had used the same definition of relevant cases as the Bureau's impacts analysis, it would have obtained substantially similar results to those of the Bureau.

Regarding the specific choice to include FDCPA cases in its analysis, the Bureau disagrees with the commenter that this creates a bias. Removing debt collectors from the Bureau's analysis would not make the Bureau's estimates—the ratio of class action attorney's fees to consumer recovery—more favorable to class actions. Debt collection cases make up a majority of the new class action lawsuits the Bureau estimates will occur as a result of the rule, as illustrated in Table 1. Removing them would reduce the count of cases by about half. Debt collection cases on average involve lower fees but also lower payments to consumers; however, the ratio of attorney's fees to consumer payments is higher for debt collection cases than class actions in other industries, and so the overall ratio of attorney's fees to consumer recovery would be somewhat lower if debt collectors were excluded.

[1184] In Part VI above, the Bureau considers whether class action plaintiff's attorney fees are excessive and thus against the public interest. The Bureau finds above that plaintiff's attorney fees are not generally excessive. However, the Bureau notes again that the primary effect of the rule, and the source of the important costs and benefits, is from deterrence, and thus the question of whether

Even considering the effectiveness of the class action procedure for providing monetary redress to consumers, which as discussed above is a transfer in economic terms with no direct effect on welfare, the ratio of attorney's fees to consumer payments may be misleading.[1185] Under some Federal consumer protection laws, the maximum recovery for the class is capped. In other cases, plaintiff's attorney fees are not negotiated or awarded by a court until after a consumer settlement amount has been reached. And in cases with injunctive relief, the court takes into account that relief when considering the reasonableness of attorney's fees, even if the value of that relief cannot be quantified.

Covered Persons' Costs Due to Additional Class Litigation

The Bureau estimates that the final class rule will create class action exposure for about 53,000 providers (those who fall within the coverage of the final rule and currently have an arbitration agreement).[1186] Based on the calculation described above, the Bureau's model estimates that this class action exposure will result—on an annual basis—in about 103 additional class settlements in Federal court. In those cases, the Bureau estimates that an additional $342 million will be paid out to consumers, an additional $66 million will be paid out to plaintiff's attorneys, and an additional $39 million will be spent by providers on their own attorney's fees and internal staff and management time.[1187]

These numbers should be compared to the number of accounts across the affected markets. While the total number of all accounts across all markets is unavailable, there are, for example, hundreds of millions of accounts in the credit card market alone. Thus, averaged across all markets, the monetized estimates provided above amount to less than one dollar per account per year. However, this exposure could be higher for particular markets.

Many cases also feature in-kind relief.[1188] However, as in the Study, the Bureau is unable to quantify this cost in a way that would be comparable with payments to class members. Similarly, injunctive relief could in some cases result in substantial forgone profit (and a corresponding substantial benefit to the consumers), but cannot be easily quantified.[1189] Commenters generally did not dispute the numbers discussed above, although some industry commenters disputed whether it was appropriate to compare overall litigation costs to the number of consumer accounts involved. These industry commenters expressed the view that the overall costs were substantial. However, they did not provide an alternative point of comparison beyond the number of consumer accounts covered by the proposal. The Bureau still believes that it is relevant to compare the overall costs of additional class action litigation to the size of the markets covered by the rule.[1190]

In addition to the costs of Federal class actions as discussed above, the Bureau assumes that providers who become subject to class actions as a result of the rule will enter into a similar number of class settlements in State court, however, with markedly lower amounts paid out to consumers and attorneys on both sides.

The Bureau performed a similar analysis to estimate the number of cases that will be filed as putative class actions but not result in a class settlement. Based on the data used in the Study, the Bureau believes that roughly 17 percent of cases that are filed as class litigations end up settling on a classwide basis.[1191] For purposes of this estimate the Bureau again assumed that these putative class actions were all brought against providers without an arbitration agreement. This is a conservative assumption; it may be that the very reason that some of these putative class actions were resolved on an individual basis was precisely because of an arbitration agreement. Nonetheless, on this assumption and extrapolating from the estimated 103 additional Federal cases that will be settled on a classwide basis each year, the Bureau estimates that there will be 501 additional Federal court cases filed as class actions that will end up not settling on a classwide basis, assuming no change in filing behavior by plaintiff's attorneys.[1192] Some of the Federal cases analyzed in the Study filed as class actions were filed against providers that had an arbitration agreement that applied to the case. Thus, the Bureau believes that such providers already face some exposure, which implies that both the 103 settled class cases and the 501 cases filed as class actions are likely overestimates of Federal court settlements.

In order to estimate the costs associated with these incremental Federal putative class actions, the Bureau notes that the Study showed that an average case filed as a putative class action in Federal court takes roughly 2.5 times longer to resolve if it is settled as a class case than if it is resolved in any

attorney's fees are excessive is not in and of itself relevant to the Bureau's Section 1022(b)(2) Analysis. Moreover, the ratio of attorney's fees to consumer redress is not even necessarily informative as to whether fees are excessive. Consumers could benefit greatly from injunctive relief while receiving little monetary compensation (perhaps due to capped statutory damages), leading to a very high ratio of fees to redress regardless of the reasonableness of the attorney's compensation.

[1185] The Bureau discusses the relative size of attorney's fees above in Part VI, the section 1028 findings, addressing comments asserting that plaintiff's attorneys are unjustly enriched by class action litigation. As discussed above, the Bureau finds plaintiff's attorneys are not in general unjustly enriched.

[1186] See the FRFA below for the data used to arrive at this estimate.

[1187] These numbers do not include any estimates from costs or benefits from increased investment in compliance with the law. As discussed above, the Bureau is not estimating those numbers. The Bureau has also performed a sensitivity analysis by using market shares of providers with arbitration agreements in the checking account and credit card markets instead of prevalence that is unadjusted by market share. The Bureau used the numbers reported in Section 2 of the Study for this sensitivity analysis. This other specification changes the results to about 109 additional Federal class settlements, an additional $475 million paid out to consumers, an additional $114 million paid out to plaintiff's attorney fees, and an additional $67 million for defendant's attorney fees and internal staff and management time per year.

[1188] *See* Study, *supra* note 3, section 8 at 4. As in the Study, the Bureau uses the term ''in-kind relief'' to refer to class settlements in which consumers were provided with free or discounted access to a service. *Id.* section 8 at 4 n.6. While the Study quantified $644 million of in-kind relief, that number is included in relief, but not in payments in the Study, and the Bureau continues to follow this approach here, both for the calculation of costs to providers and benefits to consumers.

[1189] The Study quantified behavioral relief (defined as a part of injunctive relief) in the Study. The Bureau uses ''behavioral relief'' to refer to class settlements that contained a commitment by the defendant to alter its behavior prospectively, for example, by promising to change business practices in the future or implementing new compliance programs. The Bureau did not include a simple agreement to comply with the law, without more, as behavioral relief. *Id.* appendix B at 135. If the Bureau were to count such cases, there would likely be significantly more cases with behavioral relief. As the Bureau noted in the Study, behavioral relief is seldom quantified in case records, and thus the Bureau does not quantify it. *Id.* section 8 at 5 n.10.

[1190] One industry commenter disputed the validity of this comparison of estimated additional costs incurred by sued firms to the overall universe of firms affected by the rule, arguing instead that the Bureau ought to compare the class action defense costs to only those firms that would incur these costs, and the number of accounts at only those firms. However, the Bureau does not believe it would be appropriate to ignore the *probability* that any one firm would be sued when evaluating the scale of the additional litigation costs.

[1191] The Bureau reported a lower number (12.3 percent) in the Study based on final settlements approved before March 1, 2014, though as noted in the Study, nearly 30 additional cases had a final settlement or proposed class settlement entered as of August 31, 2014. *Id.* section 6 at 7, 36.

[1192] The Bureau estimated 102.7 (rounded to 103) additional Federal class settlements. Thus, the calculation for additional Federal cases that would be settled on a classwide basis is (102.7/.17) * (1 − .17).

other way.[1193] The Bureau discusses two potential estimates below and presents the more conservative one in the table below. The cost to providers from a putative class case that is not resolved as a class case is almost entirely from defense costs—the Bureau believes the compensation to a single consumer is likely to be trivial by comparison, and any plaintiff's attorney fees—if paid by the provider at all—will be of a similar magnitude.[1194]

For the purposes of the first defense cost estimate, the Bureau assumed that putative class action cases that are not settled on a class basis (for whatever reason) cost 40 percent (1 divided by 2.5) as much to litigate. Therefore, the Bureau estimated that these additional 501 Federal class cases that do not settle on a class basis will result in $76 million per year in defense costs to providers. The Bureau did not include in this estimate recovery amounts in these putative class cases that did not result in a class settlement, as the Bureau believes those are negligible amounts (for example, a few thousand dollars per case that had an individual settlement). Based on similar numbers of Federal and State cases, it is likely that there will also be an additional 501 State cases filed that do not settle on class basis, whose cost the Bureau does not estimate due to the lack of nationally representative data; however, these cases will likely be significantly cheaper for providers.[1195]

The Bureau believes that the calculation above might be an overestimate of time spent on such cases because both defendant's and plaintiff's attorneys frequently come to the conclusion, relatively early in the case that the case will not result in a class settlement. Once such a conclusion is reached, the billable hours incurred by either side (in particular the defense) are likely significantly lower than for a case that is headed towards a class settlement, even if the final outcome of the two cases might be achieved in comparable calendar time. Similarly, many cases are resolved before discovery or motions on the pleadings; such cases are cheaper to litigate. In other words, at some point early in many putative class actions, the case becomes effectively an individual case (in terms of how the parties and their counsel treat the stakes of it), and from that point on, its cost should be comparable to the cost of an individual case (as opposed to a case settled on a classwide basis). The calculation above assumes that this point of transition to an individual case is the last day of the case.

In contrast, the Bureau also calculated the impact of making the opposite assumption that from the first day of the case the parties (in particular, the defense) know that the case is not going to be settled on a classwide basis. Using this assumption, the 501 class cases cost as much to defend as 501 individual cases. Using $15,000 per individual case as a defense cost estimate, the cost of these 501 cases would be approximately $8 million per year.[1196] Thus, the Bureau believes that the correct estimate is somewhere between $8 and $76 million per year. For the purposes of clearer presentation, the Bureau conservatively presents the $76 million number in the table below.

The Bureau notes that for several markets the estimates of additional Federal class action settlements are low.[1197] These low estimates could reflect some combination of the following three possibilities. First, as noted above, in some markets class actions may be more commonly filed in State courts. Second, in some markets, by their nature, there will be few claims that can proceed as class actions, regardless of arbitration agreements, because there are not common issues that are predominant or because the market is highly dispersed. Finally, in some markets the current prevalence of arbitration agreements is so high (over 80 percent) that any estimates regarding future class action activity in the absence of such agreements are especially imprecise because currently so few firms are subject to class action exposure.

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[1193] *See* Study, *supra* note 3, section 6 at 46 tbl. 7.

[1194] One industry commenter expressed concern that the Bureau had significantly undercounted the costs of putative class actions that resulted in individual settlements. The commenter mistakenly interpreted the additional fees listed in the last column of Table 1 in the Section 1022(b)(2) Analysis in the proposal as excluding defense costs. In fact, the figures are almost entirely defense costs.

[1195] For the sensitivity analysis using market share prevalence data for checking account and credit card markets, the results are additional 530 Federal class cases that do not settle on class basis result in $130 million in costs to providers.

[1196] While the $15,000 figure is hard to estimate, this estimate is consistent with data received from one of the SERs during the SBREFA process. *See* SBREFA Report, *supra* note 419, at 18.

[1197] As further discussed in Part IX below, a number of other markets are covered, but not sufficiently affected to the point that the Bureau would estimate the number of affected persons. The Bureau likewise does not generally include rows in the Federal class settlement estimate table for those markets.

Table 1: Five-Year Summary of Estimated Additional Federal Class Action Settlements

NAICS	Description	Number of Lawsuits (data)	Total Payment (data)	Attorney Fees (data)	Prevalence (data)	Additional Federal Class Settlements (estimate)	Additional Total Payments (estimate)	Additional Attorney Fees (estimate)	Additional Defense Fees (estimate)	Additional Federal Class Cases Resolved on a Non-Class Basis (estimate)	Additional Fees Due to Federal Class Cases Resolved on a Non-Class Basis (estimate)
522298	Other nondepository credit, Pawnshops	0	$ -	$ -	0.1	0	$ -	$ -	$ -	0	$ -
541990	Credit Counseling and Debt Relief	4	$ 5,591,756	$ 3,379,013	0.65	7	$ 10,384,690	$ 6,275,310	$ 3,679,151	36	$ 7,185,166
561440	Debt Collectors	234	$ 56,848,405	$ 28,002,831	0.53	264	$ 64,105,648	$ 31,577,660	$ 18,513,666	1288	$ 36,156,100
522110	Depository Institutions (including credit unions), Research Organization (LexisNexis), Student accounts, Student Loan Servicing	34	$ 556,721,398	$ 256,518,784	0.1	4	$ 61,857,933	$ 28,502,087	$ 16,710,488	18	$ 32,634,600
522291	P2P Lending, Other Personal Loans, Student Loan Issuance - Private, Third Party Payemnt Processing , Consumer Lending, Commercial Banking	4	$ 86,154,716	$ 11,149,054	0.9	36	$ 775,392,444	$ 100,341,486	$ 58,829,207	176	$ 114,889,981
561450	Credit Reporting Agencies, Credit Monitoring, Homeowners Insurance, Life Insurance	6	$ -	$ 5,428,000	0.65	11	$ -	$ 10,080,571	$ 5,910,138	54	$ 11,542,152
522210	Credit Cards, Consumer Lending	6	$ 277,041,928	$ 59,410,000	0.1	1	$ 30,782,436	$ 6,601,111	$ 3,870,165	3	$ 7,558,205
522320	Other Personal Loans, Other Money Transmitters / Remittances, Prepaid Cards, Payment Processing/Transfers, ACH systems, Check Guarantee, Third Party Financial Service Providers , Mobile Payments	3	$ 2,911,654	$ 8,450,000	0.35	2	$ 1,567,814	$ 4,550,000	$ 2,667,619	8	$ 5,209,704
522390	Payday Loan, Tribal Lending, Refund Anticipation Check, Deposit Advance, Servicing (non-mortgage), Virtual Currency, Traveler's Checks, Check Cashing, Mobile wallets, Debt Settlement/Relief, Marketplace loans, Tax Lending, Lump Sum Payment Company (payment advance)	1	$ 56,770	$ 57,780	0.9	9	$ 510,930	$ 520,020	$ 304,883	44	$ 595,418
522220	Installment Lending, Auto Title, Auto Finance, Truck/Boat/RV Finance, Non-Auto Consumer Product Leasing	12	$ 84,935,366	$ 6,752,360	0.9	108	$ 764,418,294	$ 60,771,237	$ 35,629,567	527	$ 69,582,449
441120	Buy-Here Pay-Here Auto Dealers	1	$ 100,000	$ 180,000	0.9	9	$ 900,000	$ 1,620,000	$ 949,790	44	$ 1,854,884
517110	Telephone - landline, Cable television, Cable Providers (First Party), Cell phones	7	$ 29,775	$ 8,991,981	0.9	63	$ 267,975	$ 80,927,826	$ 47,447,173	308	$ 92,661,538
Total		*312*	*$ 1,070,391,768*	*$ 388,319,802*		*514*	*$ 1,710,188,164*	*$ 331,767,308*	*$ 194,511,847*	*2,506*	*$ 379,870,197*
Per year						*103*	*$ 342,037,633*	*$ 66,353,462*	*$ 38,902,369*	*501*	*$ 75,974,039*

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The Bureau notes that providers might attempt to manage the risks of increased class litigation exposure by opting for more comprehensive

insurance coverage or a higher reimbursement limit. However, the Bureau is not able to model the impacts of insurance in providers' response to the final rule. During the Small Business Review Panel, these SERs reported that it often is not clear to them which type of class litigation exposure a policy covers, nor was it clear that providers typically ask about this sort of coverage. These SERs explained that their coverage is often determined on a more specialized case-by-case basis that limits at least small providers' ability to plan ahead. Larger firms may have more sophisticated policies and more systematic understanding of their coverage, however, or they may self-insure. Finally, the insurance providers might require at least some of the changes to compliance and products discussed above as a prerequisite for coverage or for a discounted premium.[1198]

Regarding the total costs to providers over a five year period, three industry trade associations asserted that accounting for State class actions could as much as double the total costs to providers from additional class action litigation, to $5.2 billion. The commenters apparently were extrapolating from the Bureau's observation in the proposal that the incidence of additional State class litigation might be similar to the incidence of additional Federal class litigation.[1199] The commenters essentially characterized that aspect of the Bureau's analysis from the proposal as bounding the cost of State class actions between zero and the full cost of additional Federal class actions.

The Bureau acknowledges again that the total additional litigation costs to providers will exceed costs from Federal class actions presented in Table 1, as they do not account for the costs of State class actions. The Bureau also acknowledges again that it does not have reliable data to estimate the cost of additional State class actions. However, as discussed above, the Bureau disagrees that the cost of State class actions are likely to be anywhere near the full cost of Federal class action litigation. Most State court class actions will seek smaller amounts of monetary relief than Federal court class actions, sometimes considerably so, due to the fact that class actions seeking more than $5 million in relief generally can be removed to Federal court under CAFA.[1200] As already noted, the Bureau expects that payments to consumers from State court class actions will be markedly lower than in cases settled in Federal court, due to the limits imposed by CAFA. No commenters disputed this assertion. Given that the vast majority of the Bureau's estimate of the costs of additional litigation comes from payments to consumers, which vary by the size and nature of the case and are likely to be higher in Federal litigation, the Bureau does not believe that a cost equal to that of the additional Federal class actions is a reasonable upper bound for the cost of additional State class actions.

Several industry commenters expressed the view that the Bureau should have generally considered costs to additional firms beyond those considered in the Section 1022(b)(2) Analysis in the proposal. Specifically, automobile dealer industry commenters expressed the view that the rule would have a significant impact on them because increased suits against indirect automobile lenders would increase the costs on dealers, who would be obligated to reimburse the indirect automobile lenders pursuant to indemnification clauses that are included in many contracts between dealers and indirect automobile lenders. An industry trade association commenter expressed a related view that merchants would be affected by the rule despite the exemption for merchants providing interest-free credit for their own nonfinancial goods or services because the rule would apply to servicers, collectors, and debt buyers (both initial and downstream). The increased costs incurred by those providers, in the view of the industry trade association, would be passed along to the merchants. As a result, the rule would impose costs on merchants ''indirectly,'' in the view of this commenter.

In its Section 1022(b)(2) Analysis, the Bureau analyzes costs and benefits to covered persons whose conduct is regulated by the rule. Although automobile dealers and merchants who originate consumer credit transactions are covered persons under Dodd-Frank section 1002(6), they are not subject to the Bureau's rulemaking authority in circumstances described in sections 1027 and, in the case of automobile dealers, section 1029 of the Dodd-Frank Act. *See* Part VI for further discussion. As a result, their conduct is expressly not regulated by this rule. *See generally* section 1040.3(b)(6) (incorporating Dodd-Frank exemptions into the scope of the rule). This Section 1022(b)(2) Analysis has already accounted for costs of additional class actions that would result from the class rule, and the Bureau acknowledges here that these costs may be passed through to automobile dealers and merchants by the providers who are subject to the rule.[1201] Based on the data available and information supplied by commenters, the Bureau is not able to estimate the amount of pass-through that would occur from these third parties covered by the rule to automobile dealers and merchants that are not covered by the rule. In any event, this impact would be indirect, as the industry trade association commenter noted, and thus is not relevant to the discussion of impacts on small entities under the Regulatory Flexibility Act as discussed below in Part IX.

Covered Persons' Costs Due to the Administrative Change Expense

Providers that currently have arbitration agreements (or who purchase contracts with arbitration agreements that do not include the Bureau's language) will also incur administrative expenses to make the one-time change to the arbitration agreement itself (or a notice to consumers concerning the purchased contract). Providers are likely to incur a range of costs related to these administrative requirements.

The Bureau believes that providers that currently have arbitration agreements will manage and incur these costs in one of three ways. First, the Bureau believes that some providers rely exclusively on third-party contract forms providers with which they already have a relationship, and for these providers the cost of making the required changes to their contracts is negligible (*e.g.,* downloading a compliant contract from the third-party's Web site, with the form likely being either inexpensive or free to download).

Second, there may be providers that perform an annual review of the

[1198] Related to this discussion, an insurance industry trade association commenter asserted that litigation insurance rates would be higher for providers who do not have or cannot rely on an arbitration agreement. The Bureau acknowledges that this is likely true simply as a matter of basic economic theory, but the Bureau cannot quantify the size of this effect, nor did the commenter provide any information or data indicating the magnitude of any potential change in insurance premiums.

[1199] 81 FR 32830, 32907 (May 24, 2016).

[1200] While claims under many Federal consumer protection statutes have damages caps, those claims also generally can be moved to Federal court if State court claims do not predominate in the case. *See* 28 U.S.C. 1331.

[1201] Related to this point, two credit union industry commenters noted that credit unions may bear some burden of class actions due to conduct on the part of dealers who contract with such credit unions for indirect automobile lending. As noted, the Bureau believes that it has already accounted for any such burden through its estimates of new class action lawsuits in the indirect automobile lending market.

contracts they use with consumers. As a part of that review (provided it comes before the final rule becomes effective), they will either revise their arbitration agreements or delete them, whether or not most of these contracts are supplied by third-party providers. For these providers, it is also unlikely that the final rule will cause considerable incremental expense of changing or taking out the arbitration agreement insofar as they already engage in a regular review, as long as this review occurs before the rule becomes effective.

Third, there are likely to be some providers that use contracts that they have highly customized to their own needs (relative to the first two categories above) and that might not engage in annual reviews. These will require a more comprehensive review in order to either change or remove the arbitration agreement.

The Bureau believes that smaller providers are likely to fall into the first category. The Bureau believes that the largest providers fall into either the second or the third category. On average across all categories, the Bureau believes that the average provider's expense for the administrative change to be about $400. This consists of approximately one hour of time from a staff attorney or a compliance person and an hour of supporting staff time. Given the Bureau's estimate of approximately 48,000 providers that use arbitration agreements,[1202] the final rule's required contractual change will result in a one-time cost of $19 million, or about $4 million per year total for all providers if amortized over five years. Alternatively, providers may choose to drop arbitration agreements altogether, potentially resulting in lower administrative costs.

Some industry commenters asserted that their costs from the required administrative changes would be higher than the Bureau's estimates, as described above and in the proposal. A small dollar credit industry commenter asserted that it had more than 100 separate consumer agreements that would need to be updated across multiple systems, in addition to hardcopies at retail storefronts. A trade association for installment lenders argued that the addition of the Bureau-required contract language would require conforming changes throughout its members' consumer agreements. The Bureau acknowledges that some providers may have particular circumstances that will lead to above average costs, even if they do not fall into the third category of providers above, with highly customized contracts. The Bureau noted in the proposal that some providers have multiple contracts: For example, some credit card issuers have filed dozens of contracts with the Bureau.[1203] However, given that many providers will have no or negligible costs, the Bureau continues to believe that its average estimate is appropriate.

In addition to the one-time change described directly above, some providers could be affected on an ongoing or sporadic basis in the future as they acquire existing contracts as the result of regular or occasional activity, such as a merger. Section 1040.4(a)(2)(iii) will require providers who become a party to an existing contract with a pre-dispute arbitration agreement that does not already contain the language mandated by § 1040.4(a)(2) to amend the agreement to include that provision, or send the consumer a notice indicating that the acquirer will not invoke that pre-dispute arbitration agreement in a class action.[1204] Various markets may incur different costs due to this requirement.

For example, buyers of medical debt could incur additional costs as a result of additional due diligence they undertake to determine which acquired debts arise from consumer credit transactions (that will be subject to final rule), or alternatively by the additional exposure created from sending consumer notices on debts that did not arise from credit transactions (*i.e.,* potential over-compliance). The Bureau does not believe that the cost of sending such a notice will be burdensome to the buyers of medical debt. In particular, the Bureau believes that medical debt buyers typically send out a notice to the consumer upon acquisition of debt due to FDCPA requirements in 15 U.S.C. 1692(g), when applicable. The Bureau believes that these debt buyers could attach the additional notice that will be required by the final rule to this required FDCPA notice with a minimal increase in costs.

A prepaid card industry commenter argued that the Bureau should have further considered the administrative burden of the proposal in concert with the burden imposed by the Bureau's recent Prepaid Accounts Rule. The commenter asserted without explanation that prepaid card providers would be compelled to revise their card packaging and disclosures twice in a short space of time. The Bureau disagrees that it should account for the costs of the Prepaid Accounts Rule, which itself accounts for its own costs.[1205] As the Bureau explained in the proposal and again in this final rule, the rule does not require prepaid card providers to revise packaging and disclosures. Specifically, § 1040.5(b) of the rule allows providers of general purpose reloadable prepaid cards to continue to sell their pre-existing stock as long as they give the consumer notice of the update to the arbitration agreement at the time they communicate with the consumer concerning registration of the card.

Comments from automobile dealers asserted that the proposed class rule would lead to inclusion of the mandated language in form retail installment sale contracts and lease forms by exempt motor vehicle dealers. These dealers expressed concern that the Bureau's proposal did not allow for the use of the language that would preserve the arbitration agreement of the dealers because given that they typically sell their loans to entities that would be providers under the proposal, those providers will in effect mandate dealers' use of compliant arbitration agreements even if the Bureau does not apply its rule to dealers. As noted in the section-by-section analysis of the rule, the Bureau has updated the contract provision that can be used in this situation to further clarify that it does not result in the coverage of, or impact on, excluded persons.[1206] While some automobile dealers might incur some costs in updating their contracts if the indirect automobile lenders they deal with do not do so automatically, the Bureau believes that these costs will be minimal, and will not be incurred by most dealers.

Costs to Covered Persons From the Requirements Regarding Submission of Arbitral and Certain Court Records

There will also be a minor cost related to the final rule's requirements regarding sending records to the Bureau related to providers' arbitrations and certain court cases. In the Study, the

[1202] *See* the Regulatory Flexibility Act analysis below at Part IX. The Bureau estimates that 4,500 debt collectors are subject to the rule but would not incur this cost because they do not act as the original provider of consumer financial products and services, and thus are unlikely to have contracts directly with the consumers with whom they interact.

[1203] *See* Bureau of Consumer Fin. Prot., ''Credit Card Agreement Database,'' *http://www.consumerfinance.gov/credit-cards/agreements/* (last visited June 1, 2017). Presumably, the marginal cost of changing each additional contract is minimal, as long as each of the contracts used the same dispute resolution clause.

[1204] The Bureau believes that medical debt buyers would be the most affected by this provision.

[1205] 81 FR 83934 (Nov. 22, 2016).

[1206] *See* § 1040.4(a)(2)(iv)(B).

Bureau documented significantly fewer than 1,000 individual arbitrations per year in the markets analyzed.[1207] The Bureau believes it is unlikely that the transmittal requirement will impose a cost of more than $100 per arbitration—a conservative estimate for the time required to copy or scan the documents, locate the address where to send the documents, and any postage costs. To the extent covered persons will be required to redact specific identifiers (such as name, physical and email address, phone number, account number, and social security number), this cost might increase, conservatively, by a few hundred dollars on average due to the time to train the staff on the specific identifiers and the time to redact the documents, for each arbitration.[1208] Thus, the total cost of the arbitration submission requirements is unlikely to reach $1 million per year given the current frequency of individual arbitrations. Moreover, these costs could be lower to the extent that providers decide not to use arbitration agreements in response to the rule.

With regard to the cost of submitting arbitral and certain court records generated by the final rule, some commenters disputed as low the amount estimated by the Bureau, suggesting that there would be additional unaccounted for burden of redacting records and ensuring privacy. As discussed in more detail in Part VI, however, the Bureau expects that the rule will not lead to additional burden because the Bureau provides a specific list of information types that must be redacted. Providers will not have to make additional redactions to ensure privacy in general. The Bureau, rather than providers, will bear any further cost of redacting information beyond those types listed in the rule to ensure privacy.

In addition to the costs of submission of records listed above, one commenter asserted that the private nature of arbitration benefits all parties involved, and as such publication of arbitral records will act as a cost toward both parties. For firms, this takes the form of a reputational cost from the details of their disputes with consumers being made public. (The commenter's arguments regarding benefits to consumers are discussed separately below.) The Bureau acknowledges that publication of arbitral awards with rulings adverse to firms may have some impact on the reputation of those firms, although the Bureau notes that the number of arbitration cases that results in such awards is so small—36 per year in the markets analyzed in the Study[1209]—that the impact on any given firm or in the aggregate is likely to be slight and may be offset by reputational benefits from the publication of awards that favor companies. In particular, firms should only face a negative cost from this effect when they have arbitral claims found in customers' favor. Providers who comply with the law and face a claim without merit will experience this cost to a much lesser extent, if at all.

Some commenters asserted that publication of arbitral records will provide an opportunity for plaintiffs to find companies susceptible to litigation, and thus indirectly impose a heavy cost burden on those firms. The Bureau again notes that the number of arbitral awards favoring individual consumers is miniscule relative to the size of the various markets covered by the rule. Moreover, as one commenter asserted, publication of arbitral records could actually create a more efficient private enforcement market, as consumers may be more likely to realize they have a valid claim if they see that an arbitral decision was made in favor of consumers with similar claims.

Potential Pass-Through of Costs to Consumers

As also discussed in Part VI, the Bureau acknowledges that most providers will pass through at least portions of some of the costs described above to consumers. This pass-through can take multiple forms, such as higher prices to consumers or reduced quality of the products or services they provide to consumers. The rate at which firms pass through changes in their marginal costs onto prices or interest rates charged to consumers is called the pass-through rate.[1210]

A pass-through rate of 100 percent means that an increase in marginal costs would not be absorbed by the providers, but rather would be fully passed through to the consumers.[1211] Conversely, a pass-through rate of 0 percent would mean that consumers would not see a price increase or a diminution in the quality of products or services due to the final rule. As noted above, the monetized estimates of additional Federal class actions above amount to less than one dollar per account per year when averaged across markets, although it is possible that the number is higher for some markets; the monetized estimates of additional State class actions is even less. Also, as noted below in the Paperwork Reduction Act analysis, the direct cost of submission of arbitral and certain court records is estimated at approximately $500,000 per year. Given the extremely high volume of accounts covered under the final rule, the monetized cost of this provision is miniscule when averaged across markets. Thus, even 100 percent pass through of the monetized costs of additional Federal class settlements in every market would result in an increase in prices of under one dollar per account per year when averaged across all markets, although particular markets or providers might see larger changes.

Determining the extent of pass-through involves evaluating a trade-off between volume of business and margin (the difference between price and marginal cost) on each customer served. Any amount of pass-through increases price, and thus lowers volume. A pass-through rate below 100 percent means that a firm's margin per customer is lower than it was before the provider had to incur the new cost. Economic theory suggests that, without accounting for strategic effects of competition, the pass-through rate ends up somewhere in between the two extremes of: (1) No

[1207] *See generally* Study, *supra* note 3, section 5. Relatedly, JAMS (the second largest provider of consumer arbitrations) reported about 114 consumer financial products or services arbitrations in 2015.

[1208] One of the SERs on the SBREFA Panel projected two to six hours of staff time. *See* SBREFA Report, *supra* note 419, at 25. Meanwhile, one commenter suggested the burden of redacting records to a level that sufficiently protected consumers' privacy would be highly burdensome, but did not provide any quantitative estimates of the amount of time and staff required.

[1209] *See* Study, *supra* note 3, section 5 at 13 (reporting 32 disputes resolved with monetary relief and 41 non-overlapping disputes with debt forbearance awarded, over a two-year period).

[1210] In some markets the provider does not have a direct relationship with the consumer, and thus the pass-through if any will be indirect. In other markets, providers are already charging a price at the usury limit, and thus would not be able to pass through any cost onto price.

[1211] Even where providers pass on 100 percent of their costs, they may lose volume and thus experience lower profits. With regard to the proposal, however, in markets where arbitration agreements are extremely widespread, this would depend on the extent to which the market's aggregate demand curve is elastic. In other words, the entities' profits would decrease in proportion to the fraction of consumers who would stop buying the consumer financial products or services if most or all firms were to increase their prices at the same time. The Bureau is unaware of reliable estimates of this elasticity for the covered markets, with the exception of the credit card market, where such a loss would unlikely be significant given the likely modest per-consumer magnitude of the marginal cost increase. *See* David Gross & Nicholas Souleles, ''Do Liquidity Constraints and Interest Rates Matter for Consumer Behavior? Evidence from Credit Card Data,'' 149 Q. J. of Econ. 117 (2002). To the extent that credit cards and mortgages are indicative of other markets for consumer financial products and services, this effect is unlikely to be significant. *See, e.g.,* Andreas Fuster & Basit Zafar, ''The Sensitivity of Housing Demand to Financing Conditions: Evidence from a Survey,'' (Fed. Reserve Board of N.Y.C., Staff Rept. No. 702, 2015).

pass-through (and thus completely preserving the volume at the expense of lowering margin) and (2) full pass-through (completely preserving the margin at the expense of lowering volume).[1212] For a case of a monopolist with a linear demand function (a price increase of a dollar results in the same change in quantity demanded regardless of the original price level) and constant marginal cost (each additional unit of output costs the same to produce as the previous unit), the theory predicts a pass-through rate of 50 percent. The rate would be higher or lower depending on how demand elasticity and economies of scale change with higher prices and lower outputs.[1213] To the extent that a provider's fixed costs change, economic theory indicates that the profit-maximizing response is not to pass that change onto prices.[1214]

Economic theory does not provide useful guidance about what the magnitude of the pass-through of marginal cost is likely to be with regard to the final rule. The Bureau believes that providers might treat the administrative costs of the class rule as fixed, while the administrative costs for submission of arbitral and certain court records will primarily have a marginal component for each actual submission. Whether the costs due to additional compliance are marginal depends on the exact form of this spending, but most examples discussed above would likely qualify as largely fixed. The Bureau believes that providers might treat a large fraction of the costs of additional class litigation as marginal: Payments to class members, attorney's fees (both defendant's and plaintiff's), and the cost of putative class cases that do not settle on a class basis. The extent to which these marginal costs are likely to be passed through to consumers cannot be reliably predicted, especially given the multiple markets affected. Empirical studies are mostly unavailable for the markets covered. Empirical studies for other products, mainly consumer package goods and commodities, do not produce a single estimate.[1215]

The available pass-through estimates for the consumer financial products or services are largely for credit cards, where older literature found pass-through rates of close to 0 percent.[1216] More recently, researchers have analyzed the effects of regulation that effectively imposed price ceilings on late payment and over-limit fees on credit cards and interchange fees on debit cards. These researchers, by and large, found evidence consistent with low to nonexistent pass-through rates in these markets.[1217] However, these findings do not necessarily imply low pass-through in other markets that will be affected by the final rule, as providers in different markets are likely to face cost and demand curves of different curvatures.

More directly related to the proposal, the Study analyzed the effect on prices of several large credit card issuers agreeing to drop their arbitration agreements for a period of time as a part of a class settlement.[1218] The Bureau did not find a statistically significant effect on the prices that these issuers charged subsequent to the contract changes, relative to other large issuers that did not have to drop their arbitration agreements. To the extent that this finding implies low or nonexistent price increases, it could be due to several reasons other than a low general industry pass-through rate. For example, issuers may have priced as if the expected litigation exposure was a fixed cost or as if most of the cost was expected to be due to investment in more compliance (and would be treated as a fixed cost).[1219] The result also might not be representative for other issuers.

Several commenters stated that the class rule would increase costs beyond the Bureau's estimates in the proposal's Section 1022(b)(2) Analysis. In general, these commenters asserted that various costs, including litigation discovery, costs of State court actions, and the costs of non-class settlements would all be passed on to consumers. As the commenters did not directly take issue with any of the Bureau's estimates of these costs, the Bureau interprets these comments as asserting that all such costs will be passed through. As neither the Bureau nor other researchers or commenters have been able to develop a quantitative model to estimate a specific pass-through rate in markets for consumer financial products and services, the commenters' view, if true, would not be inconsistent with the Bureau's assumption that pass-through will be between 0 and 100 percent.

An industry commenter asserted that the potential for pass-through of costs to consumers must be analyzed by focusing on individual companies facing class actions, not averaging across an entire market of consumer accounts. The commenter asserted that individual companies facing class actions may be forced out of business by the additional class action litigation exposure if they cannot pass the costs through to consumers and stay in business. The Bureau disagrees, as this would ignore the issue of pass-through of compliance costs incurred by providers that are not subject to such a suit. As discussed above, the Bureau also believes that it is important, given the size of the markets at issue, to evaluate cost estimates relative to the number of accounts and consumers. More specifically, the Bureau recognizes that the rule will have the greatest impact on those providers whose compliance is least robust, as those providers will either spend more to bring their compliance up to an appropriate level to avoid class liability or are more likely to be subject to class liability. The Bureau does not agree that, to the extent that the pass-

[1212] It is theoretically possible to have a pass-through rate of over 100 percent, even without accounting for strategic effects of competition. These strategic effects tend to drive up the pass-through rate even higher. *See, e.g.,* Jeremy Bulow & Paul Pfleiderer, ''A Note on the Effect of Cost Changes on Prices,'' 91 J. of Pol. Econ. 182 (1983); Rajeev Tyagi, ''A Characterization of Retailer Response to Manufacturer Trade Deals,'' 36 J. of Mktg. Res. 510 (1999); E. Glen Weyl & Michal Fabinger, ''Pass-Through as an Economic Tool: Principles of Incidence under Imperfect Competition,'' 121 J. of Pol. Econ. 528 (2013); Alexei Alexandrov & Sergei Koulayev, ''Using the Economics of the Pass-Through in Proving Antitrust Injury in Robinson-Patman Cases,'' 60 Antitrust Bull. 345 (2015).

[1213] In other words, these rates depend on curvatures (concavity/convexity) of cost and demand functions.

[1214] Some industry commenters asserted that all costs of the class provision would be passed through to consumers, but none provided evidence or specific figures. Thus, the Bureau's conclusion remains that pass through will likely occur, but that it cannot estimate whether the level of pass through will be closer to zero or 100 percent. Economic theory predicts that pass through will be lower in industries that are less competitive.

[1215] *See, e.g.,* RBB Economics, ''Cost Pass-Through: Theory, Measurement, and Potential Policy Implications,'' (2014), *available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/320912/Cost_Pass-Through_Report.pdf.*

[1216] *See* Lawrence Ausubel, ''The Failure of Competition in the Credit Card Market,'' 81 Am. Econ. Rev. 50 (1991); *but see* Todd Zywicki, ''The Economics of Credit Cards,'' (Geo. Mason Sch. of L., Working Paper No. 00–22, 2000); Daniel Grodzicki, ''Competition and Customer Acquisition in the U.S. Credit Card Market,'' (Working Paper, 2015), *available at https://editorialexpress.com/cgi-bin/conference/download.cgi?db_name=IIOC2015&paper_id=308.*

[1217] *See* Sumit Agarwal et al., ''Regulating Consumer Financial Products: Evidence from Credit Cards,'' 130 Q. J. of Econ. 1 (2015); Benjamin Kay et al., ''Bank Profitability and Debit Card Interchange Regulation: Bank Responses to the Durbin Amendment,'' (Fed. Reserve Board, Working Paper No. 2014–77, 2014), *available at http://www.federalreserve.gov/econresdata/feds/2014/files/201477pap.pdf. But see* Todd Zywicki et al., ''Price Controls on Payment Card Interchange Fees: The U.S. Experience,'' (Geo. Mason L. & Econ., Res. Paper No. 14–18, 2014).

[1218] *See generally* Study, *supra* note 3, section 10.

[1219] *See id.* (for other caveats to this analysis). *See also* Alexei Alexandrov, ''Making Firms Liable for Consumers' Mistaken Beliefs: Theoretical Model and Empirical Applications to the U.S. Mortgage and Credit Card Markets,'' Soc. Sci. Res. Network (Sept. 22, 2015).

through of these costs occurs or that some individual providers exit the market, it will substantially restrict access to financial products or services as a whole.

Credit union industry commenters asserted that the risk or magnitude of pass-through costs to consumers is effectively greater for credit unions, because unlike traditional banks, credit unions are owned by their members. The Bureau agrees that, at least for any credit unions that use arbitration agreements, this may be true, if somewhat tautological. In general, a cost to a firm must either be passed on to consumers through higher prices or to the owners of the firm through reduced profits. To the extent that credit union customers are also owners, such costs will ultimately fall to consumers one way or another. Nonetheless, given that the Bureau's preliminary conclusion was only that pass-through was likely greater than zero, and given that most credit unions currently do not use arbitration agreements and so will not be affected by the rule, the Bureau's analysis is not meaningfully altered by this comment.

Some industry commenters argued that pass-through would be especially high in their specific industry. For example, a small dollar lending industry commenter argued that profit margins in that industry are so thin that costs would have to be passed on, or else firms would go out of business. Again, the Bureau acknowledges that full pass-through is possible, but the Bureau believes that even full pass-through will not impose substantial burden on individual consumers.

A research center commenter asserted that large financial services firms adjust price more slowly than smaller firms and firms in other sectors, and that this explains the lack of price response from the issuers studied by the Bureau. The Bureau has no evidence to suggest that price responses by credit card issuers are so slow that they would not have been captured by the analysis in the Study, and the commenter did not provide any evidence to support this assertion; nor did any credit card issuer or other provider come forward with such evidence, even anecdotally.[1220] However, the Bureau acknowledges that this is another reason that the lack of a price response observed in the Study may not reflect the industry-wide level of pass-through.

C. Potential Benefits and Costs to Consumers

Potential Benefits to Consumers

Consumers will benefit from the class rule to the extent that providers will have a larger incentive to comply with the law; from the class payments in any class settlement that occurs due to a provider not being able to invoke an arbitration agreement in a class proceeding; and, from any new compliance with the law consumers experience as a result of injunctive relief in a settlement or as a result of changes in practices that a provider adopts in the wake of the settlement to avoid future litigation.[1221] In addition, consumers will benefit from the monitoring rule to the extent that the rule provides transparency into the arbitration process.

As noted above and in Part VI, the primary effect of the rule on consumers will be to provide a deterrent against harmful conduct on the part of providers, resulting in additional investments in compliance. Consumer benefits due to providers' larger incentive to comply with the law are directly related to the aforementioned investments by providers to reduce class litigation exposure. Specifically, consumers would benefit from the forgone harm resulting from fewer violations of law. A full catalog of how all laws applicable to affected products benefit consumers when they are followed is far beyond the scope of this analysis. However, a few examples of types of benefits are offered. These benefits could take a form that is easier to monetize—for example, a credit card issuer voluntarily discontinuing (or not initiating) a charge to consumers for a service that generates $1 of benefit to consumers for every $10 paid by consumers; a depository institution ceasing to charge overdraft fees with respect to transactions for which the consumer has sufficient funds on deposit at the time the transaction settles to cover the transaction; or, a lender ceasing to charge higher rates to minority than non-minority borrowers. Or this could take a form that is harder to monetize—for example, a debt collector investing more in insuring that the correct consumers are called and in complying with various provisions limiting certain types of contacts and calls under the FDCPA and TCPA; or, a creditor taking more time to assure the accuracy of the information furnished to a credit reporting agency or to investigate disputes of such information.

Just as the Bureau is unable to quantify and monetize the investment that providers would undertake to lower their exposure to class litigation, the Bureau is unable to quantify and monetize the extent of the consumer benefit that would result from this investment or particular subcategories of investment, such as improving disclosures, improving compliance management systems, expanding staff training, or other specific activities. The Bureau requested comment on any representative data sources that could assist the Bureau in both of these quantifications, but did not receive any responses.

The Bureau also believes consumers will benefit from the reporting requirement via improved monitoring for potential biases in administration of arbitration (as was alleged in the case of NAF, discussed in Part II above), as well as other potential harms in the use of arbitration agreements. Some commenters disputed this, arguing that the Bureau's existing database of complaints serves as a direct substitute. That is, in their view, the public already has access to consumers' complaints about providers, and more information through the submission of arbitral awards is unnecessary. However, the Bureau believes that the monitoring proposal would produce different and supplemental information that is important. Perhaps most importantly, the monitoring provision will provide the Bureau and the public insight into how the arbitration process is serving consumers who enter into it. In addition, while the Bureau's complaint process serves as an effective avenue through which a consumer can complain to a provider, the Bureau does not adjudicate claims. The Bureau does not decide on the merits of a complaint, and firms are not required to provide any response to consumer complaints submitted through the portal. Absent settlement by the affected entities, arbitration features legally binding decisions on the merits of a case by a third party that can serve as a means by which the public can better understand potential areas of non-compliance.

Consumers will also benefit from class payments that they receive from settlements of additional class actions. According to the calculation above, this benefit would be on the order of $342 million per year for Federal class

[1220] The only empirical data any commenters provided on the issue of arbitration agreements and pricing was an anecdote from the 1990s where a credit card issuer offered its existing customers an APR discount of 2 percent if they accepted a new arbitration agreement. While little conclusion can be drawn from one such dated example, the Bureau notes that in that case, the price difference was not delayed.

[1221] *See* Part VI for a related discussion.

settlements, and an unquantified amount in State court settlements.[1222]

Moreover, as noted above as well, the Bureau believes that there will also be significant benefits to consumers when settlements include injunctive relief.[1223] This relief can affect consumers beyond those receiving monetary remediation, including for example future customers of the provider or customers who fall outside of the class action but will stand to benefit from the injunctive relief. The Bureau is not aware of a consistent method of quantifying the total amounts of additional injunctive relief from the approximately 103 additional Federal class settlements per year and a similar number of additional State class settlements.[1224] The Bureau requested comment on whether the extent of this benefit, and the associated cost to providers, could be monetized, and if so how, but did not receive any responses.

Consumers may also benefit to the extent that they prefer to engage in disputes through the court system, rather than through arbitration. A research center's comment provided the results of its survey which they stated indicated that 89 percent of 1,008 consumers surveyed would like to be able to participate in class actions against a bank who had charged them for a fee or services they did not request. An industry association comment criticized the research center survey for, among other things, not asking about arbitration as an alternative, and several industry association comments asserted the Bureau should survey consumer preferences for arbitration. The latter, the Bureau believes, is less relevant given the infrequent use of arbitration and its potential to continue under the rule. Other industry commenters asserted that consumers prefer arbitration, although they only cited the purportedly attractive features of arbitration, rather than empirical data on actual consumer preferences. In any event, the research center survey concerning class actions focused on a particular example in a particular market, and its results may not extend to other situations in other markets.

Potential Costs to Consumers

The cost to consumers is mostly due to the aforementioned pass-through by providers, to the extent it occurs, as discussed above and in Part VI. The Bureau does not repeat this general discussion here.

A second possible impact could occur if some providers decide to remove arbitration agreements entirely from their contracts, although there is no empirical basis to determine the proportion of providers that would do so, and the Bureau believes it is unlikely that many, if any, providers will do so.[1225] Assuming that some providers will remove these agreements, some consumers who can currently resort to arbitration for filing claims against providers will no longer be able to do so if the provider is unwilling to engage in post-dispute arbitration. Conversely, some consumers who currently cannot resort to individual litigation will be able to do so if an arbitration agreement is removed in toto.

As discussed in detail in Part VI, the Bureau continues to believe that the results of the Study were inconclusive as to the benefits to consumers of individual arbitration versus individual litigation.[1226] However, given that the Study found only several hundred individual arbitrations per year involving consumer financial products or services, the Bureau believes that the magnitude of consumer benefit, if any, of individual arbitration over individual litigation would need to be implausibly large for some, or even all, providers that eliminated their arbitration agreements to make a noticeable difference to consumers in the aggregate.

In short, if a consumer initiates a formal dispute relating to a consumer financial product or service, it is possible that the consumer would fare somewhat better in individual arbitration than in individual litigation.[1227] However, in practice, this comparison is not material for the analysis of consumer benefits and costs since consumers do not initiate formal individual disputes involving consumer financial products or services in notable numbers in any forum: The Bureau documented hundreds of individual arbitrations versus millions of consumers receiving relief through class actions.[1228]

The Bureau requested comment on both providers' incentives to drop arbitration agreements altogether and on quantification of consumer benefit or cost of individual arbitration over and above individual litigation. A number of industry commenters asserted that providers would drop individual arbitration agreements.

Commenters made two points. First, they asserted that companies subsidized individual arbitration, requiring significant upfront expenses on filing fees and other costs, for the purpose of avoiding class action exposure. Thus, in their view, it would be unprofitable to subsidize individual arbitration if companies cannot in turn prevent class actions. Second, the commenters asserted that the decision to drop arbitration agreements would occur because it is not cost-effective to support a dual-track system of litigation (on a class or putative class basis) and individual arbitrations. However, this reasoning conflicts with available facts.

As discussed above in Part VI findings, the upfront costs of individual arbitration are likely more than offset by the reduced cost compared to litigating in court.[1229] Thus, even without the ability to block class actions, companies would still have an incentive to retain their arbitration agreements. Further, the Study showed that providers often

[1222] As noted above, the calculation depends on many assumptions, and thus there are many reasons for why this number might be considerably higher or considerably lower.

[1223] In a market with transaction costs (not subject to the Coase Theorem), the value of behavioral relief to consumers could be either roughly equal, higher or lower than the value to firms.

[1224] One easier quantification to make is in the class settlement analysis in Section 8 of the Study, where 13 percent of the settlements featured behavioral relief and 6 percent featured in-kind relief. Accordingly, out of the additional 103 cases, a reasonable quantification is that 13 percent will feature behavioral relief and 6 percent will feature in-kind relief. As noted above, while the Study quantified $644 million of in-kind relief, that number is included in relief, but not in payments in the Study, and the Bureau continues to follow this approach here, both for the calculation of costs to providers and benefits to consumers. Similarly, as noted above, the Study did not include promises to obey the law going forward as specific enough to count toward behavioral relief, suggesting that injunctive relief overall is likely higher.

[1225] See Part VI for more discussion of this issue.

[1226] *See* Study, *supra* note 3, section 6 at 2. Existing empirical evidence compiled by scholars prior to the Study mainly concerns employment, franchisee, and security arbitrations (note that FINRA rules require an option of class action in any arbitration agreement). The Bureau does not believe that these data are necessarily applicable to consumer financial products and services. Even that evidence is also largely inconclusive. *See, e.g.,* Theodore Eisenberg & Elizabeth Hill, ''Arbitration and Litigation of Employment Claims: An Empirical Comparison,'' 58 Disp. Resol. J. 44 (2004) (finding no statistical differences in a variety of outcomes between individual arbitration and individual litigation). *See also* Peter Rutledge, ''Whither Arbitration?,'' 6 Geo. J. of L. & Pub. Pol'y 549, at 557–9, (2008) (discussing several studies that compared outcomes in individual arbitration and individual litigation, typically showing comparable outcomes in the two fora). The Bureau notes that these and other similar comparative studies should be interpreted carefully for reasons stated in the Study. *See* Study, *supra* note 3, section 6 at 2–5.

[1227] Similarly, it is possible that the consumer would fare somewhat worse in individual arbitration than in individual litigation.

[1228] If anything, the Study showed considerably more individual litigation (in Federal and in small claims courts) than individual arbitration. *See generally,* Study, *supra* note 3, sections 5 and 6.

[1229] Some commenters asserted that the cost savings were less significant compared to small claims court. However, a large portion of the arbitration claims in the Study were for amounts exceeding the small claims court limits in many States, so this comparison is not entirely apt.

do not invoke arbitration agreements in individual lawsuits,[1230] and thus providers are already operating in such a dual-track system. In addition, since most individual firms do not face even one arbitration claim in any given year, it seems unlikely that firms are paying substantial fixed costs to maintain an individual arbitration program nor did commenters submit evidence to the contrary. Thus, the Bureau lacks sufficient information to determine that most providers would drop arbitration agreements altogether rather than adopting the Bureau's language if the rule is finalized as proposed.

A third possible cost to consumers could arise if, as discussed above, some providers decide that a particular feature of a product makes the provider more susceptible to class litigation, and therefore decide to remove that feature from the product. A provider might make this decision even if that feature is actually beneficial to consumers and does not result in legal harm to consumers. In this case, consumers would incur a cost due to the provider's over-compliance with respect to this particular decision. The Bureau is not aware of any data showing this theoretical phenomenon (over-compliance) to be prevalent among providers who currently do not have an arbitration agreement or any reason to believe this would be likely among providers who will be required to forgo using their arbitration agreement to block class actions. The Bureau requested comment on the extent of this phenomenon in the context of the proposal but did not receive any responses.[1231]

A nonprofit commenter and some industry commenters posited a fourth possible cost to consumers, arguing that consumers value the private nature of individual arbitration, and that the monitoring provision of the rule could compromise this. These commenters also asserted that consumers' private financial information could be released as a result of this provision if the arbitral records are made public and consumers are re-identified using public information. Taking the second argument first, the Bureau notes that several measures will sufficiently reduce re-identification risk. While providers must submit records redacted of certain personal identifiers, the Bureau will take the primary responsibility, prior to publication, for redacting any additional information needed to minimize the risk of re-identification.[1232] The Bureau has extensive experience in redacting such information from its consumer complaints database. With regard to the first argument, the Bureau is not aware of any evidence that consumers who are particularly privacy sensitive currently seek out arbitration to handle formal disputes.

D. Impact on Depository Institutions With No More Than $10 Billion in Assets

The prevalence of arbitration agreements for large depository institutions is significantly higher than that for smaller depository institutions.[1233] Moreover, while more than 90 percent of depository institutions have no more than $10 billion in assets, about one in five of the class settlements with depository institutions in the Study involved depository institutions under this threshold (approximately one class settlement per year). The magnitude of these settlements, measured by payments to class members, was also considerably smaller than settlements with institutions above the threshold: The aggregated documented payments to class members from all cases that involve depository institutions with less than $10 billion in assets was under $2 million over the five years analyzed in the Study. Similarly, while the requirement that providers using pre-dispute arbitration agreements submit certain records relating to arbitral proceedings to the Bureau will, in relative terms, cost more for a small firm than a large firm, given the small number of overall arbitral proceedings, and the smaller relative likelihood of a small depository entity invoking an arbitration agreement, this cost will not be disproportionately borne by smaller entities. Additionally, even if a small depository entity would need to submit records of arbitral and certain court proceedings to the Bureau, the overall administration cost burden, as stated above, is relatively small.

Thus, using the same method discussed above to estimate additional class settlements (and putative class cases) among depository institutions with no more than $10 billion in assets suggests that the final rule will have practically no effect that could be monetized. Specifically, the calculation predicts approximately one additional Federal class settlement and about three putative Federal class cases over five years involving depositories below the $10 billion threshold after the class rule takes effect.

However, there might be other ways in which impacts on smaller depository institutions, and smaller providers in general, would differ from impacts on larger providers. The Bureau describes some of these in this Section 1022(b)(2) Analysis.

One possibility might be that the managers of smaller providers (depository institutions or otherwise) are sufficiently risk averse, or generally sensitive to payouts, such that putative class actions have an *in terrorem* effect. To the extent this occurs, small providers may settle any such additional lawsuits for more than the expected value of an award if the case were likely to be certified as a class case and go to trial. However, the Study found that it is most common for class action settlements to be reached before a court has certified a case as a class case. Moreover, as noted above, the amount of any such settlement should be lower for smaller providers given the smaller magnitude of the case and the lower number of consumers affected. In addition, as noted above, the Bureau estimates the number of additional class lawsuits in general against small depository institutions to be extremely low. In particular, the Bureau believes that out of the 312 cases (over five years) that are used for the estimates of the impact on the number of Federal class settlements, about one Federal class settlement per year involved smaller institutions (either depository or non-depositories) paying over $1,000,000 to class members.

There is a significant amount of academic finance literature suggesting that management should not be risk averse, unless the case involves a possibility of a firm going bankrupt in case of a loss.[1234] However, management of smaller providers, regardless of whether they are depository institutions, might be more risk averse because their shareholders or owners might be less diversified.

The bargaining theory literature generally suggests that the party with deeper pockets and relatively less at stake will be the party that gets the most out of the settlement.[1235] It follows that

[1230] Study, *supra* note 3, section 1 at 15.

[1231] Some commenters made a general assertion that the rule would stifle innovation. Although somewhat related, innovation of new products and services is not the same thing as the over-compliance phenomenon described here. In any event, as described above in Part VI (the findings), the Bureau believes the rule is as likely to suppress harmful innovations as those beneficial to consumers.

[1232] *See* § 1040.4(b)(5).

[1233] *See generally* Study, *supra* note 3, section 2.

[1234] *See, e.g.,* Clifford Smith & René Stulz, ''The Determinants of Firms' Hedging Policies,'' 20 J. Fin. & Quantitative Analysis 391 (1985).

[1235] More generally, economic theory suggests that the side that is more patient is going to get a

smaller defendants might fare worse in terms of the settlements relative to their larger peers, all else being equal. However, from anecdotal evidence, the Bureau believes that, if the smaller defendants are sued at all, they are likely to be sued by smaller law firms. This could equalize bargaining power (as a smaller law firm might not be able to afford to be too aggressive even in a single proceeding) or tilt bargaining power more to a smaller defendant's side relative to their larger peers defending against larger law firms.

Finally, given the considerably lower frequency of class litigation for smaller providers, it is possible that it is not worth the cost for smaller providers to invest in lowering class litigation exposure. This might also explain the relatively lower frequency of arbitration agreement use by smaller depositories.

E. Impact on Rural Areas

Rural areas might be differently impacted to the extent that rural areas tend to be served by smaller providers, as discussed above with regard to depository institutions with less than $10 billion in assets and below with regard to providers of all types that are below certain thresholds for small businesses. In addition, markets in rural areas might also be less competitive. Economic theory suggests that less competitive markets would have lower pass-through with all else being equal; therefore, if there were any price increase due to the proposal, it would be lower in rural areas.[1236]

F. Impact on Access to Consumer Financial Products and Services

Given hundreds of millions of accounts across affected providers and the numerical estimates of costs above, the Bureau expects the additional marginal costs due to additional Federal class settlements to providers to be negligible in most markets. Each of the product markets affected has hundreds of competitors or more. Thus, the Bureau does not believe that this final rule will result in a noticeable impact on access to consumer financial products or services.

The Bureau does not believe that access to consumer financial products or services will be diminished due to effects on providers' continued viability or, as discussed below in Part IX, due to effects on providers' access to credit to facilitate the operation of their businesses. It is possible that consumers might experience temporary access concerns if their particular provider were sued in a class action. These concerns might become permanent if such litigation significantly depleted the provider's financial resources, potentially resulting in the provider exiting the market.

Of course, the incentive for a class counsel to pursue a case to the point where it would cause a defendant's bankruptcy is low because this would leave little or no resources from which to fund a remedy for consumers in a class settlement or any fees for the class counsel and could make the process longer. In addition, the potential consumers of this provider presumably have the option of seeking this consumer financial product or service from a different company that is not facing a class action, and thus a bankruptcy scenario is substantially more of an issue for the particular provider affected than for the provider's customers. Moreover, especially given the low prevalence of cases against smaller providers outlined above and the amounts of documented payments to class members, the Bureau does not believe that out of the Federal class settlements analyzed in the Study, many settlements threatened the continued existence of the defendant and the resulting access to credit or other consumer financial products or services.

A Congressional commenter also stated his view that the class rule would likely cause financial institutions to increase their cash reserves held to mitigate litigation risk. The commenter stated that this increase in cash reserves, in turn, could reduce the amount of cash that institutions have available to lend to consumers and small businesses, or to invest in technology upgrades and employee retention. The commenter referred to this effect as creating ''dead capital.'' To the extent that financial institutions self-insure in this fashion, the Bureau does not believe it will substantially impact consumers' access to credit, as the overall costs of the rule are small relative to the size to the relevant markets.

G. Potential Alternatives Considered by the Bureau in Lieu of the Class Action Rule

In developing the proposal and the final rule, the Bureau considered several potential alternative approaches in light of whether these potential alternatives would achieve the goals of the rulemaking with less burden on industry. The Bureau discussed some of these potential alternatives in the IRFA included in the proposal, and noted in the Section 1022(b)(2) Analysis that it also considered them in that context. The Bureau discusses potential alternatives further here, both in general and in light of comments received regarding potential alternatives.[1237] Commenters suggested and the Bureau considered four general classes of potential alternatives to the proposed class rule: (1) Measures to increase consumer choice with respect to entering into arbitration agreements; (2) measures to improve consumers' access to and the conduct of individual arbitrations; (3) an exemption from the proposed class rule for potentially actionable conduct that providers report to regulators; and (4) an exemption from the rule for small businesses.[1238] The fourth alternative, because it relates to small entities, is discussed in more detail in the FRFA in Part IX below.

Beyond these general classes of potential alternatives, commenters suggested other limitations to the class rule, which the Bureau has discussed in Part VII. Some commenters suggested exempting claims under specific statutes, discussed in Part VI and Part VII,[1239] while others raised the possibility of excluding arbitration agreements from the class rule if they allow for class arbitration.[1240] Some

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better deal, all else being equal. For the canonical economic model of bargaining, *see* Ariel Rubinstein, ''Perfect Equilibrium in a Bargaining Model,'' 50 Econometrica 97 (1982).

[1236] *See* Weyl and Fabinger, *supra* note 1212; Alexandrov and Koulayev, *supra* note 1212.

[1237] The proposal also discussed the potential for a total ban on the use of arbitration agreements. Consumer advocate commenters generally urged that option as an alternative to the individual monitoring proposal, as discussed in Part VII above. In any event, as compared to the class rule, such an approach would not reduce burden as explained in the proposal. 81 FR 32830, 32921 (May 24, 2016), and the Bureau does not discuss it further here.

[1238] Some commenters that suggested a small entity exemption requested that this exemption cover the monitoring proposal as well as the class rule. The Bureau discusses this potential alternative in the FRFA, below.

[1239] For discussion of claims under statutes providing for statutory damages or attorney's fees generally, see Part VI (Bureau findings that the class rule is warranted for these claims). For further discussion of claims under the Credit Repair Organization Act (CROA) in particular, see the section-by-section analysis of § 1040.3(a)(4) above (Bureau decision not to exclude providers potentially subject to these claims from coverage). A nonprofit commenter criticized EFTA ATM ''sticker'' class actions and stated these cases demonstrate that the rule should exclude claims under statutes that do not explicitly authorize class remedies. Yet the Bureau notes that EFTA does provide for class remedies in 15 U.S.C. 1693m(a)(2)(B), and in any event, the EFTA ATM ''sticker'' requirements have been repealed, as noted in Part VI above. To the extent the commenter was asserting that statutes authorizing statutory damages in individual actions provide sufficient deterrence without allowing for class actions under Federal Rule 23 of the Federal Rules of Civil Procedure, this comment is addressed in Part VI above, which finds that application of the rule to class actions, including those seeking statutory damages, is in the public interest and for the protection of consumers.

[1240] One industry commenter and an individual commenter suggested the Bureau examine class

Continued

other potential alternatives suggested by commenters would be infeasible or in conflict with the goals of the rulemaking, such as excluding consumers from participating in a class action unless they have exhausted informal dispute resolution [1241] or excluding class claims where the attorney did not state the fees sought would be below a certain amount, discussed in more detail immediately below.

For these reasons, and for the reasons discussed below for the other potential alternatives, the Bureau concludes that none of these potential alternatives would accomplish the goals of the class rule of promoting more effective compliance and remediation for non-compliance with laws providing for a private right of action applicable to covered consumer financial products and services, while minimizing any significant burden on providers.

One Member of Congress suggested the Bureau consider limiting the percentage of attorney's fees that an attorney can demand ''in a lawsuit.'' However, the Bureau does not believe that lawsuit complaints typically state the amount of attorney's fees sought. Thus, such an alternative would amount to introducing a new pleading requirement on consumer class actions or a cap on the fees that could be awarded at the settlement stage—something that is the province of Congress and the courts and would not be appropriate for the Bureau to regulate. Moreover, the Bureau does not believe information needed to estimate the attorney's fees sought is reliably available at the outset of a case. As the Study showed, the dollar value of consumer harm and the size of the class are rarely pleaded in consumer class complaints.[1242] The Bureau believes this is because this information is generally not reliably available at the outset of a case. The size of the class often is not determined until the settlement approval and administration process. Finally, in most consumer protection statutes that allow for recovery of attorney's fees, the rules for attorney's fees do not specify a cap. The Bureau believes there would be little basis for identifying a generic cap that would apply across all cases that are impacted by this rule. For these reasons, this policy option seems infeasible.

Potential Alternatives Involving Disclosure, Consumer Education, Opt-In, or Opt-Out Requirements

Several industry commenters suggested that instead of prohibiting firms from using pre-dispute arbitration agreements to bar class actions, the Bureau should instead require firms to give consumers more choice regarding whether and how they enter into arbitration agreements. These proposals took a variety of forms, including requiring firms to allow consumers to either to opt in to or opt out of pre-dispute arbitration agreements, a mandated disclosure of the existence and details of an arbitration agreement, and consumer education initiatives.

The Bureau discusses its concerns with each of these variations in turn below. However, the fundamental problem with this class of potential alternatives is that it does not address the market failure that the rulemaking is intended to address—the fact that consumers often lack awareness that they have a legal claim and, moreover, that when they are aware of such claims, many are negative-value claims that cannot practicably be pursued in any formal dispute resolution forum (whether litigation or arbitration) on an individual basis. Both of these factors reduce firms' incentives to comply with the laws (and thereby correct the market failures the laws were enacted to address).

Moreover, because the market failure identified in this rule relates to what happens when a claim does arise (and the consequences for compliance and remedies), it cannot be ameliorated by increasing consumers' knowledge and understanding *ex ante* of entering into arbitration agreements before these claims arise. The weak individual incentives for consumers to pursue these claims lead to weakened incentives for firms to comply with the law. While the Study revealed that many consumers lack awareness of arbitration agreements, and it is likely true that consumers are rarely able to make an informed choice to avoid entering into an arbitration agreement if they wish to, remedying this problem would not be sufficient to correct the market failure which is the focus of this rulemaking. Increased information and choice about arbitration agreements cannot increase consumers' knowledge of their claims, change the small value of the claims, or reduce the effort consumers must exert to pursue these claims in a way that would render them positive value, and thus address the market failure.[1243] Class actions, in contrast, take these net negative costs, centralize them with one entity already familiar with the legal process who pursues the claim, and distributes net proceeds if the valid claim provides a net positive return. Consumers who are class members need to expend virtually no time in this process. The class attorneys may pass their fees on to consumers, but even when doing so, that does not render the claims net negative; consumers still receive positive payout amounts after accounting for legal fees, with little or no expenditure of their own time or money.

None of the commenters that suggested these potential alternatives articulated how the proposed alternatives would accomplish the Bureau's goals.[1244] As such, the Bureau believes that none of the suggested alternatives aimed at improving consumer choice will achieve the goals of the rulemaking.[1245]

With respect to the specific alternatives suggested, the Bureau received some comments that suggested

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arbitration as a potential alternative to the class rule. The industry commenter stated that consumers might be able to receive higher recoveries in class arbitration, but recognized the ''little or no data available,'' and did not explain why consumers might be able to receive higher recoveries. This is discussed in detail in the section-by-section analysis of § 1040.4.

[1241] Two industry associations suggested that the Bureau allow arbitration agreements to block consumers from participating in class actions unless they had exhausted an internal dispute resolution process. This approach, however, would not only make it more difficult for consumers who recognize that they have been harmed to obtain legal relief to which they are entitled, but would foreclose relief on behalf of consumers who do not recognize that harm has occurred. Even if such a system would result in equal amounts of redress for consumers who recognize their injuries, the Bureau believes it would result in far less deterrent effect and therefore produce far less benefit than the final rule.

[1242] *See* Study, *supra* note 3, section 6 at 15 n.36 and 23 n.42.

[1243] Indeed, the value of the time necessary for consumers to learn about the arbitral process, learn enough about consumer law to understand when they have a valid claim, and finally initiate and pursue the arbitral process to completion will likely often exceed the value of the claims discussed in the market failure section. A common way to measure the value of consumers' time is using their wages. At the 2015 U.S. median wage of $17.40, a process requiring several hours of time will be more costly than forgoing a claim with expected value of $100 or less.

[1244] One industry commenter stated that its proposed alternative would allow consumers to choose for themselves whether they prefer arbitration or litigation. As noted above, consumers' preferences over the forum for individual dispute resolution are not the focus of the rulemaking—the market failure in question is a problem of collective action. Other commenters simply said that the Bureau should have considered the suggested alternative without further explanation.

[1245] The Bureau is in general concerned about consumer awareness of contract terms and the ability of consumers to make informed choices about consumer financial products and services. Several industry commenters have noted certain public statements about transparency and consumer choice in the context of arbitration agreements. Nonetheless, as the rulemaking record reflects, the lack of transparency and choice regarding pre-dispute arbitration agreements is not the rationale for the class action provision of the final rule.

the rule could mandate opt-out agreements that could allow consumers to remove themselves from the obligation to pursue individual arbitration in lieu of participating in a class action.[1246] One credit union industry commenter argued that consumers should have this opportunity as a right, while a credit union trade group also promoted it under the rubric of providing consumers with more choices. Another industry commenter offered that opt-outs make sure consumers are not ''forced'' into arbitration. An industry trade association commenter, under similar logic, maintained that the Bureau did not adequately consider the potential of a combination of consumer education and opt-outs. Another industry trade association commenter argued that knowledgeable consumers might choose not to opt out because they decide that arbitration is superior to individual or class action litigation. Finally, an industry commenter and a research center cited an example from the 1990s where a provider offered a price discount to existing customers who chose not to opt out of a new arbitration agreement. These commenters suggested that this could allow consumers to choose what is more important to them: Price or non-arbitration dispute options.

For many of the same reasons already discussed, the Bureau believes that requiring opt-out arrangements would not meet the objectives of the proposal because they would not alleviate the market failure that the class rule seeks to address. Opt-out agreements will not make consumers aware they have a legal claim in the future, nor will such agreements make negative-value claims worth pursuing. The timing of decisions becomes a factor as well—consumers generally choose whether to be part of an arbitration agreement at the outset of their customer relationship, while firms make compliance decisions continually over time.[1247] As such, there is no reason to believe that opt-out provisions would materially influence firms' compliance decisions, nor did commenters suggest that they would. Further, a number of providers in markets for consumer financial services used opt-out agreements in the course of adopting their current arbitration agreements, but the Study showed that very few consumers are aware whether they have arbitration agreements in their contracts. This suggests that such regimes are subject to many of the same awareness and effectiveness issues discussed below with regard to disclosures.

Furthermore, even if the Bureau's goals in this rulemaking was to enhance informed consumer decision-making with respect to the potential risks and benefits of entering into adhesion contracts that contain arbitration agreements, there is reason to doubt that mandated opt-out provisions would be effective in promoting informed consumer decision-making, even if coupled with consumer education or improved or additional disclosures. Although there is limited evidence specific to the context of arbitration, there is extensive academic literature showing that consumers frequently do not opt to leave a default option, even if it would be advantageous for them to do so.[1248] In this respect an opt-out regime would only marginally increase firms' class action exposure relative to the *status quo*.[1249] The commenters that suggested that mandatory opt-out provisions did not provide any evidence that consumers would be any more likely to opt-out of arbitration agreements, compared to opt-outs in other contexts, offering only that consumers sometimes take advantage of existing opt-out provisions.[1250]

In a related series of comments, industry commenters, trade associations and a nonprofit commenter also suggested that the Bureau mandate new disclosures to accompany arbitration agreements that block class actions as an alternative to the class rule. These commenters focused on the problem of lack of consumer awareness about the possible future consequences of entering into an arbitration agreement. In support, these commenters cited to the Bureau's lack of consumer education on arbitration and the Bureau's support of improved disclosure in other contexts. The Bureau's primary focus in this rulemaking, however, is not the problem that improved disclosure purports to fix. Thus, the market failure this rule seeks to address would remain even if the Bureau mandated the best possible form of disclosure proposed by some commenters, including, among other features, plain language and large, clear fonts on pages separate from the rest of the financial contract, coupled with increased consumer education efforts (whether by the providers, regulators, or both). Moreover, as discussed in Part VI, above, the disparity in numbers between the few hundred consumers who currently pursue individual claims in arbitration and the tens of millions annually who are part of a putative class makes it difficult to imagine that any kind of information intervention could bridge the difference.

In any event, there is reason to doubt that disclosures would be very effective in raising consumer awareness, even coupled with consumer education or mandated opt-out provisions. The Study indicated that current consumer understanding of arbitration agreements is low.[1251] The Bureau believes that even with the most effective disclosures and education it is unlikely that many consumers could, at the outset of a customer relationship, anticipate that the provider will act unlawfully not only to the consumer but to a putative class, and accurately assess the value of these dispute-resolution rights in a hypothetical future scenario.[1252]

[1246] In an opt-out agreement, the default for consumers is that they would be subject to the arbitration agreement if they become a party to the contract. However, the provider would allow consumers to ''opt out'' of the arbitration agreement so that that part of the contract would not apply to them. If the arbitration agreement could be used to block a class action, only those consumers who opted out would be able to file or participate in a class action. Any class settlement would not apply to those consumers who did not take the affirmative step to opt out of the arbitration agreement.

[1247] An exception would be if firms add an arbitration clause to their existing contracts and notify consumers of the opportunity to opt out at that time. Even then, the provider's compliance decisions are made over time after the opportunity to opt out.

[1248] *See* Stefano DellaVigna, ''Psychology and Economics: Evidence from the Field,'' 47 J. Econ. Lit. 2 (2009) (for a review of this literature).

[1249] For instance, auction site eBay engineered its opt-out provision specifically as a means of shielding the company from class action liability, and achieved a very low opt-out rate. Ted Frank, ''Class Actions, Arbitrations and Consumer Rights: Why Concepcion is a Pro-Consumer Decision,'' MI Report (Feb. 19, 2013). One commenter cited this report as an example of consumers being happy with arbitration clauses, an argument that is at odds with the source material.

[1250] The Bureau acknowledges that mandatory opt-in or opt-out policies have been set by regulation in consumer financial regulation, most notably Regulation E's opt-in regime for overdraft services. 12 CFR 1005.17(b).

[1251] Despite contract language and placement that is not dramatically different from that of other contract provisions.

[1252] *See* Study, *supra* note 3, section 3 at 16–23. Two individual commenters suggested the rule could mandate opt-in arbitration agreements that could be used to block class actions only for consumers who actively consented to be a part of that agreement. Neither commenter seemed to envision that many consumers would actually opt in. An industry commenter suggested that the rule should allow companies to offer either opt out or opt in. A State attorney general commenter noted that consumers generally lack awareness of opt-out regimes, and also observed opt-in regimes are fair and reasonable but did not actually suggest that the Bureau adopt such a rule. Because the Bureau believes that it is unlikely that many consumers would actively opt in to a pre-dispute arbitration agreement absent inducement, in principle such an alternative could achieve much of the benefits of the final rule. However, the Bureau believes that consumers will face the same difficulties in making an informed decision to opt in as they would to opt out. The Bureau is also concerned that providers would raise prices and offer equivalent small incentives to induce consumers to opt in. Because

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In sum, the Bureau believes it is unlikely that firms would be able to implement an opt-out program that is effective at enabling informed choices. But more importantly, as noted above, a lack of consumer awareness and choice regarding pre-dispute arbitration clauses is not the market failure that the rule is trying to address, and even without the problems detailed above, disclosures or opt-in/opt-out provisions will not address the market failure of insufficient deterrence.

Potential Alternatives Involving Features of the Arbitration Process

Some commenters suggested alternatives aimed at making individual arbitration easier, cheaper, or more desirable to consumers. These included proposals intended to lower the costs of arbitration, reduce barriers to entry, or increase the potential value of consumers' claims. The premise of these alternatives is that small dollar claims would be easier for consumers to prosecute as a result of these changes, the demand for individual arbitration would increase, and class action litigation would not be necessary.

Specifically, the commenters suggested that the Bureau mandate that providers incorporate certain features into their arbitration agreements such as advancement of filing fees and legal costs to consumers when they bring a claim; improving consumers' knowledge and understanding of the arbitration process for purposes of enabling them to file a claim in the event of a dispute; requiring easily accessible venues for arbitrations such as online forums and online filing of documents; and providing for rapid adjudication. These features all would, in the view of the commenters, lower the costs of entry to arbitration, so that fewer claims are negative-value claims. For purposes of this analysis, the Bureau considers all of these cost-reducing alternatives jointly as one alternative.

As an initial matter, even if demand for individual arbitration increased enough to be as strong a deterrent to illegal behavior as class action litigation, it is far from clear that this would reduce the burden to industry as compared to the class rule. The Study found only a few hundred claims related to consumer financial products filed each year by consumers, compared to millions who were part of a putative class. Even if only a small fraction of affected consumers filed arbitration claims, this would be several orders of magnitude more than firms currently face. A thousand-fold increase in individual arbitration claims could be more expensive to defend against than class actions. Moreover, even under ideal circumstances individual arbitration is not suited to providing prospective conduct relief.[1253]

That being said, the Bureau believes that reducing the costs of individual arbitration, while a laudable goal, would not increase demand for individual arbitration enough to provide a deterrent that would substitute for class action exposure. First, improved access to individual arbitration does nothing for consumers who are not aware that they have a legal claim. Second, the Bureau notes that many of the features suggested by commenters are already relatively common in arbitration agreements,[1254] yet the Bureau's Study showed that there were few individual claims filed in arbitration. This suggests that there is a systemic limit to what consumers acting on their own will be willing or able to do to address their concerns, even when they are aware of a problem and have access to a low-cost means of pursuing redress.

The Bureau also considered, in combination with the cost-reducing potential alternatives discussed above, an intervention suggested by an industry commenter and a nonprofit commenter that, in their view, would increase the perceived value of claims brought in individual arbitration. Specifically, commenters suggested that the Bureau mandate that arbitration agreements include clauses that provide for some additional payment to consumers in cases in which four conditions are satisfied: A company makes a settlement offer to the consumer, the consumer rejects the offer, an arbitrator makes an award in favor of the consumer, and the award provides for relief that exceeds the amount of the settlement offer. The premise of this intervention is that it would shift the balance of costs and benefits for consumers with a claim, increasing the demand for arbitration. However, although the commenters pointed to examples of these types of policies in existing agreements, they did not identify evidence that consumers actually pursue individual arbitration more often in response to the presence of such clauses, nor is the Bureau aware of any.

As with the cost-reducing options discussed above, the Bureau notes that conditionally increasing the payout to consumers from individual arbitration will not make consumers aware that they have a claim if they were not otherwise aware. Moreover, and for similar reasons as in the discussion regarding statutory damages in Part VI (whether providing for minimum recovery or punitive damages), the Bureau disagrees that the additional incentives would be large enough to persuade large numbers of consumers to pursue claims that they are aware of and that today they decline to pursue. In order for these incentives in arbitration agreements to make an impact, consumers must both be aware that they have a claim and believe an otherwise small claim also presents a meaningful opportunity for additional recovery. As to the latter, the Bureau does not believe these contract awards meaningfully increase the expected value of claims at the time consumers decide whether to pursue them. First, consumers must evaluate the potential likelihood of an arbitrator finding in their favor. Second, they must condition their expected additional payout on the likelihood that the firm will provide a settlement offer before judgment. Third, they must evaluate the likelihood that the firm will provide a settlement offer lower than the payout that might in the future be awarded by the arbitrator. Thus, any supplemental payout is contingent on decisions made by the consumer, the firm, and the arbitrator, and the actual expected supplemental payout is the value of that supplemental payout times these three separate probabilities, since a specific contingent outcome must occur in each of the conditions. That expected award, as it is a factor of several values less than or equal to one, is likely to be very small and difficult to accurately estimate. Because the resulting expected payout will still be small, it is unlikely that a low probability of a supplemental payment will make an otherwise negative-value claim positive even for a risk-neutral consumer. This expected payout is also only considered by the subset of consumers who understand they have a pursuable claim. Thus, the Bureau does not believe that conditional contract awards would increase the demand for

of the difficulty in making an informed decision to opt in or opt out of pre-dispute arbitration agreements, such incentives might have sufficient take-up to effectively shield providers from class action exposure, undermining the goals of the rule.

[1253] In principle, a firm might change its general practices in the face of a large number of successful arbitration claims. In practice, a firm is likely to have a substantial number of informal complaints about a practice, either made to the firm's customer service or through other venues such as the Bureau's complaint database, well before any large number of individual arbitration claims accrue. The Bureau believes it is unlikely that there are a substantial number of firms that would voluntarily change their practices in response to a large volume of arbitrations but would not already do so in response to the previous volume of informal complaints.

[1254] Study, *supra* note 3, section 2 at 31.

arbitration beyond the other options already described above, which also are insufficient to replace class actions for the reasons discussed above.

Safe Harbor for Conduct Reviewed by, or Self-Reported to, Government Regulators

The Bureau generally considered potential alternatives related to public enforcement in the proposal, but received comments only on one particular potential alternative.[1255] Three industry commenters and their trade associations urged the Bureau to adopt a safe harbor or exemption from the class rule for conduct that has been reviewed by, or been self-reported to, government regulators as promoted by the Bureau's Bulletin on Responsible Business Conduct.[1256] Under this potential alternative, the class rule would not apply to a class action concerning such conduct. As a result, an arbitration agreement could be used to block such a class action.

These comments stated that this potential alternative would reduce firms' exposure to unmeritorious cases because unlike class action attorneys, public regulators bring more meritorious cases. These commenters also stated consumers would benefit more because public regulators achieve more meaningful relief for consumers than class action attorneys, and do not charge their attorney's fees to providers. Accordingly, in the commenters' view, as long as a public regulator is aware of an issue, there is no need for class actions.

The commenters further argued that this alternative would address the market failure this rule seeks to address (reduced incentive to comply with the law) because it would not allow arbitration agreements to eliminate exposure. Rather, it would only allow companies to eliminate class exposure if they were willing to create public enforcement exposure (by self-reporting) or already are subject to public enforcement exposure (by virtue of a regulatory review of their conduct). The commenters also asserted that the alternative would accomplish the Bureau's goals with a reduced burden because providers would be able to block class actions which assert non-meritorious claims that public enforcement was not willing to assert, as well as follow-on class actions that in the commenters' view are unnecessary when public enforcement has already resolved the problem.

The Bureau acknowledges that public enforcement can be more efficient than private actions at achieving redress for consumers, compared to private actions. However, as discussed in Part VI above, due to resource constraints and limits on legal authority there are a number of reasons that a regulator may not pursue an action, or may achieve less than full redress, in spite of the merits of the underlying claims. This may particularly occur for violations with relatively low aggregate harm, as a regulator should reasonably prioritize a case with harm to thousands of consumers over one with harm to hundreds, even if consumers in both groups suffer equal individual harm. In addition, regulators are only authorized to bring certain types of legal claims. As such, providing a broad safe harbor for conduct self-reported to or investigated by public regulators would undermine the goals of the rule by removing the deterrent effect of class actions for such claims that public regulators cannot bring or reasonably prioritize.

Even if this were not true, the Bureau believes that the safe harbor articulated by the commenters would be infeasible in practice. Below the Bureau describes the problems with implementing the potential alternative suggested by the commenters. The Bureau also considered a more limited version of a safe-harbor for self-reporting, described below, but concludes that this would not provide a substantial reduction in burden, and would also be inconsistent with the goals of the rule.

Considering the version of the potential alternative proposed by commenters, the essential problem is that the mechanism to trigger the safe harbor is unworkable. To begin with, allowing a safe harbor to be raised in private litigation for conduct that is the subject of a regulatory investigation is incompatible with the procedures of such investigations.[1257] The broad exemption for self-reporting envisioned by the commenters is problematic as well. The commenters seem to intend that a self-report of any conduct involving any potential legal claims to any regulator would suffice to trigger the safe-harbor. However, the Bureau believes this level of flexibility would in practice undermine the goals of the rulemaking, effectively giving the provider an option for drastically reducing the deterrent effect of class actions by terminating private claims that could not legally or practicably be brought by the agency that receives the self-report. Providers could choose to report a violation to a regulator that does not enforce the relevant law, does not have jurisdiction, or does not prioritize enforcement of that law. For instance, the final rule will apply to all financial institutions, but pursuant to Dodd-Frank section 1026 the Bureau does not have enforcement authority over depository institutions with assets of $10 billion or less and its supervisory authority with respect to such institutions is limited to information gathering, and would be unable to act on a self-report from such an entity. Similarly, it is possible that a provider facing a class action in State court regarding treatment of a class of consumers in that jurisdiction could report to that State's regulator only upon receiving the lawsuit, effectively removing its national liability in the process. It is also possible that a provider could report a violation to a regulator with a mission that is primarily focused on its safety and soundness and not on the protection of consumers.

Given the difficulties with a broad exemption for conduct self-reported to regulators, the Bureau also considered a more limited potential alternative. Specifically, the Bureau considered a safe-harbor for conduct violating a Federal consumer financial law (FCFL) enforced by the Bureau against the reporting person, which is reported to the Bureau. This potential alternative would avoid the issues discussed above that make the version proposed by commenters infeasible. Confidential investigations would not be implicated, and the Bureau would have legal authority to pursue an enforcement action if warranted. However, the Bureau's practical ability to pursue enforcement actions would still be subject to resource and prioritization constraints. Moreover, in light of the

[1255] 81 FR 32830, 32922 (May 24, 2016).

[1256] Bureau of Consumer Fin. Prot., ''Responsible Business Conduct: Self-Policing, Self-Reporting, Remediation, and Cooperation,'' *CFPB Bulletin,* No. 2013–06 (June 25, 2013) (calling upon companies to take responsible conduct including ''promptly self-report[ing] to the Bureau when [they] identif[y] potential violations'').

[1257] In order for a provider to invoke the suggested safe harbor, the regulatory action and its scope would have to be disclosed to the court in the motion to compel arbitration. However, it is difficult to understand how a provider could accurately describe the scope of a regulator's investigation to a court, as regulators do not typically explain the full scope of their investigations to the targets of those investigations. Nor would it be appropriate to put the regulator in the position of providing information about its confidential investigations in the context of a private lawsuit. This would further place a strain on their limited resources and thus may interfere with their enforcement priorities. Further, the investigations of many regulators besides the Bureau are confidential to preserve the integrity of the investigation. In many cases this confidentiality is required by statute. Thus, the Bureau does not believe that it would be feasible for a safe-harbor to be based upon ongoing investigation activity.

more limited scope of the safe harbor, the Bureau believes that this narrower safe-harbor would not provide a substantial reduction in burden to providers, while at the same time harming the goals of the rule by reducing deterrence for some violations of FCFLs.

Specifically, the Bureau believes that a safe harbor for conduct reported to it might decrease but would not minimize the burden of the rule on providers. While under the potential alternative making a self-report would shield a firm from class-action liability for FCFLs, it would not shield the firm from class-action liability under other claims. As the Study noted, more than 63 percent of Federal court class actions in selected markets asserted State law claims.[1258] The fact that such residual exposure would exist suggests that in a substantial majority of cases, companies could not block a class action as a result of the exclusion, but instead could only block certain claims in a class action (*i.e.,* claims of FCFL violations). As a result, at best the exclusion would only allow providers to gain leverage over certain potential class claims, rather than avoid class litigation entirely.[1259] Indeed, the benefits would probably be the smallest from frivolous class action lawsuits, as, all else equal, these are more likely to be brought with a variety of claims.

As a result, rather than reducing the burden to providers from frivolous lawsuits, the potential safe-harbor would instead compromise the deterrent effect of the rule. The Bureau believes this would primarily occur for law violations with relatively low aggregate harm. The Bureau's enforcement resources are limited, and the Bureau may not be able to bring enforcement actions in cases with low aggregate harm, even if an action would be justified in a world with unlimited resources. The proposed safe-harbor would thus block class actions with limited countervailing risk of public enforcement, lowering deterrence. In contrast, for violations with large aggregate harm, a self-report would also increase the likelihood of public enforcement by the Bureau, perhaps substantially. As a result, the Bureau believes that firms would only make an additional self-report if the avoided risk of class action liability outweighed the increased risk of Bureau action. Given these competing risks, the Bureau does not believe most providers would see sufficient benefit from the alternative to outweigh the costs of exercising it for serious violations of the law, save for cases where the provider would self-report anyway.[1260] On balance, the Bureau believes that the potential alternative at best would have no effect on overall deterrence and compliance with the law, and at worst will have a deleterious effect on compliance.[1261]

To summarize, after further consideration and for the reasons outlined above, the Bureau does not believe that a self-reporting exemption, including the one suggested by commenters, would be workable or promote the goals of this rulemaking. And while the Bureau has considered a narrower alternative that might be more workable as a practical matter, that alternative does not appear likely to reduce burden without compromising the ability of the rule to provide deterrence for certain violations, and thus also seems unlikely to accomplish the Bureau's goals.

IX. Regulatory Flexibility 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.[1262] These analyses must "describe the impact of the proposal on small entities." [1263] An IRFA or FRFA is not required if the agency certifies that the proposal will not have a significant economic impact on a substantial number of small entities.[1264] The Bureau also is subject to certain additional procedures under the RFA involving the convening of a panel to consult with small entity representatives prior to proposing a rule for which an IRFA is required.[1265]

In the proposal, the Bureau did not certify that the proposal would not have a significant economic impact on a substantial number of small entities within the meaning of the RFA. Accordingly, the Bureau convened and chaired a Small Business Review Panel under SBREFA to consider the impact of the proposal on small entities that would be subject to the rule and to obtain feedback from representatives of such small entities. The Small Business Review Panel for the proposal is discussed in the SBREFA Report. The proposal also contained an IRFA pursuant to section 603 of the RFA, which among other things estimated the number of small entities that would be subject to the proposal. In this IRFA, the Bureau described the impact of the

[1258] Study, *supra* note 3, section 6 at 19.

[1259] The Bureau also notes that to the extent that the proposed alternative reduces firms' class action liability, the need to litigate over the applicability of the exemption counteracts some of the reduction in burden. Parties would likely incur new costs and time delays in litigating arbitration motions, trying to figure out whether the subject of a class action (and the related size and scope of the class) matched the subject, size, and scope of the defendant's self-report. Currently, it already takes companies a significant amount of time to persuade a court to grant a motion to compel arbitration terminating a class action. According to the Study (Section 6 at table 7), this took on average almost 500 days. Under the potential alternative, courts would need to determine several additional complex issues, extending the time and cost of litigating a motion to compel arbitration. Moreover, uncertainty over how courts would make these determinations would only reduce the potential for increased self-reporting in the first place. Finally, resolution of any claims that were not compelled to arbitration would have been delayed, potentially substantially, which would not serve the consumer protection goals of the rule.

[1260] The Bureau also notes that potentially even this narrow exemption could be abused by firms who "self-report" information they accurately believe is already known to the Bureau. Such superfluous self-reports would not have any effect on firms' compliance decisions, nor on public enforcement—in such cases the Bureau's decision of whether or not to bring a case would not be altered by the nominal self-report. While in principle the potential alternative could carve out information that is already known to the Bureau or publicly available, this would require the Bureau to become involved in the court's decision whether to allow the arbitration agreement to block the class action, by verifying that the self-report contained new information or was otherwise made in good faith. For example, under the Bureau's Responsible Conduct Bulletin, it assesses whether the company "voluntarily disclosed material information not directly requested by the Bureau or that otherwise might not have been uncovered." The Bureau does not believe it should be required to make this assessment in the context of private litigation.

[1261] One industry commenter suggested that the Bureau could make the safe harbor temporary, *i.e.,* until the Bureau completed its investigation. However, the Bureau does not believe that approach would be feasible. Arbitration agreements are used to obtain stays or dismissal of class actions in favor of arbitration. Thus, there is currently no procedure for using an arbitration agreement as a basis for obtaining a general stay on the class litigation, without also proceeding to arbitration. Yet if arbitration of the named plaintiff's claim on an individual basis proceeded, this would not preserve the status quo of the class action during the pendency of the Bureau's investigation. Alternatively, if the arbitration agreement were used to dismiss the class claims during the temporary period, this would raise complex questions under statute of limitations laws, which could preclude refiling of the case after the Bureau's investigation.

[1262] 5 U.S.C. 601, *et seq.*

[1263] 5 U.S.C. 603(a). For purposes of assessing the impacts of the proposal 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).

[1264] 5 U.S.C. 605(b).

[1265] 5 U.S.C. 609.

proposal on those entities, drawing on the proposal's Section 1022(b)(2) Analysis. The Bureau also solicited comment on any costs, recordkeeping requirements, compliance requirements, or changes in operating procedures arising from the application of the proposal to small businesses; comment regarding any Federal rules that would duplicate, overlap, or conflict with the proposal; and comment on alternative means of compliance for small entities. Comments that addressed the impact on small entities are discussed below. Many of these comments implicated individual provisions of the final rule or the Bureau's Dodd-Frank Act Section 1022(b)(2) Analysis discussion and are also addressed in those parts.

Similar to its approach in the proposal, the Bureau is not certifying that the final rule will not have a significant economic impact on a substantial number of small entities. Instead, the Bureau has completed a FRFA as detailed below. However, the Bureau continues to believe that the arguments and calculations outlined both in the Section 1022(b)(2) Analysis and the FRFA below, as well as the comments received on the IRFA, strongly suggest that the final rule will not have a significant economic impact on a substantial number of small entities in any of the covered markets.

1. Statement of the Need for, and Objectives of, the Final Rule

As the Bureau outlined in the SBREFA Report and discussed above, the Bureau considered a rulemaking because it was concerned that by blocking class actions, arbitration agreements reduce deterrent effects and compliance incentives in connection with the underlying laws. The Bureau was also concerned that consumers do not have sufficient opportunity to obtain remedies when they are legally harmed by providers of consumer financial products and services, because arbitration agreements effectively block consumers from participating in class proceedings. Finally, the Bureau was concerned about the potential for systemic harm if arbitration agreements were to be administered in biased or unfair ways. Accordingly, the Bureau considered proposals that would: (1) Prohibit the application of certain arbitration agreements regarding consumer financial products or services as to class litigation; and (2) require submission of arbitral claims, awards, and two other categories of documents to the Bureau. The rulemaking is pursuant to the Bureau's authority under sections 1022(b) and (c) and 1028 of the Dodd-Frank Act. The latter section directs the Bureau to study pre-dispute arbitration agreements in connection with the offering or providing of consumer financial products or services and authorizes the Bureau to regulate their use if the Bureau finds that certain conditions are met.[1266]

2. Statement of the Significant Issues Raised by the Public Comments in Response to the IRFA, a Statement of the Assessment of the Agency of Such Issues, and a Statement of Any Changes Made as a Result of Such Comments

In accordance with section 603(a) of the RFA, the Bureau prepared an IRFA. In the IRFA, the Bureau estimated the possible compliance costs for small entities with respect to each major component of the rule against a pre-statute baseline. The Bureau requested comment on the IRFA.

Very few commenters specifically addressed the IRFA. A number of commenters suggested potential alternatives, some but not all of which were intended to reduce the burden of the rule on small entities. The Bureau discusses comments relating to a small entity exemption below, in section 6 of this FRFA. The Bureau discusses comments relating to other potential alternatives in Part VIII, above. As noted in those sections, the Bureau has decided not to adopt any of the potential alternatives suggested by commenters, as the Bureau believes that these potential alternatives will not substantially reduce burden to providers without compromising the objectives of the rule.

Several insurance industry commenters and their trade associations and an association of State insurance regulators expressed concern regarding whether, in the IRFA, the Bureau had even considered potential effects of the proposal on life insurers that may offer other consumer financial products or services. As is explained above in the section-by-section analysis of § 1040.3(a)(1), although an insurance company could be covered by the rule to the extent that it offers consumer financial products that are not part of the business of insurance, the Bureau believes it is unlikely that there are many, or even any, such firms.

3. Response to the Small Business Administration Chief Counsel for Advocacy

In the FRFA, the Bureau has taken into account feedback received in interagency communications with the SBA.

4. Description of and Estimate of the Number of Small Entities to Which the Final Rule Will Apply

As noted in the SBREFA Report, the Panel identified 22 categories of small entities that may be subject to the proposal. These were later narrowed (see discussion and table below with estimates of the number of entities in each market). The NAICS industry and SBA small entity thresholds for these 22 categories are the following:

TABLE 2—SBA SMALL ENTITY THRESHOLDS

NAICS description	NAICS code	SBA small business threshold
All Other Nondepository Credit Intermediation	522298	$38.5m in revenue.
All Other Professional, Scientific, and Technical Services	541990	$15m in revenue.
Collection Agencies	561440	$15m in revenue.
Commercial Banking	522110	$550m in assets.
Commodity Contracts Dealing	523130	$38.5m in revenue.
Consumer Lending	522291	$38.5m in revenue.
Credit Bureaus	561450	$15m in revenue.
Credit Card Issuing	522210	$550m in assets.
Direct Life Insurance Carriers	524113	$38.5m in revenue.
Direct Property and Casualty Insurance Carriers	524126	1,500 employees.
Financial Transactions Processing, Reserve, and Clearinghouse Activities	522320	$38.5m in revenue.
Mortgage and Nonmortgage Loan Brokers	522310	$7.5m in revenue.
Other Activities Related to Credit Intermediation	522390	$20.5m in revenue.

[1266] 12 U.S.C. 5518(b).

TABLE 2—SBA SMALL ENTITY THRESHOLDS—Continued

NAICS description	NAICS code	SBA small business threshold
Other Depository Credit Intermediation	522190	$550m in assets.
Passenger Car Leasing	532112	$38.5m in revenue.
Real Estate Credit	522292	$38.5m in revenue.
Sales Financing	522220	$38.5m in revenue.
Truck, Utility Trailer, and RV (Recreational Vehicle) Rental and Leasing	532120	$38.5m in revenue.
Used Car Dealers	441120	$25m in revenue.
Utilities (including Electric Power Generation, Transmission, and Distribution of Electric Power, Natural Gas, Water/Sewage, and other systems).	221	between $15–$27.5m in revenue or 250–1,000 employees.
Wired Telecommunications Carriers	517110	1,500 employees.
Wireless Telecommunications Carriers (except Satellite)	517210	1,500 employees.

For purposes of assessing the impacts of the proposals under consideration on small entities, ''small entities'' are defined in the RFA to include small businesses, small nonprofit organizations, and small government jurisdictions that would be subject to the proposals under consideration. A ''small business'' is defined by the SBA Office of Size Standards for all industries through the NAICS.

To arrive at the number of entities affected, the Bureau began by creating a list of markets that will be covered. The Bureau assigned at least one, but often several, NAICS codes to each market. For example, while payday and other installment loans are provided by storefront payday stores (NAICS 522390), they are also provided by other small businesses, such as credit unions (NAICS 522120). The Bureau estimated the number of small firms in each market-NAICS combination (for example, storefront payday lenders in NAICS 522390 would be such a market-NAICS combination), and then the Bureau added together all the markets within a NAICS code if there is more than one market within a NAICS code, accounting for the potential overlaps between the markets (for example, probably all banks that provide payday-like loans also provide checking accounts, and the Bureau does not double-count them, to the extent possible given the data).

The Bureau first attempted to estimate the number of firms in each market-NAICS combination by using administrative data (for example, Call Reports that credit unions have to file with the NCUA). When administrative data was not available, the Bureau attempted to estimate the numbers using public sources, including the Bureau's previous rulemakings and impact analyses. When neither administrative nor other public data was available, the Bureau used the Census's NAICS numbers. The Bureau estimated the number of small businesses according to the SBA's size standards for NAICS codes (when such data was available).[1267] When the data was insufficient to precisely estimate the number of businesses under the SBA threshold, the Bureau based its estimate for the number of small businesses on the estimate that approximately 95 percent of firms in finance and insurance are small.[1268]

NAICS numbers were taken from the 2012 Economic Census, the most recent version available from the Census Bureau. The data provided employment, average size, and an estimate of the number of firms for each industry, which are disaggregated by a six-digit ID. Other industry counts were taken from a variety of sources, including other Bureau rulemakings, internal Bureau data, public data and statistics, including published reports and trade association materials, and in some cases from aggregation Web sites. For a select number of industries, usually NAICS codes that encompass both covered and not covered markets, the Bureau estimated the covered market in this NAICS code using data from Web sites that aggregate information from multiple online sources. The reason the Bureau relied on this estimate instead of the NAICS estimate is that NAICS estimates are sometimes too broad. For example, the NAICS code associated with virtual wallets includes dozens of other small industries, and would overestimate the actual number of firms affected by an order of magnitude or more.

Although the Bureau attempted to account for overlaps wherever possible, a firm could be counted several times if it participates in different industries and was counted separately in each data source. While this analysis removes firms that were counted twice using the NAICS numbers, some double counting may remain due to overlap in non-NAICS estimates. For the NAICS codes that encompass several markets, the Bureau summed the numbers for each of the market-NAICS combinations to produce the table of affected firms.

In addition to estimating the number of providers in the affected markets, the Bureau also estimated the prevalence of arbitration agreements in these markets. The Bureau first attempted to estimate the prevalence of arbitration agreements in each market using public sources. However, this attempt was unsuccessful.[1269] For the markets covered in Section 2 of the Study that provided data on prevalence of arbitration agreements, the Bureau uses the numbers from the Study. The Bureau contacted trade associations to obtain supplemental data for the markets that were not covered in Section 2 of the Study.[1270]

[1267] The Bureau also used data from the Census Bureau, including the Census Bureau's Statistics of U.S. Businesses.

[1268] *See* Small Bus. Admin. Off., ''SBA's Size Standards Analysis: An Overview on Methodology and Comprehensive Size Standards Review,'' Presentation of Sharma R. Khem at 4 (2011), *available at http://www.gtscoalition.com/wp-content/uploads/2011/07/Size-Stds-Presentation_Dr.-Sharma-SBA.pdf.*

[1269] The Bureau attempted to develop a methodology for sampling contracts on the internet. The methodology involved attempting to sample the contracts of 20 businesses from randomly-selected States and different levels of web search relevance (to alleviate selection biases). However, providers generally do not provide their contracts or terms and conditions online. Even when some contracts are available online in a specific market, providers that provided such information are usually large, national corporations that operated in multiple States. The lack of provider-specific revenue and employment information also makes it hard to determine which of the sampled businesses are small according to the SBA threshold. After attempting this methodology for several markets, the Bureau decided to proceed by contacting trade associations instead. The Bureau attempted the sampling method for the following markets: Currency Exchange, Other Money Transmitters/Remittances, Telephone (Landline) Services, and Cable Television. The Bureau also started work on a few other markets before determining that the results were unlikely to be sufficiently representative for the purposes of this analysis.

[1270] The Bureau obtained the necessary PRA approval from OMB for the survey. The Bureau contacted national trade associations with a history of representation of providers in the relevant markets. The questions the Bureau posed related to the prevalence of arbitration agreements among providers in this market generally, as opposed to among the members of the trade association. The Bureau uses the prevalence numbers from the Study

The table below sets forth affected markets (and the associated NAICS codes) in which it appears reasonably likely that more than a few small entities use arbitration agreements. Some affected markets (and associated NAICS codes) are not listed because the number of small entities in the market using arbitration agreements is likely to be insignificant. For example, the Bureau did not list convenience stores (NAICS 445120). While consumers can cash a check at some grocery or convenience stores, the Bureau does not believe that consumers generally sign contracts that contain arbitration agreements with grocery or convenience stores when cashing checks; indeed, this is even less likely for check guarantee (NAICS 522390) and collection (NAICS 561440). For the same reason, currency exchange providers (NAICS 523130) are not listed on the table. The Bureau also did not list department stores (NAICS 4521) because the Bureau does not believe small department stores are typically involved in issuing their own credit cards, rather than partnering with an issuing bank that issues cards in the name of the department store.

Other notable exceptions were Other Depository Credit Intermediation (NAICS 522190) and Attorneys who Collect Debt (NAICS 541110). The Bureau believes that for these codes virtually all providers that are engaged in these activities are already reporting under other NAICS codes (for example, Commercial Banking, NAICS 52211, or collection agencies, NAICS 561440).

In addition, the final rule will apply to mortgage referral providers for whom referrals are their primary business. For example, the Bureau estimates that there are 7,007 entities classified as mortgage and nonmortgage brokers (NAICS 522310), 6,657 of which are small.[1271] However, the Bureau believes that arbitration agreements are not prevalent in the consumer mortgage market.[1272] With respect to brokering of credit more broadly, the Bureau also believes that some credit lead generators may be primarily engaged in the business of brokering and would be affected by the rule. The Bureau lacks data on the number of such businesses and the extent to which they are primarily engaged in brokering. The Bureau requested these data and data on the use of contracts and on the prevalence of arbitration agreements by these providers, but did not receive any responses.

Merchants are not listed in the table because merchants generally will not be covered by the final rule, except in limited circumstances. For example, the Bureau believes that most types of financing consumers use to buy nonfinancial goods or services from merchants is provided by third parties other than the merchant or, if the merchant grants a right of deferred payment, this is typically done without charge and for a relatively short period of time. For example, a provider of monthly services may bill in arrears, allowing the consumer to pay 30 days after services are rendered each month. Thus the Bureau believes that merchants rarely offer their own financing with a finance charge, or in an amount that significantly exceeds the market value of the goods or services sold.[1273] In those rare circumstances (for example, acting as a TILA creditor due to lending with a finance charge), then the merchants will be covered by the final rule in those transactions (unless, in the case of offering credit with a finance charge, the merchant is a small entity and meets the other requirements of Dodd-Frank section 1027(a)(2)(D)). The Bureau lacks data on how frequently merchants engage in such transactions, whether in the education, health, or home improvement sectors, among others, and on how often pre-dispute arbitration agreements may apply to such transactions. The Bureau requested comment and data on the frequency of these transactions, by industry, but did not receive any response.

Similarly, the Bureau does not list Utility Providers (NAICS 221) because when these providers allow consumers to defer payment for these providers' services without imposing a finance charge, this type of credit is not subject to the final rule. In some cases, utility providers may engage in billing the consumer for charges imposed by a third-party supplier hired by the consumer. However, government utilities that are immune from suit as an arm of the State will be exempt and, with respect to private utility providers providing these services, the Bureau believes that these private utility providers' agreements with consumers, including their dispute resolution mechanisms, are generally regulated at a State or local level. The Bureau is not aware that those dispute resolution mechanisms provide for mandatory arbitration.[1274]

Further, the final rule will apply to extensions of credit by providers of whole life insurance policies (NAICS 524113) to the extent that these companies are ECOA creditors and that activity is not the ''business of insurance'' under the Dodd-Frank section 1002(15)(C)(i) and 1002(3) and arbitration agreements are used for such policy loans. However, it is unlikely that a significant number of such providers will be affected because a number of State laws restrict the use of arbitration agreements in insurance products and, in any event, it is possible that the loan feature of the whole life policy could be part of the ''business of insurance'' depending on the facts and applicable law.[1275]

The Bureau also does not believe that a significant number of new car dealers offer or provide consumer financial products or services that render these dealers subject to the Bureau's regulatory jurisdiction. As a result, New Car Dealers (NAICS 44111) and Passenger Car Leasing Companies (NAICS 532112) are not included in the table below; rather, the table covers dealer portfolio leasing and lending with the Used Car Dealer Category (NAICS 441120) and indirect automobile lenders with the Sales Financing category (NAICS 522220).

This analysis does not account for various types of entities that are indirectly affected (and thus would likely not need to change their

for checking/deposit accounts, credit cards, payday loans, GPR prepaid cards, private student loans, and wired and wireless telecommunication providers. All other prevalence estimates used in this section and in the Section 1022(b)(2) Analysis are based on this survey of trade associations. In each such market (represented by a separate row in the table below), except credit monitoring and providers of credit reports, we relied on numbers from one trade association for that market. For credit monitoring and providers of credit reports, we received supplemental information from a trade association that we did not survey that lead us to adjust the estimate by averaging the two estimates. For the markets covered by the Study's prevalence analysis, the Bureau adjusted the numbers to fit into the four choices provided in the survey: 0 to 20 percent, 20 to 50 percent, 50 to 80 percent, and 80 to 100 percent. The prevalence column in the tables in this section and in the Section 1022(b)(2) Analysis provide the midpoint estimate (for example, 10 percent if the answer was 0 to 20 percent).

[1271] NAICS 522292 is similarly excluded from estimates.

[1272] Since 2013, Bureau regulations have prohibited using PDAAs in most types of consumer mortgages. *See* 12 CFR 1026.36(h).

[1273] However, the Bureau includes buy-here-pay-here automobile dealers in the table below.

[1274] The Bureau notes, for example, that in some situations, such as some consumer disputes heard by State utility regulators, consumers may be required to submit disputes to governmental administrative bodies prior to going to court. If courts review the determinations of those administrative bodies as agency administrative action, rather than an arbitral award, then the Bureau does not believe that processes such as these would be considered ''arbitration'' under proposed § 1040.2(d).

[1275] *See, e.g.,* Kan. Stat. Ann. § 5–401 (2015). These State laws involve interplay between the FAA and the McCarran-Ferguson Act, 15 U.S.C. 6701 *et seq.*

contracts) and for which the Bureau did not find any Federal class settlements in the Study (and thus would not be significantly affected by additional class litigation exposure). These entities include, for example, billing service providers for providers of merchant credit (third-party servicers NAICS 522390).

Small government entities at the State and local level, in theory, also could be affected to the extent they use arbitration agreements and are not an arm of the State. The Bureau does not have data indicating such use of arbitration agreements by such small government entities is widespread, however, and the Bureau did not receive any comments from these governmental providers, even though the proposal did not call for their complete exemption.[1276]

Similarly, the Bureau is unaware of the number of software developers (NAICS codes 511210 and 541511) that provide covered consumer financial products or services with arbitration agreements directly to consumers (such as payment processing products) that do not report in the NAICS codes listed either above or in the table below. The Bureau believes that the number of such software developers is low. The Bureau requested comment on this issue, and no commenters disputed this assertion.

Some merchants extending consumer credit with no finance charge may use third parties to service these transactions, as an industry trade association noted in its comment. Whether affiliated with the merchant or not, those persons may be covered by § 1040.3(a)(1)(v). When the merchant uses a pre-dispute arbitration agreement, there is a possibility that agreement could apply to third parties such as a servicer, depending on the facts and applicable law. The commenter did not provide data on how often such credit is extended, how often the merchants extending such credit use third parties to service it, how often the merchants use pre-dispute arbitration agreements, or how often the servicers may be covered by such agreements. The Bureau is not in a position to estimate how many third-party merchant servicers may be included in this coverage and as such does not include them in the table below.

Finally, the final rule expanded the scope from the proposal to include providers of credit repair services even when these services were unrelated to debt settlement (which was covered by the proposal). However, the Bureau believes that these credit repair providers were already counted in the table below under NAICS code 541990, and no update to the table is needed in that respect.[1277]

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[1276] The Bureau received a number of comments from Tribal government entities involved in the small-dollar credit industry. The impact on those entities is captured in the table below. Note, however, that the figures in the table may somewhat overstate the number of such entities, as the final rule exempts entities that are an arm of a Tribal government, which may include some small-dollar credit providers.

[1277] According to a GAO report, in 2015 there were about 50 to 60 companies providing identity theft services, including credit monitoring. (GAO Report. No. 17–254 (Mar. 2017) at 6–7. As the GAO noted, no agency or trade association collects comprehensive data on the industry and census data classifies identity theft protection services in a catch-call category (NAICS 812990) for ''other personal services'' that includes about 50 different types of services ranging from astrology services to wedding planning. Accordingly, both because of the number of providers estimated by GAO and because of the inability to estimate the number using Census data, credit monitoring is not separately listed on the table below, except for the counting of consumer reporting agencies, which are significant participants in this market.

Table 3: Estimated Number of Affected Entities by NAICS Code

Description	NAICS	Markets Affected in this NAICS	Businesses	SBREFA Small Businesses	SBA Small Business Threshold	Percent Estimated to Use Arbitration Agreements	Estimated Midpoint of Businesses Using Arbitration Agreements
All Other Nondepository Credit Intermediation	522298	Other Personal Loans, Pawnshops	10,300	10,086	$38.5m in revenue	0-20%	1,009
All Other Professional, Scientific, and Technical Services	541990	Credit Counseling	726	715	$15m in revenue	50-80%	465
Collection Agencies	561440	Debt Collectors	4,500	4,356	$15m in revenue	100%	4,356
Commercial Banking	522110	Depository Institutions (including credit unions), Student Loan Servicing	13,303	11,608	$550m in assets	0-20%	1,161
Consumer Lending	522291	P2P Lending, Other Personal Loans, Student Loan Issuance - Private, Third Party Payment Processing, Consumer Lending, Commercial Banking	6,620	6,416	$38.5m in revenue	80-100%	5,775
Credit Bureaus and Direct Property and Casualty Insurance Carriers	561450 and 524126	Credit Reporting Agencies, Credit Monitoring, Homeowners Insurance	3,383	3,063	$15m in revenue (Credit Bureaus)/1500 Employees (Direct Property and Casualty Insurance Carriers)	0-20%	306
Credit Card Issuing	522210	Credit Cards, Consumer Lending	444	422	$550m in assets	0-20%	42
Financial Transactions Processing, Reserve, and Clearinghouse Activities	522320	Other Personal Loans, Other Money Transmitters / Remittances, Prepaid Cards, Payment Processing/Transfers, ACH Systems, Third Party Financial Service Providers, Mobile Payments	7,380	6,880	$38.5m in revenue	20-50%	2,408
Other Activities Related to Credit Intermediation	522390	Payday Loan, Tribal Lending, Refund Anticipation Check, Deposit Advance, Servicing (non-mortgage), Virtual Currency, Money Order, Traveler's Checks, Mobile Wallets, Debt Settlement/Relief, Marketplace Loans, Tax Lending, Lump Sum Payment Company (payment advance)	11,023	10,812	$20.5m in revenue	80-100%	9,731
Sales Financing and Truck, Utility Trailer, and RV (Recreational Vehicle) Rental and Leasing	522220 and 532120	Installment Lending, Auto Title Lending, Auto Finance, Truck/Boat/RV Finance	10,703	10,056	$38.5m in revenue	80-100%	9,050
Used Car Dealers	441120	Buy-Here Pay-Here Auto Dealers	9,156	8,966	$25m in revenue	80-100%	8,069
Wired and Wireless (except Satellite) Telecommunications Carriers	517110 and 517210	Telephone - landline, Cable Television, Cable Providers (First Party), Cell Phones	7,756	7,528	1500 employees	80-100%	6,775

Note: Some of the counts in this table may be over inclusive. For more precise descriptions of many of these NAICS codes and which entities covered by the codes are subject to the rule see the accompanying text.

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5. Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Proposal, Including an Estimate of the Classes of Small Entities Which Will Be Subject to the Requirement and the Type of Professional Skills Necessary for the Preparation of the Report Reporting Requirements

As discussed above in the Section 1022(b)(2) Analysis, the providers that use arbitration agreements will have to change their contracts to state that the arbitration agreements cannot be used to block class litigation. The Bureau believes that, given that the Bureau is specifying the language that must be used, this can be accomplished in minimal time by compliance personnel, who do not have to possess any specialized skills, and in particular who do not require a law degree.[1278] Moreover, the Bureau believes that to the extent small covered entities use contracts from form providers, that task might be done by the providers themselves, requiring a simple check by the small entity's compliance staff to ensure that this has indeed been done. See the last column in the table above for the Bureau's estimate of the number of small entities that use arbitration agreements.

Additionally, as discussed above, debt buyers and other consumer financial services providers who become parties to existing contracts with pre-dispute arbitration agreements that do not contain the required language would be

[1278] The Bureau is aware that many small providers do not employ dedicated compliance staff, and uses the term broadly to denote any personnel who engage in compliance activities.

subject to the ongoing requirements of § 1040.4(a)(2), which will require them to issue contract amendments or notices when they become party to a pre-existing contract that does not include the proposed mandated language. As discussed above, the Bureau believes that this cost and the skills required to satisfy this requirement will also be minimal since many of these providers typically send out notices for FDCPA purposes to consumers whose contracts these providers just acquired.

The final rule also includes a reporting requirement when covered entities exercise their arbitration agreements in individual lawsuits and in several other circumstances. Given the small number of individual arbitrations identified in the markets covered by the Study, the Bureau believes that there would be at most a few hundred small covered entities affected by this requirement each year, and most likely considerably fewer since most defendants that participated in arbitrations analyzed by the Study were frequent repeat players.[1279] Each instance of reporting consists of sending the Bureau already existing documents, potentially redacting specified categories of personally identifiable information pursuant to the final rule. As discussed above, the Bureau believes that fulfilling the requirement would not require any specialized skills and would require minimal time.

The Bureau requested comment on whether there are any additional costs or skills required to comply with reporting, recordkeeping, and other compliance requirements of the proposal that the Bureau had not mentioned in the IRFA. Although a number of commenters discussed the reporting, recordkeeping, and other compliance requirements of the proposal, as discussed in the Bureau's Section 1022(b)(2) Analysis above and the Bureau's PRA analysis below, none stated that there were additional costs or skills required beyond those described above. As noted in its Section 1022(b)(2) Analysis above, the Bureau believes that the vast majority of the final rule's impact is due to additional exposure to class litigation and to any voluntary investment (spending) in reducing that exposure that providers might undertake, including foregone profit from products or services that might lead to class action exposure. The Bureau believes that neither of these categories is a reporting, recordkeeping, or other compliance requirement; however, the Bureau discusses them below.

[1279] *See* Study, *supra* note 3, section 5 at 59.

The costs and types of additional investment to reduce additional exposure to class litigation and the components of the cost of additional class litigation itself are described above in the Section 1022(b)(2) Analysis. As noted above, it is difficult to quantify how much all covered providers, including small entities, would invest in additional compliance.

With respect to additional class litigation exposure, using the same calculation as in the Section 1022(b)(2) Analysis, limited to providers below the SBA threshold for their markets,[1280] the Bureau estimates that the final rule will result in about 25 additional Federal class settlements, and in those cases, an additional $3 million paid out to consumers, an additional $2 million paid out in plaintiff's attorney fees, and an additional $1 million for defendant's attorney fees and internal staff and management time per year. The Bureau also estimates 121 additional Federal cases filed as class litigation that would end up not settling on class basis, resulting in an additional $2 million in fees per year. This aggregate $8 million per year for Federal class litigation should be juxtaposed with an estimated 51,000 providers below the SBA thresholds that use arbitration agreements, resulting in well under a 1 percent chance per year of those entities being subject to a putative Federal class litigation, a much lower chance of any of those cases resulting in a class settlement, and an expected cost of about $200 per year from Federal class cases per entity.

While the expected cost per provider that the Bureau can monetize is about $200 per year from Federal class cases, these costs would not be evenly distributed across small providers. In particular, the estimates above suggest that about 25 providers per year would be involved in an additional Federal class settlement at a considerably higher expense than $200 per year, as noted in the Section 1022(b)(2) Analysis above.

[1280] The Bureau attempted to classify defendants of the class settlements from the Study on whether they meet the SBA threshold for a small business in the defendant's market. Some of the markets were relatively easy to classify; for example, the Bureau has the data on depository institutions' assets and that is the only data necessary to determine whether depository institutions are SBA small. Other markets were considerably more difficult, in particular debt collectors. The Bureau used trade publications and internal expertise to the extent possible to classify debt collectors into large and small; however, it is likely that the Bureau made mistakes in this classification in at least several cases. The mistakes were likely made in both directions: Some debt collectors that were SBA small at the time of the settlement were likely classified as large, and other debt collectors that were not SBA small at the time of the settlement were likely classified as small.

In addition, the additional Federal cases filed as class litigation that will end up not settling on class basis (121 per year according to the estimates above) are also likely to result in a considerably higher expense than $200. However, the vast majority of the 51,000 providers will not experience any of these effects.

As discussed above, these entities will also face increased exposure to State class litigation. While the Study's Section 6 reported similar numbers for State and Federal cases, it is likely that the State to Federal class litigation ratio is higher for small covered entities to the extent that they are more likely to serve consumers only in one State. However, as discussed above, the Bureau believes that State class litigation is also likely to generate lower costs than Federal litigation. The Bureau believes that these calculations strongly suggest that the final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the RFA.

The Bureau notes that the estimates are higher for small debt collectors than for other categories: Small debt collectors account for 22 of the 25 Federal settlements estimated above for small providers overall, and $5 million (out of $8 million for small providers) in costs combined. With about 4,400 debt collectors below the SBA thresholds, the estimates suggest a roughly 2 percent chance per year of being subject to an additional putative Federal class litigation, a lower than 1 percent chance of that resulting in a Federal class settlement, and an expected cost of about $1,100 per year from these additional settlements. The same State class litigation assumptions outlined above apply to smaller debt collectors.

As evident from the data and from feedback received during the SBREFA process, providers that are debt collectors might be the most affected relative to providers in other markets, despite the fact that debt collectors do not enter into arbitration agreements directly and already frequently collect on debt without an arbitration agreement in the original contract. However, for the reasons described above, the Bureau believes it is unlikely that class settlement amounts will in fact drive companies out of business. Indeed, as discussed above, debt collectors already face class litigation exposure in connection with a significant proportion of debt they collect. Much of that debt comes from creditors that do not have arbitration agreements, and even where the credit contract includes an arbitration agreement, collectors are not always

able to invoke the agreements successfully.

6. Description of the Steps the Agency Has Taken To Minimize the Significant Economic Impact on Small Entities

The Bureau described several potential alternatives above in the Section 1022(b)(2) Analysis. For the reasons discussed above, the Bureau believes that none of these are significant alternatives insofar as they would not accomplish the goal of the proposed rulemaking with substantially less regulatory burden. The Bureau discussed these alternatives both for SBA small providers and for larger providers as well. In addition to the general alternatives discussed above, the Bureau further considered an exemption for small entities, which the Bureau discusses here. In the proposal, the Bureau requested comment on whether to exempt smaller entities from the rule, including comment on how to structure any such exemption, and received a number of comments both for and against such an exemption.

A small business advocacy organization stated that the Bureau should exclude all small businesses from the class rule because, in its view, data concerning defense costs outlined in the SBREFA Report [1281] demonstrates that it is particularly costly for a small business to defend a class action lawsuit, even when the small business has not violated the law, and the Bureau has not adduced data to demonstrate that small entities are under-complying with the law. The commenter also noted observations by small businesses that they have greater incentives to comply with laws due to a greater need to retain customers.[1282]

Two credit union and community bank industry commenters also urged an exemption from the class rule for depository institutions with $10 billion or less in assets. In their view, the duty to consider the impact on these institutions under Dodd-Frank section 1022(b)(2)(A)(ii) feeds into the criteria for considering total assets of an institution for purposes of an exemption under Dodd-Frank section 1022(b)(3). These commenters stated that, in their view, institutions of this size are less likely to harm customers because of their relationship-based business model, and added that they are not subject to Bureau supervision or enforcement under Dodd-Frank. They further stated that institutions of this size have little choice but to settle class actions filed against them, because they cannot afford high attorney's fees and fear the imposition of crippling statutory damages on a classwide basis. Credit union industry commenters also emphasized that because credit unions are member owned, such costs also are passed on them not only as customers, but also in their capacity as owners. One credit union industry commenter also stated that exposure to class actions can lead smaller depository institutions to curtail product and service offerings. Finally, one community banking industry commenter stated that an exemption for smaller depository institutions should be adopted, since these are the institutions that are supervised and have ongoing customer relationships with incentives to treat customers fairly and, unlike certain nonbank markets such as payday lending, these institutions are not saturated already with arbitration agreements.

A consumer advocate urged against a small entity exemption because, in its view, an exemption would encourage businesses to structure their operations to avoid coverage under the class rule.

Considering the comments received and its own analysis and experience, the Bureau concludes that an exemption to the class rule for small entities would not reduce burden by any significant degree for most of the over 50,000 small entities covered by the rule because their burden is already relatively low given their low exposure to class actions. The Bureau is also concerned that such an exemption would potentially create significant unintended market distortions. Of course, any exemption to the class rule would reduce burden by allowing the exempted providers to shield themselves from class action liability. However, the Bureau has found that the rule is for the benefit of consumers and is in the public interest even after factoring in the costs that would be associated with the rule (see Part VI). In light of these findings, and the nature of the costs and benefits of the class rule, the Bureau evaluated a potential exemption to the class rule for small entities by considering whether such entities will be disproportionately burdened by the rule, compared to large entities.[1283]

The Bureau believes that the burden to small entities from the rule will be smaller relative to their size than the burden to larger providers. First, the Bureau estimated in the proposal that the vast majority of new class actions against small entities filed per year due to the class rule would be filed against small debt collectors.[1284] The Bureau notes that an exemption for small entities would not necessarily provide a reduction in burden for small debt collectors. Debt collectors and other service providers such as payment processors typically do not enter into arbitration agreements with consumers, but instead rely upon agreements made by the original creditor. Thus, unless small debt collectors work only for small creditors, a small entity exemption would not necessarily benefit such debt collectors absent a special rule allowing small debt collectors to invoke a large creditor's arbitration clause to block a class action even though the creditor itself, or its larger service providers, could not. The Bureau believes that large firms' arbitration agreements should not have a loophole that allows small service providers to avoid the rule. To do otherwise would distort incentives in the marketplace, as large firms could outsource potential sources of liability to small subcontractors. Therefore, the Bureau believes that there is no way to exempt small debt collectors without creating a market distortion that undermines the goals of the rule.

At the same time, in the proposal the Bureau estimated just three additional Federal class action settlements per year against small entities that are not debt collectors. Assuming the same number of State class action settlements, and four times more class actions that do not settle on a class basis, this would mean 30 cases filed against the roughly 45,000 small entities that are not debt collectors. By comparison, the Bureau estimated that there would be 22 additional Federal class action settlements against small debt

[1281] The commenter noted, for example, that SERs estimated it costs between $15,000 and $50,000 to defend a class action, that employee time is diverted, and business reputation can suffer, even when the company has done nothing wrong. *See* SBREFA Report, *supra* note 419, at 18–19 and appendix A.

[1282] *Id.* at 34.

[1283] In general, an exemption for small entities to a regulation might be justified if the benefits of applying a rule to small entities were disproportionately smaller. In the case of the class rule, the costs and benefits are inextricably linked, as the burden of class action exposure provides the primary benefit of the rule—deterrence.

[1284] As discussed above, the Bureau estimated the number of additional class actions for small entities using the same methodology as was used in its Section 1022(b)(2) Analysis. That is, the rate of class action settlements with small entities in the Study was assumed to be the same for firms with arbitration agreements. Because few class actions in the Study were filed against small entities who were not debt collectors, the Bureau correspondingly estimated few additional cases against these entities due to the proposal. The underlying low rate of class actions against small entities may reflect better practices of these entities, or reduced incentives by class counsel to bring cases, or some combination.

collectors, the same number of State class action settlements and four times more cases that are not settled on a class basis. This would mean 220 total Federal and State Class actions filed against about 4,300 small debt collectors.

Based on the Bureau's estimate of 30 additional Federal and State class action cases against roughly 45,000 small non-debt collectors, all else being equal (and the Bureau does not assume that is the case), there is only a 1-in-1,500 chance that any given firm would face an additional class action lawsuit each year. This is substantially lower than the risk for large firms that are not debt collectors. The Bureau estimates that there are 1,740 firms affected by the rule that are not small and that are not debt collectors, and that there would be roughly 560 additional putative Federal and State class actions lawsuits filed against these firms in a typical year, or a roughly 1-in-3 annual risk of an additional putative class action lawsuit.[1285]

The Bureau acknowledges that, as some commenters and SBREFA participants asserted, it may be that the occurrence of a class action lawsuit harms small entities more than large ones. Although damage claims and payments to consumers are presumably a direct function of a firm's size in most cases, those few small entities that do face a lawsuit could feel a greater impact than any given large business that faces such a suit given that there are likely fixed costs to defending a class action lawsuit (*i.e.,* the time it takes to resolve a class action costs a certain amount in defense costs). Small entities could have fewer cash reserves to pay a judgement, or as commenters suggested, small entities may be more likely to settle because they do not have the resources to fight the class action.[1286] Nevertheless, to the extent this is true, the Bureau believes it is unlikely that small entities on net would have greater expected costs from the class rule than large entities. For this to be true, the cost to small entities from defending a class action would have to be not just larger, but large enough to account for the difference between the 1-in-1,500 annual risk of a new class action for small entities and the 1-in-3 annual risk for larger entities, or 500 times larger.

Considering the facts available to it, the Bureau does not believe the differences in burden justify an exemption for small entities. In addition, the Bureau has other concerns regarding the small entity exemption suggested by commenters.

First, the risk of a class action lawsuit, while relatively low for small entities, will nonetheless provide a measure of deterrence. In particular, small entities with poor compliance practices are more likely to be the target of a class action, but might continue their poor practices or reduce compliance further if shielded from class action liability. Moreover, as discussed above in Parts VI and VIII, due to resource constraints, regulators will tend to prioritize public enforcement actions against violations of the law with larger aggregate harms. To the extent that this entails targeting larger entities, this potentially leaves class actions as the only feasible means of redress for customers of small entities that violate the law. At the same time, the Bureau believes that consumers have no effective means of avoiding the increased risk of harm that a small entity exemption would create when dealing with small providers. The size of particular institutions and their affiliates is not generally a matter of public record let alone known to individual consumers and the Study showed consumers already do not take arbitration agreements into account when selecting providers. Thus, consumers would have little means to avoid the greater risks they may be exposed to by small providers who are not covered by the rule.

Second, the Bureau also is concerned with the potential for market distortions or unfair or potentially arbitrary distinctions that a small entity exemption could create for market participants. The Bureau does not agree with the community bank industry commenter that suggested it would be appropriate to exempt smaller depository institutions even if the Bureau does not exempt providers of the same products who are nonbanks. Such differential exposure to legal risk based on the same conduct could create market distortions of the sort that the Bureau is charged with minimizing.

Third, even if all types of market participants were eligible for a small exemption, any such exemption still would be problematic. The Bureau believes that fashioning an appropriate threshold for a small-entity exemption would impose substantial complexity, particularly around how such a threshold would address the various markets covered by the final rule. As noted, other than a request for a threshold specific to depository institutions, the Bureau received no comments on how to adopt a broad threshold that could apply to providers that provide multiple different types of products and services only some of which are covered by the rule and with a variety of corporate structures. Furthermore, the Bureau is concerned that any threshold would be difficult to apply to small entities that are service providers to larger entities. In addition, complex legal questions would arise in situations in which a provider crossed over or dropped under the threshold after the rule takes effect.

Finally, with regard to the member-ownership structure of credit unions, the Bureau does not believe that issue pertains to the size of the credit union. Therefore, the concern expressed by commenters that credit unions already have sufficient incentives for compliance does not seem relevant to the specific issue of a potential small entity exemption.

7. Description of the Steps the Agency Has Taken To Minimize Any Additional Cost of Credit for Small Entities

Although SERs expressed concern that the proposal could affect costs that they bear when they seek out business credit to facilitate their operations, the Bureau believes based on its estimates derived from current litigation levels as discussed above that the vast majority of small providers' cost of credit will not be impacted by the final rule. The Bureau did not receive any comments on this subject in response to the proposal. Although the Bureau estimates a higher likelihood that a smaller debt collector would be subject to incremental class litigation at any given time, most of these entities are already subject to class litigation due to the fact that they may or may not be able to rely on an arbitration agreement from their clients. As such, the Bureau believes it is unlikely that these firms will experience an adverse impact on their cost of credit. In any event, the Study indicated that the majority of cases filed as class actions are resolved within a few months, such that any adverse impact is likely to be only temporary.

As noted in the SBREFA Report, SERs expressed concerns about how the

[1285] The number of additional cases for large entities follows from the Bureau's estimates in table 1, in the Section 1022(b)(2) Analysis above, and the firm counts presented in table 3. The Bureau estimated there that there would be 514 additional class action settlements across all industries over a five-year period. Deducting the 264 settlements affecting debt collectors and then dividing by five yields 50 cases. Deducting the three cases affecting small entities leaves 47 class settlements. With the Bureau's assumption of five times more cases settled on an individual basis, this makes 282 total putative Federal class cases. Assuming an equal number of putative State class cases yields 564.

[1286] As noted in Part VI above, courts can take into account the financial condition of the defendant both in approving settlements and imposing judgements. Thus, it is unlikely that a firm would actually become bankrupt as a result of a putative class action.

proposals under consideration would affect their borrowing costs. None of these SERs reported that they actually had spoken with their lender or that, when they sought credit in the past, their lender inquired as to whether they used arbitration agreements in their consumer contracts.

X. Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501 *et seq.*), Federal agencies are generally required to seek the Office of Management and Budget (OMB) approval for information collection requirements prior to implementation. Under the PRA, the Bureau may not conduct or sponsor, and, notwithstanding any other provision of law, a person is not required to respond to an information collection unless the information collection displays a valid control number assigned by OMB. OMB has tentatively assigned control #3170–0064 to these collections of information, however this control number is not yet active.

This final rule contains information collection requirements that have not yet been approved by the OMB and, therefore, are not effective until OMB approval is obtained. The unapproved information collection requirements are listed below. A complete description of the information collection requirements, including the burden estimate methods, is provided in the information collection request (ICR) that the Bureau has submitted to OMB under the requirements of the PRA.

The Bureau believes that this final rule will impose the following two new information collection requirements (recordkeeping, reporting, or disclosure requirements) on covered entities or members of the public that would constitute collections of information requiring OMB approval under the PRA. Both information collections would apply to agreements entered into after the compliance date of the rule.[1287]

The first information collection requirement relates to disclosure requirements. The final rule will require providers that enter into arbitration agreements with consumers to ensure that these arbitration agreements contain a specified provision, with two limited exceptions as described below.[1288] The specified provision would effectively state that no person can use the agreement to stop the consumer from being part of a class action case in court.[1289] The Bureau proposed this language and providers will be required to use it unless an enumerated exception applies. The Bureau will also permit providers to use an alternative provision in connection with arbitration agreements in contracts for multiple products or services, some of which are not covered by the final rule.[1290] The Bureau will further permit providers to include optional adjustments to these provisions, where applicable.[1291]

The final rule contains two exceptions to this first information collection requirement. Under the first exception, if a provider enters into an arbitration agreement that existed previously (and was entered into by another person after the compliance date),[1292] and the agreement does not already contain the provision required by § 1040.4(a)(2)(i) (or the alternative provision permitted by proposed § 1040.4(a)(2)(ii)), the provider must either ensure that the agreement is amended to contain a specified provision or send any consumer to whom the agreement applies a written notice containing specified language. The provider is required to ensure the agreement is amended or provide the written notice within 60 days of entering into the agreement.[1293] Under the second exception, the requirement to ensure that an arbitration agreement entered into after the compliance date contains the provision required by § 1040.4(a)(2)(i) (or the alternative provision permitted by § 1040.4(a)(2)(ii)) will not apply to an arbitration agreement for a general-purpose reloadable prepaid card if certain conditions are satisfied with respect to when the card was packaged and purchased in relation to the compliance date. For a prepaid card provider that has the ability to contact the consumer in writing, the provider must also, within 30 days of obtaining the consumer's contact information, notify the consumer in writing that the arbitration agreement complies with the requirements of § 1040.4(a)(2) by providing an amended arbitration agreement to the consumer.[1294]

The second information collection requirement relates to reporting requirements. The provision will require providers to submit specified arbitral and court records to the Bureau relating to any arbitration agreement entered into after the compliance date.[1295] The rule will require the submission of three general categories of documents to the Bureau. The first category will require providers to submit any submission to a court that relies upon an arbitration agreement in support of the provider's attempt to seek dismissal, deferral, or stay of a case.[1296] The second category will require providers to submit certain records in connection with any claim filed in arbitration by or against the provider concerning a covered consumer financial product or service. In particular, providers will be required to submit the following four types of documents in connection with any claim filed in arbitration: (A) The initial claim and any counterclaim; (B) the answer to any initial claim and/or counterclaim, if any; (C) the arbitration agreement filed with the arbitrator or arbitration administrator; (D) the judgment or award, if any, issued by the arbitrator or arbitration administrator; and (E) if an arbitrator or arbitration administrator refuses to administer or dismisses a claim due to the provider's failure to pay required filing or administrative fees, any communication the provider receives from the arbitrator or an arbitration administrator related to such a refusal.[1297] The third category will require providers to submit any communications the provider receives from an arbitrator or arbitration administrator related to a determination that an arbitration agreement covered by the final rule does not comply with the administrator's fairness principles, rules, or similar requirements.[1298]

The Bureau received no comments specifically addressing the PRA notice, although some industry commenters made general comments regarding the expected burden of the proposal, including burdens accounted for in the PRA. As explained in detail in the Supporting Statement filed with this rule and available at *Regulations.gov* or *Reginfo.gov*, the Bureau believes that the burden estimates contained in the Supporting Statement with the ICR that the Bureau has submitted to OMB under the requirements of the PRA are sufficiently conservative, such that even if all of the assertions of the commenters

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[1287] *See* § 1040.5(a).

[1288] *See* § 1040.4(a)(2). In addition to the one-time change described directly above, some providers could be affected on an ongoing basis or sporadic basis in the future as they acquire existing contracts as the result of regular or occasional activity, under § 1040.4(a)(2). As noted above in the Section 1022(b)(2) Analysis, the Bureau believes that this requirement does not impose a material burden, and thus the Bureau does not further discuss it in this Section 1022(b)(2) Analysis.

[1289] *See* § 1040.4(a)(2)(i).

[1290] *See* § 1040.4(a)(2)(ii).

[1291] *See* § 1040.4(a)(2)(iv)–(vi).

[1292] *See* comment 4(a)(2)–2 for an example of when this could occur.

[1293] *See* § 1040.4(a)(2)(iii).

[1294] *See* § 1040.5(b).

[1295] *See* § 1040.4(b).

[1296] *See* § 1040.4(b)(1)(iii).

[1297] *See* § 1040.4(b)(1)(i).

[1298] *See* § 1040.4(b)(1)(ii).

were entirely supported by data, they would still point to a burden less than or equal to the Bureau's estimates.

Pursuant to 44 U.S.C. 3507, the Bureau will publish a separate notice in the **Federal Register** announcing the submission of this these information collection requirements to OMB as well as OMB's action on this these submissions, including the OMB control number and expiration date.

The Bureau has a continuing interest in the public's opinion of its collections of information. At any time, comments regarding the burden estimate, or any other aspect of the information collection, including suggestions for reducing the burden, may be sent to the Consumer Financial Protection Bureau (Attention: PRA Office), 1700 G Street NW., Washington, DC 20552, or by email to *CFPB_Public_PRA@cfpb.gov*.

List of Subjects in 12 CFR Part 1040

Banks, Banking, Business and industry, Claims, Consumer protection, Contracts, Credit, Credit unions, Finance, National banks, Reporting and recordkeeping requirements, Savings associations.

Authority and Issuance

■ For the reasons set forth above, the Bureau adds 12 CFR part 1040 to Chapter X in Title 12 of the Code of Federal Regulations, as set forth below:

PART 1040—ARBITRATION AGREEMENTS

Sec.

1040.1 Authority and purpose.
1040.2 Definitions.
1040.3 Coverage and exclusions from coverage.
1040.4 Limitations on the use of pre-dispute arbitration agreements.
1040.5 Compliance date and temporary exception.
Supplement I to Part 1040—Official Interpretations.

Authority: 12 U.S.C. 5512(b) and (c) and 5518(b).

§ 1040.1 Authority and purpose.

(a) *Authority.* The regulation in this part is issued by the Bureau of Consumer Financial Protection (Bureau) pursuant to sections 1022(b)(1) and (c) and 1028(b) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) (12 U.S.C. 5512(b)(1) and (c) and 5518(b)).

(b) *Purpose.* The purposes of this part are the furtherance of the public interest and the protection of consumers regarding the use of agreements for consumer financial products and services providing for arbitration of any future dispute, and also to monitor for risks to consumers in the offering or provision of consumer financial products or services, including developments in markets for such products or services.

§ 1040.2 Definitions.

(a) *Class action* means a lawsuit in which one or more parties seek or obtain class treatment pursuant to Federal Rule of Civil Procedure 23 or any State process analogous to Federal Rule of Civil Procedure 23.

(b) *Consumer* means an individual or an agent, trustee, or representative acting on behalf of an individual.

(c) *Pre-dispute arbitration agreement* means an agreement between a covered person as defined by 12 U.S.C. 5481(6) and a consumer providing for arbitration of any future dispute concerning a consumer financial product or service covered by § 1040.3(a).

(d) *Provider* means:

(1) A person as defined by 12 U.S.C. 5481(19) that engages in an activity covered by § 1040.3(a) to the extent that the person is not excluded under § 1040.3(b); or

(2) An affiliate of a provider as defined in paragraph (d)(1) of this section when that affiliate is acting as a service provider to the provider with which the service provider is affiliated consistent with 12 U.S.C. 5481(6)(B).

§ 1040.3 Coverage and exclusions from coverage.

(a) *Covered products and services.* Except for persons when excluded from coverage pursuant to paragraph (b) of this section, this part applies to the offering or provision of the following products or services when such offering or provision is a consumer financial product or service as defined by 12 U.S.C. 5481(5):

(1)(i) Providing an ''extension of credit'' that is ''consumer credit'' when performed by a ''creditor'' as those terms are defined in Regulation B, 12 CFR 1002.2;

(ii) ''Participat[ing] in [ ] credit decision[s]'' within the meaning of 12 CFR 1002.2(l) when performed by a ''creditor'' with regard to ''consumer credit'' as those terms are defined in 12 CFR 1002.2;

(iii)(A) Referring applicants or prospective applicants for ''consumer credit'' to creditors when performed by a ''creditor'' as those terms are defined in 12 CFR 1002.2; or

(B) Selecting or offering to select creditors to whom requests for ''consumer credit'' may be made when done by a ''creditor'' as those terms are defined in 12 CFR 1002.2;

(C) Except that this paragraph (a)(1)(iii) does not apply when the referral or selection activity by the creditor described in paragraphs (a)(1)(iii)(A) or (B) of this section is incidental to a business activity of that creditor that is not covered by this section;

(iv) Acquiring, purchasing, or selling an extension of consumer credit covered by paragraph (a)(1)(i) of this section; or

(v) Servicing an extension of consumer credit covered by paragraph (a)(1)(i) of this section;

(2) Extending automobile leases as defined by 12 CFR 1090.108 or brokering such leases;

(3)(i) Providing services to assist with debt management or debt settlement, modify the terms of any extension of consumer credit covered by paragraph (a)(1)(i) of this section, or avoid foreclosure;

(ii) Providing products or services represented to remove derogatory information from, or improve, a person's credit history, credit record, or credit rating;

(4) Providing directly to a consumer a consumer report, as defined by the Fair Credit Reporting Act, 15 U.S.C. 1681a(d), a credit score, as defined by 15 U.S.C. 1681g(f)(2)(A), or other information specific to a consumer derived from a consumer file, as defined by 15 U.S.C. 1681a(g), in each case except for a consumer report provided solely in connection with an adverse action as defined in 15 U.S.C. 1681a(k) with respect to a product or service that is not covered by this section;

(5) Providing accounts subject to the Truth in Savings Act, 12 U.S.C. 4301 *et seq.,* as implemented by 12 CFR part 707 and Regulation DD, 12 CFR part 1030;

(6) Providing accounts or remittance transfers subject to the Electronic Fund Transfer Act, 15 U.S.C. 1693 *et seq.,* as implemented by Regulation E, 12 CFR part 1005;

(7) Transmitting or exchanging funds as defined by 12 U.S.C. 5481(29) except when necessary to another product or service if that product or service:

(i) Is offered or provided by the person transmitting or exchanging funds; and

(ii) Is not covered by this section;

(8) Accepting financial or banking data or providing a product or service to accept such data directly from a consumer for the purpose of initiating a payment by a consumer via any payment instrument as defined by 12 U.S.C. 5481(18) or initiating a credit card or charge card transaction for the consumer, except by a person selling or marketing a good or service that is not

covered by this section, for which the payment or credit card or charge card transaction is being made;

(9) Providing check cashing, check collection, or check guaranty services; or

(10) Collecting debt arising from any of the consumer financial products or services described in paragraphs (a)(1) through (9) of this section when performed by:

(i) A person offering or providing the product or service giving rise to the debt being collected, an affiliate of such person, or a person acting on behalf of such person or affiliate;

(ii) A person purchasing or acquiring an extension of consumer credit covered by paragraph (a)(1)(i) of this section, an affiliate of such person, or a person acting on behalf of such person or affiliate; or

(iii) A debt collector as defined by 15 U.S.C. 1692a(6).

(b) *Excluded persons.* This part does not apply to the following persons in the following circumstances:

(1)(i) A person regulated by the Securities and Exchange Commission as defined by 12 U.S.C. 5481(21); or

(ii) A person to the extent regulated by a State securities commission as described in 12 U.S.C. 5517(h) as either:

(A) A broker dealer; or

(B) An investment adviser; or

(iii) A person regulated by the Commodity Futures Trading Commission as defined by 12 U.S.C. 5481(20) or a person with respect to any account, contract, agreement, or transaction to the extent subject to the jurisdiction of the Commodity Futures Trading Commission under the Commodity Exchange Act, 7 U.S.C. 1 *et seq.*

(2)(i) A Federal agency as defined in 28 U.S.C. 2671;

(ii) Any State, Tribe, or other person to the extent such person qualifies as an ''arm'' of a State or Tribe under Federal sovereign immunity law and the person's immunities have not been abrogated by the U.S. Congress;

(3) Any person with respect to a product or service described in paragraph (a) of this section that the person and any of its affiliates collectively provide to no more than 25 consumers in the current calendar year and to no more than 25 consumers in the preceding calendar year;

(4) A merchant, retailer, or other seller of nonfinancial goods or services to the extent such person:

(i) Offers or provides an extension of consumer credit covered by paragraph (a)(1)(i) of this section that is of the type described in 12 U.S.C. 5517(a)(2)(A)(i); and

(A) Is not subject to the Bureau's rulemaking authority under 12 U.S.C. 5517(a)(2)(B); or

(B) Is subject to the Bureau's rulemaking authority only under 12 U.S.C. 5517(a)(2)(B)(i) but not 12 U.S.C. 5517(a)(2)(B)(ii) or (iii); or

(ii) Purchases or acquires an extension of consumer credit excluded by paragraph (b)(4)(i) of this section.

(5) Any ''employer'' as defined in the Fair Labor Standards Act, 29 U.S.C. 203(d), to the extent it is offering or providing a product or service described in paragraph (a) of this section to its employee as an employee benefit; or

(6) A person to the extent providing a product or service in circumstances where they are excluded from the Bureau's rulemaking authority including pursuant to 12 U.S.C. 5517 or 5519.

§ 1040.4 Limitations on the use of pre-dispute arbitration agreements.

(a) *Use of pre-dispute arbitration agreements in class actions*—(1) *General rule.* A provider shall not rely in any way on a pre-dispute arbitration agreement entered into after the date set forth in § 1040.5(a) with respect to any aspect of a class action that concerns any of the consumer financial products or services covered by § 1040.3, including to seek a stay or dismissal of particular claims or the entire action, unless and until the presiding court has ruled that the case may not proceed as a class action and, if that ruling may be subject to appellate review on an interlocutory basis, the time to seek such review has elapsed or such review has been resolved such that the case cannot proceed as a class action.

(2) *Provision required in covered pre-dispute arbitration agreements.* Upon entering into a pre-dispute arbitration agreement for a consumer financial product or service covered by § 1040.3 after the date set forth in § 1040.5(a):

(i) Except as provided elsewhere in this paragraph (a)(2) or in § 1040.5(b), a provider shall ensure that any such pre-dispute arbitration agreement contains the following provision: ''We agree that neither we nor anyone else will rely on this agreement to stop you from being part of a class action case in court. You may file a class action in court or you may be a member of a class action filed by someone else.''

(ii) When the pre-dispute arbitration agreement applies to multiple products or services, only some of which are covered by § 1040.3, the provider may include the following alternative provision in place of the one required by paragraph (a)(2)(i) of this section: ''We are providing you with more than one product or service, only some of which are covered by the Arbitration Agreements Rule issued by the Consumer Financial Protection Bureau. The following provision applies only to class action claims concerning the products or services covered by that Rule: We agree that neither we nor anyone else will rely on this agreement to stop you from being part of a class action case in court. You may file a class action in court or you may be a member of a class action filed by someone else.''

(iii) When the pre-dispute arbitration agreement existed previously between other parties and does not contain either the provision required by paragraph (a)(2)(i) of this section or the alternative permitted by paragraph (a)(2)(ii) of this section:

(A) The provider shall either ensure the pre-dispute arbitration agreement is amended to contain the provision specified in paragraph (a)(2)(i) or (a)(2)(ii) of this section or provide any consumer to whom the agreement applies with the following written notice: ''We agree not to rely on any pre-dispute arbitration agreement to stop you from being part of a class action case in court. You may file a class action in court or you may be a member of a class action filed by someone else.'' When the pre-dispute arbitration agreement applies to multiple products or services, only some of which are covered by § 1040.3, the provider may, in this written notice, include the following optional additional language: ''This notice applies only to class action claims concerning the products or services covered by the Arbitration Agreements Rule issued by the Consumer Financial Protection Bureau.''

(B) The provider shall ensure the pre-dispute arbitration agreement is amended or provide the notice to consumers within 60 days of entering into the pre-dispute arbitration agreement.

(iv) A provider may add any one or more of the following sentences at the end of the disclosures required by paragraphs (a)(2)(i) and (ii) of this section:

(A)(*1*) ''This provision does not apply to parties that entered into this agreement before March 19, 2018.''

(*2*) ''This provision does not apply to products or services first provided to you before March 19, 2018 that are subject to an arbitration agreement entered into before that date.''

(B) ''This provision does not apply to persons that are excluded from the Consumer Financial Protection Bureau's Arbitration Agreements Rule.''

(C) ''This provision also applies to the delegation provision.'' A provider using

this sentence as part of the disclosure required by paragraph (a)(2)(i) or (ii) of this section in a pre-dispute arbitration agreement is not required to separately insert the disclosure required by paragraph (a)(2)(i) or (ii) of this section into a delegation provision that relates to such a pre-dispute arbitration agreement.

(v) In any provision or notice required by this paragraph (a)(2), if the provider uses a standard term in the rest of the agreement to describe the provider or the consumer, the provider may use that term instead of the term ''we'' or ''you.''

(vi) In any provision or notice required by this paragraph (a)(2), if a person has a genuine belief that sovereign immunity from suit under applicable law may apply to any person that may seek to assert the pre-dispute arbitration agreement, then the provision or notice may include, after the sentence reading ''You may file a class action in court or you may be a member of a class action filed by someone else,'' the following language: ''However, the defendants in the class action may claim they cannot be sued due to their sovereign immunity. This provision does not create or waive any such immunity.'' In the preceding sentence, the word ''notice'' may be substituted for the word ''provision'' when the included language is in a notice.

(vii) A provider may provide any provision or notice required by this paragraph (a)(2) in a language other than English if the pre-dispute arbitration agreement also is written in that other language.

(b) *Submission of arbitral and court records.* For any pre-dispute arbitration agreement for a consumer financial product or service covered by § 1040.3 entered into after the date set forth in § 1040.5(a), a provider shall comply with the requirements set forth below.

(1) *Records to be submitted.* A provider shall submit a copy of the following records to the Bureau, in the form and manner specified by the Bureau:

(i) In connection with any claim filed in arbitration by or against the provider concerning any of the consumer financial products or services covered by § 1040.3:

(A) The initial claim and any counterclaim;

(B) The answer to any initial claim and/or counterclaim, if any;

(C) The pre-dispute arbitration agreement filed with the arbitrator or arbitration administrator;

(D) The judgment or award, if any, issued by the arbitrator or arbitration administrator; and

(E) If an arbitrator or arbitration administrator refuses to administer or dismisses a claim due to the provider's failure to pay required filing or administrative fees, any communication the provider receives from the arbitrator or an arbitration administrator related to such a refusal;

(ii) Any communication the provider receives from an arbitrator or an arbitration administrator related to a determination that a pre-dispute arbitration agreement for a consumer financial product or service covered by § 1040.3 does not comply with the administrator's fairness principles, rules, or similar requirements, if such a determination occurs; and

(iii) In connection with any case in court by or against the provider concerning any of the consumer financial products or services covered by § 1040.3:

(A) Any submission to a court that relies on a pre-dispute arbitration agreement in support of the provider's attempt to seek dismissal, deferral, or stay of any aspect of a case; and

(B) The pre-dispute arbitration agreement relied upon in the motion or filing.

(2) *Deadline for submission.* A provider shall submit any record required pursuant to paragraph (b)(1) of this section within 60 days of filing by the provider of any such record with the arbitrator, arbitration administrator, or court, and within 60 days of receipt by the provider of any such record filed or sent by someone other than the provider, such as the arbitration administrator, the court, or the consumer.

(3) *Redaction.* Prior to submission of any records pursuant to paragraph (b)(1) of this section, a provider shall redact the following information:

(i) Names of individuals, except for the name of the provider or the arbitrator where either is an individual;

(ii) Addresses of individuals, excluding city, State, and zip code;

(iii) Email addresses of individuals;

(iv) Telephone numbers of individuals;

(v) Photographs of individuals;

(vi) Account numbers;

(vii) Social Security and tax identification numbers;

(viii) Driver's license and other government identification numbers; and

(ix) Passport numbers.

(4) *Internet posting of arbitral and court records.* The Bureau shall establish and maintain on its publicly available internet site a central repository of the records that providers submit to it pursuant to paragraph (b)(1) of this section, and such records shall be easily accessible and retrievable by the public on its internet site.

(5) *Further redaction prior to Internet posting.* Prior to making records identified in paragraph (b)(1) of this section easily accessible and retrievable by the public as required by paragraph (b)(4) of this section, the Bureau shall make such further redactions as are needed to comply with applicable privacy laws.

(6) *Deadline for internet posting of arbitral and court records.* The Bureau shall initially make records submitted to the Bureau by providers under paragraph (b)(1) of this section easily accessible and retrievable by the public on its internet site no later than July 1, 2019. The Bureau will annually make records submitted under paragraph (b)(1) available each year thereafter for documents received by the end of the prior calendar year.

§ 1040.5 Compliance date and temporary exception.

(a) *Compliance date.* Compliance with this part is required for any pre-dispute arbitration agreement entered into on or after March 19, 2018.

(b) *Exception for pre-packaged general-purpose reloadable prepaid card agreements.* Section 1040.4(a)(2) shall not apply to a provider that enters into a pre-dispute arbitration agreement for a general-purpose reloadable prepaid card if the requirements set forth in either paragraphs (b)(1) or (2) of this section are satisfied.

(1) For a provider that does not have the ability to contact the consumer in writing:

(i) The consumer acquires a general-purpose reloadable prepaid card in person at a retail store;

(ii) The pre-dispute arbitration agreement was inside of packaging material when the general-purpose reloadable prepaid card was acquired; and

(iii) The pre-dispute arbitration agreement was packaged prior to the compliance date of the rule.

(2) For a provider that has the ability to contact the consumer in writing:

(i) The requirements set forth in paragraphs (b)(1)(i) through (iii) of this section are satisfied; and

(ii) Within 30 days of obtaining the consumer's contact information, the provider notifies the consumer in writing that the pre-dispute arbitration agreement complies with the requirements of § 1040.4(a)(2) by providing an amended pre-dispute arbitration agreement to the consumer.

Supplement I to Part 1040—Official Interpretations

Section 1040.2—Definitions

2(c) Pre-dispute arbitration agreement.

1. *Scope of the term includes agreements with covered persons that are not providers.*

i. While § 1040.2(c) defines ''pre-dispute arbitration agreement'' as an agreement between a covered person and a consumer, the rule's substantive requirements, which are contained in § 1040.4, apply only to ''providers.'' ''Covered persons'' as that term is defined in 12 U.S.C. 5481(6) include persons excluded from the Bureau's rulemaking authority under 12 U.S.C. 5517 and 5519. Therefore, the requirements contained in § 1040.4 would not apply to any such excluded persons entering into a pre-dispute arbitration agreement because they are not ''providers,'' by virtue of the definition in § 1040.2(d) which excludes persons described in § 1040.3(b) including its paragraph (b)(6) (under which any person is excluded under § 1040.3(b) to the extent it is not subject to the Bureau's rulemaking authority including under sections 1027 or 1029). The requirements in § 1040.4 could apply, however, to the use of any such pre-dispute arbitration agreement by a different person that meets the definition of provider in § 1040.2(d), when the pre-dispute arbitration agreement was entered into after the compliance date.

ii. For example, an automobile dealer that extends consumer credit is a covered person under 12 U.S.C. 5481(6). Its pre-dispute arbitration agreement would therefore fall within the scope of the definition in § 1040.2(c). However, an automobile dealer excluded from the Bureau's rulemaking authority in circumstances described by Dodd-Frank section 1029 would not be required to comply with the requirements in § 1040.4, because those requirements apply only to providers, and such dealers are excluded by § 1040.3(b)(6) and therefore are not providers under § 1040.2(d). The requirements in § 1040.4 would apply, however, to the use of the automobile dealer's pre-dispute arbitration agreement by a different person that meets the definition of provider, such as a servicer or purchaser or acquirer of the automobile loan, when the agreement was entered into after the compliance date.

2. *Delegation provisions.* The term pre-dispute arbitration agreement as defined in § 1040.2(c) includes delegation provisions. Delegation provisions are agreements to arbitrate threshold issues concerning a pre-dispute arbitration agreement, and may sometimes appear elsewhere in a contract containing or relating to the arbitration agreement.

3. *Form of pre-dispute arbitration agreements.* A pre-dispute arbitration agreement for a consumer financial product or service includes any agreement between a covered person and a consumer providing for arbitration of any future disputes between the parties concerning a consumer financial product or service described in § 1040.3(a), regardless of the form or structure of the agreement. Examples include a standalone pre-dispute arbitration agreement that applies to a product or service, as well as a pre-dispute arbitration agreement that is included within, annexed to, incorporated into, or otherwise made a part of a larger agreement that governs the terms of the provision of a product or service.

2(d) Provider.

1. *Providers of multiple products or services.* A provider as defined in § 1040.2(d) that also engages in offering or providing products or services not covered by § 1040.3 must comply with this part only for the products or services that it offers or provides that are covered by § 1040.3. For example, a merchant that transmits funds for its customers as a general service, when that funds transmittal activity is not necessary to its offering or provision of products or services that are not covered by this part, would be covered pursuant to § 1040.3(a)(7) with respect to the transmittal of funds. That same merchant generally would not be covered with respect to the sale of durable goods to consumers, however, except when extending consumer credit in certain circumstances as provided in 12 U.S.C. 5517(a)(2)(B)(ii) or (iii).

2. *Affiliated service providers.* Section 1040.2(d)(2) defines the term ''provider'' to include an affiliate of another provider as defined in § 1040.2(d)(1) when the affiliate is acting as a service provider to the other provider consistent with 12 U.S.C. 5481(6)(B). The rule applies to such an affiliated service provider in connection with the offering or provision of a covered consumer financial product or service by the other provider, even when the affiliated service provider is not itself directly engaged in offering or providing a consumer financial product or service covered by § 1040.3(a). However, even if an affiliated service provider does not meet the definition of provider in § 1040.2(d)(2) because it provides services to a person who is excluded from the rule under § 1040.3(b) and thus is not a provider, the affiliated service provider still could be a provider as defined in § 1040.2(d)(1). For example, if an affiliate of a merchant excluded by § 1040.3(b)(6) services consumer credit extended by the merchant, the affiliate may, in its own right, be ''servicing an extension of consumer credit covered by paragraph (a)(1)(i) of this section'' as discussed in § 1040.3(a)(1)(v). As a result, the affiliate servicer may meet the definition of provider in § 1040.2(d)(1) even though the merchant is not a provider.

Section 1040.3—Coverage and Exclusions From Coverage

3(a) Covered products and services.

1. *Consumer financial products or services pursuant to 12 U.S.C. 5481(5).* Section 1040.3(a) provides that the products or services listed therein are covered by part 1040 when they are consumer financial products or services as defined by 12 U.S.C. 5481(5). Products or services generally meet this definition in either of two ways: They are offered or provided for use by consumers primarily for personal, family, or household purposes, or they are delivered, offered, or provided in connection with the first type of consumer financial products or services. An example of the second type of consumer financial product or service is debt collection, when the underlying loan that is the subject of collection is a consumer financial product or service.

2. *Mobile phone applications and online access tools.* If a provider of a consumer financial product or service covered by this part offers or provides a consumer a technological means for accessing information about that product or service, such as a mobile phone application or an internet Web site, this part shall apply to the application or internet Web site as it concerns that product or service.

Paragraph (a)(1)(iii).

1. *Offering or providing creditor referral or selection services.* Section 1040.3(a)(1)(iii) includes in the coverage of part 1040 providing referrals or selecting or offering to select creditors for consumer credit consistent with the meaning in 12 CFR 1002.2(l) by a creditor as defined in 12 CFR 1002.2(l). Section 1040.3(a)(1)(iii) does not apply when such a creditor's referral or selection activity is incidental to its business activity not covered by this section. *See* § 1040.3(a)(1)(iii)(C). For example, a merchant may regularly and in the ordinary course of its business provide creditor referrals or selection services to help a consumer pay for nonfinancial goods or services sold by that merchant. By virtue of such activities, such a merchant may be a creditor as defined in 12 CFR 1002.2(l). Nonetheless, such a merchant would not be covered by § 1040.3(a)(1)(iii) because its creditor referral or selection services are incidental to its sale of goods or services not covered by this section.

Paragraph (a)(1)(v).

1. *Servicing of credit.* Section 1040.3(a)(1)(v) includes in the coverage of part 1040 servicing of extensions of consumer credit covered by § 1040.3(a)(1)(i). Servicing of extensions of consumer credit includes, but is not limited to, student loan servicing as defined in 12 CFR 1090.106 and mortgage loan servicing as defined in 12 CFR 1024.2(b).

Paragraph (a)(3)(i).

1. *Debt relief products and services.* Section 1040.3(a)(3)(i) includes in the coverage of part 1040 services that offer to renegotiate, settle, or modify the terms of a consumer's debt. Providers of these services would be covered by § 1040.3(a)(3)(i) regardless of the source of the debt, including but not limited to when seeking to relieve consumers of a debt that does not arise from a consumer credit transaction as described by § 1040.3(a)(1)(i) or from a consumer financial product or service more generally.

Paragraph (a)(3)(ii).

1. *Credit repair products or services.* Section 1040.3(a)(3)(ii) includes in the coverage of part 1040 products or services represented to remove derogatory information from, or improve, a person's credit history, credit record, or credit rating. The description of these products and services in § 1040.3(a)(3)(ii) is generally based upon the coverage of credit repair goods or services in regulations implementing 15 U.S.C. 6101 *et seq.,* codified at 16 CFR 310.4(a)(2). However, part 1040 also would apply even if such credit repair

goods or services would not be covered under the regulations implementing 15 U.S.C. 6101 *et seq.,* codified at 16 CFR 310.4(a)(2), solely because they were not the subject of telemarketing as defined in 16 CFR 310.2(gg).

Paragraph (a)(8).

1. *Credit card and charge card transactions.* Section 1040.3(a)(8) includes in the coverage of part 1040 certain payment processing activities involving the initiation of credit card or charge card transactions. The terms ''credit card'' and ''charge card'' are defined in Regulation Z, 12 CFR 1026.2(a)(15). For purposes of § 1040.3(a)(8), those definitions in Regulation Z apply.

Paragraph (a)(10).

1. *Collection of debt by the same person arising from covered and noncovered products and services.* Section 1040.3(a)(10)(i) includes in the coverage of part 1040 the collection of debt by a provider that arises from its providing any of the products and services described in paragraphs (a)(1) through (9) of § 1040.3, including, for example, an extension of consumer credit described in § 1040.3(a)(1). If the person collecting such debt also collects other debt that does not arise from any of the products and services described in paragraphs (a)(1) through (9) of § 1040.3, the collection of that other debt is not included in the coverage of § 1040.3(a)(10)(i). For example, if a creditor extended consumer credit to consumers and business credit to other persons, § 1040.3(a)(10)(i) would include in the coverage of part 1040 the collection of the consumer credit but not the collection of the business credit. Similarly, if a debt buyer purchases a portfolio of credit card debt that includes both consumer and business debt, § 1040.3(a)(10)(ii) would include in the coverage of part 1040 only the collection of the consumer credit card debt.

2. *Collection of debt by affiliates.* Paragraphs (a)(10)(i) and (ii) of § 1040.3 cover certain collection activities not only by providers themselves, but also by their affiliates. The term ''affiliate'' is defined in 12 U.S.C. 5481(1) as any person that controls, or is controlled by, or is under common control with another person.

3(b) Excluded Persons.

Paragraph (b)(2)(ii).

1. *Exclusion for States under Federal sovereign immunity law.* Section 1043.3(b)(2)(ii) excludes States and other persons to the extent they would be an arm of the State under Federal sovereign immunity law and their immunity has not been abrogated by the U.S. Congress. For purposes of this rule, the term State includes any State, territory, or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, Guam, American Samoa, and the U.S. Virgin Islands.

2. *Exclusion for Tribes under Federal sovereign immunity law.* Section 1040.3(b)(2)(ii) excludes Tribes and other persons to the extent that they would be an arm of a Tribe under Federal sovereign immunity law and their immunity has not been abrogated by the U.S. Congress. For purposes of this exclusion, the term ''Tribe'' refers to any federally recognized Indian Tribe, as defined by the Secretary of the Interior under section 104(a) of the Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. 479a–1(a).

Paragraph (b)(3).

1. *Including consumers to whom affiliates provide a product or service toward the numerical threshold for exemption of a person under § 1040.3(b)(3).* Section 1040.3(b)(3) provides an exclusion to persons providing a product or service covered by § 1040.3(a) if no more than 25 consumers are provided the product or service in the current and prior calendar years by the person and its affiliates. The exclusion applies based on the frequency with which the product is provided, regardless of the number of times a product is offered. Note, however, that participating in a credit decision with regard to consumer credit in circumstances described in § 1040.3(a)(1)(ii), for example, constitutes providing a product or service covered by § 1040.3(a), even if an application for consumer credit is denied. In addition, for purposes of this test, the number of consumers to whom affiliates of a person provide a product or service is combined with the number of consumers to whom the person itself provides that product or service. The term ''affiliate'' is defined in 12 U.S.C. 5481(1) as any person that controls, or is controlled by, or is under common control with another person.

2. *Effect of exceeding the numerical threshold for the exemption.* If, during a calendar year, a person to that point excluded by § 1040.3(b)(3) for a given product or service described in § 1040.3(a) provides that product or service to a 26th consumer, then that person ceases to be eligible for this exclusion at that time with respect to that product or service. The provider must begin complying with this part with respect to the covered product or service provided to that 26th consumer. In addition, the provider will not be eligible for the exclusion in § 1040.3(b)(3) whenever it offers or provides that product or service for the remainder of that calendar year and the following calendar year.

Paragraph (b)(4).

1. *Exemption for merchants who purchase or acquire consumer credit from other merchants who are exempt.* Section 1040.3(b)(4)(ii) provides an exemption for a merchant who purchases or acquires consumer credit from another merchant when the merchant from whom the credit is being purchased or acquired is exempt under § 1040.3(b)(4)(i). This exemption in § 1040.3(b)(4)(ii) applies not only to the purchase or acquisition itself, but also to any servicing or collection activities by the merchant purchaser or acquirer.

Paragraph (b)(5).

1. *Exemption for employers providing employee benefits.* Section 1040.3(b)(5) provides an exemption for an employer to the extent it is offering or providing a consumer financial product or service to an employee as an employee benefit. If an employer offers or provides a consumer financial product or service covered by § 1040.3(a) to an employee on terms and conditions that the employer makes available to the general public, such product or service is not an employee benefit for purposes of § 1040.3(b)(5).

Section 1040.4—Limitations on the Use of Pre-Dispute Arbitration Agreements

1. *Enters into a pre-dispute arbitration agreement.*

i. Examples of when a provider enters into a pre-dispute arbitration agreement for purposes of § 1040.4 include but are not limited to when the provider:

A. Provides to a consumer, after the date set forth in § 1040.5(a), a new product or service covered by § 1040.3(a) that is subject to a pre-existing agreement to arbitrate future disputes between the parties, and the provider is a party to that agreement, regardless of whether that agreement predates the date set forth in § 1040.5(a). When that agreement predates the date set forth in § 1040.5(a), § 1040.4 applies only with respect to any such new product or service;

B. Acquires or purchases after the date set forth in § 1040.5(a) a product or service covered by § 1040.3(a) that is subject to a pre-dispute arbitration agreement and becomes a party to that pre-dispute arbitration agreement, even if the seller is excluded from coverage under § 1040.3(b) or the pre-dispute arbitration agreement was entered into before the date set forth in § 1040.5(a); or

C. Adds a pre-dispute arbitration agreement after the date set forth in § 1040.5(a) to an existing product or service.

ii. Examples of when a provider does not enter into a pre-dispute arbitration agreement for purposes of § 1040.4 include but are not limited to when the provider:

A. Modifies, amends, or implements the terms of a product or service that is subject to a pre-dispute arbitration agreement without engaging in the conduct described in comment 4–1.i after the date set forth in § 1040.5(a). However, a provider does enter into a pre-dispute arbitration agreement for purposes of § 1040.4 when the modification, amendment, or implementation constitutes the provision of a new product or service. See comment 4–1.i(A).

B. Acquires or purchases a product or service that is subject to a pre-dispute arbitration agreement but does not become a party to the pre-dispute arbitration agreement that applies to the product or service.

2. *Application of section 1040.4 to providers that do not enter into pre-dispute arbitration agreements.*

i. Pursuant to § 1040.4(a)(1), a provider that has not entered into a pre-dispute arbitration agreement cannot rely on any pre-dispute arbitration agreement entered into by another person after the compliance date specified in § 1040.5(a) with respect to any aspect of a class action concerning a consumer financial product or service covered by § 1040.3. In addition, pursuant to § 1040.4(b), the provider is required to submit certain specified records concerning claims filed in arbitration pursuant to such pre-dispute arbitration agreements. However, as discussed in comment 4(a)(2)–1, § 1040.4(a)(2) does not apply to providers that do not enter into pre-dispute arbitration agreements.

ii. For example, when a debt collector collecting on consumer credit covered by

§ 1040.3(a)(1)(i) has not entered into a pre-dispute arbitration agreement, § 1040.4(a)(1) nevertheless prohibits the debt collector from relying on a pre-dispute arbitration agreement entered into by the creditor after the compliance date specified in § 1040.5(a) with respect to any aspect of a class action filed against the debt collector concerning its debt collection products or services covered by section § 1040.3. The debt collector in this example is subject to § 1040.4(a)(1) even if the creditor was a merchant, government, or other person who was excluded from coverage by § 1040.3(b)(5).

4(a) Use of pre-dispute arbitration agreements in class actions.

Paragraph 4(a)(1) General rule.

1. *Reliance on a pre-dispute arbitration agreement.*

i. *Examples of conduct that constitutes reliance.* Sections 1040.4(a)(1) and (2) both use the term ''rely on.'' For purposes of these provisions, reliance on a pre-dispute arbitration agreement includes, but is not limited to, doing any of the following on the basis of a pre-dispute arbitration agreement:

A. Seeking dismissal, deferral, or stay of any aspect of a class action;

B. Seeking to exclude a person or persons from a class in a class action;

C. Objecting to or seeking a protective order intended to avoid responding to discovery in a class action;

D. Filing a claim in arbitration against a consumer who has filed a claim on the same issue in a class action;

E. Filing a claim in arbitration against a consumer who has filed a claim on the same issue in a class action after the trial court has denied a motion to certify the class but before an appellate court has ruled on an interlocutory appeal of that motion, if the time to seek such an appeal has not elapsed or the appeal has not been resolved; and

F. Filing a claim in arbitration against a consumer who has filed a claim on the same issue in a class action after the trial court in that class action has granted a motion to dismiss the claim and, in doing so, the court noted that the consumer has leave to refile the claim on a class basis, if the time to refile the claim has not elapsed.

ii. *Example of conduct that does not constitute reliance.* Reliance on a pre-dispute arbitration agreement for purposes of § 1040.4(a)(1) and (2) does not include, among other things, a class action defendant seeking or taking steps to preserve the defendant's ability to seek arbitration after the trial court has denied a motion to certify the class and either an appellate court has affirmed that decision on an interlocutory appeal of that motion, or the time to seek such an appeal has elapsed.

2. *Protected petitioning conduct.* A class action defendant does not violate § 1040.4(a)(1) by relying on a pre-dispute arbitration agreement where it has a genuine belief that it is not subject to this part. For example, a class action defendant does not violate § 1040.4(a)(1) by relying on a pre-dispute arbitration agreement where it has a genuine belief either that it is not covered by the rule because it is not a provider pursuant to § 1040.2(d), or that none of the claims asserted in the class action concern any of the consumer financial products or services covered pursuant to § 1040.3.

3. *Class actions concerning multiple products or services.* In a class action concerning multiple products or services only some of which are covered by § 1040.3, the prohibition in § 1040.4(a)(1) applies only to claims that concern the consumer financial products or services covered by § 1040.3.

Paragraph 4(a)(2) Required provision.

1. *Application of section 1040.4(a)(2) to providers that do not enter into pre-dispute arbitration agreements.* Section 1040.4(a)(2) sets forth requirements only for providers that enter into pre-dispute arbitration agreements for a covered product or service after the compliance date set forth in § 1040.5(a). Accordingly, the requirements of § 1040.4(a)(2) do not apply to a provider that does not enter into a pre-dispute arbitration agreement with a consumer.

2. *Entering into a pre-dispute arbitration agreement that had existed previously between other parties.* Section 1040.4(a)(2)(iii) requires a provider that enters into a pre-dispute arbitration agreement that had existed previously as between other parties and does not contain the provision required by § 1040.4(a)(2)(i) or (ii) to ensure the agreement is amended to contain either of those provisions, as applicable, or to provide a written notice to any consumer to whom the agreement applies. This could occur, when, for example, Bank A is acquiring Bank B after the compliance date specified in § 1040.5(a), and Bank B had entered into pre-dispute arbitration agreements before the compliance date specified in § 1040.5(a). If, as part of the acquisition, Bank A enters into the pre-dispute arbitration agreements of Bank B, Bank A would be required either to ensure the account agreements were amended to contain the provision required by § 1040.4(a)(2)(i) or the alternative permitted by § 1040.4(a)(2)(ii), or to provide the notice specified in § 1040.4(a)(2)(iii)(B). See comment 4–1 for examples of when a provider enters into a pre-dispute arbitration agreement.

3. *Notice to consumers.* Section 1040.4(a)(2)(iii) requires a provider that enters into a pre-dispute arbitration agreement that does not contain the provision required by § 1040.4(a)(2)(i) or (ii) to either ensure the agreement is amended to contain a specified provision or to provide any consumers to whom the agreement applies with written notice. The notice may be provided in any way that the provider communicates with the consumer, including electronically. The notice may be provided either as a standalone document or included in another notice that the customer receives, such as a periodic statement, to the extent permitted by other laws and regulations.

4. *Contract provision for a delegation provision.* If a provider has included in its pre-dispute arbitration agreement the language required by § 1040.4(a)(2), and the provider's pre-dispute arbitration agreement contains a delegation provision, the provider must also separately insert the language required by § 1040.4(a)(2) into the delegation provision, except under § 1040.4(a)(2)(iv)(C). Under § 1040.4(a)(2)(iv)(C), the provider need not also include the language required by § 1040.4(a)(2) within a separate delegation provision—the language can be included once and applies to both the pre-dispute arbitration agreement and the delegation provision.

4(b) Submission of arbitral records.

1. *Submission by entities other than providers.* Section 1040.4(b) requires providers to submit specified arbitral and court records to the Bureau. Providers are not required to submit the records themselves if they arrange for another person, such as an arbitration administrator or an agent of the provider, to submit the records on the providers' behalf. The obligation to comply with § 1040.4(b) nevertheless remains on the provider, and thus the provider must ensure that the person submits the records in accordance with § 1040.4(b).

2. *Redaction by entities other than providers.* Section 1040.4(b)(3) requires providers to redact records before submitting them to the Bureau. Providers are not required to perform the redactions themselves and may arrange for another person, such as an arbitration administrator, or an agent of the provider, to redact the records. The obligation to comply with § 1040.4(b) nevertheless remains on the provider and thus the provider must ensure that the person redacts the records in accordance with § 1040.4(b).

Paragraph 4(b)(1) Records to be submitted.

Paragraph 4(b)(1)(ii).

1. *Determinations that a pre-dispute arbitration agreement does not comply with an arbitration administrator's fairness principles.* Section 1040.4(b)(1)(ii) requires submission to the Bureau of any communication the provider receives related to any arbitration administrator's determination that the provider's pre-dispute arbitration agreement entered into after the date set forth in § 1040.5(a) does not comply with the administrator's fairness principles or rules. The submission of such records is required both when the determination occurs in connection with the filing of a claim in arbitration as well as when it occurs if no claim has been filed. However, when the determination occurs with respect to a pre-dispute arbitration agreement that the provider has not entered into with any consumers, submission of any communication related to that determination is not required. For example, if the provider submits a prototype pre-dispute arbitration agreement for review by the arbitration administrator and never includes it in any consumer agreements, the pre-dispute arbitration agreement would not be entered into and thus submission to the Bureau of communication related to a determination made by the administrator concerning the pre-dispute arbitration agreement would not be required.

2. *Examples of fairness principles, rules, or similar requirements.* Section 1040.4(b)(1)(ii) requires submission to the Bureau of records related to any administrator's determination that a provider's pre-dispute arbitration agreement violates the administrator's fairness principles, rules, or similar requirements. What constitutes an administrator's fairness principles, rules, or

similar requirements should be interpreted broadly. Examples of such principles or rules include, but are not limited to:

i. The American Arbitration Association's Consumer Due Process Protocol; or

ii. JAMS Policy on Consumer Arbitrations Pursuant to Pre-Dispute Clauses Minimum Standards of Procedural Fairness.

Paragraph 4(b)(1)(iii).

1. *Reliance on a pre-dispute arbitration agreement.* Section 1040.4(b)(1)(iii) requires that a provider shall submit to the Bureau certain submissions in court that rely on a pre-dispute arbitration agreement entered into after the compliance date set forth in § 1040.5(a) with respect to certain aspects of a case concerning any of the consumer financial products or services covered by § 1040.3.

2. A submission does not rely on a pre-dispute arbitration agreement, for purposes of § 1040(b)(1)(iii), if it:

i. Objects to or seeks a protective order intended to avoid responding to discovery;

ii. Is only referred to in an answer to a complaint or a counterclaim; or

iii. Is only incidentally part of an attachment to a submission. For instance, if a motion attaches the entire consumer financial contract, including the pre-dispute arbitration agreement, but the motion does not cite or rely on the pre-dispute arbitration agreement, the provider is not required to submit the motion to the Bureau.

Section 1040.5—Compliance Date and Temporary Exception

5(b) Exception for pre-packaged general-purpose reloadable prepaid card agreements.

1. *Application of § 1040.4(a)(1) to providers of general-purpose reloadable prepaid card agreements.* Where § 1040.4(a)(2) does not apply to a provider that enters into a pre-dispute arbitration agreement on or after the compliance date by virtue of the temporary exception in § 1040.5(b)(2), the provider must still comply with § 1040.4(a)(1).

Paragraph 5(b)(2).

1. *Examples.* Section 1040.5(b)(2)(ii) requires a provider that has the ability to contact the consumer in writing to provide an amended pre-dispute arbitration agreement to the consumer in writing within 30 days after the issuer has the ability to contact the consumer. A provider is able to contact the consumer when, for example, the consumer registers the card and gives the provider the consumer's mailing address or email address.

Dated: June 27, 2017.

Richard Cordray,

Director, Bureau of Consumer Financial Protection.

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Proclamation 9626 of July 14, 2017

Captive Nations Week, 2017

By the President of the United States of America

A Proclamation

During Captive Nations Week, we stand in solidarity with those living under repressive regimes, and we commit to promoting our American ideals, grounded in respect for natural rights and protected by the rule of law, throughout the world. As President Reagan often reminded us, as a shining city upon a hill, America has a duty to shine its beacon light on freedom-loving people around the world.

President Eisenhower first proclaimed Captive Nations Week during the Cold War with the Soviet Union, promising that America would stand with those people in captive nations who seek ''freedom and national independence.'' The Soviet Union collapsed more than a quarter of a century ago, but hundreds of millions of people around the world still live under the tyranny of authoritarian regimes. Authoritarianism and its many injustices have wrought misery and held captive the dreams of generations, while nations that value liberty have prospered and empowered their citizens to pursue their God-given potential to the fullest.

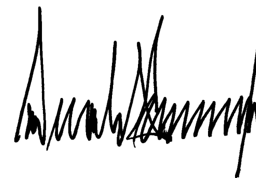
The injustices and abuses authoritarian regimes inflict on their own people affect us all, and we must recognize the bond we share with those who long to be free from oppression. Throughout our Nation's history, brave Americans have fought for the freedom of those suffering under authoritarianism. These American service members have shined light in the darkest corners of the world, those that are marred by starvation, political imprisonment, religious intolerance, and many other civil rights abuses.

Our military and diplomatic experiences have taught us that freedom is a powerful, yet fragile force that must be tirelessly protected. We continue to encourage despotic regimes to turn away from their oppressive ideologies and embrace a more hopeful and prosperous future for their people. This week, and always, we stand with all people throughout the world who are fighting for liberty, justice, and the rule of law.

The Congress, by Joint Resolution approved July 17, 1959 (73 Stat. 212), has authorized and requested the President to issue a proclamation designating the third week of July of each year as ''Captive Nations Week.''

NOW, THEREFORE, I, DONALD J. TRUMP, 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 July 16 through July 22, 2017, as Captive Nations Week. I call upon all Americans to reaffirm our commitment to those around the world striving for liberty, justice, and the rule of law.

IN WITNESS WHEREOF, I have hereunto set my hand this fourteenth day of July, in the year of our Lord two thousand seventeen, and of the Independence of the United States of America the two hundred and forty-second.



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